

Judgement reserved on 19.04.2024

Judgement Delivered on 07.05.2024

Court No. - 6

Case :- WRIT - A No. - 8523 of 2021

Petitioner :- Sarla Devi

Respondent :- State Of U.P.Thru.Prin.Secy.Secondary Education And Ors.

Counsel for Petitioner :- Yadukul Shiromani Srivast,Ankit Kumar Chaudhary,Deepthi Singh

Counsel for Respondent :- C.S.C.

Hon'ble Abdul Moin,J.

1. Heard Ms Shivani Maurya as well as Shri Y. S. Lohit, learned counsels for the petitioner and learned Standing Counsel for the respondents no.1 to 3.
2. The instant writ petition has been filed praying for the following main reliefs:

"(i) issue a writ order or direction in the nature of certiorari there by quashing the impugned orders dated 06.07.2020, 09.09.2020 & 11.11.2020 as contained in Annexure No. 1, 2 & 3 respectively to the writ petition.

(ii) issue a writ order or direction in the nature of mandamus commanding the opposite parties by directing them to allow the petitioner to continue in service till 31.05.2025 i.e. till superannuation followed by consequential benefits according to her date of birth 12.05.1965 recorded in her service book, in the identity card jointly issued by DIOS & Principal, and the Govt. of India Card for NPS which is mentioned in her Adhar Card & Voter ID Card.

(iii) issue a writ order or direction in the nature of mandamus commanding the opposite parties by directing them to allow the petitioner to perform the duty till 31.05.2025 with payment of salary & allowances etc., followed by consequential benefits; and in the event of being allowed to continue in service, the pension being transmitted in her Bank Account may kindly be ordered to be adjusted in the salary & allowances payable to her."

3. The case set forth by learned counsel for the petitioner is that the petitioners' husband Shri Nath Vishvakarma was a class IV employee in

Government Jubilee Inter College, Lucknow (hereinafter referred to as the College) who died in harness on 30.03.2005. The petitioner applied for compassionate appointment. The Principal of the College vide order dated 25.05.2005 appointed the petitioner as a Class IV employee in the pay scale of 2550-3220. A copy of the appointment order is annexure 6 to the petition. The date of birth of the petitioner was recorded as 12.05.1965 in her service book. The same date of birth was also mentioned in the identity card issued on 11.08.2008, a copy of which is annexure 7 to the writ petition. The petitioner claims to have been included in the New Pension Scheme in which her date of birth was mentioned as 12.05.1965. The Aadhar card and Voter Id card of the petitioner also mention date of birth of the petitioner as 12.05.1965. It is claimed that the Tehsildars' report dated 28.04.2005 had also been sent to the College which indicates the members in the family of late Shri Nath Vishvakarma wherein the name of the petitioner was also indicated and her age has been mentioned as 39 years. As her salary was not paid despite the petitioner performing her duties till 05.07.2020 since September, 2009 and upon a demand being raised for the same the order impugned dated 06.07.2020, a copy of which is annexure 1 to the petition, was passed whereby retiring the petitioner from service retrospectively with effect from 31.05.2020 by indicating that her age as on 12.05.2005 was 45 years, as such she has completed 60 years of age on 31.05.2020 and consequently is being retired.

4. The petitioner claims to have submitted various representations which were rejected vide order dated 09.09.2020, a copy of which is annexure 2 to the petition, whereby it was indicated that prior to her appointment the petitioner had submitted an affidavit on 26.04.2005 wherein it had been indicated that the petitioner is not high school or equivalent pass and her age has not been determined / her name is not entered in the Nagar Nigam or parivar register and that she does not have any document to prove her age. On the basis of said affidavit and in order to determine her age she was referred to the Chief Medical Officer, Lucknow with a request to determine

her age who vide his letter dated 12.05.2005 has indicated that as per the version of the petitioner her age is 40 years but on due medical examination her age appears to be 45 years. The service record of the petitioner contains various interpolations. Consequently the letter issued by the Chief Medical Officer, Lucknow has been considered.

5. It is also claimed that another order dated 11.11.2020, a copy of which is annexure 3 to the petition, had been passed subsequent to retirement of the petitioner indicating that her date of birth should have been entered as 45 years at the time of her appointment on the basis of the letter issued by the Chief Medical Officer, Lucknow which previously could not be indicated in her service record and on due consideration and on the basis of Chief Medical Officer, Lucknow letters dated 12.05.2005 her age has been indicated as 45 years in the year 2005 and consequently she is being retired on 31.05.2020.

6. The contention of learned counsel for the petitioner is that the U.P. Recruitment to Services (Determination of Date of Birth) Rules, 1974 (hereinafter referred to as the Rules, 1974) has overriding effect over all service rules with regard to date of birth. It is contended that the Rules 1974 provide that if the government servant had not passed high school or equivalent examination, the date of birth or age recorded in the service book at the time of entering into government service shall be deemed to be correct date of birth or age for all purposes in relation to service.

7. Reliance has been placed on the D.O. dated 26.02.1980, a copy of which is annexure 18 to the petition, to contend that the said D.O. provides that in the case of non high school pass person, the date of birth entered in record will be final.

8. Reliance has also been placed on the following judgements:

(i) Smt. Bhanmati vs State of U.P. and another, 2003(1) AWC 784

(ii) Mohan Singh vs U.P. Rajya Vidyut Utpadan Ltd & others, (2013) 1 SLR 129 All

(iii) Mohd. Imran Khan vs State (Govt. of NCT of Delhi) 2011 (10) SCC 192

(iv) Manorey alial Manohar vs Board of Revenue (U.P) and others 2003 (13) SCC 336.

(v) Shankar Lal vs Hindustan Copper Limited, 2022 (6) SCC 211.

9. Learned counsel for the petitioner argues that when a particular date of birth / age of the petitioner had been entered in the service records at the time of entry of the petitioner in service i.e. in the year 2005 indicating her age as 40 years, consequently she has to retire in the year 2025 i.e. 31.05.2025 by treating her date of birth as 12.05.1965 and hence the orders impugned per which the date of birth has been changed and she has been retired on the basis of her corrected age being recorded in the service record as 45 years at the time of entry in service merits to be set aside.

10. On the other hand, learned Standing Counsel on the basis of averments contained in the counter affidavit, argues that after death of husband of the petitioner, who died in harness, the petitioner applied for compassionate appointment declaring her age as 39 years. She submitted her joining on 26.05.2005. As there was no evidence regarding her educational qualification and age therefore the College vide letter dated 15.04.2005, a copy of which is annexure CA-1 to the counter affidavit, referred the matter to the Chief Medical Officer, Lucknow for ascertaining the age of the petitioner and to issue an age certificate and medical fitness certificate. The petitioner before the Chief Medical Officer, Lucknow declared her age as 40 years while in the report of the Radiologist her age was certified as 45 years and consequently her age was required to be recorded in her service book as 45 years on the basis of the letter of the Chief Medical Officer, Lucknow. However on account of the mistake committed by the then concerned authority / employee and on the basis of affidavit given by the petitioner by treating her age of 39 years, her date of birth was recorded as 12.05.1965.

11. It is also indicated that in the service book of the petitioner the entries of the date of birth are in two handwritings.

12. When this fact has been discovered i.e. the age of the petitioner being recorded as 40 years and the same being at variance with the letter of the Chief Medical Officer, Lucknow indicating her age as 45 years, as such the correction has been made in the service book of the petitioner and consequently she has been retired on 31.05.2020 and thus there is no error in the petitioner being retired by treating her age as 45 years on her appointment in May 2005.

13. After passing of the order dated 09.09.2020, another order dated 11.11.2020 was passed by the respondents specifically indicating that the letter of the Chief Medical Officer, Lucknow dated 12.05.2005 indicating the age of the petitioners 45 years could not erroneously be entered in the service record and thus for all purposes the age of the petitioner is to be treated as 45 years as on 12.05.2005.

14. Heard learned counsel for the parties and perused the records.

15. From the argument as raised by learned counsel for the contesting parties and perusal of the records it emerges that the petitioner had been appointed on compassionate grounds on a class IV post vide appointment order dated 25.05.2005. At the time of entry of the petitioner in service, her date of birth was recorded as 12.05.1965 in service book. The same date of birth was also mentioned in the identity card issued three years later i.e. on 11.08.2008. In the New Pension Scheme (NPS) also, her date of birth was mentioned as 12.05.1965 and Aadhar Card and voter identity card of the petitioner also mention the date of birth of petitioner as 12.05.1965. As the salary of the petitioner was not paid despite the petitioner performing her duties till 05.07.2020 since September 2001, and upon raising a demand for the same, the order impugned dated 06.07.2020 was issued whereby the petitioner was retired from service with effect from 31.05.2020 by indicating that her age as on 12.05.2005 was 45 years and that she has completed 60 years of

service on 31.05.2020. The petitioner raised her grievance against her early retirement which, according to date of birth recorded in her service book, should have entailed her to continue till 31.05.2025. The same has been rejected vide the order dated 09.09.2020. The reasons which emerge from perusal of the said order is that prior to her appointment, the petitioner had submitted an affidavit on 26.04.2005 wherein she had indicated that she is not high school or equivalent pass and her age has also not been entered in Nagar Nigam or family register and she does not have any documents to prove her age. The petitioner had been referred to the Chief Medical Officer, Lucknow, who, on medical examination and on the basis of report of the Radiologist, had recorded her age as 45 years and as per her statement, her age had been indicated as 40 years. Erroneously the age of the petitioner as per her statement had been entered as 40 years in the service records which thus entailed the petitioner to retire on 31.05.2025.

16. Here it is pertinent to mention that Rules 1974 pertain to determination of date of birth which categorically provide in Rule 2 that the date of birth or the age recorded in service book at the time of entry into government service shall be deemed to be the correct date of birth for all purpose in relation to service of the employee concerned and no application or representation shall be entertained for correction of such date of birth or age in any circumstances whatsoever. Rule 2 also provides that the date of birth of government servant as recorded in the certificate of he having passed high school or equivalent examination or in case he has not passed in such examination, the date of birth recorded in service book at the time of entry into service, shall be treated to be correct date of birth.

17. Admittedly, no age proof had been given by the petitioner when she was appointed on a class IV post vide appointment order dated 25.05.2005. As per the certificate issued by the Chief Medical Officer, Lucknow on the basis of the Radiologist report the age of the petitioner had been determined to be 45 years as on 12.05.2005 i.e. the date of issue of Chief Medical Officers' certificate vis a vis the age indicated by the petitioner on her own accord

which stood recorded as 40 years in the certificate of the Chief Medical Officer, Lucknow. Thus the age of the petitioner at the time of her entry into service i.e. May 2005 was recorded as 40 years which thus entailed the petitioner to continue in service till the year 2025 vis a vis the age determined on the basis of Radiologist report which was 45 years as on 12.05.2005 which would entail the respondents to retire the petitioner on 31.05.2020.

18. The date of birth of the petitioner by treating her age as 40 years, as on 12.05.2005 i.e. 12.05.1965 was entered in the service book and the same date of birth continued to be recorded in the identity card issued by the respondents, the NPS as well as the Adhar Card and voter identity card.

19. At the same time the respondents also have a valid justification for retiring her on 31.05.2020 on the ground that at the time of entry in service as per the medical certificate issued by the Chief Medical Officer dated 12.05.2005 the petitioner's age as per the radiologist report was 45 years. Thus it is the case of a long recorded date of birth of the petitioner being changed at the behest of the respondents at the fag end of her service but not on any whimsical ground but on the basis of the certificate issued by the Chief Medical Officer, Lucknow and thus there appears to be a justification as per respondents for change of date of birth of the petitioner. Also, the certificate dated 12.05.2005 as issued by the Chief Medical Officer indicating her age as 45 years based on Radiologists' report has not been challenged by the petitioner.

20. The Court may observe that once the petitioner had acquired a valuable right to continue in service on the basis of her date of birth which was recorded as 12.05.1965 in her service book which entailed the petitioner to continue right til 31.05.2025 and the petitioners' date of birth has been changed without affording any opportunity of hearing to her, thus makes the order impugned being in gross violation of rules of natural justice.

21. Again the Court is conscious of the fact that the respondents have a valid case of changing the date of birth on the basis of certificate issued by the Chief Medical Officer, Lucknow dated 12.05.2005 of the date of birth of the petitioner being recorded erroneously at that stretch of time but at the same time there is no dispute that the order impugned has been passed in gross violation of rules of natural justice.

22. The fact of the order impugned being in gross violation of rules of natural justice would thus entail the order impugned to be set aside on this ground alone. However, at the same time again considering that the respondents had a valid ground for changing the date of birth of the petitioner on the basis of Chief Medical Officer certificate as such the mere fact that the order impugned has been passed in gross violation of the principles of natural justice may itself not entail the order to be set aside on this ground alone rather the Court is of the view that a post decisional hearing to the petitioner in order to justify her claim of the date of birth being recorded correctly as 12.05.1965 at the time of her entry into service vis a vis the claim of the respondents of it being recorded erroneously should be accorded.

23. In this regard, the Court may refer to judgement of Hon'ble Supreme Court in the case of the **State of U.P. vs Vijay Kumar Tripathi and another AIR 1995 SC 1130** wherein Hon'ble Supreme Court has observed as under:

"It would certainly be open to the competent authority in a given case to provide a post-decisional opportunity instead of pre-decisional hearing. (There may indeed be exceptional situations where the principles of natural Justice may have to be dispensed with, but they are an exception.) It is upto the competent authority to decide whether in the given circumstances the opportunity to be provided should be a prior one or a post-decisional opportunity. Normal rule, of course, is prior opportunity."

(emphasis by the Court)

24. The question of post decisional hearing has been considered by Hon'ble Apex Court in the case of **Swadeshi Cotton Mills vs Union of India, 1981 SCR (2) 533** and **Maneka Gandhi vs Union of India, 1978 SCR (2) 621**.

25. Considering the aforesaid and the peculiar facts of the case, none of the judgements cited on behalf of the petitioner have any applicability in the facts of the case.

26. Keeping in view the aforesaid discussion, the writ petition is **disposed of** with a direction to the respondents to issue a notice to the petitioner regarding her change of date of birth within a period of three weeks from the date of receipt of a certified copy of this order. It would be open for the petitioner to submit her reply to the same within three weeks of the date of receipt of notice. The respondents / competent authority shall consider the reply of the petitioner and pass a reasoned and speaking order upon the same in accordance with law which order would be passed within a period of four weeks from the date of reply of the petitioner. The orders impugned would be subject to order being passed by the competent authority in terms of this judgement.

Order Date :- 07.05.2024

J. K. Dinkar