

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.1726 OF 2003

Sonabai Harchand Gurav,
Age : 59 years, Occ : Retired,
R/o Karwan, Tal.Shirpur,
District Dhule.

...PETITIONER

-VERSUS-

- 1 Zilla Parishad, Nandurbar.
Through it's Chief Executive Officer.
- 2 Deputy Chief Executive Officer,
Zilla Parishad, Nandurbar.
- 3 Bal Vikas Prakalp Adhikari,
Shahada, District Nandurbar.

...RESPONDENTS

...
Shri N.B.Suryawanshi, Advocate for the Petitioner.

Shri K.C.Sant and Shri S.J.Bhamare, Advocates for the Respondents.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 21st January, 2016

Oral Judgment:

- 1 This petition was admitted on 24.06.2003. Considering the fact that the issue was with regard to the retirement of an employee and

correction of date of birth, there was no question of interim relief involved at the time of admission of the petition since the Petitioner had already retired.

2 Shri Suryawanshi, learned Advocate for the Petitioner, has strenuously criticized the judgment of the Industrial Court dated 13.02.2003 by which Revision (ULP) No.264/2001 filed by the Respondent/ Zilla Parishad was allowed and the impugned judgment of the Labour Court dated 26.09.2001 thereby, allowing Complaint (ULP) No.63/1999, was quashed and set aside.

3 Shri Suryawanshi has canvassed the Petitioner's case at length. His submissions can be summarized as follows:-

- (a) The School Leaving Certificate of the Petitioner indicates her date of birth as 15.10.1941.
- (b) On 22.11.1976, the maternal uncle of the Petitioner swore an affidavit whereby, it is stated that though the School Leaving Certificate of the Petitioner indicates the date of birth as 15.10.1941, her actual date of birth is 15.06.1944.
- (c) The affidavit of the maternal uncle also indicates that the same was sworn by him since the Petitioner wanted the said affidavit for acquiring employment.

- (d) On 14.01.1977, the Petitioner joined services as a Gramsevika with the Respondent/ Zilla Parishad, Nandurbar. Her date of birth was recorded as 15.06.1944.
- (e) On 04.10.1985, the seniority list was published indicating her date of birth as 15.06.1944.
- (f) The Petitioner was promoted as a Superintendent on 24.03.1986.
- (g) On 10.03.1992, the second seniority list was published showing the date of birth of the Petitioner as 15.06.1944.
- (h) On 29.08.1996, the Petitioner got her date of birth 15.06.1944 published in a Government Gazette.
- (i) On 13.11.1997, the Respondent/ Establishment got the date of birth of the Petitioner corrected in the service records.
- (j) A notice of retirement was issued by the Respondent on 30.06.1999 indicating that the Petitioner would stand retired from 31.10.1999.
- (k) Complaint (ULP) No.63/1999 was filed by the Petitioner on 26.10.1999 which is just about four days prior to her retirement.
- (l) It was averred in the complaint that her retirement on 31.10.1999 amounts to forceful termination. Since she is a permanent employee, the same would amount to an illegal

retrenchment.

- (m) The Labour Court by its judgment and order dated 26.09.2001 allowed the complaint by making a declaration of unfair labour practice under Item 1 (a), (b), (d) and (f) of Schedule-IV of the MRTU & PULP Act, 1971 thereby, setting aside her retirement w.e.f. 31.10.1999 as being illegal and declared that the Petitioner was entitled to retire on 30.06.2002.
- (n) The Labour Court granted reinstatement with continuity and full back wages with the direction that the Petitioner would be allowed to work up to 15.06.2002, which is a period of about three years considering her date of birth to be 15.06.1944.
- (o) The Respondent/ Zilla Parishad preferred Revision (ULP) No.264/2001 before the Industrial Court at Jalgaon.
- (p) By the impugned judgment and order dated 13.02.2003, the revision petition was allowed. The judgment of the Labour Court was quashed and set aside and the complaint filed by the Petitioner was dismissed.
- (q) The conclusions of the Industrial Court are perverse and erroneous.
- (r) No correction in the date of birth of the Petitioner could have been carried by the Respondent/ Employer beyond five years

from the date of her entering services with the Respondent.

- (s) The Petitioner's date of birth was entered in the service record in 1977 while joining duties in the light of the affidavit sworn by her maternal uncle.
- (t) Beyond five years from the date of joining services, no correction could be made by the Employer much less without any notice to the Petitioner.
- (u) The Industrial Court has erred in concluding that the School Leaving Certificate is sufficient evidence to indicate the actual date of birth of the Petitioner.
- (v) The School Leaving Certificate mentions an erroneous date of birth.
- (w) The School Leaving Certificate dated 17.09.1968 cannot be relied upon.
- (x) The Industrial Court has wrongly concluded that the Petitioner was given an opportunity by notice dated 22.09.1989 by which her date of birth was verified.
- (y) The Industrial Court has erroneously concluded that the service record was corrected in 1992 and once again there was verification carried out in 1996-1997 recording the date of birth of the Petitioner as 15.10.1941.
- (z) If the verification was carried out in 1992, there was no

occasion for the Respondent/ Employer to once again carry out verification of the date of birth in 1996-1997.

- (aa) In a catena of judgments, the law has been crystallized by the Apex Court and various High Courts that no party can seek correction in the date of birth beyond five years from the date of joining services, much less at the fag end of the service.
- (ab) Correction carried out by the Respondent is in opposition to Rule 38 of the Maharashtra Civil Services (General Conditions of Services) Rules, 1981 (herein after referred to as “the 1981 Rules”) and the instruction there below.
- (ac) The conclusions of the Labour Court have been erroneously interfered with, in the limited revisional jurisdiction of the Industrial Court under Section 44 of the MRTU & PULP Act, 1971.
- (ad) This petition be allowed. The impugned judgment of the Industrial Court be quashed and set aside and the judgment of the Labour Court be upheld.

4 Shri Sant, learned Advocate for the Respondent/ Employer, has contended as under:-

- (a) The Petitioner has filed her complaint only under Item 1 (b) and (f) of Schedule IV of the MRTU & PULP Act, 1971.

- (b) The Labour Court allowed the complaint and declared that the Respondent has committed unfair labour practice under Item 1 (a), (b), (d) and (f) of Schedule IV of the MRTU & PULP Act, 1971.
- (c) The Petitioner while joining services had relied upon the affidavit of her maternal uncle indicating her date of birth as 15.06.1944.
- (d) There was nothing placed on record on the basis of which it could have been concluded that her date of birth is verified and confirmed so as to cause a final entry in her service book.
- (e) A notice dated 22.09.1989 was issued to the Petitioner so as to ensure that entries in the service book are verified and settled once and for all.
- (f) The Petitioner replied to the notice by her reply dated 16.10.1989.
- (g) The date of birth 15.10.1941 was thereafter, entered in the service book of the Petitioner in 1992. She raised no challenge.
- (h) Re-verification was conducted in 1996-1997 and the Petitioner did not raise any objection with regard to her date of birth 15.10.1941 having been entered in the service book in 1992.

- (i) The Petitioner kept silent over the correction in the service book till she retired.
- (j) The complaint before the Labour Court was filed about four days prior to her date of retirement.
- (k) By applications dated 11.10.1999 and 13.12.1999, the Petitioner raised an objection before the Commissioner, Nashik regarding her date of birth.
- (l) By order dated 29.02.2000, the Commissioner, Nashik concluded that correction in the service book is correct.
- (m) The Petitioner preferred an appeal under Section 14 of the Maharashtra Zilla Parishads (Discipline and Appeal) Rules, 1964 (herein after referred as “the 1964 Rules”) before the Upper Revenue Commissioner, Nashik and the said appeal was dismissed by order dated 22.06.2000.
- (n) This indicates that on the one hand, the Petitioner filed the complaint before the Labour Court and on the other hand, she resorted to remedies under the 1964 Rules.
- (o) The Labour Court has not looked into the service book entries and the fact that the Petitioner was served with the notice dated 22.09.1989 and she had replied to the said notice by her reply dated 16.10.1989.
- (p) The Industrial Court rightly concluded that once the entries

were corrected in 1992, the Petitioner could have raised a grievance with promptitude.

(q) The complaint filed by the Petitioner just four days before her retirement, would indicate that she desired that correction be made in the service book at the fag end of her service.

(r) The impugned judgment is neither perverse nor erroneous.

5 I have considered the submissions of the learned Advocates as have been recorded herein above.

6 It is undisputed that the Petitioner has not produced any statutory document before the Respondent while entering service on 14.01.1977. Just six weeks prior to her appointment, she had acquired an affidavit from her maternal uncle, which is dated 22.11.1976. Her maternal uncle has stated in the affidavit that the same is being issued because the Petitioner desires to utilize it for acquiring service. It is further stated in the affidavit that the date of birth of the Petitioner is 15.06.1944 as per the impression of the maternal uncle. It is, therefore, clear that as the Petitioner entered service, the entries in the service record were made with regard to her date of birth, not on the basis of any statutory document, but on the basis of an affidavit sworn by her maternal uncle based on his impression and knowledge.

7 A notice of hearing was issued by the Respondent/ Zilla Parishad dated 22.09.1989. No doubt, the Respondent attempted to correct its record after a period of almost 12 years from the date of the Petitioner joining duties. However, it cannot be overlooked that till the issuance of notice dated 22.09.1989, the Respondent/ Employer had not embarked upon an exercise to confirm the entries made in the service book especially with regard to the Petitioner.

8 The Petitioner replied to the notice on 16.10.1989 reiterating that her date of birth is 15.06.1944 based purely on the affidavit sworn by her maternal uncle. Apparently, then and even today, the Petitioner has no document to cite which may have statutory importance/ force to indicate that her date of birth is 15.06.1944. In short, there is nothing available on record to contradict the date of birth entered in the School Leaving Certificate. I also find from the entire journey of litigation of the Petitioner that there is no whisper as regards the stand taken by her parents about her date of birth or as to whether, both of her parents were not available to take a stand.

9 The record also reveals that the first correction in the service book of the Petitioner based on the School Leaving Certificate was carried

out on 18.02.1992. The said correction was made by relying on the School Leaving Certificate as a mere affidavit of her maternal uncle would not have probative value. Neither has the Petitioner challenged the notice dated 22.09.1989, nor has the Petitioner challenged the correction in her service book dated 18.02.1992. So also, in the second verification that has taken place in 1996, the Petitioner had not questioned the said verification exercise.

10 Shri Suryawanshi, learned Advocate, has relied upon Rule 38 of the 1981 Rules. He submits that Instruction-1 below Rule 38(2)(f) prohibits any application for alteration of the entry regarding the date of birth as recorded in the service book or service roll of a Government servant, who has entered into the Government services on or after 16.08.1981, if the said application is beyond the period of five years commencing from the date of entry in the Government service.

11 For the sake of clarity, Rule 38 in it's entirety is reproduced as below:-

- “38. *Procedure for writing the events and recording the date of birth in the service book.*
- (1) *In the service book every step in a Government servant's official life, including temporary and officiating promotions of all kinds, increments and transfers and leave availed of should be regularly and*

concurrently recorded, each entry being duly verified with reference to departmental orders, pay bills and leave account and attested by the Head of the Office. If the Government servant is himself the Head of an Office, the attestation should be made by his immediate superior.

(2) While recording the date of birth, the following procedure should be followed :--

(a) The date of birth should be verified with reference to documentary evidence and a certificate recorded to that effect stating the nature of the document relied on;

(b) In the case of a Government servant the year of whose birth is known but not the date, the 1st July should be treated as the date of birth;

(c) When both the year and the month of birth are known, but not the exact date, the 16th of the month should be treated as the date of birth;

(d) In the case of Government servant who is only able to state his approximate age and who appears to the attesting authority to be of that age, the date of birth should be assumed to be the corresponding date after deducting the number of years representing his age from his date of appointment;

(e) When the date, month and year of birth of a Government servant are not known, and he is unable to state his approximate age, the age by appearance as stated in the medical certificate of fitness, in the form prescribed in rule 12 should be taken as correct, he being assumed to have completed that age on the date the certificate is given, and his date of birth deducted accordingly;

(f) When once an entry of age or date of birth has been made in a service book no alteration of the entry should afterwards be allowed, unless it is known, that the entry was due to want of care on the part of some person other than the individual in question or is an obvious clerical error;

Instruction:-

(1) No application for alteration of the entry

regarding date of birth as recorded in the service book or service roll of a Government servant, who has entered into the Government service on or after 16th August, 1981, shall be entertained after a period of five years commencing from the date of his entry in Government service.

(2) Subject to Instruction (1) above, the correct date of birth of a Government servant may be determined, if he produces the attested xerox copy of the concerned page of the original birth register where his name and date of birth has been entered as per the rules for the time being in force regarding the registration of birth, and maintained at the place where the Government servant is born, such proof should be considered as an unquestionable proof for change of date of birth in service record.

(2A) At the time of scrutiny of the application, it shall be ensured that :--

(i) no advantage has been gained in school admission, entry into Government service by the said Government servant by representing a date of birth which is different than that which is later sought to be incorporated;

(ii) the date of birth so altered would not make him ineligible for admission in any school or University or for the Maharashtra Public Service Commission examination in which he had appeared; or for entry into Government service on the date on which he first appeared at such examination or on the date on which he entered in the Government service.

(2B) No application for alteration of entry regarding date of birth of the Government servant pending with the Government on the date of commencement of the Maharashtra Civil Services (General Conditions of Services)(Amendment) Rules, 2006 shall be processed after the date of retirement of such Government servant and such application shall automatically stand disposed of as rejected on the date of retirement. Any such application made by the retired

Government servant shall not be entertained.

(3) All cases relating to alterations of dates of birth of Gazetted Government servants and such of the requests of Non-Gazetted Government servants above, should invariably be referred to the General Administration Department and the Finance Department through the Administrative Department concerned.

- (3) Officers of a rank not lower than the Principal District Officer in the Department concerned may correct errors in the service book which are obviously clerical. Cases in which the correctness of the original entry is questioned on other grounds should be referred to a competent authority.*
- (4) Finger-prints of a Government servant who is not literate enough to sign his name in English, Hindi or Marathi should be recorded in the column headed "Personal Marks of identification" in the service book itself. The impressions should not be taken on separate slips of paper and pasted to the service book.*

Exemptions:-

When a military employee is transferred to a civil department and assumes a civilian status or when a military employee discharged from the army without earning a pension is employed in a post in a civil department in which his military service counts towards pension, the date of birth to be entered in his service book or roll shall be either that entered by the Military Authorities in his form of attestation when he first joined the army or, if at the time of attestation he stated only his approximate age, the date arrived at by deducting the number of years representing his age from his date of appointment.

Note 1. The latest discharge certificate (printed as Appendix V) issued to military employees on release of discharge does not provide for the age on the date of attestation or enrollment. It does, however, provide

inter alia for (i) age at the time of completion of the certificate and (ii) date of enrollment. In such cases the age at the time of enrollment (attestation) should be worked out as indicated below:-

(a) Calculate the difference between (i) the date of Commanding Officer's signature (*vide* space provided below Serial No.8 in the certificate and (ii) the date of enrollment.

(b) Deduct the period calculated as per (a) above from the age at the time of completion of the certificate (the date of the completion of the certificate *vide* serial No.2 in the certificate).

Once the age at the time of enrollment is calculated the date of birth should be calculated as per the exemptions above.

Note 2. Cases in which the date of birth has been deduced by any other method, from the age at appointment or attestation, or cases in which Government have passed specific orders accepting a particular date of birth, need not be re-opened."

12 There is no dispute that Instruction-1 as appearing below Rule 38(2)(f) prohibits entertaining of any application for alteration in the date of birth as is recorded in the service book beyond five years from the date of entering or commencing of service.

13 Shri Suryawanshi has placed reliance upon the observations of the Apex Court in paragraph 11 of the judgment in the matter of the *State of Maharashtra and another vs. Gorakhnath Sitaram Kamble and others*, **AIR 2011 SCW 206**, which read as under:-

“11. According to the notification, from 16.08.1981 the date of birth of Government servants cannot be changed after five years from 16.08.1981. Assuming this notification is applicable only for employees who joined after 16.08.1981, even then according to the 'instruction (1)' of the Maharashtra Rules, 1981 that no application for alteration of entry regarding date of birth should be entertained after a period of five years.

The said instruction is reproduced as under:

“(1) Normally, no application for alteration of the entry regarding date of birth as recorded in the service book or service roll of a Government servant should be entertained after a period of five years commencing from the date of his entry in Government service....”

14 Shri Suryawanshi, therefore, submits that the Apex Court has concluded that Instruction-1 below Rule 38(2)(f) prohibits entertaining of any application for correction of date of birth after five years from commencement of service. He, therefore, submits that the ratio laid down by the Apex Court in the case of the State of Maharashtra vs. Gorakhnath Sitaram Kamble (supra) would squarely apply to the case in hand and hence, entry made by the Respondent in 1992 will, therefore, have to be set aside as the same was impermissible in law.

15 I am unable to accept the submissions of Shri Suryawanshi for the reason that Instruction-1 below Rule 38(2)(f) prohibiting filing an application for correction of date of birth after five years of

commencement of service, was introduced on 24.12.2008. This was apparently not brought to the notice of the Apex Court when the Apex Court decided the case on 16.11.2010. It was, therefore, not informed to the Apex Court by the litigating sides in the State of Maharashtra case (supra) that the said instruction was introduced on 24.12.2008 and prior thereto, Rule 38(2)(f) permitted alteration in entry of age or date of birth if the said entry made at the time of joining services was due to want of care on the part of some person other than an individual in question or is an obvious clerical error.

16 In the light of the above, Rule 38(2)(f) assumes significance. While considering the instant case within the ambit of this provision, it cannot be ignored that the Petitioner had entered services declaring her date of birth as 15.06.1944 purely on the basis of an affidavit sworn, not by her parents, but by her maternal uncle. The service record in relation to the Petitioner was, therefore, not verified, much less confirmed till the Respondent initiated the exercise by issuing the first notice of hearing to the Petitioner on 22.09.1989. It, therefore, has to be concluded that the correction made by the Respondent in the date of birth of the Petitioner on 18.02.1992 was under Rule 38(2)(f) of the 1981 Rules. The initial entry was devoid of any confirmation and was based on the affidavit of her maternal uncle.

17 In the light of the above, I do not find that the correction made by the Respondent could be termed as being unsustainable in law.

18 The Labour Court while delivering the impugned judgment appears to have not even gone into the text of the affidavit sworn by the maternal uncle of the Petitioner. Had it so done, it would have come to the conclusion that the said affidavit was executed by the Petitioner's maternal uncle on her request and for obtaining employment.

19 It also appears that the Labour Court though reproduced Rule 38(2) in its judgment, failed to consider that Instruction-1 was introduced on 24.12.2008 and which, therefore, means that Rule 38(2)(f) had its full applicability till 23.12.2008.

20 Shri Suryawanshi has relied upon several judgments of the Apex Court and the various High Courts as were cited before the Labour Court and before the Industrial Court. I am in respectful agreement with the view taken by the Apex Court that no correction should be carried out at the fag end of the career of an employee.

21 The facts as are noted above, indicate that the Petitioner

neither challenged the notice issued on 22.09.1989, nor did she challenge the first correction carried in the service book on 18.02.1992. It, therefore, appears that the Petitioner assailed the correction in her service book for the first time on 27.10.1999 by filing the complaint before the Labour Court, which was just four days prior to her retirement.

22 So also, she challenged the correction of her date of birth for the first time before the Commissioner, Nashik by her application dated 13.12.1999. Her appeal under Section 14 of the 1964 Rules before the Upper Revenue Commissioner, Nashik was dismissed by the order dated 22.06.2000. It appears that these facts were not brought to the notice of the Labour Court as there was no reference to these facts.

23 The Petitioner had invoked Item Nos.1(b) and (f) of Schedule-IV of the MRTU & PULP Act, 1971. Needless to state, the prayer for declaration of ULP was restricted to these two sub-clauses. The Labour Court in a casual manner has declared ULP against the Respondents under Item Nos.1(a), (b), (d) and (f) of Schedule-IV of the MRTU & PULP Act, 1971. The said declaration cannot be sustained in the light of the fact that Item Nos.1(a) and (d) were not invoked at all.

24 As such, considering the fact situation as above, I do not find

that the impugned judgment of the Industrial Court dated 13.02.2003 could be termed as being perverse or erroneous. This petition is devoid of merit and is, therefore, dismissed.

25 Rule is discharged.

kps

(RAVINDRA V. GHUGE, J.)