

(2003) 09 BOM CK 0104
In the Bombay High Court
Case No : F.A. No. 627 of 1987

Shaikh Dawood Shaikh Ommor (alias) Mujjawar through his heirs and legal representatives and Others APPELLANT

Vs

Reserve Bank of India and Another RESPONDENT

Date of Decision : 12-09-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 2 LLJ 202 : (2004) 3 MhLj 94

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : Gabrial Pillai and Sheetal Sampat, instructed by Gabrial Pillai and Co, for the Appellant; S.K. Talsania and J.K. Mistry, instructed by Crawford Bayley and Co., for the Respondent

Final Decision : Dismissed

Judgement

D.G. Deshpande, J.—Heard advocates for the appellants and respondents. The appellant - the deceased in this case is the original plaintiff. He was serving in Reserve Bank of India as a peon. He was employed by the Reserve Bank of India in 1945. At that time he had not given his date of birth. In 1952 he was asked about his date of birth and he gave his date of birth as March 14, 1924. The age of his retirement was 60 years.

Therefore, he was to retire in 1984. In the year 1984 itself he filed a suit for a declaration that he could not be retired in March 1984 because in 1979 he came to know, in a particular background, that his real date of birth is July 10, 1926, and therefore, he must be continued in service till July 9 or 10, 1986.

2. The claim and contentions of the plaintiff was opposed by the Reserve Bank of India on two grounds. Firstly, the plaintiff has given his date of birth as March 14, 1924 in 1952 on his own, and now he cannot be permitted to seek change in the said date of birth at the fag end of his service. The Trial Court after recording evidence, concluded that the date of birth of the plaintiff was July 10, 1926. But

however, held that for the purpose of employment the plaintiff's date of birth was to be taken as March 14, 1924. In view of these findings no further reliefs were granted to the plaintiff and his suit was dismissed. Hence this appeal.

3. Counsel for the appellant contended that if the Trial Court had come to the conclusion that the correct date of birth of the plaintiff was July 10, 1926, then this resultant benefit should have been granted to the plaintiff as prayed by him in his suit. Secondly, according to the advocate for the plaintiff, refusal to give resultant benefit was the ground of concluded contract entered into between the employer and employee wherein the plaintiff-employee has given his date of birth as March 14, 1924 was not permissible and, which according to the advocate for the appellant, is wrong finding based on misappropriation of facts and law. Counsel for the appellant urged that if the appellant has succeeded in proving that he came to know of his real date of birth only after dispute of his property starting in 1979, then he immediately applied to the Bank and from the correspondence of the bank i.e. two letters Exhibit L & M on the record, to which my attention was drawn. The bank's contention was that the documents tendered by the plaintiff were not conclusive proof of his date of birth as July 10, 1926. From this correspondence, the counsel for the appellant tried to submit that the bank was ready to consider the application of the plaintiff for change in his date of birth provided he had sufficient proof to the satisfaction of the Court.

4. As against this, the counsel for the respondents relied upon the judgment of the Supreme Court reported in State of U.P. and Ors. v. Gulaichi (Smt) 2003 3 CLR 168 wherein the Supreme Court has, in para 11 held that, "unless a clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the Court or the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible." The Supreme Court further observed in the same para that "if no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time." I am reproducing the aforesaid judgment that is very relevant and has direct bearing on the issue involved.

"11. An application for correction of the date of birth should not be dealt with by the Court, Tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. This is certainly an important and

relevant aspect, which cannot be lost sight of by the Court or the Tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the Court or the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the Court or the Tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove about the wrong recording of his date of birth, in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the Court or the Tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their date of birth in the service books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months after the date of superannuation. The Court or the Tribunal must, therefore, be slow in granting an interim relief or continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and thereby caused injustice to his immediate junior."

5. As against this the counsel for the appellant contended that merely because the plaintiff gave his date of birth March 14, 1924, he cannot be prevented or debarred from agitating that it was not correct date of birth. My attention was drawn by the counsel for the appellant to the judgment of the Supreme Court reported in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, wherein the Supreme Court has considered the policy of hire and fire and has made following observations at p. 213 of LLJ:

"104. It was, however, submitted on behalf of the Appellants that this was a contract entered into by the Corporation like any other contract entered into by it in the course of its trading activities and the Court, therefore, ought not to interfere with it. It is not possible for us to equate employees with goods which can be bought and sold. It is equally not possible for us to equate a contract of employment with a mercantile transaction between two businessmen and much less to do so when the contract of employment is between a powerful employer and a weak employee.

105. It was also submitted on behalf of the Appellants that Rule 9(i) was

supported by mutuality inasmuch as it conferred an equal right upon both the parties, for under it just as the employer could terminate the employee's service by giving him three months' notice or by paying him three months' basic pay and dearness allowance in lieu thereof, the employee could leave the service by giving three months notice, and when he failed to give such notice, the Corporation could deduct an equivalent amount from whatever may be payable to him. It is true that there is mutuality in Clause 9(i) the same mutuality as in a contract between the lion and the lamb that both will be free to roam about in the jungle and each will be at liberty to devour the other. When one considers the unequal position of the Corporation and its employees, the argument of mutuality becomes laughable.

106. The contesting Respondents could, therefore, have filed a civil suit for a declaration that the termination of their service was contrary to law on the ground that the said Rule 9(i) was void. In such a suit, however, they would have got a declaration and possibly damages for wrongful termination of service but the Civil Court could not have ordered reinstatement as it would have amounted to granting specific performance of a contract of personal service. As the Corporation is "the State", they, therefore adopted the far more efficacious remedy of filing a wrong petition under Article 226 of the Constitution."

6. Looking to the facts of the case in *Central Inland Water Transport Corporation v. Tarun Kanti Sengupta* it is clear that the judgment of the Supreme Court in *Central Inland Water Transport Corporation v. Brojo Nath* (supra) is not applicable in the present case. Here in the present case the plaintiff at the time of initial appointment in 1945 did not give any date of birth; wherein in 1952 he has given an option and opportunity, but he gave his date of birth as March 14, 1924. He allowed the said date of birth to be continued on record till 1980. When for the first time i. e. four years before his retirement, he made a grievance about correction of his date of birth. But the Supreme Court has laid down in the aforesaid judgment of *State of Uttar Pradesh v. Gulaichi* (supra) that for interfering in such matters regarding change of date of birth two things are required to be proved viz. a clear case on the basis of material which can be held to be conclusive in nature has to be made out and, secondly application for change has to be made within reasonable time. It is to be noted that these two conditions are required to be satisfied. Therefore, if a person has to succeed in his claim regarding change in his date of birth which he has earlier given at the time of joining his service, then he must have material which is conclusive in nature and, secondly he must apply within reasonable time.

7. Therefore, without going to the merits as to whether the plaintiff has succeeded in bringing out material which is conclusive in nature about his date of birth being July 10, 1926, what is crucial and important to put is, whether he has applied within reasonable time. Obviously, the finding has to be negative and against the plaintiff because he was employed in 1945 and he applied for change of his date of birth in 1980 i. e. after 35 years of his service and four years

before his retirement. Therefore, filing this application by the plaintiff is an attempt to change his service record by changing his date of birth four years prior to his retirement. In para 11 of the aforesaid judgment in *State of Uttar Pradesh v. Gulaichi* (supra) the Supreme Court has directed that an application for correction of the date of birth should not be dealt with by the Courts, Tribunal or the High Court keeping in view only the public policy concerned. The entire Judgment speaks of the policy that is required to be considered in allowing such applications. Various aspects as enumerated by the Supreme Court in the aforesaid para are involved in such correction and, therefore, a duty cast upon diligent person to apply for correction of the date of his birth at earliest time i.e. within a reasonable time. Obviously the reasonable time has to be calculated from the date of employment and not from the date of retirement. There is no merit in this appeal. It is dismissed. No order as to costs. Certified copy expedited.