

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

WRIT PETITION NO. 1410 OF 2004

Sayyed Shabbir s/o Sayyed Karim
Age : 60 yrs, occu.: retired
R/o 291, Gajanan Nagar at
Kopargaon, District Ahmednagar.

Petitioner.

Versus

1. Executive Engineer,
M.S.E.B. At Sangamner.
2. The Superintending Engineer
M.S.E.B., Station Road,
Ahmednagar.
3. The State of Maharashtra
Formal Party
(Copy to be served on Govt.
Pleader, High Court Bombay,
Bench at Aurangabad).

Respondents.

Smt. R.S. Kulkarni, Advocate holding for
Mr. S.D. Kulkarni, Advocate for the petitioner.
Mr. A.S. Shelke, Advocate for respondent No.1.
Mr. Y.G. Gujrathi, A.G.P. for respondent No.3.

**CORAM : RAVINDRA V.GHUGE &
SUNIL K.KOTWAL, JJ.**

**Reserved on : 14.11.2017.
Pronounced on : 29.11.2017.**

JUDGMENT : (PER SUNIL K. KOTWAL, J.)

1. This Writ Petition is filed under Article 226 of the Constitution of India for quashment of the letters dated 15.11.2003 and 30.06.2003 and for issuance of directions to respondent Nos.1 to 3 to pay one-third gratuity, 10% amount of Provident Fund i.e. Rs. 2,33,000/-, medical reimbursement, one year's earned leave and other miscellaneous dues i.e. permanent interest which comes to Rs.2,00,000/- to the petitioner.

2. Respondent No.1 is the Executive Engineer, M.S.E.B. Sangamner, respondent No.2 is the Superintending Engineer, M.S.E.B. Ahmednagar and respondent No.3 State of Maharashtra is a formal party.

3. Undisputed facts between the parties are that the petitioner was appointed as a Sub Engineer on 13.11.1969 and his date of birth was mentioned as "12.03.1943" in the documents submitted by him at the time of his interview. The petitioner continued his service till

31.03.2003 when he was superannuated. Few days before his retirement, on an application submitted by the petitioner to respondent No.1 Office, he was informed that his date of retirement would be 31.03.2003 after office hours. Even on 25.03.2003 respondent No.1 issued a letter to the petitioner and informed him to remain present in the office alongwith his wife for the farewell programme of his retirement arranged by the Department. On 28.03.2003 respondent No.1 informed the petitioner that the petitioner was retiring on 31.03.2003 and he was directed to submit necessary documents through his superior officer for getting Provident Fund. On 06.06.2003 i.e. after retirement of the petitioner, respondent No.1 had issued a letter directing the petitioner to submit School Leaving Certificate in which his date of birth is mentioned, for the purpose of sanctioning his final gratuity and other claims.

4. Contention of the petitioner is that respondent Nos.1 and 2 have prepared his service record on the basis of his correct date of birth

which is 12.03.1943. However, respondent Nos.1 and 2 have committed a mistake while making the entry about the date of birth of the petitioner in his service record and they have allowed the petitioner to continue his service till the date of his retirement i.e. 31.03.2003. On 15.11.2003 respondent Nos.1 and 2 served notice upon the petitioner alleging that the petitioner tried to tamper with his date of birth in his service record and thereby worked for additional two years in the service of M.S.E.B., got additional service benefits during these additional two years and received an amount of Rs. 4,98,924/-, contrary to the rules. Respondent Nos.1 and 2 directed the petitioner to refund the amount of Rs. 4,98,924/- to the M.S.E.B.

5. Contention of the petitioner is that as per Maharashtra Electricity Board Employees Service Regulations, procedure for correction in the date of birth of an employee can be done only within one year from the date of appointment and not thereafter. Accordingly, reply was given

through an advocate by the petitioner on 14.01.2004. According to the petitioner, the demand notice dated 15.11.2003 and subsequent orders passed by respondent Nos.1 and 2 are arbitrary and illegal, and therefore, the petitioner was constrained to file this Writ Petition for the above said reliefs.

6. Heard Smt. R.S. Kulkarni, learned Counsel for the petitioner, Shri A.S. Shelke, learned Counsel for respondent No.1 and learned A.G.P. for the State.

7. Learned Counsel for the petitioner fairly submitted that the correct date of birth of the petitioner is "12.03.1943" and in pursuant to this date of birth, on attaining the age of 58 years, the correct date of retirement would be "31.03.2001". However, respondent Nos.1 and 2 wrongly recorded date of birth of the petitioner as "12.03.1945" in his service record and allowed him to retire on 31.03.2003. According to learned Counsel for the petitioner, though the petitioner

continued in service for the excess period of two years than his entitlement, it was not as a result of practicing fraud at the end of the petitioner, and therefore, the respondents cannot recover the wages paid to the petitioner for the additional service period of two years and the pensionary benefits thereon. She has drawn our attention towards the certificate issued by respondent No.1 informing the date of retirement to the petitioner as on 31.03.2003, as well as the request letter issued by respondent No.1 to the petitioner to attend the farewell programme on 31.03.2003.

8. Learned Counsel for the petitioner submitted that as per Maharashtra Electricity Board Employees Service Regulations, no application for alteration of entry regarding date of birth as recorded in the service book of an employee can be entertained after a period of one year from the date of his entry in the Board's service. She placed reliance on the judgments in the cases of **"Gaurabai Vs. State of Maharashtra and others"** reported in [2015 (3) Mh.L.J. 552],

"Vishnu Manerikar Vs. State of Goa and others"
reported in [2012 (4) Mh.L.J. 443) and "Balwant
Mohan Badve Vs. Ahmednagar Municipal Corporation"
reported in [2016 (4) Mh.L.J. 954].

9. Learned Counsel for respondent No. 1 submitted that the correct date of birth of the petitioner i.e. 12.03.1943 was recorded in his service book, which is also mentioned in the Seniority List of Junior Engineers published on 31.03.1995. However, subsequently the petitioner managed to manipulate the date of birth and changed it as "12.03.1945".

10. Learned Counsel for respondent No.1 submits that the petitioner was aware about his his correct date of birth and the manipulation done by him in his own service record with the help of other staff members, and therefore, few days prior to his retirement, he requested the Department to inform him about date of his retirement, only to create evidence. Learned Counsel for respondent No.1 submits that in the

ordinary course of nature an educated person would not inquire about his correct date of retirement. In brief, the contention of the learned Counsel for respondent No.1 is that the petitioner cannot take benefit of his own wrong. He placed reliance on the judgments in the cases of **"G.M. Bharat Coking Coal Limited, West Bengal Vs. Shib Kumar Dushad"** reported in [2000 (1) ALL.M.R. 264] and **"Burn Standard Company Ltd. Vs. Dinabandhu Majumdar"** reported in [1995 AIR (SC) 1499].

11. In the wake of the submissions of the rival parties, the admitted facts before us are that the correct date of birth of the petitioner is 12.03.1943, and therefore, his correct date of superannuation after attaining the age of 58 years would be "31.03.2001". However, in the service book of the petitioner, his date of birth is mentioned as "12.03.1945" instead of "12.03.1943". Manipulation of the number '5' in place of '3' in 1943 is apparently seen.

12. Contention of the petitioner is that

mentioning the incorrect date of birth as "12.03.1945" in his service book is the mistake of the office of respondent Nos.1 and 2 and for such mistake the petitioner cannot be blamed. On the other hand, according to respondent Nos.1 and 2, initially even in the service book the correct date of birth of the petitioner was mentioned as "12.03.1943", but with the help of some staff members the petitioner managed to manipulate it and changed it as "12.03.1945" by altering '3' in 1943. In fact, there is no dispute between both the parties regarding the correct date of birth of the petitioner as 12.03.1943.

13. The question for determination is, whether the date of birth mentioned in the service book as "12.03.1945" is as a result of a manipulation or is it a slip of the pen. For that purpose, we have perused the original service book of the petitioner. By naked eyes, it reveals that initially the date of birth of the petitioner was written in handwriting as "12.03.1943", but subsequently somebody manipulated and changed it

as "12.03.1945" by converting the digit "3" into digit "5". Thus, obviously in the service book of the petitioner, as a result of the manipulation, the correct date of birth "12.03.1943" is changed as "12.03.1945".

14. Though the learned Counsel for the petitioner tried to evade the responsibility on the ground that the petitioner was not the custodian of the service book, it cannot be ignored that the petitioner was the only beneficiary due to this manipulation of the date of birth in his service book. Even in the Seniority List dated 31.03.1995, the date of birth of the petitioner is shown as "12.03.1943". Thus, the petitioner cannot claim that he was not aware of his correct date of birth or date of retirement. Therefore, the pointer of the responsibility for manipulation in the service book tilt only towards the petitioner.

15. On the scale of the "preponderance of probability" only one inference can be drawn that

the petitioner is the person who managed to get the date of birth manipulated in his own service book. It cannot be ignored that the petitioner being a Sub Engineer was well educated person and certainly he was expected to be aware of his date of birth as "12.03.1943". He was also expected to be aware that his retirement was on 31.03.2001, on attaining the age of 58 years.

16. Even in paragraph No.4 of the petition the petitioner has averred that *"few years prior to the date of retirement, the petitioner felt that there appears to be some mistake in the record maintained by the respondent Nos.1 and 2"*. Accordingly, the petitioner requested respondent No.1 by submitting an application dated 18.01.2001 and obtained a certificate to the effect that his date of retirement would be on 31.03.2003. Knowingly obtaining such incorrect certificate by the petitioner supports the inference that the petitioner is the man behind the manipulation of the date of birth in his own service book.

17. Thus, it can be concluded that the petitioner was aware that he was due for retirement on 31.03.2001 and he malafidely continued in service till 31.03.2003 by taking disadvantage of the manipulation in his own service record.

18. In the recent judgment delivered by the Hon'ble Supreme Court in the matters of **Syed Abdul Quadir Vs. State of Bihar and others [(2009) 3 SCC 475]** and **State of Punjab and others Vs. Rafiq Masih (White Washer) [(2015) 4 SCC 334]**, it has been held that though recovery is not prohibited in each and every case, it should be assessed as to whether the excess payment received by the employee is a result of his handiwork. He should have played a fraud or should have caused misrepresentation with the intention to cause a wrong pay fixation and thereby earn excess amount to which he is not legally entitled to.

19. In the light of the above discussed trite law, respondent Nos.1 and 2 are certainly

empowered to recover the excess payment received by the petitioner by rendering unauthorised service for the period of two years i.e. upto 31.03.2003 by taking disadvantage of the manipulation of the date of birth in the service book.

20. The judgments in the cases of **Gaurabai Vs State of Maharashtra** (supra), **Vishnu Vs State of Goa** (supra) and **Balwant Vs Ahmednagar Municipal Corporation** (supra) are distinguishable on facts as well as on distinct ratio *decidendi*. In all these cases excess payment was not made as a result of fraud or misrepresentation. Therefore, the ratio of these cases is not applicable in the present case.

21. Even the cases of **G.M. Bharat Coking Coal Vs. Shib Kumar Dushad** (supra) and **Burn Standard Company Ltd. Vs. Dinabandhu Majumdar** (supra) are distinguishable, because in those cases the Hon'ble Apex Court was considering the powers of the High Court under Article 226 of the

Constitution of India in the matters of correction of disputed date of birth. Therefore, the ratio of those Authorities is also not applicable to the case at hand.

22. However, as observed above, the petitioner has received excess payment for the period of two years even after his correct date of retirement on 31.03.2001 by manipulating his date of birth in his own service record. Therefore, the action initiated by respondent Nos.1 and 2 for recovery of such excess payment from the petitioner cannot be termed as perverse or an arbitrary action which calls for interference by this Court by exercising its extraordinary jurisdiction under Article 226 of the Constitution of India.

23. We, therefore, hold that none of the reliefs claimed by the petitioner can be granted.

24. In the result, this Petition being devoid of merit, deserves to be dismissed.

25. Accordingly, we pass the following order.

ORDER

- a) Writ Petition No 1410 of 2004 is dismissed.
- b) Rule is discharged.
- c) No order as to costs.

(SUNIL K. KOTWAL)
JUDGE

(RAVINDRA V. GHUGE)
JUDGE

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