
(2012) 03 PAT CK 0057

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 17525 of 2008

Yugeshwar Singh

APPELLANT

Vs

The B.R.A. Bihar University

RESPONDENT

Date of Decision : 02-03-2012

Acts Referred:

Bihar Pension Rules, 1950 — Rule 5, 57
Bihar Service Code, 1952 — Rule 73
Bihar State Universities Act, 1976 — Section 67
Contract Act, 1872 — Section 11
Majority Act, 1875 — Section 3

Citation : (2012) 2 PLJR 417

Hon'ble Judges : Jayanandan Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Jayanandan Singh, J.—Petitioner of this writ application is aggrieved by a notification of the University, contained in Memo No. B/1639 dated 27.09.2008 (Annexure-3), by which his date of superannuation had been notified as 01.03.2008. He has prayed for quashing of the same and for a direction to the University authorities to reinstate him as a class-IV employee of S.R.K.G. College, Sitamarhi (in short "the College") and allow him to continue in service till he attains the age of 62 years. The short facts of the case are that the petitioner was appointed as a Lab Boy in the Department of Chemistry on 01.02.1964 by the Management of the College. Subsequently while he was in service of the College, he appeared and passed his matriculation examination in March, 1972 and was issued marks-sheet (Annexure-1). In the marks-sheet, his date of birth was shown as 02.07.1952. Thereafter, in 1975 the College was taken-over by the University as a constituent college and consequently the services of the petitioner and others were absorbed under the University. Petitioner was made permanent and, as per the certificate of the Principal, vide Annexure-2, was placed in the scale of Rs. 940-1500 with effect from

01.01.1986. Petitioner has since continued in the service of the University to the full satisfaction of all concerned without any complaint against him. All of a sudden, the University issued the impugned Notification, by which the dates of superannuation of petitioner and others were notified. Petitioner's date of superannuation was mentioned as 01.03.2008. Thus, by virtue of this Notification, petitioner stood retired. As per his date of birth mentioned in the matriculation marks-sheet, at that point of time petitioner's age was less than 56 years. The grievance of the petitioner is that, as per Section 67 (a) of the Bihar State Universities Act, 1976 (hereinafter to be referred as "Universities Act"), he was entitled to continue in service till he attained the age of 62 years. Hence, as per law, he had 6 years more of service left, which the University has illegally denied to him. Therefore, prayer is for quashing of the said impugned Notification and for his reinstatement in the service.

2. Learned Counsel for the petitioner submitted that the date of birth of the petitioner, as mentioned in his matriculation marks-sheet, was never disputed or questioned by the respondents at any point of time. The respondents have also never disputed his date of appointment in the College while the College was an affiliated college of the University. He was absorbed in the University service, after the College became its constituent unit, taking into account his appointment in the College with effect from 01.02.1964. Hence, the University had to allow him to continue in service till he attained the age of 62 years, in terms of Section 67(a) of the Universities Act. He submitted that the said Section 67 (a) starts with a non-obstante clause and hence has an overriding effect over any other Act, Rules, Statutes, Regulation or Ordinance. As such, the respondents were not legally justified in making the petitioner superannuate with effect from 01.03.2008. He submitted that, at the time of appointment by the Management, petitioner was admittedly about 12 years of age, but at that time no minimum age was prescribed for appointment in a privately managed college. Therefore, the respondents accepted his appointment as valid and absorbed him in regular service of the University.

3. Respondents have filed a counter affidavit in the case. In the counter affidavit, it has been stated that the petitioner was made to superannuate with effect from 01.03.2008 by the impugned Notification (Annexure-3), as per decision of this Court and the Government Circular vide letter no.15/14/1-14-99-1961 dated 12.11.1999, upon completion of 44 years of service. It is stated that, for such decision, University has relied upon the judgment of the Full Bench of this Court reported in Ragjawa Narayan Mishra Vs. Chief Executive Officer, Bihar Rajya Khadi Gramoudyog Board and Others, and a judgment reported in 1983 LIC 162. It is also stated that a large number of employees of the University were made to superannuate on completion of 44 years of service in similar circumstances, one of such was one Ganesh Sinha. He moved this Court challenging his superannuation on completion of 44 years of service through CWJC No. 11890 of 2005, which was heard and dismissed by this Court by order dated 22.04.2009. Another employee one Bhupal Prasad Singh, who was also made to superannuate

on completion of 44 years of service by the University in identical circumstances, also moved this Court whose writ application was also dismissed. While dismissing the writ applications, this Court relied upon the said Full Bench judgment of this Court. Hence, it was submitted by Learned Counsel for the University that there being no apparent distinguishing feature in the case of said Ganesh Sinha and Bhupal Prasad Singh vis-à-vis the present petitioner, this Court should follow the judicial precedent in the case of this petitioner also.

4. Learned Counsel for the petitioner, in reply, submitted that the case before the Full Bench was in respect of an employee of Bihar Rajya Khadi Gramodogya Board in whose case the Bihar Service Code was applicable. The Full Bench considered the Rule 73 of the Bihar Service Code in context of Rule 57 and Rule 5 in Appendix-5 of the Bihar Pension Rules 1950 as amended up-to-date and found that for the purposes of service of an employee becoming pensionable, his age had to be 18 years. He submitted that Rule 73 of the Bihar Service Code and said Rule 57 and Rule 5 in Appendix-5 of the Bihar Pension Rule did not contain any non-obstante clause. Hence, the Full Bench considered the provision of Section 11 of the Indian Contract Act, 1972 as well as Section 3 of the Majority Act, 1875 and held that, since service is a contract, a person entering into service has to be eligible to enter into a contract for which he needs to be a major and therefore of minimum 18 years of age. He submitted that, as Section 67 (a) of the Universities Act is a special provision and contains a non-obstane clause, the provisions of Indian Contract Act or of the Majority Act cannot be applied in the case of an employee of the University for making him superannuate prior to as his attaining the age of 62 years. In support of this proposition of law, he relied upon two judgments of the Apex Court in the case of Gobind Sugar Mills Ltd. Vs. State of Bihar and Ors. [1999 (3) PLJR 166 (SC)] and Col. D.D. Joshi and Others Vs. Union of India and Others [1983 (1) SLR 552]. He submitted that neither the provisions of Bihar Service Code nor the provisions of Bihar Pension Rules are applicable in the case of an employee of the University whose services are governed strictly by the provisions of the Bihar State Universities Act and the Statutes framed thereunder. He submitted that there is no provision in the Act or in the Statute which could lend any support to the stand of the respondents that their act of making the petitioner superannuate on completion of 44 years of service and prior to his attaining the age of 62 years was valid. He further submitted that even if a provision could be found in this regard, the same was not applicable in the light of the overriding effect of clause (a) of the said Section 67. He further submitted that a Division Bench of this Court in the case of Mokhtar Ahmad Vs. State Road Transport Corporation and Ors. [1995 (1) PLJR 183] has held that if there was no provision imposing restriction on appointments of persons below the age of 18 years in government service, the date of birth entered in the service book and corroborated by matriculation marks-sheet cannot be assailed being incorrect so as to make the employee superannuate without his attaining the age of superannuation prescribed in the Rules. It is submitted that in the case of Ganesh Sinha (supra)

there was a dispute with regard to his actual date of birth in the records. Hence, this Court assumed in favour of the University and held petitioner's superannuation on completion of 44 years of service as valid. He submitted that, so far as present petitioner is concerned, there is no dispute with regard to his date of birth. Hence, in terms of the judgment of the said Division Bench in the case of Mokhtar Ahmad (supra), it must be accepted for calculating his age of superannuation.

5. Learned Counsel for the University, in reply, submitted that the Division Bench judgment of this Court in the case of Mokhtar Ahmad (supra) has been overruled by the said Full Bench judgment of this Court reported in Ragjawa Narayan Mishra Vs. Chief Executive Officer, Bihar Rajya Khadi Gramoudyog Board and Others, . He submitted that the submissions made by Learned Counsel for the petitioner in context of Section 67 of the Universities Act has already been considered and dealt with by this Court in the case of Ganesh Sinha (supra) and has been negatived. Hence, there is no new ground available to the petitioner which calls for rethinking in the matter and, therefore, the precedent as emerging from the judgment of this Court in Ganesh Sinha (supra) should be followed by this Court.

6. this Court has considered the submissions of learned counsels for the parties and the judicial pronouncements relied upon by them and the legal provisions referred to. This is correct that the said Full Bench, in the case before it, was dealing with a case of an employee of Bihar Rajya Khadi Gramodyogya Board in whose case Bihar Service Code and Bihar Pension Rules were applicable. The Full Bench found that, in terms of the Code and the Rules, for being entitled for pensionable service, an employee was required to enter into service validly. It took notice of the settled proposition of law that any employment in a public service is a contract between the employee and the employer. Therefore, both the parties of the contract must be competent to contract in terms of Section 11 of the Indian Contract Act. It further noticed that only a major could enter into a valid contract, the age of which as per Section 3 of the Majority Act was 18 years. Hence, for the purposes of claiming a valid service and for benefits of the same and for the purpose of post retiral benefits, he had to accept that he had entered into service after attaining the age of majority. It was specifically noticed that as per the amended Pension Rules, for qualifying service, minimum age was prescribed as 18 years. With these findings the writ applications were disposed of by the Full Bench against the petitioners.

7. In the case of Ganesh Sinha (supra) the case of the employee of the University was dealt with in detail and the specific plea of the petitioner that in terms of Section 67 he was entitled to continue up to the age of 62 years was negatived. After careful consideration of the judgment of this Court in the case of Ganesh Sinha (supra), this Court finds that the same is almost identical to the case of the present petitioner. As per his case, the said petitioner was initially appointed on 02.02.1957 at which point of time his date of birth was shown as

10th February, 1944. Later on his service was terminated, but he was reappointed with effect from 18.08.1960. It has been noticed in the judgment that the said petitioner passed his Matriculation examination after his initial appointment in the College on 02.02.1957. this Court also noticed that the service book of the said petitioner was opened in 1997, i.e., almost 40 years after his entry in the service of the College. Hence this Court held that the matriculation marks-sheet could not be treated as authentic proof of his date of birth since he passed his matriculation examination while continuing in service and after his joining in 1957. The observations of this Court in this regard were as follows:-

It has to be noted that the petitioner on his own showing had passed his matriculation examination while continuing in the service of the College which is admitted by him in paragraph no.6 of the writ application. Thus, the petitioner cannot also rely on the date of birth on his matriculation certificate which was neither the basis of his entry in the College nor was ever acted upon at the time of his joining in the year, 1957. The moment this fact remains uncontroverted that the petitioner in the year 1957 was not even a matriculate, his subsequent passing of matriculation examination while continuing in College at least could not be made the basis for computing his age specially when the service book, noting his date of birth on the basis of matriculation certificate, was opened in the year 1997 i.e. after 40 years of his entry in service.

8. The applicability of provisions of Section 67 of the Universities Act was also considered by the learned Single Judge and it was held that since there was no reliable proof that when the said petitioner was initially appointed he was aged about 13 years and yet got employment, the protection of Section 67 will not come to his aid on the basis of the service book opened in 1997, for the Court to accept his date of birth as 10.02.1944 for allowing him to continue in service till he attaining the age of 62 years. The observations of the learned Single in this regard were as follows:-

If case of the petitioner is examined in the light of aforesaid law laid down by the Full Bench of this Court, Section 67 of the Act will be of no avail. It is true that u/s 67 of the Act, there is a provision that the date of retirement of a non-teaching employee who is in the service of the University prior to the commencement of the Act, shall be the date on which he would attain the age of 62 years. The question still would be as to what would be the basis for the petitioner to contend that as a non-teaching employee when he had entered in service of the College in the year 1957 he was aged about 13 years and yet got employed in the College. There being no proof of this fact from any records and the service book produced and relied by the petitioner being of the year 1997, this Court would find it very difficult to accept the submission of the petitioner that his date of birth should be accepted as 10.02.1944, for being continued in service till attaining of his age of 62 years i.e. upto February, 2006.

9. this Court finds striking similarity between the case of the said Ganesh Sinha

and the present petitioner. As per the case of the petitioner he was appointed by the Management of the College on 01.02.1964 when he was not a matriculate. There is no pleading and there is no material on record that at the time of his appointment in 1964 he had produced any unimpeachable proof of his date of birth. Admittedly he passed the matriculation examination 8 years after. There is no pleading and there is no material on record to establish that when the petitioner filled up his form for appearing in the matriculation examination in 1972 he had mentioned his date of birth on the basis of some unimpeachable evidence. There is also no materials available on record to show that the date of birth of the petitioner as 02.07.1952 was recorded at the time of his birth in any government or official records so that the correctness of the same had to be accepted by the all concerned at all point of time. Clearly the petitioner mentioned his date of birth in his application form for appearing in the matriculation examination, at best on hearsay or on assumption. this Court finds that at that point of time nothing could prevent the petitioner from mentioning his date of birth in the said application form even as 02.07.1960 so as to claim that he was appointed by the Management of the College in 1964 at the age of 4 years. This is also not disputed that the said date of birth mentioned in the matriculation marks-sheet has been the sole basis for entering of his date of birth in the service book. It is true that the Apex Court as well as this Court has repeatedly held that there is a presumption of correctness of date of birth of a person in his matriculation certificate and in absence of any other evidence to the contrary, it has to be accepted as conclusive and binding. But this is also not in dispute that if a presumption leads to an absurdity or illegality the Courts should refrain from acting on the said presumption.

10. In the circumstances, this Court finds that the date of birth of the petitioner mentioned in his marks-sheet of matriculation examination, as contained in Annexure-1, cannot be accepted as sacrosanct so as to calculate his service on that basis for his superannuation in terms of provisions of Section 67(a) of the Universities Act.

11. Apart from the above finding of this Court, it can also be observed that as the petitioner claims that he was appointed at the age of 12 years when he was not competent to enter into contract of service, his appointment itself fell in the category of void appointment depriving him the right to be absorbed in the service of the University. In the circumstances, when the College was made constituent by the University and the case of the petitioner was being considered for absorption, it was open to the University to reject his claim for absorption on the basis of such void appointment. But clearly the University took a lenient view and absorbed him in service treating him to be validly appointed, for which his age, as on his date of appointment in 1964, had to be assumed as 18 years. The petitioner has continued in service and has now superannuated and the validity of his initial appointment is not an issue in this case. But the period of his service, rendered since his appointment in the affiliated College and thereafter under the University, has to be taken a valid service for which he has to be

treated as appointed in 1964 at the age of 18 years. Hence counting his age as 18 years on 01.02.1964 his 62 years of age stands completed in February, 2008. The general provisions under the Government Notification for superannuating any employee on completion of 44 years of service is on the assumption that the employee had entered into the employment on attaining the age of majority. This assumption has to be made wherever there is no authentic and unimpeachable proof of recording of date of birth of the employee in any contemporaneous official records at the time of birth of the employee itself.

12. The submission of Learned Counsel for the petitioner in respect of overriding effect of Section 67(a) of the Universities Act is of no avail. It is not the question of overriding effect of Section 67(a) over any law providing any different age of retirement of a University employee. The question is of the date of birth of an employee entered in records coming into existence after his appointment and its authenticity and reliability and validity of his entire service on the basis of a void appointment at an adolescent age and its consequences. Surely nobody will insist for a few years of more service at the risk of his entire service getting wiped out.

13. The reliance placed by Learned Counsel for the petitioner, in this regard, on the judgments of the Apex Court in the case of Gobind Sugar Mills Ltd. (supra) and Col.D.D. Joshi (supra) is also misconceived. In both the cases the Apex Court has noticed the settled principles of interpretation of statutes and held that if two Acts operate in the same field an attempt has to be made to construe them harmoniously, failing which, the general provision of an Act should yield to special provision of the other and that if the language of the statute is clear and unambiguous, it would be wrong to discard the plain meaning of the words used. In the present case, there is no conflict between the provisions of the Contract Act and Majority Act on the one hand and the provisions of the University Act as they operate in altogether different field and different circumstances having no bearing on each other.

14. In the circumstances, this Court finds no justification for deviating from the approach of the learned Single Judge made in the case of Ganesh Sinha (supra) who was also an employee of the respondent University made to superannuate under almost identical facts and circumstances. As a result, this Court does not find any merit in the writ application and the same is dismissed.