

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.12580 of 2007

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Md.Abu Zaffar Mallick, son of Late Md. Ayub, resident of Kagjee Mohalla,
Biharsharif, P.S.- Biharsharif, District- Nalanda.

.... Petitioner/s

Versus

1. The State of Bihar
2. The Secretary-cum-Commissioner, Water Resources Department, Government of Bihar, Patna.
3. The Deputy Secretary, Water Resources Department, Government of Bihar, Patna.
4. The Chief Engineer, Central Design Office, Water Resources Department, Water Resources Building, Anisabad, Patna-2.
5. The Superintending Engineer, Dam and Gate Design Circle, Water Resources Building, Anisabad, Patna.
6. The Executive Engineer, Dam and Gate Design Division No. 2, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. S.R.SHARAN

For the Respondent/s : Mr. (SC11)

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

ORAL JUDGMENT

Date: 29-04-2015

This writ application seeks appropriate direction commanding the respondent authorities to treat his date of birth as 03.02.1950 recorded as such in the Service Book of the petitioner. The same was arbitrarily changed by the respondent employer and a fictitious date of birth as 06.02.1949 was entered in 1989 against the petitioner. As per the original date of birth recorded in the Service Book, the petitioner was scheduled to retire in February, 2010. Owing to the alteration in the date of birth made by the respondents, he was made to retire in February, 2009.

The factual background of the case may be noted as

under:



The petitioner was appointed as Moharir in the Work Charge Establishment under Executive Engineer, Lift Irrigation Division, Patna by order dated 04.02.1967. Said post was subsequently redesignated as Lower Division Clerk (L.D.C.). Soon thereafter, the Service Book was opened in which his date of birth was recorded as 03.02.1950. He was subsequently brought in the regular establishment w.e.f. 06.02.1977. It may be noted here that subsequent to his appointment in the Work Charge Establishment, the petitioner appeared in the matriculation examination conducted by the Bihar School Examination Board and was declared passed. A copy of the matriculation certificate has been enclosed as Annexure-2 which records 03.02.1950 as the date of birth of the petitioner. The same was produced by the petitioner before the respondents. In the year 1989, the Superintending Engineer of the Department vide communication dated 15.09.1989(Annexure-3) found that if the date of birth of the petitioner was accepted as 03.02.1950 then at the time of initial engagement, he was few months less than 18 years. Accordingly, a fictitious date of birth was directed to be entered in the service record of the petitioner. The petitioner protested thereagainst and made representations. No action was taken thereon. However, in the subsequent gradation list(s) prepared by the



Department the name of the petitioner figured and 03.02.1950 continued to be shown as his date of birth. This probably gave an impression to the petitioner that the respondents have restored his date of birth which was originally recorded in the Service Book of the petitioner which was the same as in the matriculation certificate. Diverse documents in this regard have been produced by the petitioner contained in Annexure-6, 7, 8 and 9. These documents appertained to the year 1998, 1999 and 2005. The respondents in these factual background by a communication dated 4.2.2009 issued by the Executive Engineer, Dam and Gate Design Division No. II, Patna (Annexure-12) directed the petitioner to superannuate from service w.e.f. 28.2.2009 as per the altered date of birth. The aforesaid order was passed during the pendency of the writ application and, as such, the same has also been challenged by filing an interlocutory application (I.A. No. 1185 of 2009).

Heard Mr. S.R. Sharan for the petitioner and A.C. to S.C. 11 for the State.

A counter affidavit has been filed on behalf of respondent nos. 4 and 5 wherein the facts regarding the entry of the petitioner in the service and recording of his date of birth in the service record as 03.02.1950 have not been disputed. However, it has been stated that subsequently it was found by the authority that if

03.02.1950 is treated as the date of birth of the petitioner as recorded in the service book as also in the matriculation certificate produced by the petitioner only few months after the entry, he was less than 18 years of age at the time of his initial entry into the service. On this notion, his date of birth was altered from 03.02.1950 to 06.02.1949.

Counsel for the petitioner has relied on a Division Bench judgment of this Court rendered in the case of ***Mokhtar Ahmad Vs. Bihar State Road Transport Corporation (1995 (1) PLJR 183)*** in order to contend that the notion under which the date of birth of the petitioner was arbitrarily changed by the respondents without notice is misconceived and not sustainable in law. Precisely, the similar question was raised for consideration in the said case when this Court found that there was no legal basis to hold that a person who is less than 18 years of age could not be engaged/appointed by the State or its instrumentality. It appears from the said report this Court in detail considered the relevant provisions of the Bihar Service Code and found that Rule 73 thereof provides for the compulsory cessation from service on attaining the age of retirement. However, the age at which a person can be employed has not been provided in the Code. Even if there is any such legal bar, the same would be deemed to have been condoned or waived by the employer at the time of initial engagement of the employee. Counsel

for the petitioner has appropriately referred to paragraphs 4, 5 and 6 of the said report wherein the aforesaid proposition of law has been laid down/propounded.

Counsel for the State conversely relied on **A.I.R. 1995 SC 1499(*Burn Standard Company Ltd. vs. Dinabandhu Majumdar*)** and **2001 (3) PLJR 770 (*Urmila Devi vs. Union of India*)**. I have gone through those judgments. In my view, the reliance placed by the Counsel for the respondents on those judgments seems to be inappropriate. In ***Burn Standard Company Ltd (supra)***, the Apex Court deprecated the exercise of discretionary writ jurisdiction in entertaining a writ application filed by an employee of the Government or its instrumentality for effecting change in the date of birth at the fag end of the service. Similarly in ***Urmila Devi (supra)***, the facts of the case considered by the Court were entirely different.

At the cost of repetition, the Court would notice that in the case on hand, 03.02.1950 was the date of birth recorded in the Service Book of the petitioner on disclosure made by him. There was no misrepresentation made in this regard. Subsequently, he cleared the matriculation examination and produced the matriculation certificate in which too his date of birth was 03.02.1950. The respondents, on their own, altered the date of birth of the petitioner



under the fictitious notion that the petitioner could not have entered the service when he was few months less than 18 years of age. This hypothesis of the respondents was exactly the subject matter of consideration in ***Mokhtar Ahmad (supra)*** on which the petitioner has placed reliance wherein it has been clearly held that there is no legal basis for such hypothesis.

In the circumstances, this Court allows the writ petition. The order contained in Annexure-12 is quashed. The petitioner shall be deemed to have continued in the service until he attained the age of superannuation treating his date of birth as 03.02.1950. Since the petitioner has already attained the age of superannuation treating his date of birth as 03.02.1950, he would only be entitled to the monetary benefits of the service period. Indisputably, the petitioner is in receipt of pension after his retirement. He would, therefore, be entitled to payment of full salary for the period he remained out of service minus the pension amount which was paid/disbursed in favour of the petitioner. The aforesaid order will set off the loss the petitioner sustained by the arbitrary action of the respondent(s). There is nothing on record to show that the petitioner was not gainfully employed or self employed during the period he remained out of service as such this Court is not directing either for payment of interest on these legal dues of the

petitioner or further directing the respondents to revise the pension or other benefits payable to him on retirement. The respondents will calculate the differential amount as per the order and authorize the same to him within two months from the date of receipt/production of a copy of this order before the respondent nos. 4 and 6. There shall be no order as to cost(s).

(Kishore Kumar Mandal, J)

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