

(2013) 07 PAT CK 0043

In the Patna High Court

Case No : LPA No's. 332 of 2008 and 1328 of 2011

The State of Bihar and Others

APPELLANT

Vs

Shiv Nath Ram
 Ghaghalee Ram @ Ghughulee Ram Vs
The State of Bihar and Others

RESPONDENT

Date of Decision : 03-07-2013

Acts Referred:

Citation : (2013) 4 PLJR 98

Hon'ble Judges : S.N. Hussain, J;Ahsanuddin Amanullah, J

Bench : Division Bench

Advocate : Bijay Kumar Pandey in LPA No. 332 of 2008, Mr. Harendra Pratap Singh and Mrs. Priyanka Singh in LPA Nos. 1328 of 2008, for the Appellant; Ajay Behari Sinha and Rajesh Ranjan, Harendra Pratap Singh and Mrs. Priyanka Singh in LPA No. 332 of 2008, Vivekanand Kumar, for the Respondent

Judgement

S.N. Hussain and Ahsanuddin Amanullah, JJ.—Although both the abovementioned letters patent appeals were filed and were admitted on separate dates, but subsequently both of them were made analogous and were heard together because subject matter of dispute was similar and the authorities concerned are also the same. The first case bearing L.P.A. No. 332 of 2008 was filed by the State of Bihar and its authorities against order dated 4.7.2007, by which a Bench of this Court allowed C.W.J.C. 11306 of 2006 Reported in Shiva Nath Ram Vs. State of Bihar and Others, filed by the sole private respondent of this appeal and quashed memo dated 2.5.2001 of the Director General of Police, holding that the respondent should be considered to have retired on 31st December of the year, in which he completed the age of superannuation, which, in this case, was 2000.

2. The second case bearing L.P.A. No. 1328 of 2011 was filed by the sole appellant against the authorities concerned challenging order dated 1.8.2011, by which a Bench of this Court dismissed C.W.J.C. No. 1393 of 2007 Reported in 2011 (4) PLJR 416 filed by him affirming the orders of the authorities

superannuating the appellant with effect from 1st July of the year, in which he completed the age of superannuation, which, in this case, was 1996.

3. Learned counsel for the State of Bihar and its authorities, who are appellants in the first case, namely, L.P.A. No. 332 of 2008, stated that according to the Bihar Finance Rules and the Bihar Board's Miscellaneous Rules, 1st July of the year, in which an employee is to retire, will be the date of his superannuation. Hence he submitted that the order of the learned Single Judge under challenge in this appeal fixing 31st December of the said year as the date of the employee's superannuation was not correct. He had also relied upon several case laws.

4. On the other hand, learned counsel for the sole private respondent in the first L.P.A. vehemently opposed the contentions of learned counsel for the appellants and stated that 31st December of the year, in which the employee was going to superannuate, was the correct date of his superannuation. In this connection, he relied upon two decisions of Division Benches of this Court; one in case of Trimbak Vs. State of Maharashtra, and the other in case of The State of Bihar and Others Vs. Bharat Singh @ Bharat Rao,

5. He submitted that the appellants had wrongly relied upon another decision of a Division Bench of this Court in case of The State of Bihar and Others Vs. Devendra Kumar Mishra which was per incuriam as it did not consider the earlier decisions of the Division Benches which are mentioned above. If the subsequent Bench was not agreeable to the said two decisions of the Division Benches, the third Division Bench should have sent the matter to a larger Bench. In this connection, he relied upon two decisions of this Court as well as three decisions of the Apex Court in case of Murray and Co. Vs. Ashok Kr. Newatia and Another, and in case of Rakesh Sharma Vs. State of Bihar and Others, as well as in case of Asstt. Collector of Estate Duty, Madras Vs. V. Devaki Ammal (Smt), Madras, in case of Usha Kumar Vs. State of Bihar and Others, and in case of State of Andhra Pradesh Vs. v.C. Subbarayudu and Others, . He further referred to Rule 1, Chapter-V of Patna High Court Rules, 1913, which has the force of law.

6. Learned counsel for the sole appellant in the second case, namely, L.P.A. No. 1328 of 2011 adopted the arguments of learned counsel for the sole private respondent in the first case, namely, L.P.A. No. 332 of 2008.

7. Learned counsel for respondent-State of Bihar and its authorities in the second L.P.A. also adopted the arguments raised by learned counsel for the appellants of the first case, namely, L.P.A. No. 332 of 2008.

8. After hearing learned counsel for the parties and after perusing the materials on record, it transpires that in both the aforesaid appeals the precise dates of birth were not known to the employees concerned and only their years of birth were known to them and they gave it to the authorities, which were recorded in their Service Books etc. as 1942 and 1938, respectively. The point of dissention between the parties in the said appeals is that the appellants in the first L.P.A., who are also respondents in the second L.P.A., claimed that in the aforesaid

circumstances 1st July of the recorded year of birth has to be fixed as the date of superannuation of such employees, whereas, the claim of the respondent in the first L.P.A. and the appellant in the second L.P.A. is that 31st December of the recorded year of birth has to be fixed as the date of superannuation of such employees.

9. So far the provision of law on the aforesaid point is concerned, Rule 97 of the Bihar Financial Rules provides as follows:--

97(1) If a Government servant is unable to state his exact date of birth but can state the year, or year and month of birth, the 1st July or the 16th of the month respectively may be treated as the date of his birth.

10. Similarly a provision is also incorporated in the Bihar Board's Miscellaneous Rules, 1958, namely, Rule 233(iii), which provides as follows:--

233(iii). Age.--When the precise date of birth is not known, the 1st of July of the year of birth should be taken to be the date of birth.

11. Admittedly, in both the aforesaid L.P.As. the years of birth of the said two employees had been duly recorded in the Government records, which are not disputed by either of the parties. Furthermore, dates and months of birth of the said two employees are not known either to the employees or to the authorities. In the said circumstances, the aforesaid provisions of law squarely cover the cases of the said two employees.

12. However, learned counsel for the respondent in the first L.P.A. and learned counsel for the appellant in the second L.P.A., who were employees in the State Police Service, could not produce any provision of law to support their claims that their date of superannuation should be fixed as 31st December of their respective years of birth. They merely relied upon two decisions of the Division Benches of this Court in *Kashi Nath Thakur vs. State of Bihar & Ors.* (supra) and *State of Bihar & Ors. vs. Bharat Singh @ Bharat Rao* (supra).

13. The case of *Trimbak Vs. State of Maharashtra*, This is a small decision, which is fully noted hereinbelow:--

In this writ application the petitioner has prayed that his date of birth be corrected as 5.11.40. The petitioner has retired after 58 years. It appears that he was appointed as a Constable on the ground of being an outstanding football player and his date of birth mentioned in the verification register as also the Service Book is recorded as 1935. In support of his claim for correction of the date of birth as 5.11.40 he has produced Matriculation Certificate and a Certificate of the Headmaster granted on 9.11.92. According to him he learnt only in December, 1992 that the column meant for the date of birth in the Service Book had been left blank by the Reserve Officer and some staff in the Reserve Office, after detecting this missing entry, mischievously wrote 1935 in the column meant for the date of birth.

2. We find no evidence in support of the allegation that some Officers in Reserve Office made wrong entry in the Service Book as 1935. The petitioner did not produce any certificate in support of his age or even the horoscope when he entered the service. The verification register as also the Service Book has been signed by the petitioner in his own writing in English on the same day. He had, therefore, full knowledge about the entries in the said register. Admittedly, at that time, he was a student of Class XI and, therefore, he was supposed to know the entry that was made in the Service Book as also in the verification register and after reading the contents he signed the same. It is surprising that only a year later, when he passed the Matriculation examination, his date of birth was mentioned in the School Admission Register as 5.11.40 and the said date was carried in the Certificate of Matriculation. The Admission Register produced is of the other School relating to the period only when he was a student of Class IX in July, 1953. There is no School Register showing his admission at the initial stage when he first entered the school and no such register has been placed on record. That would have possibly shown the correct date of birth when he first entered any such school. Therefore, we have no reason to disbelieve the entry made in the Service Book as also the one mentioned in the verification register signed by the petitioner himself at the time when he first entered the service. Although he had the knowledge about the date of birth entered as 1935 in the Service Book as also in the verification register but only at the time of superannuation he made an application before the S.P. for correction after passing the Matriculation examination. He being a student of Class XI, had entered the service and signed the Service Book as also the verification register with full knowledge of the contents and he ought to have produced some evidence but no such evidence was produced. He could have produced his school admission register wherein he studied upto XI Class which could have shown the date of birth when he first entered the school. However, the benefit can be given to him treating the year mentioned as 1935 to be read as 31st December, 1935 and that would give six months extension to him in service even though he has retired a month ago.

3. In this view of the matter, the application is disposed of with a direction that the petitioner's retirement shall be counted from 31st December, 1935 whereby he gets an extension of nearly six months and until then he shall be treated in the service for all purposes with service benefits admissible to him.

14. Similarly the case of State of Bihar & Ors. vs. Bharat Singh @ Bharat Rao (supra) was decided by a Division Bench of this Court as far back as on 23.11.2000, but was reported belatedly in The State of Bihar and Others Vs. Bharat Singh @ Bharat Rao, This is a small two paragraphs order, which is fully noted hereinbelow:--

The State of Bihar has filed the present letters patent appeal challenging the order, dated 7.10.1999 passed in CWJC No. 6271 of 1998 Bharat Singh @ Bharat Rao Vs. State of Bihar and Others,]. The court has gone into the order and does not find anything incorrect in it so as to interfere by the present letters patent

appeal. The order seems to be reasonable that the petitioner has virtually been made to retire by a declaration of the High Court reckoned from the year ending 1940. The petitioner's request, that is, the date of birth be treated as in 1942 was denied. The petitioner was to superannuate on 30.6.1998. All that will happen is that now he will superannuate at the end of the year, 1998.

2. This is too petty a matter that the issue should be continued in a letters patent appeal. This appeal accordingly dismissed.

15. From the aforesaid two decisions, it is quite apparent that the relevant provisions for such matters as prescribed in Bihar Financial Rules and Bihar Board's Miscellaneous Rules had not at all been noticed and the said two decisions are merely based on facts and their results run counter to the provisions of law. Hence, it is a clear case of obtrusive omission and the said decisions are per incuriam not binding in law.

16. The law is well-settled that such infirmities in the decisions found per incuriam can cripple the authority of an otherwise binding precedent. However, despite the aforesaid situation, in view of the aforesaid two decisions of Division Benches of Patna High Court, this Court has to act as per the provisions of law with caution. The Apex Court in case of Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs., has decided as follows:--

Certainty of the law, consistency of rulings and comity of courts, all flowering from the same principle, coverage to the conclusion that a decision once rendered must later bind like cases. It is no doubt true that in exceptional instances, where by obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority, running counter to the reasoning and result reached, it may not have the sway of binding precedents. But it should be a glaring case of an obtrusive omission.

17. Although in the aforesaid regard learned counsel for the respondent in the first L.P.A. and learned counsel for the appellant in the second L.P.A. have relied upon three decisions of the Apex Court and a Full Bench decision of Patna High Court in case of Asstt. Collector of Estate Duty, Madras Vs. V. Devaki Ammal (Smt), Madras, in case of Usha Kumar Vs. State of Bihar and Others, , in case of State of Andhra Pradesh Vs. v.C. Subbarayudu and Others, and in case of Rakesh Sharma Vs. State of Bihar and Others, claiming that no reliance can be validly placed on the decision of a Division Bench of this Court in case of State of Bihar & Ors. vs. Devendra Kumar Mishra (supra) as it was per incuriam due to non-consideration of the earlier two Division Bench decisions in case of Kashi Nath Thakur vs. State of Bihar & Ors. (supra) and State of Bihar & Ors. vs. Bharat Singh @ Bharat Rao (supra). But a perusal of the decisions relied upon by the said learned counsel shows that only those decisions would serve as per incuriam, which were (sic--not?) based on sound legal principle. In the instant case, it is quite apparent that earlier two Division Bench decisions of the Patna High Court in case of Kashi Nath Thakur vs. State of Bihar (supra) and in case of

State of Bihar vs. Bharat Singh @ Bharat Rao (supra) are not at all based on sound legal principle, rather they were against the provisions of law, which were completely ignored.

18. On the other hand, the other decision of the Division Bench of this Court in case of State of Bihar & Ors. vs. Devendra Kumar Mishra (supra) has been passed not only considering in detail the specific provisions of the relevant laws, namely, Bihar Financial Rules and Bihar Board's Miscellaneous Rules, but also considering the case of State of Bihar vs. Bharat Singh @ Bharat Rao (supra) (L.P.A. No. 261 of 2000) in paragraph 15 of the judgment.

19. So far Rules of High Court of Judicature at Patna, 1916 is concerned, it provides Rule 1 of Chapter-V for such a situation, which reads as follows:--

Wherever a Division Bench desires and the Chief Justice consents that any case shall be referred to a Full Bench, or whenever in any case a Division Bench differs from any other Division Bench upon a point of law or uses having the force of law, such case shall be referred for decision by a Full Bench.

20. In the instant matter, there is no difference on any point of law or uses having the force of law, between the two Division Bench decisions of this Court in case of Kashi Nath Mishra vs. State of Bihar (supra) and in case of State of Bihar vs. Bharat Singh @ Bharat Rao on one hand and the decision of a Division Bench of this Court in case of The State of Bihar & Ors. vs. Devendra Kumar Mishra (supra) on the other, because the first two cases had not been decided on the basis of any provision of law nor even the concerned provisions of law, which were present, were even considered and the two decisions were given merely on facts completely ignoring the provisions of law. On the other hand, the subsequent decision of a Division Bench of this Court in case of State of Bihar vs. Devendra Kumar Mishra (supra) is a detailed judgment considering all the relevant provisions of law and deciding the matter on their basis and hence it cannot be legally held to be per incuriam due to the earlier two decisions of the Division Benches. In the said circumstances, the respondent of the first L.P.A. and the appellant of the second L.P.A. cannot legally take help of the aforesaid provisions in the Patna High Court Rules. In view of the aforesaid principles of law as settled by various decisions of this Court as well as of the Apex Court and also in view of the specific provisions of law applicable to the facts of the case admitted by both the parties, L.P.A. No. 1328 of 2011 is dismissed and the impugned order of the learned Single Judge dated 1.8.2011 passed in C.W.J.C. No. 1393 of 2007 is affirmed, whereas, L.P.A. No. 332 of 2008 is allowed and the impugned order of the learned Single Judge dated 4.7.2007 passed in C.W.J.C. No. 11306 of 2006 is hereby set aside and the writ petition is dismissed holding that the authorities had rightly decided the date of birth of respondent Shiv Nath Ram as 1.7.1942 and had rightly superannuated him on the basis of the aforesaid date of birth.