

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No.11685/2009**

% **Date of Decision: 23.02.2011**

Union of India
Through Mr.S.K.Dubey and Mr.Tongesh,
Advocates.

.... Petitioner
Mr.Tongesh,

Versus

Mr.D.R.Dhingra & Anr.
Through Mr.Mukul Rohtagi, Sr.Advocate with
Mr.A.K.Behera & Mr.Ramesh
Gopinathan, Advocates for respondent
no.1.
Mr.Manjit Singh, Advocate for
respondent. No.2.

.... Respondents

AND

+ **W.P(C) No.11694/2009**

Mr.D.R.Dhingra
Through Mr.Mukul Rohtagi, Sr.Advocate with
Mr.A.K.Behera & Mr.Ramesh
Gopinathan, Advocates.

.... Petitioner

Versus

Union of India & Anr.
Through Mr.S.K.Dubey and Mr.Tongesh,
Advocates for respondent No.1.
Mr.Manjit Singh, Advocate for
respondent. No.2.

.... Respondents

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MS.JUSTICE VEENA BIRBAL

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be
reported in the Digest? | YES |

ANIL KUMAR, J.

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1. These writ petitions are against the orders dated 4th August, 2009 passed by the Principal Bench, Central Administrative Tribunal in O.A No.1267/2008 titled 'D.R. Dhingra v. Union of India and Anr' holding that the date of birth of Sh.D.R.Dhingra (hereinafter referred to as applicant) is 6th May, 1952 and not 6th May, 1948. The Tribunal has held that though there is no bonafide clerical mistake as contemplated under Rule 16A of the All India Services (Death-cum-Retirement Benefits) Rules, 1958, however, the tribunal deemed the case of the applicant as a rarest of rare case, and thus directed the Central Government to consider the applicability of Rule 3 of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960 and to take a decision whether or not, the applicant is entitled for dispensation or relaxation of the requirement of rules or regulations on account of undue hardship to him. The Tribunal, however, left it to the discretion of the Union of India to continue or not to continue the applicant in service and during the three weeks granted by it directed the Government to decide the applicability of Rule 3 and if the Government is of the view that in the facts and circumstances, the case does entail a change in date of birth, then the period of three weeks be not treated as an interruption in the service of the applicant. The Tribunal further

directed that in case the applicant succeeds then he be also given leave of the kind due, as may be permissible under the rules.

2. The Union of India has challenged the impugned order dated 4th August, 2009 of the Tribunal in Civil Writ Petition No.11685/2009 challenging the date of birth of the applicant as 6th May, 1952 and the direction of the Tribunal to consider the case of the applicant under Rule 3 of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960 whereas the applicant has also challenged the order of the Tribunal in his writ petition being W.P(C) No.11694/2009 seeking direction to Union of India to continue the applicant in service in accordance with his date of birth as 6th May, 1952 and to give all the consequential benefits and direction to the UOI to issue and order after getting extension of time for implementation of the order dated 4th August, 2009, advising the Chief Secretary, State of Haryana not to discontinue the services of the petitioner.

3. The facts in brief relevant for decision of writ petitions are as follows. On 14th May, 1993 after the name of the applicant was approved for selection from State Civil Services to Indian Administrative Service, a representation dated 22nd May, 1993 was filed before the Chief Secretary, Government of Haryana regarding alteration of his date

of birth contending inter-alia that the mother-in-law of his elder sister Smt. Sheela Taneja had expired in April, 1993 and on the kriya ceremony it transpired that his elder sister was born in the year 1951 being the first child out of the wedlock of his parents who got married in the year 1949. He asserted that his elder sister Sheela was born on 21st July, 1951 as per the certificate issued by District Registrar (Birth and Death) Civil Surgeon, Rohtak. According to the applicant the birth certificate also indicates that Sheela was the eldest child born to her parents at Village Anwal, Police Station Kalanaur, Tehsil and District Rohtak. His sister was admitted in the year 1960 in the first class in the Government Girls Primary School at Village Anwal and her school certificate and middle standard examination certificate indicated her date of birth as 3rd March, 1951. The applicant contended that he is the second child and as per the certificate of the Government Primary School, Anwal he was born on 6th May, 1952 which is also the date of birth in the certificate issued by the Headmaster, Government High School, Lahli, which is also the date of birth reflected by the certificate issued by the District Education Officer, Rohtak for middle standard examination. The applicant also contended that the office of District Registrar (Births and Deaths) Civil Surgeon, Rohtak failed to supply his birth certificate, rather issued "not to be found" certificate for the year 1948-50 and 1952-54. According to the applicant therefore, his date of birth as recorded in the service record as 6th May, 1948 cannot be

correct as he being the second child, his year of birth should be between 1951-1955 as the first child to his parents was born in 1951 and the child younger to him was born in 1955. The incorrect date of birth in the matriculation certificate in his opinion was on account of some act of commission and omission of the teacher filling up the form of Matriculation Examination. The applicant further pleaded that his younger brother Manohar Lal whose name is recorded as Vishan Dass in the certificate issued by District Registrar (Births and Deaths) Civil Surgeon, Rohtak was born on 26th November, 1955. The certificate also discloses that his brother Manohar Lal was the third child. His brother's high school certificate shows his date of birth as 6th April, 1955. In the case of his younger brother and younger sister though there are variations in the date and month in the various records, however, the order is the same. The applicant, therefore, contended that his date of birth is 6th May, 1952 and not 6th May, 1948 as he could not have been born prior to the marriage of his parents in the year 1949.

4. The first representation of the applicant was rejected and communicated by letter dated 12th July, 1993 by the Under Secretary (Administration) on behalf of the Chief Secretary to the Government of Haryana stating that the applicant first entered into the Government service as Assistant Registrar Cooperative Societies, Haryana on the

basis of the date of birth recorded in the Matriculation Certificate as 6th May, 1948. Had the date of birth of the applicant being 6th May, 1952 he would not have been eligible for appointment to the said post. It was further stated that since the applicant has already availed the benefit in the matter of entry into service on the basis of the date of birth recorded in the matriculation certificate, the applicant is estopped from stating that his correct date of birth is 6th May, 1952 and, therefore, his request for changing the date of birth from 6th May, 1948 to 6th May, 1952 was rejected.

5. The applicant had moved the Punjab University for change of his date of birth in his Matriculation Certificate from 6th May, 1948 to 6th May, 1952 which was allowed by the University in its syndicate proceedings held on 20th January, 1997 and a revised matriculation certificate changing the date of birth from 6th May, 1948 to 6th May, 1952 was issued. Consequent thereto the applicant filed another representation dated 27th March, 1997 to the Chief Secretary, Government of Haryana.

6. Another representation of the applicant was rejected by Department of Personnel and Training by communication reference No.F.No.25015/3/97-AIS-II dated 19th May, 1997 stating that as per

Rules 16A (3) of AIS (DCRB) Rules, 1958 change of date of birth in service records of an IAS officer is not to be allowed unless there is a bonafide clerical mistake in accepting the date of birth as per sub rule (2) or (3) of Rule 16A of AIS (DCRB) Rules. While rejecting the representation of the applicant, reference was also made to the decision of the Tribunal, Principal Bench in case of Deshraj Singh v. Union of India in O.A No.1789/1990 stipulating that even a complete certificate indicating the entry of birth in the register of births and deaths cannot shake the date of birth once it has been accepted in accordance with the statutory rules. It was further stated that if anybody after taking advantage of the date of birth recorded in the High School/Matriculation Certificate secures employment, such a person cannot claim change of date of birth and in the circumstances there is no bonafide clerical mistake in accepting the date of birth as 6th May, 1948 and the second representation of the applicant was also rejected.

7. After rejection of applicant's second representation by communication dated 19.5.1997, the applicant remained dormant for ten years. Ten years after the rejection of his second representation, the applicant made a third representation to the Chief Secretary, Government of Haryana which was forwarded by the State Government to the Government of India, Ministry of Personnel by communication

dated 26th July, 2007. In the third representation dated nil made by the applicant he reiterated the facts as disclosed by him in the first and second representations of 1993 and 1997 respectively and further contended that the rejection of his representation on the premise that he had also taken the advantage of his recorded date of birth 6th May, 1948 while getting employment in the State Government according to rules, is not correct.

8. The petitioner disclosed that advertisement was issued in October, 1972 for holding Haryana Civil Service (Executive Branch) and other allied services Examination which was to be held in March, 1973. He passed the examination held in June, 1973 and was called for an interview on 7th February, 1974. The post for Assistant Registrar Cooperative Society in 1974 was governed by Punjab State Cooperative Service Class II, Rules, 1958. Rule 6 (b) of the said rules provided for qualification of the candidates by direct recruitment which provided eligibility condition of 21 years and not more than 25 years on the first of October preceding the date on which he was interviewed by the Commission. According to the applicant his age, therefore, should not have been less than 21 years on 1st October, 1973 and more than 25 years on that date, as the interview was held on 7th February, 1974. According to him by taking into account his proposed date of birth as

6th May, 1952 also, he was more than 21 years of age on the relevant date and eligible for appointment. Therefore, he had not taken any benefit of giving the wrong date of birth as 6th May, 1948 because with his allegedly correct date of birth also he would have been eligible for appointment to the post of Assistant Registrar Cooperative Societies. He further stated that after selection to the post of Assistant Registrar, Co-operative Society he underwent training for 2 years but before the completion of training he competed for HCS (EB) Examination held in the year 1974 and was selected and appointed to Haryana Civil Service. In the circumstances, it was stated that he was never appointed as Assistant Registrar, Cooperative Societies. The advertisement issued by the Haryana Civil Service Commission was, however, not produced contending that in any case it is irrelevant as any age limit prescribed in the advertisement contrary to the rules would be a nullity.

9. The applicant's plea was that rejection of his earlier representation appeared to be on the basis of rules of 1997 i.e the Haryana State Cooperative (Group B) Service Rules, 1997. Rule 5 of the 1997 Rules contemplate that no person shall be appointed in the service by direct recruitment who was less than 21 years or more than 35 years of age on or before the last date of submission of application to the commission. In the circumstances, in his third representation of

2007 the applicant contended that as per his wrong date of birth he would retire on 31st May, 2008 though he is legally entitled to work upto 31st May, 2012 and, therefore, he sought change of his date of birth.

10. The third representation of the applicant was also rejected by the Government of India by letter reference No.25015/3/97-AIS (II) dated 7th September, 2007 on the ground that in view of provision of Rule 16A of AIS (DCRB) Rules, 1958 it is not established that a bonafide clerical error has been committed in accepting the date of birth under sub Rule (3) of Rule 16A and, therefore, the request of the applicant for change of date of birth from 6th May, 1948 to 6th May, 1952 was not accepted.

11. Aggrieved by the rejection of the representation by communication dated 7th September, 2007, the applicant filed a petition before Central Administrative Tribunal, Principal Bench being O.A No.2207/2007 titled 'Sh.D.R.Dhingra v. Union of India' which was disposed of by order dated 13th March, 2008 remitting the matter back to the Government of India to re-examine the same in the context of the observations made in the order dated 13th March, 2008 and in the light of the decision of the Apex Court in S.Janardhana Rao v. Government of

A.P and anr., (1999) SCC (L&S) 653 and Union of India vs. C. Rama Swamy, (1997) 4 SCC 547.

12. Pursuant to order dated 13th March, 2008 the Government of India passed the order dated 27th May, 2008 relying on Rule 16A of the AIS (DCRB) Rules, 1958 holding that change of date of birth in the service records of an IAS Officer is not be allowed unless there is a bonafide clerical mistake in accepting the date of birth as per sub Rule (2) or (3) of the said rule. The communication dated 27th May, 2008 also relied on the uniform policy of the Central Government that the date of birth once entered by the concerned officer in the service record is not to be changed on any ground at all except if there was some clerical mistake while entering the date of birth. Any subsequent change in the source of information regarding date of birth does not make it incumbent for the Government of India to make consequential changes in the service records. The judgments in reference to which the representation was to be reconsidered were considered and were found to be distinguishable. The Government of India noticed that in case of C.Ramaswamy (supra), the candidate was a direct recruit to IAS whereas the applicant was appointed from the State Civil Service under the IAS (Appointment by Promotion) Regulation and was an officer of the State Civil Service. Relying on various other orders of the Supreme

Court and the Tribunal it was held that correction of date of birth or alteration was not to be allowed at the fag end of service or after considerable period on entering the service, as it would disturb the entire cadre management and as a result thereof continuation of an officer further would have far reaching implications and shall affect the service conditions of other officers including the juniors. Reliance was placed on Tribunal's order dated 2nd April, 2008 in O.A No.573/2008, Smt.Surjit Kaur Sandhu v. Union of India holding that matriculation certificate is not the sole criterion under All India Service Rules to determine the date of birth. It was also held that the selection committee constituted under Regulation 3 of the Indian Administrative Service (Appointment by Promotion) Regulation, 1955 held on 30th March, 1993, had prepared a list of candidates including the applicant where the date of birth of the applicant was recorded as 6th May, 1948 whereas the applicant made representation to the State Government for change of his date of birth on 22nd May, 1993, two months after the meeting of the selection committee held on 30th March, 1993. The UPSC had also approved the recommendations of Selection Committee on 14th May, 1993 prior to the representation of the applicant and the applicant had not represented either to the State Government before the meeting of the Selection Committee or before the approval of the recommendation of the Selection Committee by UPSC on 14th May, 1993 despite being in the State Civil Service since 1st July, 1976.

Therefore the alteration was not allowed after considerable period of entering the State service as it would have disturbed the cadre management and as a result thereof continuation of applicant further would have had far reaching implications and would have affected the service conditions of other officers including the juniors. In the circumstances, the Government of India held that the representation of the applicant for change of his date of birth could not be said to be pending with the Government on the date relevant for acceptance of date of birth and could not be allowed.

13. The case of S. Janardhana Rao (supra) was also found to be distinguishable as in that case the date of birth of the candidate had been changed by the State Government prior to the meeting of the selection Committee for inclusion of the name of the candidate in the select list. However, instead of correct date of birth, incorrect date of birth was communicated whereas in the case of applicant no representation was even pending on the date of the selection Committee meeting. In the case of S. Janardhana Rao before the proposal was sent for promotion to IAS, the State Government had corrected the service book of that candidate and consequently it had been held that on the ratio of S. Janardhana Rao's case the applicant is not entitled for change of date of birth, as the State Government did not change his date of

birth before his case was referred to the Central Government. Thus on reconsideration of the representation of applicant pursuant to order dated 13th March, 2008 of the Tribunal, the change of date of birth was again declined by order dated 27th May, 2008.

14. Pursuant to rejection of change of date of birth of the applicant by order dated 27th May, 2008, an order dated 30th May, 2008 was issued retiring the applicant from the service. The applicant filed an original application being O.A No. 1267/2008 where an interim order dated 17th June, 2008 was passed and the order dated 27th May, 2008 of the Department of Personnel and Training as well as order dated 30th May, 2008 retiring the applicant from service were stayed till 1st July, 2008.

15. The Tribunal has allowed the Original application of the applicant holding that the case of the applicant is a rarest of rare case, as he has produced irrefutable and unimpeachable evidence showing that his date of birth recorded in the official record is incorrect. Despite all other authorities accepting his stand based on the evidence produced by the applicant, even the State of Haryana recommending by a detailed communication supporting the case of the applicant, the Government of India has declined to change the date of birth on the rigor of Rule 16A of the All India Service (Death Cum Retirement Benefits) Rules, 1958.

The Tribunal held that with regard to the actual date of birth there is hardly any doubt about the date of birth of the applicant. It was held that the case of the applicant is not such where an employee comes on some imaginary stories like coming to know of their correct date of birth from their old or grown up relations or from their family purohits. But the applicant has been able to bring on record and to the satisfaction of all concerned, be it the Punjab University or the State Government, irrefutable evidence of his actual date of birth being 6th May, 1952. The Tribunal also held that the parents of the applicant got married in November, 1949 and his elder sister was born on 21st July, 1951, therefore, the date of birth of 6th May, 1948 as recorded in the original matriculation certificate of the applicant, could not be correct as he could not have been born before his parents were married and before his elder sister was born. Thus the applicant brought on record all the conceivable certificates up to the middle standard which too he had passed from the State Education Board which are more than 30 years old and hence has the presumption of truth under Section 90 of the Evidence Act. The Tribunal further held that the birth and death certificates as also middle school examination certificate were in the custody of such authorities which, in the nature of their duties, carry out such purpose. Hence it was concluded that the said certificates were given by the proper authorities and would meet the requirement under section 90 of the Evidence Act. According to the Tribunal on the

basis of pleadings made in the application and the documents, a firm finding has to be recorded that the applicant had produced irrefutable and unimpeachable evidence that he was actually born on 6th May, 1952 and not on 6th May, 1948 and, therefore, the date of birth being 6th May, 1952 had become a non issue.

16. The Tribunal by impugned order, however, held that the correct procedure as envisaged under Rule 16A of the 1958 Rules of not accepting the date of birth was adopted and no bonafide clerical mistake had been committed in accepting the date of birth of the applicant as 6th May, 1948. The plea of the applicant that the order of the Government of India dated 27th May, 2008 was in contrast to the judicial precedent of Supreme Court in S.Janardhana Rao (Supra) was repelled. The plea of the applicant that while deciding his earlier O.A 2207/2007, the Tribunal had given a conclusive finding was also repelled holding that if the findings given in the earlier original application filed by the applicant by the Tribunal were final, there was no need to remit the matter to the authorities concerned.

17. The Tribunal dealing with the issue of delay or inaction on the part of the applicant held that the issue had been raised only during the course of the argument and change of date of birth has not been

rejected on the basis of delay. It was held that in the reply filed on behalf of Government of India there was no plea with regard to the applicant acting late in the matter of correction of his date of birth. According to the Tribunal in the case of the applicant, it is not that he had hit upon an idea to get a change in his date of birth close to his retirement, instead as soon as he came to know about the discrepancy in his date of birth record in his matriculation certificate, he moved the Punjab University for correction of his date of birth in the matriculation certificate and the decision was taken in the syndicate meeting held on 20th January, 1997. Applicant even prior to that day had made a representation on 22nd May, 1993 to the Chief Secretary Haryana. The Tribunal also noted that had the plea of delay been determined at any stage, the applicant would have explained that he was not aware of the difference in rules applicable when he came to be appointed and the rules on the basis of which it was said that the applicant had taken advantage of his wrong date of birth in securing the Government employment as the Assistant Registrar Cooperative Societies. It has also been held that applicant is not in the kind of service that he would have naturally known in the course of his duties the rule position and, therefore, the third representation made after 10 years of the second representation was held to be justified and, therefore, rejection of change of date of birth on the ground of delay was not acceded to.

18. Tribunal after returning the finding that the actual date of birth of the applicant is 6th May, 1952 and not 6th May, 1948 relying on the alleged irrefutable and or impeachable evidence produced by the applicant further held that it is a rarest of rare case. Since the applicant had not taken advantage of his wrong date of birth for securing the Government employment, therefore, rejection of his representation in 1993 and 1997 was incorrect as his representations were rejected on the wrong premise that he had taken advantage of his wrong date of birth and that he was ineligible in 1974 for the appointment to the post of Assistant Registrar, Cooperative Societies on the basis of his date of birth of 6th May, 1952. Since the evidence produced by the applicant has been held to be irrefutable, the Tribunal considered whether the rigor of Rule 16A of Rules of 1958 can be relaxed or not. In view of Rule 3 of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960 the Tribunal has deemed it to be a case which requires consideration by the Government of India and, therefore, has directed the Government of India to consider the applicability of Rule 3 on the ground that the case of the applicant appears to be a rarest of rare case where the employee has proved to the hilt that his date of birth is incorrect and allowed his original application to this limited extent.

19. The order of the Tribunal has been challenged by the Government of India inter alia on the following grounds. Learned counsel for the petitioner has vehemently argued that the tribunal has gravely erred in its finding that the present matter of the applicant is a rarest of rare case and hence the petitioners are required to reconsider the plea of the applicant under Rule 3 of the All India Services (Condition of Service-Residuary Matters) Rules 1960. It is alleged that the tribunal has completely ignored the law on the subject, on both counts namely the statutory rules enumerated in Rule 16 A which does not permit the change of date of birth except on account of a bonafide clerical mistake, a change which would have a cascading adverse effect on other employees, public interest vis-à-vis individual interest and that neither the requirement of rule 3 are applicable in the case of applicant nor the applicant had made such a request or prayer before the government or even before the Learned Tribunal.

20. The learned counsel for the Union of India Mr. Dubey has contended that even the Tribunal came to the conclusion that the correct procedure as envisaged under Rule-16A of the Rules of 1958 was adopted and while doing so, no bonafide clerical mistake had been committed in accepting the date of birth. According to the learned counsel once the Tribunal has given the finding that there has not been

any bonafide clerical mistake under Rule 16A of 1958 Rules, direction could not be given to the petitioner to consider the matter for giving relaxation under Rule 3(ii) of the All India Services (Conditions of Service-Residuary Matters) Rule, 1960 to relax Rule 16A on account of alleged undue hardship and alter the date of birth of the applicant.

21. According to the learned counsel the power under Rule-3 is an enabling power of the Central Govt. which on consideration of facts in an appropriate case, may, grant relief, any relaxation of certain provisions of the Rules or the Regulations made under All India Service Act. According to him, Union of India has raised in Ground (G) of the petition, the challenge to the change of date of birth of the respondent. Representations after a lapse of 17 long years in the service in the government by the applicant for a change of his date of birth from 6th May, 1948 to 6th May, 1952 on the ground that his parents got married in 1949 and his elder sister was born on 21st July, 1951 and that in 1993, on the death of the mother-in-law of his elder sister, he came to know about these facts and therefore, his correct date of birth on the basis of the documents collected by him is 6th May, 1952 and not changing his date of birth will cause undue hardship, is without any factual and legal basis.

22. In view of the ex facie evident facts that the applicant is an officer qualified as MA, LL.B and worked as a civil servant in state services for 45 years and is the eldest male child, learned counsel contends that it is incomprehensible to accept that he wasn't aware of the alleged mistake in his date of birth as recorded in the service record for the 17 years he spent in service. That the date of birth of the applicant being 6.5.1948 as recorded in his service record, was furnished by him with his academic testimonials since 1976, pursuant to his appointment in Haryana Civil Service (Executive) and also recorded in the Matriculation Certificate issued by the Punjab University, produced by the applicant at the time of his selection to the post of Assistant Registrar, Co-operative Society, Haryana. Thereafter on his selection in the Haryana State Civil Service (Executive) at the administrative level for nearly 17 years from his joining the civil services in State of Haryana and approximately 45 years from his date of birth, the respondent did not complain or make any representation with regard to the alleged incorrect date of birth i. e. 6.5.1948 as appearing in the service book and his academic record. In March, 1993 the name of the applicant was included in the select list for promotion to the All India Civil Services (IAS) along with the other officers of the State of Haryana. In May 1993 UPSC had held DPC where his name was recommended for the promotion to the All India Civil Services (IAS) and it is only then that the applicant had made his first application on 22nd May 1993 for

change of date of birth from 6.5.1948 to 6.5.1952. After the rejection of his first two representations in 1993 and 1997, the third application was only made in the year 2007 when the respondent was due to retire on 31st May 2008, at the fag end of his service. The first representation to the State Government was in the circumstances after considerable period after entering the State service, rather at the fag end of State Service. It was contended that under the rules of the State Government, the applicant would not have been entitled for change of his date of birth after 17 years of entering the service. Hence it was contended that the applicant cannot be allowed to take advantage of his own wrong in the facts and circumstances of the present case, where such mistake is not bonafide.

23. It is also contended that Rule 16 of the All India Service (Death Cum Retirement Benefit) Rules 1958 permits only correction of date of birth in cases of bonafide clerical mistake, while Rule 3(ii) of the All India Services (Conditions of Service Residuary Matters) Rules clearly states that any regulation made under any such rule, regulating the conditions of service of persons appointed to All India Service causes undue hardship in any particular case, it may, by order, dispense or relax the requirements of the rule or regulation, as the case may be, to such extent and subject to such exceptions and conditions as it may

consider necessary for dealing with the case in a just and equitable manner. "Undue hardship" signifies unforeseen or unmerited hardship to an extent not contemplated when the rule was framed and does not cover any ordinary hardship or inconvenience which normally arises. This also undoubtedly implies the reasonable care to be taken on the part of the party alleging undue hardship. In the facts and circumstances it is evident that the undue hardship caused is due to the negligence or mistake on the part of the applicant himself for which the government cannot be held responsible.

24. The bare reading of Rule 16 makes it clear that the said Rule is made to limit the scope of correction of date of birth and service record and the intent of the rule is to exclude all other circumstances for the said purpose. The benefit to alleviate the undue hardship of relaxation of any rule or rules must be of a nature already provided for in the rules. Government is not empowered by this rule to confer benefits which are not contemplated in the rules. Therefore the impugned order of the tribunal is apparently erroneous, illegal and contrary to the mandate of law and the intent and purposes of All India Services (Condition of Service- Residuary matters) Rules 1960 as well as All India Services (Death cum retirement Benefit) Rules 1958.

25. It has been further contended that the order of the Tribunal is bound to have a delirious effect of overriding and upsetting the service record maintained in the due course of administration for promotion/ appointment to All India Services and seniority thereof. The impugned order of the tribunal is contrary to the public interest and virtually makes the statutory provisions i.e. Rule 16 of the All India Services (Death cum Retirement) Rules 1958 totally ineffective and non applicable.

26. Regarding the non applicability of Rule 3 of the residuary rules the learned counsel Mr. Dubey has relied on (1993)3SCC575, Syed Khalid Rizvi and Ors. & Ramesh Prasad Singh and Ors. Vs. Union of India (UOI) and Ors & Krishna Behari Srivastava Vs. State of U.P. and Anr; (1979) 3 SCC 553, D.D.Suri Vs Union of India (UOI) & Anr.; (1980) 3 SCC 402, R.R.Verma & Ors. Vs Union of India & Ors.; MANU/MS/0153/2008, R.R.Tripathi and Gaurang Dinesh Damani Vs Union of India through Secretary, Ministry of Home Affairs & Ors. According to learned counsel for the Union of India mere assertion of `undue hardship is not sufficient and has relied on 2009 (160) DLT 238, Priya Shah Vs Enforcement Directorate, New Delhi. Reliance has also been placed on (2001) 9 SCC 230, Union of India Vs M.S.Heble (deceased) through LRs where Supreme Court had set aside the order of

Tribunal invoking Rule 3 All India Services (Condition of Service-Residuary Matters) Rules, 1960.

27. The learned counsel for the Union of India has also relied on (2010) 9 SCC 337, State of Haryana Vs Satish Kumar Mittal and anr. to contend that under the rules of State Government the claim of the applicant seeking alteration of date of birth could not be entertained after 19 years and since the record of the Union of India is based on the date of birth recorded in the record of the State Government, the same cannot be done and the Tribunal could not have given a direction to treat it as rarest of rare cases and apply Rule 3 of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960 and to take a decision whether the applicant is entitled for dispensation or relaxation of the requirement of rules or regulations on account of undue hardship.

28. The learned counsel for the Union of India has also relied on (1993) Sup.1 SCC 763, Executive Engineer, Bhadrak (R&B) Division, Orissa and Ors. v. Rangadhar Mallik; (1993) 2 SCC 162 Union of India v. Harnam Singh; (2000) 8 SCC 696 G.M.Bharat Coking Coal Ltd., West Bengal v. Shib Kumar Dushad & Ors.; (2003) 6 SCC 483 State of U.P. & Others v. Gulaichi; (2004) 3 SCC 394, State of Punjab v.

S.C.Chaddha; (2005) 6 SCC 49 State of Punjab & Anr. v. Shiv Narayan Upadhyay; (2005) 11 SCC 465 UP Madhyamik Shiksha Parishad & Anr. v. Raj Kumar Agnihotri; (2006) 6 SCC 537 State of Gujarat v. Vali Mohammed Dosa Bhai Sindhi; (1997) 4 SCC 647 Union of India v. C.Ramaswami & Others in support of its pleas and contentions.

29. Per contra the learned counsel for the applicant contended that two fold reliefs have been claimed by the applicant, which are setting aside the impugned orders dated 27.5.2008 and 30.05.2008 and to correct the date of birth of the applicant as 6.5.1952 and to give all the consequential benefits to the applicant.

30 The learned counsel for the applicant has contended that the order dated 27th May 2008 is based on after thoughts and is contrary to statutory rules, in as much the petitioners have declined to accept 6.5.1952 as the correct date of birth on the ground that as on 30th March 1993 when the Selection Committee meeting was held to consider the petitioner for promotion, no representation regarding the date of birth had been preferred by the petitioner. It is contended that it is not the Selection Committee but the Central Government who accepts the date of birth. It is an admitted position that the proposal relating to the promotion of the respondent was sent by the State Government only

on 8th July 1993 and by that time the representation of the petitioner regarding the date of birth was pending with the State Government. Thus the natural inference would be that the occasion for accepting the date of birth would arise only after 8th July 1993 and not before that. In support of this submission the learned counsel for the respondents has relied on Rule 16 A of the All India Services (Death-Cum – Retirement Benefits) Rules 1958 which clearly stipulates in clause (1):

“For the purpose of determination of the date of superannuation of a member of the service, such date shall be calculated with reference to the date of birth as *accepted by the Central Government* under this rule”

31. The learned counsel for the respondent has also relied on the comments given by the State Government to his third representation made in the year 2007 dated nil which is annexed with the letter date 28th June 2007 by the Chief Secretary, Government of Haryana, addressed to the Secretary, Government of India, Ministry, which has been heavily relied on by the Tribunal as well. The State government had duly traced the history of the case referring to the earlier representations made by the applicant and had given detailed reasons for its finding that the applicant had submitted irrefutable proof of his actual date of birth as being 6.5.1952 instead of 6.5.1948. It was also stated therein that the respondent had not accrued any benefit in the

matter of securing employment in the Government on the basis of his wrong date of birth. The learned counsel for the respondent further contended that even though The State Government had found the representation meritorious with the conclusion that the evidence produced by the applicant for the correction of his date of birth was irrefutable, and had even made the recommendation to the Government of India for correction of his date of Birth in the official records, however by order dated 9th August 2007, the State government could not do the needful, as the service records were not in its possession and were instead sent to the Government of India.

32. According to Mr. Rohtagi, Sr. advocate the declaration given by The Tribunal on the basis of irrefutable and unimpeachable evidence, that the date of birth of applicant is 6th May, 1952 has not even been challenged by the Union of India. According to him the middle school certificate and the marks sheet issued by the concerned authorities, the date of birth has been shown as 6th May, 1952. He submitted that even in earlier petition before Central Administrative Tribunal, Principal Bench being O.A No.2207/2007 titled 'Sh.D.R.Dhingra v. Union of India' which was disposed of by order dated 13th March, 2008 remitting the matter back to the Government of India to re-examine the same in the context of the observations made in the order dated 13th March,

2008 and in the light of the decision of the Apex Court in S.Janardhana Rao v. Government of A.P and Anr, (1999) SCC (L&S) 653 and Union of India v. C. Rama Swamy, (1997) 4 SCC 547, the date of birth of the applicant as 6th May, 1952 was not challenged nor in any of the application the factum of the said date of birth has been denied.

33. According to learned senior counsel 'undue hardship' has not been defined in any of the judgments of Supreme Court in service matters. The expression 'undue hardship' has to be construed in normal circumstances and a natural meaning has to be given to the said expression. According to him 'undue' is unnecessary and 'hardship' is suffering. Since the factum of date of birth is not denied, the three factors, retirement before the age of superannuation, deprivation of salary, allowances and qualifying service before which the applicant would be retired and the effect on his pension as the last drawn salary is the determinant effect which would be lifelong, and would therefore constitute 'undue hardship'.

34. This Court has heard the learned counsel for the parties in detail and has also perused the record which was before the Tribunal and the precedents relied on by the parties. Before analyzing the facts of the case, the precedents relied on by the parties are considered.

35. In Executive Engineer, Bhadrak (R&B) Division, Orissa and Ors. (Supra), the Supreme Court had held while dealing with Rule 65 of Orissa General finance rule that correction in a date of birth cannot be entertained at stage of superannuation and date of birth admitted in service role shall be final. It was also held that while dealing with the representation for alteration in change of date of birth, there was no requirement of any law to give any personal hearing to any such employee before dismissing his representation.

36. In Harnam Singh (Supra), the Apex Court was of the opinion that those employees who were already in service prior to 1979 were obliged to seek alteration within the maximum period of 5 years from the date of coming into force of amended note in 1979. In this case, alteration was sought in 1991 by the employee 35 years after his induction into the service in 1956 during which period he had several occasions to see service book, but he raised no objection regarding his date of birth and therefore, in view of unexplained and inordinate delay and relying on Fundamental Rule 56 (m) a note vide the alteration in the date of birth was declined. A division Bench of this Court in the matter of Sh.Y.P.Madan (WP(C) No.6821/2010) by order dated 24.01.2011 had noticed the judgment of Supreme Court setting aside the direction given to Government of Haryana for change of date of Birth. It was held:

19. In a recent judgment, the Supreme Court had set aside the decree granted in favor of the employee of Haryana Govt. directing the authorities to correct the date of birth of the employee, though the request was made 9 years after joining the service. Rules had contemplated that correction of date of birth could be sought within two years from joining the service. In this recent judgment *State of Haryana Vs. Satish Kumar Mittal & Ors.*, (2010) 9 SCC 337, the Supreme Court rather cautioned the Tribunal or the High Court that any application for correction of date of birth should not be dealt with keeping in view only the public servant concerned. The Apex Court was of the view that any direction for correction of the date of birth of the public servant concerned has a chain reaction inasmuch as others waiting for years below him for their respective promotions are affected in this process and some are likely to suffer irreparable injury, inasmuch as, because of the correction of date of birth, officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority, waiting for promotion may lose their promotions for ever.

20. According to the Supreme Court, the application for correction of date of birth is also to be looked into from the point of view of the concerned department and the employee engaged therein. No doubt, it is true that the respondent has since retired and in his case, alteration in the date of birth may not affect many employees, however, under the Rules prescribing the time limit during which the alteration can be carried out, no exceptions have been carved out that alteration in the date of birth can be carried out if the employee requesting the correction of the birth date has already retired. The Supreme Court has further held that unless a clear case on the basis of clinching material, which can be held to be conclusive in nature, is made out by the public servant and that too within a reasonable time as provided in the Rules governing the service, the Court or the Tribunal should not issue a direction or make a declaration on the basis of the materials which make such claim only plausible. The Supreme Court relied on para-7 of *UOI Vs. Harnam Singh*, (1993) 2 SCC 162 with approval, which is as under:

"A Government servant, after entry into service, acquires the right to continue in service till the age of retirement, as fixed by the State in exercise of its powers regulating conditions of service, unless the services are dispensed with on other grounds contained in the relevant service rules after following the procedure prescribed therein. The date of

birth entered in the service records of a civil servant is, thus of utmost importance for the reason that the right to continue in service stands decided by its entry in the service record. A Government servant who has declared his age at the initial stage of the employment is of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay. In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on grounds of laches or stale claims, is generally applied to by the courts and tribunals. It is nonetheless competent for the Government to fix a time limit, in the service rules, after which no application for correction of date of birth of a Government servant can be entertained. A Government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous. The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire. Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age..."

37. In G.M.Bharat Coking Coal Ltd. (supra), the employee had sought alteration in the date of birth in the service record maintained by employer after 20 years of service. The employee in this case had subsequently obtained two certificates and claimed alteration in the date of birth on the basis of the same. The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India had allowed

the writ petition directing the employer to change the date of birth. Reversing the decision of the High Court it was held that core question was whether two certificates subsequently obtained by the employee should be accepted and the date of birth entered therein be taken as conclusive. The Supreme Court further held that High Court in its writ jurisdiction is not an appropriate forum for undertaking such enquiry into the disputed questions of fact. The Supreme Court held that the date of birth of an employee is not only important for the employee but for the employer also. While determining the dispute in such matters Courts should bear in mind that in change of date of birth long after joining services, particularly when the employee is due to retire shortly which will upset the date recorded in the service record maintained in due course of administration should not generally be accepted. The court was further of the view that the date of birth should not be dealt by the tribunal or High Court keeping in view only the public servant concerned as any direction for alteration in the date of birth of the public servant concerned has chain reaction, inasmuch as others waiting for years, below him for their respective promotion which is affected in this process and some are likely to suffer irreparable injury, inasmuch as, because of correction of the date of birth, the officer concerned, continue in the office, in some cases for years within which time many officers who are below him in seniority waiting for their promotion may lose their promotion forever. The Supreme Court,

therefore, caution that the Court or the tribunal should therefore, be slow in granting interim relief for continuation in service, unless prima facie evidence or impeachable character is produced because if the public servant succeeds he could always be compensated, but if he fails, he would have enjoyed undeserved benefits of extended service which would further cause injustice to his immediate juniors.

38. In S.C.Chaddha (Supra), an application filed by the employee seeking change of date of birth within a period of two years as provided under Punjab Civil Services Rules, Vol.-I, Part-1 was rejected, however, the High Court allowed the change in date of birth on the ground of request for change being made within the period permitted by the amended rules. The Supreme Court had set aside the judgment of the High Court and held that merely because an opportunity was granted to a Government Employee to get his date of birth corrected, did not take away the fact of inaction and continuing silence for the considerable period, which de-horse the latches on the employee's part seriously reflected the lack of bona fide in his claim. The Supreme Court had held that no explanation by the employee as to why he did not go for correction of date of birth on any occasion when he was employed in 7 or 8 institutions makes his claim doubtful.

39. In Shiv Narayan Upadhyay (Supra), the order of the High Court directing alteration in the date of birth on account of non-production of service record by the employer was set aside by the Supreme Court as the service record of the employee showed his date of birth which also bore the employee's signature. Similarly, in Rajkumar Agnihotri (Supra), the employee's appeal for correction of his date of birth on the basis that his date of birth was wrongly entered in High School Certificate was allowed by the High Court, however, the order of the High Court was set aside by the Supreme Court holding that there was no conclusive proof which could lead to irresistible conclusion regarding date of birth of the employee.

40. In Vali Mohammed Dosa Bhai Sindhi (Supra), while dealing with the Rule 171 of the Bombay Civil Services Rules 1959, it was held that under Rule 171 once an entry of age and date of birth has been made in the service book, no alteration of the entry afterwards could be allowed unless it was shown that entry was wrong for want of care on the part some person, other than individual in question or was obvious a clerical error.

41. In the circumstances, it was held that unless a clear case on the basis of material which could held to be a conclusive in nature, was

made out by the employee and that to within a reasonable time provided in the rules governing the services, the court or tribunal should not issue a direction or make a declaration on the basis of the material which make such claim only plausible. In the circumstances, the judgment of a Division Bench directing alteration in the date of birth was quashed by the Supreme Court.

42. In C.Ramaswami (Supra), the positive case put forth by the employees was that it was after the demise of his mother that he has discovered that his real date of birth was different than what was recorded in that service record. The Supreme Court had held that even in absence of statutory rules like 16 A, the principle of estoppel would apply and authorities concerned would be justified in declining to alter the date of birth and if such a decision is challenged, the court also ought not to grant any relief even if it is shown that the date of birth as originally recorded was incorrect because the candidate concerned had represented a different date of birth to be taken into consideration obviously with a view that would be to his advantage. Once having secured entry into the service, possibly preference to other candidates, the principle of estoppel would clearly be applicable and relief of change of date of birth can be legitimately denied.

43. In Syed Khalid Rizvi (supra), the Supreme Court held that for invoking Rule-3 of All India Services (Conditions of Service –Residuary Matters) Rule, 1960 requirement is that there should be an appointment to the service in accordance with rules, and by operation of the rule, undue hardship has been caused, that too in an individual case, the Central Govt., on its satisfaction of those conditions, has been empowered to relieve such undue hardship by exercising the power to relax the condition. It was further held that the conditions of recruitment and conditions of service are distinct and the conditions of appointment according to rules are preceded by condition of service. The conditions of the recruitment cannot be relaxed but the condition of service may be relaxed while exercising power under Rule-3.

44. The Supreme Court had also held that relaxation under Rule-3 would be a policy matter, which will be in the discretion of the Executive and the Courts will not interfere and issue a direction to the Govt. In R.R. Verma and Ors. (Supra), the challenge to the constitutional validity of said Rule-3 was repelled and it was held that the Central Govt. is vested with a reserve power under Rule-3 to deal with unforeseen and unpredictable situations, and to relieve the Civil servants from the infliction of undue hardship and to do justice and equity. It was further held that it does not mean that the Central Govt.

is free to do what it likes, regardless of right or wrong; nor does it mean that the Courts are powerless to correct them. The Central Govt. is bound to exercise the power in the public interest with a view to secure Civil servants of efficiency and integrity, and when and only when undue hardship is caused by the application of the rules, the power to relax is to be exercised in a just and equitable manner but, again, only to the extent necessary for so dealing with the case.

45. Rule-3 of All India Services (Conditions of Service –Residuary Matters) Rule, 1960 is as under:-

“3. Power to relax rules and regulations in certain cases- Where the Central Government is satisfied that the operation of-

(i) any rules made or deemed to have been made under the All India Services Act, 1951 (61 of 1951), or

(ii) any regulation made any such rule, regulating the conditions of service of persons appointed to an All India Service causes undue hardship in any particular case, it may, be order, dispense with or relax the requirements of that rule or regulations, as the case may be, to such extent and subject to such exceptions and conditions as it may consider necessary for dealing with the case in a just and equitable manner.”

46. In RR Tripathi and Gaurang Dinesh Damani (Supra), the Supreme Court had held that the essence of the Rule is the words “causes undue hardship in any particular case”. The word “undue hardship” has to be given its literal meaning and should be understood

on its plain language. In para-29 of the said judgment, the Bombay High Court had held that hardship essentially has reference to the cadre of service, interest of service and least individual interest. Relevant para-29 is as under;-

“29. Now, coming to the applicability of Rule 3 of the Rules, 1960, this Rule certainly vests the Central Government with the power to relax rules and regulations in certain cases. Exercise of such power to relax the requirement of the rule or regulation to such extent and to such exception and conditions as it may consider necessary for dealing with the case must be in a just and equitable manner. The essence of the Rule is the words "causes undue hardship in any particular case". The word "undue hardship" has to be given its literal meaning and should be understood on its plain language. The "undue hardship" is relatable to the persons appointed to all India service. It is hardship in relation to regulating the conditions of service of persons appointed to All India service. The hardship, therefore, should essentially have reference to the cadre of service, interest of the service and least individual interest. The State Government in its proposal had not made out any case of hardship either to the service or even to the individual respondents. While taking decision in exercise of its powers conferred under Rule (3) of Rule 1960, the Competent Authority is required to strike a balance between public interest/service interest and individual interest. To a private interest, interest of the service would be paramount while to the service interest, public interest would be paramount. The Government may be able to take recourse to power of relaxation or even to issue instructions to provide for a situation which is not dealt with specifically under the Rules. Even if that was the situation, still the reasons ought to be the ones which would tilt the balance of interest in favour of the order rather than against it. The Central Government or any competent authority granting approval and/or according its

sanction for such purpose must do so for valid and proper reasons. The action of the State or its instrumentalities should be for reasons which are valid, just fair and reasonable. The fairplay and transparency in such an administrative or executive actions is the sine qua non to exercise of such power. Reference may be made to the judgment of the Apex Court in the case of M.J. Sivani and Ors. v. State of Karnataka : [1995]3SCR329 . The Central Government, in the compilation filed before the Court, made a reference to the letter dated 1st January, 1966, where the Government clarified that benefit to be conferred in relaxation of any Rule or Rules must be of a nature already provided for in the Rules and Governments are not empowered by this Rule to confer benefits which are not contemplated in Rules. It also indicated that undue hardship signifies unforeseen hardship to an extent not contemplated in the Rule framed and not covered under any ordinary hardship or inconvenience.”

47. In Priya Shah (supra), A Division Bench of this Court had held that “undue” means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. It was held that “undue hardship” is caused when the hardship is not warranted by the circumstances. For a hardship to be “undue”, it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it, therefore, “undue” adds something more than just hardship which means an excessive hardship or a hardship greater than the circumstances warrant.

48. The Tribunal has held that the case of the applicant is not such where an employee comes with some stories like coming to know of his correct date of birth from his old or grown up relations or from his family purohits. This observation of the Tribunal is incorrect because the case of the applicant is that the mother-in-law of his elder sister Smt. Sheela Taneja had expired in April, 1993 and on the kriya ceremony it transpired that his elder sister was born in the year 1951 being the first child out of the wedlock of his parents who got married in the year 1949. The applicant is the eldest male child and is also not illiterate. Even according to him in his middle school record his the date of birth of the year 1952 is shown. In 1972 when he applied for Haryana Civil Services (Executive Branch) and other allied services examination which was held in March, 1973, he would have known the year of marriage of his parents and year of birth of his elder sister. He had entered the civil service of the State in 1974. No plausible ground has been disclosed by the applicant as to why he did not take any steps from 1976 to 1993 to correct his date of birth. It is also inconceivable that for seventeen years he did not know about his incorrect date of birth and he realized that his date of birth is incorrect from his relative and friends whom he met on the ceremonies of death of mother in law of his elder sister. The Tribunal has not considered this aspect and has gone on its own assumption that the case of the applicant is not such where an employee comes on some stories like coming to know of his

correct date of birth from his old or grown up relations or from his family purohits.

49. Had the applicant continued in the civil service of State of Haryana, he could not have got his date of birth altered or changed in 1993 which was entered in 1973. In the State of Haryana the rule governing the change of date of birth was rule 2.5 of the Punjab Civil Services Rules, 1994 which laid down that the date of birth of the Government employee, once recorded in service book, cannot be corrected except in case of a clerical error without previous order of the Government. The Rule further provided that the date of birth/declaration of age made at the time of entry into service shall be deemed to be conclusive as against the Government servant, unless he applies for correction of his age within two year from the date of his entry into government service.

50. The relevant rule contained in Para 1 of the Punjab Financial Rules reads as follows: (Referred to in Rule 2.5 and Note 3 there under)

1. In regard to the date of birth a declaration of age made at the time of, or for the purpose of entry into government service shall, as against the government employee in question, be deemed to be conclusive. The employee already in the service of the Government of Punjab on the date of coming into force of the Punjab Civil Services (First Amendment) Rules, Volume I, Part I, 1994, may apply for the change of date of birth within a period of two years from the coming into force of these Rules on the basis of

confirmatory documentary evidence such as matriculation certificate or municipal birth certificate, etc. No request for the change of date of birth shall be entertained after the expiry of the said period of two years. The Government, however, reserves the right to make a correction in the recorded age of a government employee at any time against the interest of the government employee when it is satisfied that the age recorded in his service book or in the history of service of a gazetted government employee is incorrect and has been incorrectly recorded with the object that the government employee may derive some unfair advantage there from.”

51. This rule was later on amended on 20.12.2000 and under the amended rule it was provided that if an application is made beyond two years, it must be considered on the recommendation of the Administrative Department and the Chief Secretary only in consultation with the Finance Department. It was entirely left to the discretion of the Government whether to entertain any such application. The principal provision, which required that the employee must apply within two years, remained unaltered. The rule amended on 20.12.2000 reads as follows:

“1. These rules may be called the Punjab Financial Volume I (Haryana First Amendment) Rules, 2000.

2. In the Punjab Financial Rules, Volume I, in Annexure A referred to in Rule 7.3 and Note 3 there under,

(i) For Para 1, the following paragraph shall be substituted, namely:

1. In regard to the date of birth a declaration of age made at the time of, or for the purpose of entry into government service, shall as against the government employee in question, be deemed to be conclusive unless he applied for correction of his age as recorded within two years from the date of his entry into government service. Wherever, it is proposed to consider the application of the employee for correction of his age within a period of two years

from the date of his entry into government service, the same would be considered by the Government in consultation with the Chief Secretary to the Government of Haryana. In cases where such application has been made beyond the stipulated period and is proposed to be accepted, the same shall be considered on recommendations of the Administrative Department and the Chief Secretary to the Government of Haryana, in consultation with the Finance Department. The Government however, reserves the right to make a correction in the recorded age of the government employee at any time against the interest of that government employee when it is satisfied that the age recorded in his service book or in the history of services of a government employee is incorrect and has been incorrectly recorded with the object that the government employee may derive some unfair advantage there from.”

52. Subsequently, by the Notification dated 13-8-2001 this rule was again amended. Amended rule contemplated that unless the application is made within two years, no change in the date of birth will be entertained. This new Rule 1, as amended on 13-8-2001 reads as follows:

“1. These rules may be called the Punjab Financial Volume I (Haryana First Amendment) Rules, 2001.

2. In the Punjab Financial Rules, Volume I, in Annexure A referred to in Rule 7.3 and Note 3 there under:

(i) for Para 1, the following paragraph shall be substituted, namely:

1. In regard to the date of birth, a declaration of age made at the time of, or for the purpose of entry into government service, shall as against the government employee in question, be deemed to be conclusive unless he applied for correction of his age as recorded within two years from the date of his entry into government service. No application submitted beyond the stipulated period of two years for change in date of birth will be entertained. Wherever, the application for correction of his age is submitted by the

employee within a period of two years from the date of his entry into government service, the same would be considered by the Government in consultation with the Chief Secretary to the Government of Haryana. The Government, however, reserves the right to make a correction in the recorded age of the government employee at any time against the interest of that government employee when it is satisfied that the age recorded in his service book or in the history of services of a government employee is incorrect and has been incorrectly recorded with the object that the government employee may derive some unfair advantage there from.”

53. Though in 1974 when the applicant entered the State service these rules were not applicable even then he should have sought alteration in his date of birth within a reasonable time. If the subsequent rules contemplated two years period, then after entering the State service in 1974 he should have sought change or alteration in his date of birth within reasonable period which could not be seventeen years as he first sought change of date of birth in 1993 on the ground that the mother-in-law of his elder sister Smt. Sheela Taneja had expired in April, 1993 and on the kriya ceremony it transpired that his elder sister was born in the year 1951 being the first child out of the wedlock of his parents who got married in the year 1949 and therefore his date of birth could not be 1948. His representation was rejected even in 1997 after 1993, however, surprisingly this plea of its own rules for correction of date of birth within two years of entering the service was not taken by the respondent no.2. While recommending the change of date of birth pursuant to representation in 2007, again the State

Government of Haryana has ignored its own rule and had recommended the alteration to the Respondent no.1.

54. Thus if the applicant had continued in services of the State Government, he could not successfully claim change of his date of birth which was recorded in his service record in 1974. If that be so, can he seek change of date of birth with the respondent no.1 on the grounds as has been canvassed on behalf of the applicant. The plea of the applicant that after coming to know the alleged discrepancy he has obtained various certificates from various authorities which makes it apparent that there is error in his date of birth as he could not have been born before the marriage of his parents. It has been held by the Supreme Court that any subsequent change in the source of information regarding date of birth does not make it incumbent for the Government of India to make consequential changes in the service record. In G.M.Bharat Coking Coal Ltd. (supra) relied on by the Union of India opposing change of date of birth, the employee had subsequently obtained two certificates and had claimed alteration in date of birth. The Supreme Court had held that the core question is whether the certificates obtained subsequently obtained by the employee should be accepted and date of birth entered therein be taken as conclusive. It was held that the High Court in writ jurisdiction is not an appropriate

forum for undertaking such an enquiry into the disputed question of fact.

55. The applicant has not produced his own certificate regarding date of birth on the ground that the record is not traceable. The applicant has also not produced the record of the primary school where he got admission before entering the middle school. In the record of the Middle school, the date of birth must have been recorded on the basis of the record of the primary school. It is not the case of the applicant that he joined the middle school without undergoing education in the primary school. At the time of admission in the primary school, the school authorities must have demanded the proof of date of birth, which could either be the date of birth certificate or the hospital record or an affidavit of any of the parent. The applicant is silent as to what was his date of birth in the primary school and on what basis the date of birth in the primary school was entered. Though the applicant has produced the certificate of the middle school and subsequent change of date of birth carried out by the Punjab University at his instance. In our opinion this shall not constitute clinching and irrefutable evidence about the date of birth of the applicant and in the circumstances the Tribunal ought not to have gone into the disputed questions of fact. The plea of the applicant of his date of birth of 1952 is based on the

certificate of his elder sister and younger brother and the deposition in the form of affidavit filed by his parents about the year of their marriage. The certificate of the elder sisters of the applicant though does not have any column whether the child is eldest or youngest, yet the certificate which is in Urdu, the child being eldest ('Awaal') is written in Hindi. The copy of this certificate was also obtained by the applicant in 1993 and the date of birth of elder sister is shown as 21st July, 1951. The applicant has also produced middle standard examination certificate of his sister where her date of birth is shown as 3rd March, 1951. The certificates issued in respect of his younger brother also has different name of his brother. The certificate of the younger brother reflecting his nationality as Indian which is written in Hindi also has another endorsement as 'No.3' which is construed as third child by the applicant. Bare perusal of said certificate reflects that the word 'Indian' in Hindi and the word 'no.3' are in different handwritings. These observations will negate the inferences of the tribunal that the applicant has produced clinching and irrefutable evidence in support of his contention that his correct date of birth is 6th May, 1952. This evidence cannot be termed to be irrefutable and unimpeachable to make the case of the applicant as rarest of rare case. The plea of the learned counsel for the applicant that the date of birth of 1952 of the applicant is not denied by the Union of India is also contrary to the record. It has been specifically averred in the petition

filed by Union of India that the evidence produced by the applicant cannot be accepted as clinching evidence and does not deserve any consideration. The presumption under section 90 of the Evidence Act of the documents which are more than 30 years old is also rebuttable and not conclusive. In view of the writings on the certificate in different handwritings, merely because the certificates are issued by the authorities, it cannot be held that they stood proved in view of categorical assertion of Union of India that they cannot be accepted and do not deserve any consideration. In any case, as held by Supreme Court, the High Court and Tribunal are not appropriate forums for undertaking enquiry into the disputed questions of fact.

56. In 1993 when the applicant first applied or represented for the change of his date of birth, the burden was on him to show that he had not taken advantage of recorded date of birth of 1948. The representations of the applicant in 1993 and 1997 were rejected on the ground that he had taken advantage of his recorded date of birth of 1948 for appearing in Haryana Civil Services (Executive Branch) and other allied services examination which was held in March, 1973. After rejection of his representation in 1993, another representation that he had not taken advantage was made in 2007 which has been justified by the tribunal on the ground that the applicant is not in the kind of

service that he would have naturally known in the course of his duties the rule position and, therefore, the third representation made after 10 years of the second representation was held to be justified. This observation of the Tribunal is based on its own assumption. The applicant was in the state civil Services of the state of Haryana. He could have known the rule position. He had applied for change of date of birth in the record of Punjab University which was done in 1997. The third representation was made by the applicant 10 years thereafter and no satisfactory explanation has been given. After 1993 the applicant was functioning as an Indian administrative service officer. In the circumstances it could not be held that he was in the kind of service that he would have naturally known the rule position. Another noticeable factor is that though the applicant has produced the rule pertaining to post of Assistant Registrar Cooperative Society in 1974, however, he has not produced the rules applicable to Haryana Civil Services. In our opinion this is not justifiable and the long delay has not been satisfactorily explained and the case of the applicant cannot be construed to be rarest of rare cases.

57. In the circumstances it has not been established by clinching and irrefutable evidence that the date of birth of the applicant is 6th May, 1952 and a firm finding as has been recorded by the Tribunal cannot be

recorded in the facts and circumstances. Unless a clear case on the basis of material which could be held to be conclusive in nature could be made out within a reasonable time as contemplated under the rules, the direction or declaration as has been made by the Tribunal could be made in the facts and circumstances as in the facts and circumstances and on the basis of the material produced by the applicant his claim can be held to be only plausible and the order of the tribunal is liable to be set aside.

58. This is no more res-integra that for invoking Rule 3 of All India Services (Conditions of service-Residuary Matters) Rule, 1960 requirement is that there should be an appointment to the service in accordance with the rules, and by operation of the rule, undue hardship has been caused, that too in an individual case in which case the Central Government on satisfaction of the relevant conditions is empowered to relieve such undue hardship by exercising the power to relax the condition. The condition of the recruitment cannot be relaxed but the condition of service may be relaxed while exercising power under Rule 3. The 'hardship' is essentially pertaining to the cadre of service, interest of service, however, least to individual interest. Government is not empowered by the rule to confer benefits which are not contemplated in rules. This also cannot be disputed that in the

context of 'Undue hardship' undue means something which is not merited by the conduct of the claimant, or is very much a disproportionate to it. In the circumstances the three factors as alleged on behalf of applicant, retirement before the age of superannuation, deprivation of salary, allowances and qualifying service before which the applicant would be retired and the effect on his pension as the last drawn salary is the determinant effect which would be lifelong, would not constitute 'undue hardship' as contemplated under the said rule. Rule 16 of the rules of 1985 makes it clear that the said Rule is made to limit the scope of correction of date of birth and service record and the intent of the rule is to exclude all other circumstances for the said purpose. If under the rules applicable to the service of the applicant in State, he would not have been entitled for alteration of his date of birth in the State, the relief cannot be granted to him under Rule 3 of All India Services (Conditions of Service-Residuary Matters) Rule, 1960 nor the scope of Rule 16 A could be enlarged. In the circumstances the directions as given by the tribunal cannot be sustained in the facts and circumstances of the case.

59. For the foregoing reasons the writ petition being WP(C) 11685 of 2009 filed by Union of India is allowed and the order of the Tribunal dated 4th August, 2009 holding that the date of birth of the applicant is

6th May, 1952 and directing Union of India to consider the case of the applicant under Rule 3 of All India Services (Conditions of Service-Residuary Matters) Rule, 1960 is set aside and the writ petition of the applicant being WP(C) 11694 of 2009 is dismissed. Considering the facts and circumstances, the parties are left to bear their own costs.

ANIL KUMAR, J.

February 23, 2011
'vk'

VEENA BIRBAL, J.