

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

+ **WP(C) No.6821/2010**

% **Date of Decision: 24.01.2011**

Union of India & Another Petitioners

Through Mr. Rajeev Sharma, Advocate

Versus

Y.P. Madan Respondent

Through Mr. Padma Kumar S., Advocate

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? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The petitioners UOI & Anr. has challenged the order dated 1st February, 2010 passed by the Central Administrative Tribunal, Principal Bench in OA 2259/2009 titled as 'Sh. Y.P. Madan Vs. Union of India & Another' directing the petitioners to take steps to verify the certificate issued by NDMC about the date of birth of the respondent and in case the petitioners are satisfied, to make necessary changes in the date of birth of the applicant from 26th May, 1950 to 31st August,

1950 and order dated 31st August, 2010 passed in CP 500/2010 directing the petitioner to deem the respondent's retirement as per the verified date of birth of the respondent as 31st August, 1950 and to grant arrears of pay and allowances accordingly within a period of four weeks from 31st August, 2010.

2. Brief facts to comprehend the controversies between the parties are that the respondent was appointed as a Work Charged employee in the office of the Station Engineer, Central Stores, AIR, Akashwani Bhawan from 22nd January, 1981. The appointment of the respondent was temporary but later on was got permanent with the work. Since the respondent continued to work for more than 4½ years, the petitioners decided to convert the work charged establishment to regular basis and the respondent was appointed on regular basis by order dated 16th October, 1985.

3. At the time of joining the services with the petitioners on 9th January, 1981, he had submitted a certificate issued by Central Board of Secondary Education showing his date of birth as 26th May, 1950 which was also entered in his service book.

4. On 24th February, 1987, the respondent submitted an application for correction of his date of birth from 26th May, 1950 to 31st August,

1950 on the basis of a birth certificate issued by NDMC. The petitioners, however, rejected the request of the respondent for the change of date of birth on 8th April, 1987.

5. From 1987 till 2009, for 22 years, the respondent did not seek change of his date of birth from 26th May, 1950 to 31st August, 1950. However, in 2009, the respondent contended that ever since he joined the Govt. service, the increment used to be granted with respect to the month of joining and consequently he used to get his increment for the post of Clerk Grade-II in the month of January, till the year 1986. Thereafter, he started getting up his increment in February, due to stepping up of pay and again from January, 2005 when he got 2nd ACP. According to the respondent, the 6th Central Pay Commission's Recommendations were brought out as Revised Pay Rules 2008, under which the recommendations were accepted retrospectively w.e.f. 1st January, 2006 and increments were to be granted on the 1st July of the year and thus, the respondent's increment had been postponed from January to July of every English calendar month.

6. Since the respondent's date of birth recorded in the service record was 26th May, 1950 and the increments were to be granted in July, it seriously affected his pensionary benefit and the family pension. Consequently, the respondent made representation for alteration of his

date of birth on 21st May, 2009. The request of the respondent, was, however, declined by order dated 6th July, 2009 on the ground that under FR-56 and Note-6 in the said FR, a request for change of date of birth is to be made by the Govt. servant within five years of the entry into Govt. service. As the respondent had not made the request for change of date of birth in accordance with FR-56 within five years, his request for change of birth date could not be considered in 2009.

7. Aggrieved by the order dated 6th July, 2009, the respondent filed an original application being OA No. 2259/2009 titled as 'Shri Y.P. Madan, Upper Division Clerk Vs. UOI & Another', which was allowed by the Tribunal by order dated 1st February, 2010. While allowing the application of the respondent, the Tribunal relied on CIDCO Vs. Vasudha Gorkhnath Mandevlekar, (2009) 7 SCC 283 and directed the petitioners to take steps to verify the birth certificate issued by NDMC stipulating the date of birth of the respondent as 31st August, 1950 and to make necessary change in the date of birth of the respondent as per public record within two months of receipt of the copy of the judgment dated 1st February, 2010.

8. Pursuant to the order of the Tribunal dated 1st February, 2010, the petitioners passed an order dated 26th May, 2010, whereby the request of the respondent for change of date of birth after considering

the birth certificate issued by NDMC had not been acceded and the request was declined. The said certificate was issued by NDMC in 1978, whereas the CBSE certificate had disclosed his date of birth as 26th May, 1950 on the basis of which the date of birth was entered in the service record of the respondent. The respondent, thereafter filed a contempt petition. The Tribunal in the contempt petition filed by the respondent, directed the petitioners to deem the respondent's retirement as per the date of birth in the NDMC Certificate as 31st August, 1950 and also directed to disburse the pay and allowance and pensionary benefits as if the respondent would retired in 31st August, 2010. The Tribunal held in the contempt petition that by order dated 26th May, 2010, passed by the petitioners, pursuant to the order of the Tribunal dated 1st February, 2010, the petitioners could only have verified the NDMC Certificate and could not have passed the fresh order dated 26th May, 2010 declining the change of date of birth on the ground of delay as in case if the petitioners were aggrieved by the order of the Tribunal dated 1st February, 2010 the only recourse left to the petitioners was to challenge the said order.

9. Aggrieved by the order dated 1st February, 2010 passed by the Tribunal in OA No. 2259/2009 and order dated 31st August, 2010 passed in CP 500/2010, the petitioners have preferred the present writ petition contending, inter alia, that the issue of change of date of birth

of the respondent in 1987 was sought about six years after the respondent was inducted in service 1981. In any case since the claim of the respondent for alteration of date of birth was declined in 1987, he could not re-agitate the issue of change of birth after a gap of 22 years on the same ground in 2009. According to the petitioners, the Tribunal ought to have rejected the original application of the respondent as it was clearly barred by limitation and principles of delay and laches. It was asserted that in the circumstances, the orders dated 1st October, 2010 and an order passed in the contempt petition dated 31st August, 2010 suffers from jurisdictional errors. The petitioners also contended that in the contempt petition, the Tribunal had to take into consideration the order dated 1st February, 2010 as passed by the Tribunal pursuant to which, order dated 26th May, 2010 was passed by the petitioner declining the change of date of birth on the ground of delay after considering the birth certificate issued by the NDMC. In exercise of its contempt jurisdiction, the order dated 26th May, 2010 passed by the petitioners could not be set aside by the Tribunal nor could the Tribunal direct the petitioner to change the date of birth of the respondent from 26th May, 1950 to 31st August, 1950. The petitioners also pleaded that there is no connection with the date of increment with the change of date of birth. The learned counsel for the petitioners also relied on a judgment of the Supreme Court titled as

Punjab & Haryana High Court at Chandigarh Vs. Megh Raj Garg and Anr. 2010(6) SCALE 61 in support of his pleas and contentions.

10. The writ petition is contested by the respondent contending, inter alia, that although, the respondent was regularized retrospectively from 22nd January, 1981, however, the order of regularization was passed on 16th October, 1985 and he had submitted his request for alteration of date of birth on 24th February, 1987 within five years as contemplated under FR-56 based on the birth certificate issued by the NDMC/MCD. According to the respondent, the date of birth as recorded in the birth certificate could not be ignored on the basis of a school certificate and reliance was placed on CIDCO (supra).

11. The counsel for the respondent has also contended that since the application for change of date of birth in 1987 was made within 1½ years of regularization, the same could not be declined. The learned counsel has also relied on Gendalal Vs. UOI & Ors. (2007) 15 SCC 553 where the employee had made representation within six years of his joining the service. It was held that merely because he sought relief departmentally instead of approaching the Tribunal, it could not be said that he had not acted diligently.

12. The learned counsel for the respondent has also contended that an application for condonation of delay was also filed on behalf of the respondent and relying on AIR 1987 SC 1353, Collector, Land Acquisition, Anant Nag & Anr. Vs. Mst. Katiji & Ors., it was averred that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested rights in injustice being done because of a non-deliberate delay. In the circumstances, the plea of the respondent is that the request for change of date of birth was rejected in 1987 but as it did not materially affected him he did not press for it, however, on account of his retirement and the implementation of the recommendations of the 6th Central Pay Commission, as it would have made difference to his pension, he had sought the change of date of birth and in case it is not done, grave injustice will be caused to him. According to the respondent, the delay is not deliberate and ought to be condoned in the facts and circumstances.

13. This Court has heard the learned counsel for the parties in detail and has also perused the pleading and documents and precedents relied on by the parties. In Gendalal (Supra), the point for consideration before the Supreme Court was whether the employee had approached the administrative tribunal at the fag end of his career or not. The first representation was made by the employee within six

years of his joining his service in 1964. Two years later, he again made a representation and sent the reminders. Instead of rejecting the representation, 21 years after the receipt of representation, the authorities demanded more documents which were supplied by the employee and thereafter, in 2001, by a cryptic order, the representation for change of date of birth was rejected on the ground that request for change of date of birth was made 32 years after the appointment of employee and 6 months prior to his retirement. Apparently, the case of the respondent is distinguishable as his representation was declined in 1987 and thereafter, he did not take any steps to seek a change of date of birth for 22 years till 2009 only after realizing the benefits he would become entitled to under the 6th Central Pay Commission with the change of date of birth. In the case of Gendalal (supra), the representations made by the employee within six years of joining the service, however they were not decided within reasonable time and it took almost 21 years to reject it on the ground of delay. In contradistinction in the case of the respondent his representation was rejected in 1987. Thereafter, on the same ground he made representation 22 years after in 2009. Merely on the basis of his rejected request for alteration of change of date birth, the limitation provided under rules would not increase nor the respondent is entitled to claim that his subsequent request for alteration in the change of date of birth would be within time. On the basis of the ratio of the said

judgment, the respondent cannot contend that there is no delay on his part to approach the authorities seeking the change of date of birth within the reasonable time, as the rejection of the representation in 1987 does not in any way extend the period of limitation till the second representation was made after 22 years.

14. The learned counsel for the respondent has also relied on CIDCO (supra) where the Supreme Court had held that entry in the municipal birth and death register shall prevail over entry in the school register, particularly in the absence of any proof that the same was recorded at the instance of the employee's guardian. In the facts and circumstances of the case relied on by the respondent, the Supreme Court had not discarded the municipal record in birth and death register on the ground that the employee's birth took place prior to creation of municipality, as the certificate was issued on the basis of records maintained by predecessor body, namely Gram Panchayat. The Supreme Court, in the said case, had also rejected the plea that the employee though had been working in the personnel department could have manipulated or made interpolation in the certificate issued by the Municipal Council, which was available with the corporation as far back as in the year 1976. In the case of the respondent, the petitioners has rejected the change of date of birth on the ground that he has approached almost after 22 years without giving any justifiable reason

after it was rejected in 1987. In CIDCO (supra) though the Supreme Court had relied on the municipal record of births and death, however, the question of delay and latches was not considered and consequently, on the basis of same, the respondent cannot claim that he is entitled for alteration of his date of birth. As far as the Municipal Certificate is concerned, it discloses the date of birth as 31st August, 1950 of a male child of Mr. Pokhar Dass. This is not disclosed by the respondent as to how many children his parents had and that the said certificate would belong only him and not to any other child.

15. The Tribunal has held that although, the respondent had approached the petitioners in 1987, however, there is no discussion in the order dated 8th April, 1987, about the validity of NDMC certificate that had been submitted. In the circumstances, it was opined by the Tribunal that in case, the NDMC certificate is found to be genuine, the petitioners has to hold that a public record is to be accepted in preference to the school certificate. The Tribunal could not sit in appeal in 2009 over the order of the petitioners passed in 1987. As already discussed herein before the facts and circumstances of CIDCO (supra), relied on by the Tribunal and the respondent are completely distinguishable. In any case, if the order dated 8th April, 1987 rejecting the claim of the respondent for change of date of birth on account of delay under FR-56 was not correct, the respondent ought to have

challenged the same. This is not disputed that the respondent was employed in 1981 though, he was regularized in 1985. If the period for seeking change of date of birth is to be computed from 1981, the request of the respondent in 1987 was beyond time and if it is to be computed from 1985, then it is within time. However, as already held, if the respondent was aggrieved by the said order, he ought to have challenged the order dated 8th April, 1987. No exception has been carved out under FR-56 as has been inferred by the Tribunal that in case the NDMC Certificate is found to be genuine, then even contrary to the time prescribed under FR-56, alteration of date of birth should be carried out. It was rather held by the Supreme Court in Punjab and Haryana High Court, Chandigarh (supra) relying on its various previous judgments that it is competent for the Govt. to fix a time limit, in the service rules, after which no application for correction of date of birth of a Govt. servant can be entertained. A Govt. 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 alteration of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous, has to be carried out.

16. The law of limitation may operate harshly but it has to be applied with all its rigor 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. No doubt, that the respondent had approached the petitioners for change of date of birth in 1987, however it was declined. Since it was declined, the respondent ought to have approached the appropriate authority impugning the said order within the time prescribed under FR-56. By no stretch, the application for change of date of birth filed in 2009 can be held to be in consonance with the relevant Rule even if the first application for the change of date of birth was filed in 1987. In the circumstances, order of the Tribunal in OA 2259/2009 titled Sh. YP Madan Vs. Union of India directing the petitioners to take steps to verify the NDMC certificate relied on by the respondent cannot be sustained as it is contrary to the law laid down by the Supreme Court and FR-56, which contemplates that the request for correction of date of birth has to be sought within five years of entry of the date of birth in the record of the authorities.

17. Pursuant to the order dated 1st February, 2010, directing the petitioners to consider the certificate issued by the NDMC, the petitioners passed an order dated 26/28th May, 2010 and it was held that in terms of OMF-9/1/61-Estt.(A) dated 17th November, 1962 the alteration of date of birth of the Govt. servant is not to be entertained after preparation of their service book and in any event not later than the completion of probation period whichever is earlier. Since, the respondent had passed his school examination in 1970 and joined the

service in 1981, therefore, despite having ample time as he did not seek alteration in his date of birth within time, the same should not be allowed. If the order passed by the petitioners was not in accordance with law, and the certificate of NDMC had not been properly considered, the remedy available with the respondent was to challenge the said order by filing the appropriate petition and not by filing a Contempt petition. In the contempt petition, being CP 500/2010, the Tribunal has rather held that the import of order dated 1st February, 2010 was directing the petitioners to change the date of birth. Such an observation of the Tribunal is not borne out, from reading of the order dated 1st February, 2010 as what was directed was to consider the NDMC Certificate. By order dated 26/28th May, 2010, the certificate was considered and it was held that since the respondent had joined the Govt. service in 1981 even on the basis of NDMC certificate the alteration in his date of birth cannot be permitted. In the circumstances, the Tribunal has committed a jurisdictional error in directing the petitioners to change the date of birth of the respondent from 26th May, 1950 to 31st August, 1950 and directing the petitioners to pay all the allowances and pension in terms of the changed date of birth.

18. It is relevant to refer at this juncture the judgment of the Hon'ble Apex Court rendered in Prithavi Nath Ram v. State of Jharkhand and

Ors., 2004 (7) SCC 261 wherein the Apex Court has held that while dealing with the application for contempt, the Court is really concerned with the question whether the earlier decision which has received its finality had been complied with or not. If any party is aggrieved by the order which in its opinion is wrong or against rules or its implementation is neither practicable nor feasible, it should always either approach the Court that passed the order or invoke jurisdiction of the appellate court. Rightness or wrongness of the order cannot be urged in contempt proceedings. Right or wrong, the order has to be obeyed. Flouting an order of the Court would render the party liable for contempt. The Court seized of the Contempt Application cannot traverse beyond the order. In the circumstances the Tribunal in the Contempt petition could not direct the petitioners to alter the date of birth of the respondent and direct the petitioners to pay all his dues on the basis of his altered date of birth. The Court, in exercise of contempt jurisdiction, has power to punish the party for intentionally violating its order/judgment, but has no power to give additional directions or to modify original order/judgment. The Supreme Court in *Prithvi Nath* (supra) had specifically ruled that the Court, while exercising contempt jurisdiction, has neither power to modify the original order/judgment nor to give additional directions. The Tribunal, in exercise of its contempt jurisdiction, in the facts and circumstances, could not have

passed such an order and the order dated 31st August, 2010 in CP 500/2010 apparently is not sustainable and is liable to be set aside.

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...”

21. For the foregoing reasons, the Tribunal ought not to have entertained the claim of the respondent which was belated as per the period provided in the Rules and should not have directed the petitioners to alter the date of birth of the respondent from 26th May, 1950 to 31st August, 1950 while dealing with the Contempt application of the respondent. The application of the respondent under section 19 of the Administrative Tribunal's Act also could not be decided in favor of respondent which was filed 2009 though the date of birth which was

sought to be altered was entered and recorded in his service book in 1981. The orders of the Tribunal apparently are illegal and are not sustainable in the facts and circumstances and are liable to be set aside.

22. For the foregoing reasons, the writ petition is allowed. The impugned order dated 1st February, 2010 in OA No. 2259/2009 directing the petitioners to take steps to verify the certificate issued by NDMC and to carryout necessary change in date of birth of the respondent in public record and order dated 31st August, 2010 in CP No. 500/2010 directing the respondent to deem the respondent's retirement as per the verified date of birth as 31st August, 1950 in place of 26th May, 1950 are set aside and the original application and the contempt application of the respondent are dismissed. Considering the facts and circumstances of the case, the parties, however, are left to bear their own costs.

ANIL KUMAR, J.

JANUARY 24, 2011

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VEENA BIRBAL, J.