

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 542 OF 2006
IN
WRIT PETITION NO. 2988 OF 2001**

Tata Memorial Center ... Appellant
V/s.
Tata Memorial Hospital
Kamgar Sangathana and ors. ... Respondents

Mr.S.K. Talsania, Sr. Advocate a/w. Mr. Agnel Carneiro &
Mr.Vaibhav Shah i/b Mulla and Mulla Craigie Blunt and Caroe
for the Appellant.
Ms Ranjana Todankar for Respondent Nos.1 and 2.

**CORAM : AKIL KURESHI &
S.J.KATHAWALLA, JJ.
DATE : SEPTEMBER 26, 2019.**

P.C.

1] This appeal is filed by the Management challenging the judgment of the learned Single Judge dated 28.04.2006 passed in Writ Petition No. 2988 of 2001, by which, the learned Single Judge was pleased to partially confirm the decision of the Industrial Court, Mumbai dated 12.10.2001.

2] Brief facts are as under:

The respondent No.2- workman was engaged as an Electrician by the employer Tata Memorial Center on

14.4.1966. At the time of his appointment, the workman had declared his date of birth as 8.8.1937. The employer had carried the said date of birth, though admittedly the employee had not produced any documentary proof of birth date. Much later in the year 1971, the employer required the workman to establish his date of birth through documentary evidence. Since the workman could not do so, he was sent for medical examination for assessing his age. The Municipal hospital, where the workman was sent for medical examination, issued a certificate on 4.11.1971 opining that as on that date his age can be estimated to be 38 years. The employer thereupon reworked the date of birth backward and substituted the workman's declared date of birth 8.8.1937 by new date of 4.11.1933. There is nothing on record to suggest that this certificate of the Municipal hospital or the consequential changes made by the employer in the service record of the workman modifying his date of birth, were brought to the notice of the workman immediately. It further emerges from the record that despite having so modified the date of birth in the record, for the period from 1982 to 1989

the service record of the workman carried the original date of birth as 8.8.1937.

3] On 18.12.1990, the workman sent a letter to the Management pointing out that on number of occasions in the past, he had requested for including his correct date of birth in his service record. He was asked to produce the documents in support thereof. Alongwith the said letter, therefore, he presented his affidavit dated 18.12.1990. In such affidavit, he pointed out that he had disclosed his date of birth as 8.8.1937, at the time of appointment. He was also issued an identity card which carried the said date of birth. He contended that pursuant to the medical examination conducted in 1971, his age was estimated as 32 years. However, there is some overwriting in the certificate issued. He contended that the estimation of age on the medical examination is not always accurate and subject to variation of plus or minus 5 years. He, therefore, requested that his original date of birth be entered in the service record.

4] The Management insisted on the documentary proof of his age, which the workman could not supply. On 24.12.1992, the Management issued a memorandum conveying to the workman that he would be completing 60 years of age on 4.11.1993, he would therefore, superannuate with effect from 30.11.1993.

5] At that stage, the workman approached the Industrial Court by filing a complaint alleging unfair labour practices. In the complaint, he contended that his date of birth was wrongly changed in the service record and on the basis of such changed date of birth, he was being wrongly superannuated earlier than his actual date of superannuation. He complained of breach of Item 9 of Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (the Act for short).

6] The Management filed a written statement and opposed the complaint pointing out that in absence of any documentary proof in support of the date of birth, the workman was sent for medical opinion and on the basis of

which, his date of birth was corrected. The Management, however, agreed that after so carrying the corrected date between 1971 to 1981, the original date crept in confidential reports during the period from 1982 to 1989, which was again corrected thereafter.

7] The workman was examined before the Industrial Court. An Administrative Officer on behalf of the employer was also examined. On the basis of such evidence and other documents on record, the Industrial Court came to the conclusion that the employer had committed unfair labor practice by forcing the workman to retire earlier than his superannuation. To come to such a conclusion, the Industrial Court doubted the accuracy of the medical opinion of the age of the workman. Resultantly, the Industrial Court granted full backwages for the remainder period, since the workman was made to retire as per the record of the employer.

8] The Management - employer challenged the said award of the Industrial Court by filing a writ petition before this Court. The learned Single Judge by the impugned judgment

modified the final directions issued by the Industrial Court. The learned Single Judge held that the employer was not justified in retiring the workman on the basis of date of birth of 4.11.1933. However, since for the remainder period of four years, the workman had not discharged his duties, the learned Single Judge awarded 50% of the idle wages and thereby gave partial relief to the employer. This judgment of the learned Single Judge, the employer has challenged in the present appeal.

9] Appearing for the appellant, the learned Counsel Shri.S.K. Talsania submitted that the Industrial Court had proceeded entirely on an erroneous basis of doubting the accuracy of the medical opinion. In absence of any contrary evidence produced by the workman, the estimation of date of birth as per the medical opinion had to be accepted. He further submitted that the date of birth, so corrected, was reflected in the service record of the workman. Year after year, he signed his confidential reports, never raising any objection about the correction of the date of birth. It was only at the fag end of his career that he raised dispute of his

correct date of birth. He lastly contended that, the employer had not committed any unfair labour practice and the complaint therefore, should have been dismissed.

10] On the other hand, the learned Counsel Ms Ranjana Todankar appearing for the workman opposed the appeal contending that the learned Single Judge has given sound reasons. The material on record suggested that the employer had itself accepted the date of birth of the workman being 8.8.1937. The medical opinion was not conclusive. No interference is called for.

11] Having heard the learned Counsel for the parties and perused the documents on record, what emerges is that at the time of appointment on 14.4.1966, the workman had declared his date of birth as 8.8.1937. The employer did not dispute this date of birth nor for a long time asked the workman to support it by any documentary evidence. It was nearly five years later that the employer refused to accept the declaration of the date of birth made by the workman, in absence of any documentary evidence and instead demanded

that he go for medical examination. The record does not suggest that culmination of the medical examination was ever conveyed to the workman nor the decision to change his date of birth formally communicated to him. The workman therefore, had no immediate basis to come to know that contrary to his declaration of his own date of birth, the employer had modified the same.

12] It may be that in the confidential reports from the year 1972 for a few years thereafter, the changed date of birth had appeared. Nevertheless, the employer also agrees that the original date of birth was again mentioned in the period between 1982 to 1989. Thus, even the employer had oscillated insofar as the correct date of birth of workman is concerned.

13] Be that as it may, we find that the employer had not raised any dispute about the declaration of the date of birth by the workman for more than five years after appointment. We further find that even the amendment in the date of birth pursuant to the medical report does not appear to have been

communicated to the workman immediately. This is significant since if the workman had any dispute about the same, he could have raised an objection, either insisting that he may be sent to medical board for further opinion or in any other manner as may be open to him, contest the estimation of his age as per the medical opinion. Several years later in the year 1990, i.e., nearly 24 years after his initial appointment, when the employer once again tried to revert back to the date of birth 4.11.1933, the workman raised an objection and requested that his correct date of birth to be restored. In the meantime, the workman had applied for an identity card. In the form that he filled-up for such purpose, he had shown the date of birth as 8.8.1937. The workers of the employer agreed that this form was countersigned by the concerned clerk after verification of the details contained therein. According to the workman's deposition, the identity card was issued in the year 1985. Thus, for a considerable period of time, the workman was given an impression by the employer that his declaration of the date of birth of 8.8.1937 is accepted.

14] Asking the workman to produce the documentary proof of his date of birth nearly 24 years after his appointment, when the workman objected to the change of date of birth in the year 1990, was thus wholly unjust and unfair. The Industrial Court may have made an error in discarding the medical opinion without any contrary proof, however, the learned Single Judge has given reasons which are completely independent and different and with which we are broadly in agreement. The learned Single Judge has also slashed down the idle wages for the remainder period by 50% . In exercise of powers of intra-court appeal, we are not inclined to interfere. This appeal is therefore, dismissed.

(S. J. KATHAWALLA, J.)

(AKIL KURESHI, J.)