

(1991) 11 AHC CK 0067

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 17934 of 1990

Wasi Ullah Siddiqui

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 01-11-1991

Acts Referred:

Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 — Rule 40, 40(2), 41, 45
Constitution of India, 1950 — Article 14, 16, 226, 229, 229(2)
Uttar Pradesh Recruitment to Services (Determination of Date of Birth) Rules, 1974 — Rule 2, 2(2)

Citation : (1991) 2 AWC 329

Hon'ble Judges : M.L. Bhat, J

Bench : Single Bench

Advocate : A.D. Saunders, for the Appellant;

Final Decision : Allowed

Judgement

M.L. Bhat, J.—The Petitioner claims that his real date of birth is 11th March, 1935 whereas in the school register of Modern High School, Allahabad where he was admitted initially it was written as 20th September, 1932. The Petitioner is said to have been admitted in the said institution on 22-10-1945 and at that point of time the Petitioner's age is said to be ten years seven months and thirteen days. The Petitioner is said to have passed High School Examination in the year 1949. On the basis of date of birth recorded in the school register, the Petitioner's date of birth entered in the High School Certificate is 20-9-1932. Some other person had got recorded the Petitioner's age as 1932 out of his own imagination. The Petitioner's age was not verified from his father. The Petitioner is said to have been informed by some relation that his actual date of birth was 11th March, 1935 which could be verified from the Birth Register maintained at the Collectorate at Allahabad. On inspection of the said register the Petitioner came to know about his real date of birth and he collected the documents purporting to show his date of birth as 11th March, 1935. The documents relied upon by the

Petitioner are as under:

- (a) Copy of the birth register for the year 1934-35 relating to village Nagiamai, Tahsil Sirathu, Police Station Saini, district Allahabad;
- (b) Copy of the extract of Khatauni of the said village;
- (c) Copy of the certificate issued by the Block Piainukh of the said area;
- (d) Copy of the affidavit of Ahmad Hasan, who is said to have informed the Petitioner about his actual date of birth being 11th March, 1935;
- (e) Copy of the affidavit of Mohammad Masood, who got the Petitioner admitted in the school.
- (f) Copy of the High School Certificate of his younger brother;
- (g) Copy of the High School Certificate of his youngest brother; and
- (h) Copy of the High School Certificate of the Petitioner.

2. On the basis of date of birth shown in the High School certificate the Petitioner was to retire in September, 1990 but on the basis of the date of birth, which the Petitioner claims to be his real date of birth, he is to retire in March 1993.

3. The Petitioner is said to have made a representation to the Chief justice on 8th May, 1989 when he was still in service for making a change in his date of birth and allow him to continue on the post upto 1993. He was informed by the Deputy Registrar on 16-6-1989 that his representation was rejected by the Chief Justice. A copy of this order is placed on the record. The Petitioner thereafter applied for a certified copy of the order passed by the Chief Justice but the same was not given. The Petitioner submits that he is governed by the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976, hereinafter called as "the Rules of 1976". It is stated by the Petitioner that in the matter of correction of date of birth of the officer of the High Court there is no rule or regulation and it is within the powers of the Chief Justice to order an enquiry for correction of date of birth if the same requires to be corrected and if there is material to support the said correction. Under Article 229(2) of the Constitution the Rule Making power is with the Chief Justice.

4. The Petitioner is also said to have made a representation to the Secretary of the Board of High School and Intermediate Education, U.P. Allahabad, Respondent No. 3, on 28-4-1990, a copy whereof is placed on record. This representation is said to have been supported by documents. On 17-5-1990 the Respondent No. 3 informed the Petitioner that his representation was rejected. Thereafter the Petitioner is said to have made a representation to the Principal, Modern High School, Allahabad on 29-6-1990 supported by documents which also was rejected on 6-7-1990. The Respondent No. 3 is said to have mechanically rejected the representation of the Petitioner that only clerical mistakes can be corrected. The representation of the Petitioner is said to have

been rejected by the Respondent No. 3 mainly on three grounds:

- (i) that it was a case of correction of date of birth;
- (ii) that it was barred by time; and
- (iii) that it related to a Government employee.

5. The Petitioner assails the findings of the Board and prays for quashing the said findings. The Petitioner also prays that the findings of the High Court conveyed to him by the Deputy Registrar on administrative side be also quashed and a mandamus be issued to them to correct his date of birth. He also prays for quashing of the Government Orders whereby no enquiry with regard to the date of birth, which is entered in the High School Certificate, is permissible as being violative of Article 14 of the Constitution or in the alternative declaring that these orders do not provide the conclusive rule of evidence for determination of age for the purpose of retirement. He wants a writ of prohibition, prohibiting the Respondents to retire the Petitioner from service on the basis of his date of birth as entered in the High School Certificate.

6. It is stated that the Government Orders did not apply to the case of the Petitioner. The Petitioner is an employee of the High Court, therefore, the Government Order dated 28-5-1974 would not apply to him as the same is applicable to the Government servants for whom Rules are made under Article 309 of the Constitution, under which no rule can be made for the High Court Staff. The Government orders dated 28-5-1974 and 14-5-1983 were not adapted by the High Court. On the other hand, dates of birth in respect of some employees of the High Court were changed from time to time by the Chief Justice. These changes were not clerical in nature. The date of birth recorded in the school register which is the basis of date of birth in the High School certificate cannot be made conclusive by any rule of evidence. The said date of birth can be rebutted if it does not represent the real date of birth.

7. The Petitioner submits that without assigning any reason his representation was rejected by the Chief Justice. Under Rule 40 of the Rules of 1976 the Chief Justice is the sole authority to correct the date of birth and he has necessarily to examine the evidence in this regard, which has not been done. The rejection of the representation is, therefore, said to be arbitrary. The Government notifications with regard to any restriction placed on the authority to correct the date of birth are applicable to Government employees and not to the Petitioner. The Petitioner's service rights flow from Article 229 of the Constitution of India. The rejection of the representation by the Respondent No. 3 is also arbitrary and illegal. Reliance is placed on the date of birth register maintained by the Collectorate at Allahabad.

8. Two counter affidavits are filed by Devendra Verma, Upper Division Assistant in the Litigation Cell, High Court, Allahabad in reply to the writ petition filed by the Petitioner and in reply to the supplementary affidavit filed by the Petitioner. It

is stated in the said affidavits that the Petitioner was appointed as stenographer in 1963 in the High Court Prior to that he was an employee of the Subordinate Court at Allahabad. The Petitioner is said to have got his service book prepared and his date of birth is recorded as 20-9-1932 on the basis of the High School Certificate. On 8-5-1989 after 27 years of his service he made a representation to the Chief Justice for correction of his date of birth as recorded in his service book. The said representation is said to have been considered in the light of Rule 2 of the Uttar Pradesh Recruitment to Services (Determination of Date of Birth) Rules, 1974 and was rejected. According to the said rules no application for correction of date of birth in any circumstances is to be entertained in which the date of birth of a Government servant recorded in the service book in the basis of the High School Certificate is sought to be changed. Paragraphs 1 to 19 of the writ petition have not been replied. In view of the foregoing paras in the counter affidavit other paras 20, 21, 22 and 23 have also not been replied It is, however, stated that the Petitioner's date of birth cannot be changed or treated to be wrong. Reliance is placed on the Rules of 1974 It is stated that the rules and orders for the time being in force and applicable to Government servants holding corresponding posts in the Government of Uttar Pradesh shall apply to all officers and servants of the Court subject to such modifications variations and exception, if any, as the Chief Justice may specify from time to time. While considering the case of a similar nature, the then Chief Justice is said to have passed an order 29-6-1977 which is being followed by the High Court. It was observed that Rule 2 of the Uttar Pradesh Recruitment to Services (Determination of date of Birth) Rules, 1974, hereinafter called "the Rules of 1974" *mutatis mutandis* shall apply to the servants of the High Court. This rule was held to be based on sound principle and there was no reason to depart from it. This order is reproduced in the supplementary counter affidavit. However, on another occasion the then Chief Justice had expressed his view that the correction of age can be reconsidered if and when one gets his age in the High School Certificate corrected. It is stated that in the past, prior to the enforcement of the Rules of 1974, as amended in 1980, the correction of date of birth was ordered in the case of some employees of the Court but under the prevailing circumstances no correction can be effected in the date of birth. It is stated that the case of Sri S.D. Dixit, presently P.P.S. to the Chief Justice is quite different. His date of birth is said to have been corrected in 1983 on the basis of the High School Certificate. Mr. Dixit's correct date of birth is 13-7-1933. His date of birth was recorded as 2-6-1930, in the service record.

9. The contention of the Petitioner is contested by the other Respondents who are employees of the High Court and who claim to be next seniors and entitled to be considered for that post which was occupied by the Petitioner under the interim orders. The Petitioner is said to have retired. His date of birth cannot be changed and if he occupies the post, rights of the Respondents will be adversely affected In fact the writ petition was vehemently contested by the said Respondents. The learned Counsel for the parties after arguing the matter

submitted their written submissions also crystalising their points of submission. (These written submissions shall form part of the record). Before adverting to the arguments it is necessary to make mention of some facts which have taken place during the pendency of the writ petition.

10. The Respondents No. 6 and 7 were impleaded subsequently as Respondents to the writ petition. They also filed counter affidavit to the writ petition. After pleadings were filed it was observed that the petition can be disposed of at the admission stage and the case was posted for hearing. The interim order granted by this Court was prayed to be vacated. The Court wanted to know some more facts in order to consider the application for vacating of the interim order. On 26-7-1991 an order was made by which the Respondents No. 3 and 4 were directed to consider the representation of the Petitioner within a period of three week; from the date of presentation of a certified copy of the order and submit report about the actual date of birth of the Petitioner. It was observed that the Court has to consider whether the Rules of 1974 are applicable in respect of the High Court employees or not. If the said rules are not applicable, the Petitioner's contention is not to be overruled. If the Petitioner's contention for reconsideration of his date of birth is to be over-ruled and the Rules of 1974 were applicable to the High Court employees the Petitioner's application for change of date of birth could not even be considered. Which of the rival contention was correct could not be determined at the interim stage. Therefore in order to consider whether the interim order is to be vacated or not the Respondent No. 3 was asked to consider the representation of the Petitioner without being influenced by their earlier orders. This order was passed in the presence of all the Respondents and their counsel. In pursuance of these directions the Respondent No. 4 has submitted his report in which he has stated that the correct date of birth of the Petitioner is 11-3-1935. He is said to have relied on the documents which the Petitioner has placed on the record of the writ petition and has changed his opinion with regard to the Petitioner's date of birth. According to him the Petitioner's date of birth is not 20-9-1932 as recorded in the school register. He submits that the same deserves to be corrected. However, the Respondent No. 3 has stated that in view of the Govt. Orders which prohibit the authorities to make any change in the date of birth in the High School certificate representation filed by the Petitioner can not be considered. Therefore the Board has refused to reconsider the matter on the basis of the Rules of 1974 which according to the Board are applicable to the present case. It is stated by the Board that only clerical error can be corrected. The Petitioner's case does not fall within the ambit of clerical error. Therefore, his representation for correction of date of birth is rejected.

11. The learned Counsel for the Petitioner wanted a direction for the Respondent No. 3 to consider the representation again and thereafter hear the matter. But, in my opinion, making of such a direction for the purpose of consideration of interim order will only prolong the matter and may not serve any purpose. The learned Counsel for the Respondents are also eager to get the case finally

decided though the report of the Board, Respondent No. 3, was not happily worded it smacked of arrogance. But in order to prevent delay in the disposal of this writ petition no fresh direction is made in the interim matter to the Board for consideration of the representation of the Petitioner nor was the same necessary for consideration of the interim order. The status quo was maintained and the case was heard on merits at great length.

12. On the face of the record it appears to be a very simple case of change of date of birth but on lifting veil it has transpired that most important questions of law with regard to the applicability of the Rules of 1947 to the High Court staff fall for determination of this Court.

13. The Petitioner has submitted that the date of birth on which an employee of the High Court can be superannuated must not be the assumed date of birth but the real date of birth. In order to find out what is the real date of birth, if the same is not reflected in the service record or in the High School Certificate, the same is to be ascertained and there is no prohibition for the High Court to determine the real date of birth. It was next contended that the High Court, has not controverted the paragraphs 3 to 19 of the writ petition, therefore, these paras of the writ petition will be deemed to have remained unrebutted. With respect to the order made on 26-7-1991 the Respondent No. 4 is said to have given a report in favour of the Petitioner to which no objections have been filed by the other side. Therefore, that report is also to be accepted and the refusal of the Respondent No. 3 to consider the representation of the Petitioner is unwarranted. The said refusal is said to be unwarranted because the date of birth recorded in the register of the Respondent No. 3 was based on the entry of the school register, which is liable to be corrected. Therefore, the Respondent No. 3 should not have relied on the Rules of 1974 or other rules which are not applicable to the Petitioner. In view of the conduct shown by the Respondent No. 3 it is stated that a mandamus can be issued to him to correct the date of birth of the Petitioner. The Rules of 1974 are not applicable to the High Court employees. These rules have not been adapted by the High Court and these rules are not the rules governing the service conditions of an employee of the High Court. These rules have not been adapted by the High Court under Rule 40 of the Rules of 1976. It is submitted that the Rules of 1974 are framed under Article 309 of the Constitution of India whereas the Petitioner's conditions of services are governed by the rules, which pre framed under Article 229 of the Constitution.

14. Elaborating his argument Mr. Gupta submitted that among other conditions of service retirement is also a condition of "service. The determination of age of retirement is not as condition of service but is a procedural rule and rule of evidence. Therefore, the 1974 Rules cannot be said to be the rules relating to the conditions of service or governing the conditions of service. Relying on Rule 40 of the Rules of 1976 it is contended that in respect of all matters which are not provided in the Rules of 1976 regarding conditions of service of Officers and

servants of Court including matters relating to their conduct, control and discipline, the rules and orders for the time being in force and applicable to Govt. servants holding corresponding posts in the Government of Uttar Pradesh shall apply to the officers and servants of the Court with such modification or variation, as may be ordered by the Chief Justice. The Rules of 1974 which impose a prohibition for changing the date of birth as entered in the High School Certificate would not fall within the purview of Rule 40(2) of the Rules of 1976 as the Rules of 1974 do not relate to anything which is mentioned in Sub-rule (2) of Rule 40. The Rules of 1974 are framed under Article 309 of the Constitution. Rule 2 of the said rules reads as under:

2. Determination of Correct Date of Birth of Age--The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination at the time of his entry into the Government service or where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the Government service shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation of his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits, and no application or representation shall be entertained for correction of such date of age in any circumstances whatsoever.

15. This rule is applicable to Government servants and in respect of the Government servants' date of birth as recorded in their service books or in the High School certificate where the said certificate is available cannot be changed and the date of birth recorded in the High School Certificate and service record is deemed to be correct. Rules of 1974 cannot be said to have been adapted by the High Court or made applicable to its employees because these rules do not relate to conditions of service or to any matters relating to control, discipline or conduct of the High Court employees. The rules prohibit enquiry with regard to the date of birth, which cannot be said to be the rules relating to condition of service. These Rules are also challenged as being ultra vires of the Constitution. Any rule which makes the date of birth as recorded in the service record or in the High School certificate as conclusive proof of date of birth is arbitrary and ultra vires of the guarantees contained in Article 14 of the Constitution.

16. Rule 2 of the Rules of 1974 is said to have been treated by the High Court as directory and not as mandatory because the Chief Justice has been entertaining representations and has in the past corrected the date of birth of some employees. It is contended that the findings of the Respondent No. 3 are based on misconceived notions of law. The Board has confused the issue inasmuch as it has applied rules of procedure or evidence applicable to the Government servants, which are not applicable to the High Court employees, to the case of the Petitioner, who is certainly not a Government employee.

17. It is also contended that though entire evidence was placed before the Chief

Justice, that evidence was liable to be considered and without considering that evidence the Petitioner's representation on the basis of rule 2 of the Rules of 1974 could not be rejected. The merits of the representation should have been considered and after consideration of merits an appropriate order rejecting or allowing the representation should have been passed. The observation made by the Chief Justice on administrative side that the Rules of 1974 should be made applicable to the High Court staff is not binding on the Judicial side of the High Court. However, another observation made by the then Chief Justice that, if the date of birth is corrected by the Higher Secondary Board, the High Court can act on it, has not been taken into consideration. In view of the past practice of the High Court, it would appear that the High Court has not taken note of Rule 2 of the Rules of 1974. Rule 41 of the Rules of 1976 would amply show that the Chief Justice has a residuary power to make such orders from time to time as he may think fit in regard to all matters incidental or ancillary to these rules which are not specifically provided for. The orders with respect to salaries, allowances, leave or pension are to be made with the approval of the Governor of U.P. because these matters have financial implications. On the basis of Rule 41 of the Rules of 1974. Mr. Gupta submitted that the representation of the Petitioner could not be rejected summarily on the basis of inapplicable rules of 1974. Some case law was also cited by the learned Counsel for the Petitioner, which will be discussed at its appropriate place.

18. The learned standing counsel relied on Rule 2 of 1974 Rules. His contention was that the date of birth of the Petitioner as shown in the school register was entered in the service record. It cannot be changed in view of the provisions of Rule 2 of the 1974 Rules.

19. The learned standing counsel also relied on two affidavits submitted by the High Court and submitted that the Petitioner's representation was rejected after consideration solely on the ground of prohibition in Rule 2 of the Rules of 1974 to effect the change of date of birth of the Petitioner.

20. The learned Counsel for the Respondent No. 6 and 7 also argued the case. One Rajendra Prasad Kukreti, P.A. High Court has made an application for being impleaded as Respondent No. 8 and his case also was considered. No objection was raised by the learned Counsel for the Petitioner to allow Sri T.P. Singh to argue the case on his behalf or the other two Respondents also. He raised some preliminary objections to the maintainability of the writ petition. It is submitted that the writ: petition for correction of date of birth is filed after 27 years, so it must be dismissed on the basis of laches. His second objection is that the Petitioner has acquiesced to the entry in his service record which was recorded in 1953 and he had raised no objection since then. He has taken advantage of the recorded date of birth. Now he cannot turn back and resale from the stand which he took in 1953 when he first entered the service as class III employee of the subordinate Court. The third objection is that a disputed question of fact cannot be decided in a writ petition. The evidence which the Petitioner wants to be

adduced can be adduced in a civil suit, therefore, he should file a civil suit where the veracity of the documents which are sought to be relied upon by the Petitioner can be appropriately tested. Mr. T.P. Singh also relies on the Rules of 1974 and submits that admittedly the Petitioner has passed the High School Examination and on the basis of the date of birth recorded in the High School Certificate the entry in the service book cannot be changed now because of the fiction created by Rule 2 of the Rule of 1974 which would mean that Whatever has been recorded is to be deemed correct by the Court even if that may not actually be correct. He submitted that Rule 2 of 1974 Rules cannot be declared ultra vires because that controversy stands concluded by the decision reported in 1990 (1) UPLBEC 320 . It is submitted that the Petitioner has misconstrued the ambit of Rule 40 of the Rules of 1976. The length of service is also a condition of service and its determination, according to Mr. T.P. Singh, will fall within the ambit of matter relating to conditions of service. Reliance is also placed by Mr. T.P. Singh on a note of the Chief Justice dated 29-6-1977 on the administrative side in which the principle of Rule 2 of the Rules of 1972 is held to be sound and not to be departed from in the matter of change of date of birth. However, if the age is corrected in the school certificate the change of age can be reconsidered by the High Court. It is stated that the ratio laid down in the case of Union of India (UOI) Vs. Jyoti Prakash Mitter, are not applicable to the present case because in that case the change of date of birth of a Judge of Calcutta High Court was under consideration for which the President alone had the exclusive power.

21. It is necessary to deal with the preliminary objections first because if the objections are accepted then the necessity of adverting to the authorities on merits would not arise The first preliminary objection was that the cause of action had arisen in 1953 when the Petitioner had entered the service in the subordinate courts and thereafter in 1963 when the Petitioner entered the service of the High Court. It is contended that the Petitioner could have challenged the entry in the service record with regard to his date of birth at that time, but he did not do so. He sought change in the date of birth when he was at the verge of retirement. Reliance is placed on the case of Malcom Lawrence Cecil D'souza Vs. Union of India (UOI) and Others, and on the case of Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, . The Supreme Court has observed that administrative decision affecting one's seniority should be challenged with due diligence and promptitude. If a person sleeps over the matter, then after a considerable gap of time rakes up the dispute, it is likely to result in administrative complications and difficulties because number of officers are likely to be affected who in the meantime had been benefited by the seniority in question shown in the seniority list are likely to be affected which will, surely create administrative chaos after lapse of time. In the next authority it was observed that if a representation is rejected the filing of the similar representation would not explain the delay.

22. So far as the first preliminary objection is concerned, the Petitioner has recurring cause of action to challenge the correctness of the entry of his date of

birth in the service record. He could have challenged it earlier also and if he has not challenged it then there is no bar to challenge the same at a later stage when he is sought to be retired on the basis of the said entry. Moreover, this is only a rule of caution and prudence which binds a person to approach the Court with promptitude for the redressal of his grievances. Approaching the Court before the date of actual retirement is not barred. Remedy to approach this Court would certainly have been effected if the Petitioner had accepted the date of birth as entered in the service record as correct for the purpose of his superannuation and after his retirement challenged the same. The Petitioner has moved the petition when he was still in service and the rejection of his representation by the High Court and the Board of Secondary Education is not on the ground of laches but is on the ground of prohibition contained in Rule 2 of the Rules of 1974 which would not permit any authority to effect any change in the date of birth once the same is recorded in the service record or once it is recorded in the High School Certificate. That being so, the Petitioner would not be dismissed on the ground of laches.

23. The second objection is with regard to acquiescence. It is contended that the Petitioner has accepted his date of birth as entered in the service record as early as in 1953. On the basis of that date of birth he had taken advantage of having entered into service in 1953. Now he cannot turn round after lapse of enormous period and challenge the said entry. This submission also is without substance, inasmuch as it is the Petitioner's case that he was informed about the real date of birth only recently by one of his relations whose affidavit he has filed. Whether that is correct or incorrect is a different matter but in view of the plea that he himself did not know his real date of birth which came to be known by him before filing of the writ petition and thereafter he initiated the action for correction of date of birth and his action did not prove successful. On the basis of the pleadings set out in the writ petition it cannot be said that the Petitioner had known the real date of birth as being March, 1935 in 1953 and he slept over the matter which would prevent him subsequently from raising this question. The averment of acquiescence is to be tested in the light of the pleadings and the submissions made in the writ petition. This is also not a ground for rejection of his representation to the Respondents No. 3 and 4. This is not a case of acquiescence. The Petitioner would not be non-suited at this preliminary stage when his case is that he acquired knowledge of real date of birth immediately before the filing of the writ petition. As to whether this plea will succeed or not on merits remains to be seen, but it will be difficult for this Court to hold that the Petitioner had acquiesced to the entry with regard to his date of birth given in this service record and his High School Certificate.

24. The third preliminary objection is based on the ground that the dispute on the question of fact cannot be solved in the writ petition. Reliance is placed on the case reported in 1990 (1) UP LB EC 320. It is true that the disputed questions of fact cannot be settled in a writ petition, but in the present case this Court is not going to determine or settle the date of birth of the Petitioner as given by

him, which, according to him, is his real date of birth. The Court will not remark on this enquiry in the writ petition but it is surely not precluded from considering as to whether the Petitioner could assail the entry with regard to his date of birth in the service record and in the High School Certificate before the Respondents No. 2, 3 and 5 and if he assails the same, what are the parameters within which the Respondents No. 2, 3 and 5 have to act. This Court will surely not decide the disputed question of fact with regard to the date of birth as prayed for by the Petitioner nor can it hold an enquiry or investigation in the writ petition about the determination of real date of birth, if the date of birth recorded in the service record is not real. The proposition laid down by the Division Bench of this Court in the case reported in 1990 (1) UP LB EC 320 is not disputed. For determination of date of birth the Division Bench has said that High Court in its writ jurisdiction is not an appropriate forum. It is said that a civil suit is the remedy where the disputed questions of fact can be considered after the parties are allowed to lead evidence. This would not mean that jurisdiction of other forums which have authority to decide such questions are also taken away and the High Court is precluded from issuing directions about the method and manner of conduct of an enquiry in respect of disputed questions of fact. Determining the date of birth is one thing and laying down guidelines for its determination for some other authority is another. Learned Counsel for the Respondents has not appreciated the fine distinction between undertaking the burden upon itself by the High Court to determine the age and the power of High Court to issue directions to some other authority to consider the matter objectively. It will be travesty of justice if the High Court refuses to consider the correctness or otherwise of the findings of the authorities rejecting the representation of an employee for effecting correction in the date of birth. The High Court is entitled to know as to whether the authority has applied its mind while disposing of the representation for change of date of birth and whether its consideration in this regard is subjective or objective. That power cannot be denied to the High Court under Article 226 of the Constitution of India and that is a distinct power which is given to the High Court as a watch-dog of the rights of citizens who approach the High Court for redressal of their grievances. While upholding the objection that High Court cannot itself embark on an enquiry or conduct an investigation with regard to the determination of date of birth, it is held that High Court has the power to consider "the grounds on which the competent authorities have rejected the representation with regard to the change of date of birth and it can issue necessary directions to such authorities if it finds that rejection of representation was not sound or was based on some irrelevant considerations. The third preliminary objections is also over-ruled. This brings us to the merits of the controversy. The learned Counsel for the parties have referred to some authorities and those authorities will now engage the attention of the Court.

25. In *Brij Mohan Singh Vs. Priya Brat Narain Sinha and Others*, , it was held that entry made in school register on a false information with the motive that false entry would give advantage at a later stage when seeking public service for

which minimum age for eligibility is prescribed is not conclusive proof about the date of birth. The Supreme Court made the following observation in this regard:

However, much one may condemn such an act of making a false statement of age with a view to secure an advantage in getting public service, a Judge of facts cannot ignore the position that in actual life this happens not infrequently.

The submission is that the High Court has relied on Rule 2 of the Rules of 1974 which is not applicable to the employees of the High Court because the said rule does not relate to the conditions of service. The other side is vehement to say that Rule 2 of the Rules of 1974 is related to the conditions of service. Therefore, it will be applicable to the High Court employees by virtue of language of Rule 40 or the Rules of 1976. It is the common ground that the Rules of 1976 as framed under Article 229 of the Constitution whereas Rule 2 of the Rules of 1974 is framed under Article 309 of the Constitution. The Rules of 1976 do not contain any mechanism by which date of birth of an employee subject to those rules can be corrected. However, Rules 41 and 45 in the said Rules are significant, Rule 41 is residuary power of the Chief Justice to make such orders from time to time as he may deem fit in regard to all matters incidental or ancillary to these rules not specifically provided for in the rules or in regard to matters as have not been sufficiently provided for. Rule 45 of the said Rules have a non-obstinate clause and it empowers the Chief Justice to make such order in respect of recruitment, promotion, confirmation or any other matter. Sub-rule 2 of Rule 40, as stated elsewhere in this judgment, applies the rules and orders for the time being in force and applicable to the Government servants holding corresponding posts in the Government of Uttar Pradesh to the officers and staff of the Court subject to such modifications, variations and exceptions, if any, as the Chief Justice may, from time to time, specify, provided these rules are with regard to the conditions of service of officers and staff of the Court including matters relating to their conduct, control and discipline.

26. Rule 2 of the Rules of 1974 provides a mechanism for determination of date of birth. It forbids to correct the date of birth of an employee if the same is based on High School Certificate or is entered in his service record. This rule neither deals with the conditions of service nor with the conduct, control and discipline of the employee" The rule is only procedural and will not apply ipso facto to the High Court employees, if it is not made applicable by the Chief Justice in exercise of his powers under Article 229(2) of the Constitution of India. The rule is rule of evidence as to how the age of an employee can be evidenced or what is the value of date of birth entered in the High School Certificate or in the service record. This is purely a rule of evidence and a rule of procedure which has nothing to do with the conditions of service or any matter relating to the conduct, control and discipline of employees of the High Court.

27. Mr. T.P. Singh has made stress on the expression "included" in the said rule which according to him will embrace within its fold all matters relating to the Government employees. Such an interpretation is de hors of the rule. The matters

to which Rule 2(2) of the 1974 Rules is applicable are condition of service including matters relating to conduct, control and discipline. The application is qualified and circumscribed by relating it to a limited sphere and not making it applicable to any other matter. While the superannuation itself is a condition of service but now the age is to be determined for superannuation is not a condition of service nor can that come within the purview of conduct, control and discipline. The meaning given to expression "including" in the case of Delhi Judicial Service Association v. State of Gujarat 1991 JT 617, has a different import and connotation. The meaning given herein to the expression "including" will not apply in the present case.

28. It was argued that on administrative side the Chief Justice once observed Rule 2 of the Rules of 1974 has a very good principle underlying the said rule which cannot be departed from in relation to the employees if the High Court. From reading the observation of the Chief Justice dated 29-6-1977 it appears that the said rule was not applicable to the High Court employees but the principle of the said rule was held to be sound and it was observed that there was no reason to depart from the same, but in the same breath it was stated that the correction of age can be reconsidered if and when one gets the age in the High School Certificate corrected. Reading the observations of the High Court made on administrative side a man of prudence will be convinced that the High Court did not apply Rule 2 of the Rules of 1974 to the employees of the High Court but its principle were lauded at one stage yet it permitted consideration of correction of date of birth at the other if High School certificate was corrected. The opinion of the High Court on administrative side is entitled to be respected. It has to be given a weightage. But opinion of this nature cannot bind the High Court on the judicial side. Even if it binds the High Court of Judicial side then this opinion is to be construed in favour of the Petitioner and not in favour of the Respondents. The opinion of the High Court is not to be construed in away which would make it pedantic or which would deprive the High Court employees from making representation in respect of correction of date of birth. The opinion is always subservient to the advancement of cause of justice which is intended to be served by the rules and regulations. A man-made regulation or a hand-made opinion cannot, therefore, be construed in a pedantic manner so as to close all doors for an employee of the High Court to approach the Chief Justice for correction of date of birth if an employee is aggrieved against his date of birth as entered in his service record or as entered in the High School Certificate.

29. I am fortified by an authority of the Supreme Court State of Punjab v. Kailash Nath AIR 1985 SC 558, in arriving at the conclusion that Rule 2 of the Rules of 1974 is not a rule of condition of service nor does it relate to matters of conduct, control and discipline of an employee. In this authority, which is on a different point, it was held that in the council course what falls within the purview of the term "condition of service" may be classified as salary or wages including subsistence allowance during suspension, the periodical increments, pay-scale, leave, provident fund, gratuity, confirmation. promotion, seniority, tenure or

termination of service, compulsory or premature retirement, superannuation, pension changing the age of superannuation, deputation and disciplinary proceedings Whether or not a Government servant should be prosecuted for an offence committed by him obviously cannot be treated to be something pertaining to conditions of service.

30. Rule 2 of the Rules of 1974 may bind the employees of the State Government. It is an independent rule and the Governor is empowered to frame such a rule, It was contended by Mr. Gupta that the said rule is ultra vires because it places an unreasonable restriction on the rights of a person to agitate his claim with regard to his real date of birth. However, I am not going to consider this aspect of the matter because validity of this rule is already upheld by this Court. Therefore, the vires of Rule 2 of the Rules of 1974 is beyond the pale of challenge in this writ petition.

31. In respect of some employees which are mentioned in the supplementary affidavit filed by the Petitioner it is stated that the High Court has considered the representations and in some cases changed the date of birth of its employees. However, it is contended that it might have happened before the coming into force of Rule 2 of the Rules of 1974. The Standing counsel did not corroborate this point but simply referred to the averments made in the counter affidavit. He could not refute that in one case the date of birth as entered in the service record was changed and the person was given benefit of some years of service. In other case also some persons were given benefit by changing their dates of birth. The High Court has not produced necessary particulars to substantiate their plea that the date of birth in respect of those employees of the High Court was changed before coming into force of the Rules of 1974. Without any proof in this regard it cannot be held that the date of birth of those employees was changed before the 1974 Rules came into force because they reply to the supplementary affidavit filed by the Petitioner, in this regard is vague and not certain.

32. This Court would never venture to make a direction for the change of date of birth of the Petitioner if the Petitioner succeeds he can only be given the relief that his representation may be considered on merits. The decision is to be taken by the authorities who are enjoined to consider his representation but rejection of his representation on irrelevant grounds and by applying Rule 2 of the Rules of 1974 does not appear to be just.

33. The Respondent No. 3 also has been influenced in its decision by Rule 2 of the Rules of 1974. Therefore, it has rejected the representation of the Petitioner in regard to the correction of date of birth. It has refused to consider it and its refusal to consider it is based on irrelevant consideration.

34. In the case of A.L. Kalra Vs. Project and Equipment Corporation of India Ltd., it was held that executive action which results in denial of equal protection of law or equality before law can be judicially reviewed. Relying on the case of E.P.

Royappa Vs. State of Tamil Nadu and Another, the Court held that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve negation of equality. In the case of E.P. Royappa v. State of Tamil Nadu (supra) an observation was made by the Supreme Court. which is reproduced below:

The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. No what is the content and reach of this great equalising principle? It is a founding faith, to use the words of pedantic or lexicographic approach we cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined.

Propounding the concept of equalising principle it was held that from a positivistic point of view equality is antithetic to arbitrariness. The principle laid down by the Supreme Court is that in fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other to the whim and caprice of an absolute monarch.

35 Mr. T.P. Singh has referred to the case of Bhupindra Nath Chatterjee Vs. The State of Bihar and Others, . In this case the notification issued by the Bihar Government on 11-1-1963 had extended the age of superannuation from 55 to 58 years and it further directed that the benefit of extension would be granted to those government officers who were due to retire after January 14, 1963. The Petitioner's date of birth was recorded as 1st January, 1908. He contended that his actual date of birth was 16th January, 1908, and, therefore, he was entitled to get benefit of the notification. He filed the writ petition, which was rejected by the High Court because the motive for filing the writ petition was obvious. Reliance is also placed on the case of Mata Prasad Sharma v. Director of Secondary Education U.P. Allahabad 1987 UP LB EC 609, which is an authority pertaining to the retirement benefit which was given by an order dated 17th December. 1973 The said order was passed under Fundamental Rule 56-A of the Financial Handbook. The age of retirement of Principal. Headmaster and teachers of Government Intermediate Colleges was fixed 58 years and if the date of superannuation falls between 1st of July and 30th June, then they will continue till the end of the academic session, namely, till 30th June. This case has distinguishing facts not applicable to the present case. In the case of Sheo Pujan v. Union of India 1988 UP LB EC 73, which was decided by a Tribunal, the Tribunal did not accept the entry of date of birth of an employee recorded in Kutumb Register, extract whereof was filed by the employee. However, this case need not be relied upon for the simple reason that it was decided by a Tribunal, which is subordinate to the High Court.

36. Mr. T.P. Singh also relied on the case of The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others, for the interpretation of Statutes. His contention was that deeming provision of Rule 2 of the Rules of 1974 should be given full

effect and taken to its logical conclusion. His contention in this regard is correct. Rule 2 of the Rules of 1974 postulates that date of birth recorded in the High School Certificate and service record shall be deemed to be correct and shall not be subject to any change. The Statute has enacted something which is to be treated as correct though in fact and truth it was not correct but the fiction created by the Statute is to be enforced. Rule 2 of the Rules of 1974 does not suffer from any vice but in view of my finding that this rule does not apply to the employees of the High Court as it does not govern the conditions of service or does not relate to any matter relating to conduct control and discipline, it cannot be made applicable to the High Court employee by virtue of Rule 40(2) of the 1976 Rules. In its place the rule is correct and it has application with regard to Government employees. The effect of that rule cannot be diluted even though it is a deeming rule. Rule 41 of the Rules of 1976 makes it possible for a High Court employee to place his grievance before the Chief Justice who is to consider the same on relevant considerations. This rule does not specify the matter which could be brought before the Chief Justice for consideration. It lays down that in regard to all matters incidental or ancillary to the rules not specifically provided can be brought before the Chief Justice for his consideration. The change of date of birth is one of the matters which can be considered by the Chief Justice. With respect it is stated that the opinion of the then Chief Justice dated 29-6-1977 on its administrative side that Rule 2 of the 1974 Rules in principle would apply to the High Court employees would not bind the High Court on Judicial side. However, in the same breath, the then Chief Justice has stated that change in the date of birth can be reconsidered if the High School certificate is corrected. That would mean that the service record of an employee of the High Court was liable to be corrected in accordance with the correction made in the High School Certificate. Rule 2 of the 1974 Rules is, therefore, not to be treated "Henry VIII Rule". It has no application to the High Court employees. Therefore, Rule 41 of 1976 Rules which gives residuary powers to the Chief Justice can be invoked by an employee of the High Court. In fact the Petitioner seems to have invoked the said rule but his representation was rejected by applying Rule 2 of the Rules of 1974 to it. The rejection of the Petitioner's representation was rejected by applying Rule? of the Rules of 1974 to it. The rejection of the Petitioner's representation is, therefore on irrelevant considerations. If the Petitioner's representation was to be dismissed it should have been considered on merit, thereafter rejected, or that the Petitioner could get his age corrected from the Board as the said age if corrected could be the basis for his retirement. The documents produced by the Petitioner could not be ignored on the ground that Rule 2 of the Rules of 1974 prohibits an enquiry with regard to the date of birth of an employee, as entered in his service record and the High School Certificate.

37. As slated already to consider the interim order issued in favour of the Petitioner it was thought that the report from the Respondents No. 3 and 4 be obtained about the date of birth of the Petitioner. The Respondent No. 4 has submitted his report. He has accepted that the Petitioner's date of birth is liable

to be changed and the date of birth recorded in the School Register as 20-9-1932 is not correct. Therefore, no direction is needed to be given to him. However, this report will not bind the Respondent No. 3 unless he has an opportunity of examining the report.

38. The Respondent No. 3 has conveyed that the Petitioner's date of birth cannot be corrected in view of the Government Order which imposes a ban to change the date of birth. He has to consider the matter and send a report to the Court. The Respondent No. 3 seems to be under the impression that he was dealing with the case of a Government employee to whom Rule 2 of the Rules of 1974 was applicable. Now that the application of Rule 2 of the 1974 Rules has been excluded insofar as the High Court employees are concerned, there is no bar imposed by the Statute or any rule or any Government Order on the powers of the Respondent No. 3 to consider the representation of the Petitioner in respect of correction of his date of birth as recorded in the High School Certificate. His contention that only clerical error can be corrected is also incorrect and set aside. He was bound to consider the material produced by the Petitioner before him and thereafter apply his mind to the facts of the case and pass appropriate orders on the merit of the case. The Petitioner is not bound by the Government Orders dated 30-7-1970, 20-5-1974 and 14-5-1983 and his representation can be considered without making these orders applicable to him. The order of the Respondent No. 3 dated 17-5-1990 whereby he has refused to correct the date of birth of the Petitioner on the ground of the aforesaid Government Orders is without application of mind and is set aside as being bad in law. The Respondent No. 3 should not confuse the Petitioner with a Government servant because the Petitioner belongs to class of employees who are separate and distinct and who are governed by the Rules of 1976 framed under Article 229(2) of the Constitution. He is obliged not to refuse to consider the Petitioner's representation on technical rules which are not applicable to the Petitioner's case. He is also bound to consider the report of the Principal, Respondent No. 4, dated 10-8-1991 submitted by him in response to the orders of this Court dated 26-7-1991.

39. Since the Petitioner's representation is to be first decided by the Respondent No. 3 and there after appropriate orders are to be passed on his representation by the High Court, it will be appropriate to allow the Board to decide his representation within a time bound period so as to enable the High Court to make appropriate orders. The Petitioner's representation is to be considered by the High Court objectively and the same is not to be rejected summarily on irrelevant considerations. Since the High Court has considered the representation* of some of its employees in the past, therefore, the Petitioner's representation also merits consideration by the High Court.

40. The result is that the order dated 17-5-1990 passed by the Secretary, Board of High School and Intermediate Education, U.P. Allahabad, is hereby quashed. The Respondent No. 3 is directed to consider the representation of the Petitioner

afresh ignoring its communication dated 14-8-1991 by which he was asked to submit a report about the age of the Petitioner which he refused to send. The said communication of confirmation or vacation of interim order. The Respondent No. 3 is further directed not to apply Government Orders dated 1-5-1983, 28-5-1974 and 30-7-1970 to the case of the Petitioner as these orders would not apply to the Petitioner for getting his representation in respect of correction of date of birth considered by the Board. Therefore, the aforesaid orders are directed to be ignored while considering the representation of the Petitioner afresh for correction of his date of birth.

41. The Board is further directed by a writ of mandamus to afford a reasonable opportunity of being heard to all those persons who are interested in contesting the Petitioner's assertions with regard " to the change of date of birth. It is also directed that the Board shall give publicity to the notice of the Petitioner's representation through the medium of a local newspaper published from Allahabad which has wide circulation at the cost of the Petitioner and invite objections to the representation of the Petitioner from all those who are interested in the matter. The Petitioner shall deposit the necessary publication fee of the notice to be published in the newspaper with the Respondent No. 3 within two weeks from the date of presentation of a certified copy of this order before the Respondent No. 3.

42. The Board is also directed to consider the report of the Respondent No. 4 and ascertain its correctness or otherwise by allowing the interested persons to cross-examine the scribe of the report i.e. the Principal, Dr. Ghosh Modern College, Allahabad, should any body contest the Petitioner's assertions before the Respondent No. 3, he shall be given reasonable opportunity of rebutting the material produced by the Petitioner before the Respondent No. 3 during the consideration of the representation.

43. The Respondent No. 3 is directed to conclude the enquiry within four months from the date of presentation of a certified copy of this order before the Respondent No. 3 and submit his report directly to the Registrar of the High Court of Allahabad for consideration. The Petitioner shall, therefore, present a certified copy of this order before the Respondent No. 3 within three days from the date of obtaining of certified copy. A certified copy of this order shall be given to the Petitioner within ten days on payment of usual charges.

44. The Petitioner is directed to cooperate with the Respondent No. 3 during the enquiry and not to delay the enquiry. If at any time the Petitioner does not cooperate with the Respondent No. 3 from completing the same within the time specified above, the Respondent No. 3 is at liberty to conclude the enquiry in the absence of the Petitioner.

45. On receipt of the report from the Board, Respondent No. 3, the Respondent No. 5 is directed to place the same, before the Respondent No. 2 for appropriate orders. If the report is in favour of the Petitioner, the Respondent No. 2 will be

within his right to effect the change in the date of birth of the Petitioner in his service record and if the report is against the Petitioner the Petitioner is not entitled to seek any relief from the Respondent No. 2. As a consequence of this order the communication of the Deputy Registrar dated 16-6-1989 based on the order of the Chief Justice on administrative side dated 20-5-1989 is hereby set aside. The Petitioner's representation shall be deemed to be pending before the Respondent No. 2 and shall be decided in accordance with the report of the Respondent No. 3, as indicated above.

46. The Petitioner is permitted to file fresh/additional representation before the Respondents No. 2 and 3, if so advised for their consideration.

47. No direction is required to be issued to the Respondent No. 4 because he has already submitted a report, the correctness or otherwise whereof is to be tested by the Respondent No. 3 in accordance with law.

48. Until the report of the Respondent No. 3 is considered by the Respondent No. 2, the Petitioner shall not be discontinued from the post which he is holding at present.

49. To the extent indicated above the writ petition is allowed. In the peculiar circumstances of the case the parties are left to bear their own costs.

50. Any observation made in this judgment shall not be construed to be an expression of opinion of the Court on the correctness or otherwise of the assertions of the Petitioner with regard to his date of birth.

51. The writ petition is finally decided in accordance with the Rules of the Court and at the joint request of the learned Counsel for the parties.