

(2006) 05 JH CK 0017

In the Jharkhand High Court

Case No : Letters Patent Appeal No. 660 of 2005

Sujeet Kumar Sah

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 04-05-2006

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2007) 1 JCR 337

Hon'ble Judges : S.J. Mukhopadhaya, J;D.K. Sinha, J

Bench : Division Bench

Advocate : K.P. Deo, for the Appellant; A.K. Sinha, Advocate-General and Krishna Shankar, J.C. to A.G., for the Respondent

Final Decision : Allowed

Judgement

S.J. Mukhopadhaya, J.—This appeal has been preferred by the appellant against the Order dated 13th September, 2005 passed by learned Single Judge in W.P.(S) No. 4192 of 2005, whereby and where under, the learned Single Judge while dismissed the writ petition, upheld the order dated 31st May, 2005 passed by the superintendent of Police, Pakur in Pakur district D.P. No. 08/05, whereby the appellant was dismissed from service.

2. As the case can be disposed of on a short point, it is not necessary to discuss all the facts, except the relevant one, as detailed hereunder:

In pursuance of Advertisement No. 1/04, the appellant applied for appointment to the post of Constable. As per the said advertisement, a person, who has completed 19 years and above of age as on 1st January, 2004, was eligible to apply. The date of birth of the appellant, according to certificate, is 1st December, 1985. The advertisement was published sometime in the middle of 2004, so he was approaching 19 years of age. He being otherwise eligible, applied for appointment and was called to take part in the written test and physical test and having come out successful, was given offer of appointment by

Memo No. 332/Go dated 11th March, 2005. The documents having been found in order, he was appointed and joined in the service. Suddenly, the Superintendent of Police, Pakur initiated a departmental proceeding being D.P. No. 08/05 against the appellant in May, 2005 (Annexure-3). Inspector of Police, Amrapara, District-Pakur was appointed as Enquiry Officer, who asked the appellant to appear on 31st May, 2005. The allegation against the appellant was that he was 11 months less than 19 years as on 1st January, 2004, his date of birth being 1st December, 1985, in spite of the same, he filled up the Form for appointment, which amounts to mis-leading the officer for his appointment, shows doubtful character and he is inefficient Constable. In the proceeding, the enquiry officer while held that the appellant was 11 months less than 19 years as on 1st January, 2004, also held the charges proved against the appellant. In view of such finding, the S.P., Pakur dismissed the appellant from service vide Memo No. 772 dated 31st May, 2005.

3. It is not in dispute that the appellant was under age as on 1st January, 2004. By that time, he disclosed his date of birth as on 1st January, 1985 and thereby, there was no mis-representation on his part. There is a provision to relax any condition of service, commonly known as "Relaxation Rule", framed under proviso to Article 309 of the Constitution of India by the then State of Bihar vide Resolution No. 111/R-2010/55A-11505 dated 28th November, 1956. The competent authority has been empowered to relax any condition of service in regard to any individual or a class of persons in case of hardship. Such power being vested with the competent authority, it is always open to any candidate to apply, though he may not fulfill one or other condition of service, such as, minimum age prescribed for appointment and can expect that favourable decision is taken. If no such application is filed, there will be no occasion for the competent authority to exercise of power of relaxation as conferred by Rule dated 28th November, 1956. In such a situation, it was always open to any candidate to apply with a hope for relaxing the specific criteria and if no mis-representation is made, it cannot be held to be misleading the authority.

It a person is not eligible, the appointment can be held to be irregular or illegal or ab initio void but that will not amount to mis-conduct or dereliction of duty or insubordination and thereby, no departmental proceeding for major punishment is attracted. The service of a person can be terminated on the ground of irregular or illegal appointment or appointment ab initio void but such person cannot be dismissed from service as a major punishment.

An illegal appointment cannot be legalized. Similarly, an appointment ab initio void cannot be recognized. But if any appointment is irregular, it can be regularized or may regularize automatically by efflux of time. If all procedures for appointment are made but if underage person is appointed, on attaining prescribed age, the appointment automatically stands regularized and, thereafter, it cannot be held to be illegal. Similar case fell for consideration before a Bench of this Court in the case of Cosmas Bhengra and Reena Kumari Vs. State of Jharkhand and Others, . That was also a case where a person, who

was under age, i.e. three days less than the prescribed age, was appointed. In his case also, the State of Jharkhand dismissed him on the ground of misconduct, he having been appointed below the prescribed age. The Court held that mis-conduct cannot be alleged without enquiry and further held that in case, the said petitioner was underage, the relaxation could have been granted under the Relaxation Rules.

4. In the present case, learned Single Judge though noticed the aforesaid judgment reported in the case of Cosmas Bhengra (supra) but without distinguishing the same, relied on another unreported judgment rendered in W.P. (C) No. 6786 of 2004. In the said case, learned Single Judge held that the petitioner of the said case having knowing fully well the minimum age but he having applied in spite of below age than the prescribed age, cannot be given benefit as that will amount to depriving thousand of similarly situated candidates, who did not apply. We are not in agreement with such finding given in W.P.(C) No. 6786 of 2004, as any person, underage or overage, has right to apply for appointment by relaxing the age limitation, as prescribed under Relaxation Rules and a statutory rule under proviso to 309 of the Constitution of India will become redundant.

5. For the reasons aforesaid, we are of the view that the authority could not have dismissed the appellant from service, there being no mis-conduct on his part and the learned Single Judge should have interfered with the order of dismissal. We, accordingly, set aside the order of dismissal dated 31st May, 2005 passed by the Superintendent of Police, Pakur and the order dated 13th September, 2005 passed by the learned Single Judge in W.P.(S) No. 4192 of 2005.

6. The writ petition is allowed with a direction to the respondents to reinstate the appellant and to pay him the consequential benefit including the arrears of salary of the intervening period to which he is entitled. The appeal is allowed, with the aforesaid observations and directions.

7. However, in the facts and circumstances, there shall be no order as to costs.