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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **W.P.(C) 7552/2018, CM APPL. 28869/2018 (permission to file documents) and CM APPL. 28870/2018 (stay)**

SMT. SANTOSH

..... Petitioner

Through: Mr. Shanker Raju and Mr. Nilansh Gaur, Advocates.

versus

UNION OF INDIA AND ANR.

..... Respondent

Through: Mr. Vikas Mahajan, CGSC with Mr. Aakash Varma and Mr. Prajesh V.S., Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

30.01.2020

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Dr. S. Muralidhar, J.:

1. The Petitioner is aggrieved by an order dated 9th July, 2018 passed by Central Administrative Tribunal, Principal Bench, New Delhi ('CAT') dismissing her OA No.2544/2017, whereby she had challenged a communication dated 8th June, 2017 of the Ministry of Defence ('MoD'), Respondent No. 1 herein, rejecting her request for changing her date of birth from 30th January, 1958 to 31st January, 1960.

2. The Petitioner joined the Indian Administrative Service ('IAS') as a

Section Officer on 10th July, 1986 after appearing in the Civil Services Examination, 1984. She joined the Department of Agriculture Cooperation ('DoAC'), Ministry of Agriculture. Within five years of joining the post, on 22nd January, 1991 the Petitioner applied for a change of date of birth in her service record. She explained that although she was born on 31st January, 1960 in Punjab and her date of birth was so registered in the record of the Chief Registrar Births and Deaths in Punjab, on account of the transferable job of her father, and her having to study in different schools, in one of the schools, due to a clerical mistake her date of birth was mentioned as 30th January, 1958. As a result, this erroneous date of birth is also mentioned in her matriculation certificate.

3. The DoAC by a letter dated 24th November, 1992 sought the advice of the Department of Personnel and Training ('DoPT'). The DoPT (Respondent No.2 herein) agreed to the proposal of the DoAC by its letter dated 1st December, 1992 and the Petitioner was accordingly directed to get her date of birth as recorded in the matriculation certificate, rectified. The Petitioner by a letter dated 24th February, 1993 of the DoAC, was again advised to have her matriculation certificate corrected.

4. On 15th December, 1993 the Petitioner wrote to the DoAC pointing out that as per the extant instructions which laid down the procedure for alteration of the date of birth, the following conditions are required to be satisfied:

“(a) a request in this regard is made within 5 years of his/her entry into Government service;

(b) it is clearly established that a genuine bona-fide mistake has occurred; and

(c) the date of birth so altered would not make him/her ineligible to appear in any school or University or Union Public Service Commission examination in which he had appeared, or for entry into Government service on the date on which he/she first appeared at such examination or on the date on which he/she entered Government service.”

5. She pointed out that her case fell well within the above parameters. She further pointed out that there was nothing in the instructions which stipulated getting the date of birth corrected from the Education Board as a pre-condition for alteration in the date of birth in the official records and that if there was such a rule, she should be provided a copy thereof.

6. Meanwhile, the Petitioner was transferred to the Ministry of Road Transport. She again submitted an application for change of date of birth. The case was examined in the Border Road Development Board (‘BRDB’) Secretariat, which again sought concurrence of the DoPT. The DoPT advised expediting the rectification of the date of birth of the Petitioner.

7. On 25th August 2006, the BRDB Secretariat, wrote to the Punjab School Education Board (‘PSEB’) for early correction of the Petitioner’s date of birth in the matriculation certificate. This resulted in the PSEB issuing a duplicate certificate on 7th April, 2008 correcting her date of birth in its records as 31st January, 1960.

8. On 14th October, 2008 the Petitioner was transferred to the Ministry of Tribal Affairs ('MTA'). After examining her case the MTA sought the advice of the DoPT for the third time. On 15th January, 2009 the DoPT advised that there was no objection to the Petitioner's request for change of date of birth and that the MTA may decide the case as powers are delegated to the Ministry/Department under which the Government servants are working.

9. The Petitioner's case was submitted to the Secretary, MTA. However, it was not immediately considered. Meanwhile, the Petitioner was transferred to the MoD. Her case was forwarded to the MoD on 17th September, 2012. The MoD made multiple references to the DoPT and the Ministry of Law ('MoL'). Both the DoPT as well as the MoL advised the MoD that the rectification order had to be issued by the MoD. On 18th November, 2016, the MoD finally decided to rectify the Petitioner's date of birth with the approval of the Secretary, MoD. The file was sent to the DoPT for concurrence.

10. The DoPT commented that the case was covered under Rules and CS Division (DoPT) on 29th December, 2016, and also observed as under:

"the officer has pursued the matter for almost 25 years, for which sufficient evidence is available. Her case is not only covered under the rules but it established beyond doubt. The delay appears to be due to red tape."

11. An officer of the DoPT on 19th January, 2017 noted that "the date of birth as recorded in the service book can be altered only under Rule 16- A(4)

of the All India Services (Death-cum-Retirement) Benefits Rules, 1958 [‘AIS (DCRB) Rules’]. It was further noted that:

“it is established that a Bona fide clerical mistake had been committed in accepting the date of birth. As per the Apex court, Bona fide clerical error would normally be one where an officer has indicated a particular date of birth in his application form or any other document at the time of his employment but, by mistake or oversight a different date has been recorded. This sub rule is similar to para b) Note 5 below PR 56 applicable to CSS Officers.”

12. Thereafter, instead of taking a final decision, the DoPT again forwarded the case of the Petitioner to the MoL. In a noting dated 6th February, 2017 it was observed by the MoL as under:

"As per para 10 of p.72/N, it states that Ms. Santosh has satisfied all the conditions for change of date of birth as per extant instructions on the subject. As per para 11 of P.27/N, it is stated that the Defence Secretary has approved the alternation of the DoB of Ms. Santosh, JS (In-situ) MoD from 30.1.1958 to 30.1.1960. In our opinion there is no illegality in the decision taken by the MoD. The judgment produced by the department as pronounced by the Hon'ble Apex Court in the case of UOI & Ors Vs Rama Swamy & Ors. 1977(3) RSJ 284 is in relation to the Rule 16A of AIS DCRB Rules and has not opined on the interpretation of Note 6 of FR 56."

13. The matter travelled between the DoPT and the Law Ministry again twice in the months of March and April, 2017. On 24th April, 2017, the MoL maintained their earlier opinion and returned the file stating that no legal issue was involved. By an order dated 24th May, 2017, the DoPT conveyed to the MoD that the proposal for change of date of birth of the Petitioner in

the service record “cannot be agreed to”. Referring to the judgment of the Supreme Court in *Union of India v. C. Ramaswamy (1997) 4 SCC 647*, it was opined as under:

“(iii) It appears from the aforesaid judgment that an error is to be considered as a bonafide clerical error for the purpose of change of date of birth if the officer concerned indicates a particular date of birth in his application form or any other document at the time of his employment but by mistake or oversight a different date of birth has been recorded in his/her service records. In the present case, no such thing had happened. The date of birth as declared by her at the time of her entry/application for the Civil Services Examination through which she came to be selected for Central Secretariat Service, stands correctly recorded in her service records. Therefore, her case seems to be squarely covered by the said judgment vide which the Hon'ble Supreme Court rejected the plea for the change of date of birth, since the recorded date of birth was as per the declaration made at the time of entry into the service.”

14. The above decision was conveyed to the Petitioner by a letter dated 2nd June, 2017. Challenging the above decision dated 24th May, 2017, the Petitioner filed OA No. 2544/2017 in the CAT.

15. By the impugned order dated 9th July, 2018, the CAT dismissed the application. The CAT first examined Fundamental Rules 56 ('FR-56') and observed that the following three conditions were required to be fulfilled if the request for change of date of birth was to be acceded to:

“(a) the request for change of date of birth must be made within five years of entry into Government service;

(b) it must be clearly established that a *bona fide* mistake has occurred;

and;

(c) in case the date of birth is altered as per the request, it should not make the candidate ineligible, to appear in any school or university or UPSC examinations, wherein the candidate appeared for entry into the Government service.”

16. The CAT held that while conditions (a) and (c) above stood fulfilled the question that arose was whether a bonafide mistake had occurred. It was then held as under:

“Had it been a case where the date of birth which was entered in the service record of the applicant was at variance with the one, in the matriculation certificate, there would have existed proper justification and basis to straightway accept her request. That, however, is not the case here. Even in 1991, it was necessary to alter the date of birth in the matriculation certificate. In para 6 of the counter affidavit, it is stated that the entry in the matriculation certificate was altered by the Punjab State Education Board only on 07.04.2006, and the same is filed as Annexure-V. This clinchingly establishes that there was no basis or foundation for making application in the year 1991, and if at all anything, such basis came into existence only in the year 2006. The applicant was not entitled to file application for change of date of birth in the year 2006, having regard to the time limit of five years stipulated for purposes of making such application. The applicant has attained the age of superannuation on 31.01.2018, and since her date of birth in the service record was not changed by that time, she is not entitled to continue in service beyond that date.”

17. This Court has heard the submissions of Mr. Shankar Raju, learned counsel for the Petitioner and Mr. Vikas Mahajan, learned Central Government Standing counsel for the Respondents.

18. The Petitioner relies on Note-6 below Rule FR-56 and urges that the conditions stipulated therein have been met and therefore the Petitioner's request should have been acceded to by the Respondents. The said note below FR-56 providing for change/alteration in date of birth of a government servant in service records, reads as under:

"The date on which a Government servant attains the age of fifty eight or sixty years, as the case may be, shall be determined with reference to the date of birth declared by the Government servant at the time of appointment and accepted by the Appropriate Authority on production, as far as possible, of confirmatory documentary evidence such as High School or Higher Secondary or Secondary School Certificate or extracts from Birth Register. The date of birth so declared by the Government servant and accepted by the Appropriate Authority shall not be subject to any alteration except as specified in this note. An alteration of date of birth of a Government servant can be made, with the sanction of a Ministry or Department of the Central Government or the Comptroller and Auditor-General in regard to persons serving in the Indian Audit and Accounts Department, or an Administrator of a Union Territory under which the Government servant is serving, if-

(a) a request in this regard is made within five years of his entry into Government service;

(b) it is clearly established that a genuine bona fide mistake has occurred; and

(c) the date of birth so altered would not make him ineligible to appear in any School or University or Union 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 Government service."

19. In interpreting the above note, it was observed by the Supreme Court in *Union of India v. C. Ramaswamy (supra)*, as under:

"24.....Bona fide clerical error would normally be one where an officer has indicated a particular date of birth in his application form or any other document at the time of his employment but, by mistake or oversight a different date has been recorded. In the present case admittedly the date of birth indicated in the application form filled in for the purpose of taking the competitive examination was that of 17th June, 1939. This date was then incorporated in his service record and this was duly signed by the respondent. Admittedly the respondent also believed this to be the date of birth, therefore, it was not a case where the date of 17th June, 1939 had been incorrectly recorded in the service book as result of any bona fide clerical mistake...."

25. In matters relating to appointment to service various factors are taken into consideration before making a selection or an appointment. One of the relevant circumstances is the age of the person who is sought to be appointed. It may not be possible to conclusively prove that an advantage had been gained by representing a date of birth which is different than that which is later sought to be incorporated. But it will not be unreasonable to presume that when a candidate, at the first instance, communicates a particular date of birth there is obviously his intention that his age calculated on the basis of that date of birth should be taken into consideration by the appointing office. In fact, where maturity is a relevant factor to assess suitability, an older person is ordinarily considered to be more mature and, therefore, more suitable. In such a case, it cannot be said that advantage is not obtained by a person because of an earlier date of birth, if he subsequently claims to be younger in age, after taking that advantage. In such a situation, it would be against public policy to permit such a change to enable longer benefit to the person concerned. This being so, we find it difficult to accept the broad proposition that the principle of estoppel would not apply in such where the age of a person who is sought to be appointed may be a relevant consideration to assess his suitability.

26. In such a case, even in the absence of a statutory rule like Rule 16-A, the principle of estoppel would apply and the authorities concerned would be justified in declining to alter the date of birth. If such a decision is challenged the court also ought not to grant any relief even if it is shown that the date of birth, as originally recorded, was incorrect because the candidate concerned had represented a different date of birth to be taken into consideration obviously with a view that it would be to his advantage. Once having secured entry into the service, possibly in preference to other candidates, then the principle of estoppel would clearly be applicable and relief of change of date of birth can be legitimately denied. To that extent the decision in *Manak Chand's* case, does not lay down the correct law."

20. The above observations have to be understood in the context of the concerns of the Supreme Court that a candidate might represent a different date of birth at the time of entering into service "with a view that it would be to his advantage". There was also a concern that the communication of a particular date of birth would be with the intention that "his age calculated on the basis of that date of birth should be taken into consideration by the appointing office". This was in the context of the "maturity" of the person which according to the Supreme Court might be a relevant factor "to assess suitability". It was observed that "an older person is ordinarily considered to be more mature, and therefore, more suitable". It was in that context, that it was stated that it would be against public policy to permit a person to claim to be younger in age at a subsequent point in time after joining service.

21. The above observations are therefore in the context of a post where by representing a certain age, a person could take advantage by projecting that one is more mature for the post. In the present case however, the Petitioner

was joining as a Section Officer at the first level and it is nobody's case that for such a job, projecting herself to be two years older gave the Petitioner an advantage over others. This does not appear to have been a relevant factor as far as appointing the Petitioner was concerned. The DoPT appears to have throughout evaluated the case only in terms of FR-56. That was also the approach of the MoL from the notes and the file referred to hereinbefore.

22. At one stage the question did arise whether Rule 16-A of the AIS (DCRB) Rules would apply. Rule 16-A of the AIS (DCRB) Rules states:

“16-A Acceptance of date of birth -

16(1) For the purpose of determination of the date of superannuation of a member of the service, such date shall be calculated with reference to the date of his birth as accepted by the Central Government under this rule.

16(2) In relation to a person appointed, after the commencement of the All India Services (Death-cum-Retirement Benefits) Amendment Rules, 1971

(a) Indian Administrative Service under clause (a) or clause (aa) of sub rule (1) of rule 4 of the All India Service (Recruitment) rules, 1954; or

(b) the Indian Police Service under clause (a) or clause (aa) of sub rule (1) of rule 4 of the Indian Police Service (Recruitment) Rules, 1954; or

(c) the Indian Forest Service under clause (a) or clause (aa) of sub rule (2) of rule 4 of the Indian Forest Service (Recruitment) Rules, 1966;

the date of birth as declared by such person in the application for recruitment to the service shall be accepted by the Central

Government as the date of birth of such person.

16(3) In relation to a person to whom sub-rule (2) does not apply, the date of birth as recorded in the service book or other similar official document maintained by the concerned government shall be accepted by the Central Government, as the date of birth of such person.

16(4) The date of birth as accepted by the Central Government shall not be subject to any alteration except where it is established that a bonafide clerical mistake has been committed in accepting the date of birth under sub-rule (2) or (3)."

23. In a detailed note prepared by the DoPT, a comparison of the two rules i.e. Rule 16-A of the AIS (DCRB) Rules and Note 6 under FR-56 was undertaken. While it was observed that the two Rules cannot be "*pari materia*", that fact "cannot undermine similarity between the two rules". Given that similarity, it was opined that "it would not be inappropriate" to apply the ratio of the decision in *Union of India v. C. Ramaswamy (supra)*. Applying the said decision, the DoPT decided that the Petitioner's request could not be acceded to. There is an indication of this note that in fact Rule 16-A of the AIS (DCRB) Rules does not apply.

24. Earlier in the same note of the DoPT, the questions posed and the answers given thereto read as under:

"Whether the officer in the matter of Rama Swamy case and in the present reference belong to the same service?"

The answer to this question is a categorical no. The officer in the matter of Rama Swamy case was an Indian Police Service (IPS) officer whereas the officer in the present reference viz. Ms. Santosh is a Central Secretariat Service Officer.

Whether Rule 16A of AIS DCRB Rules is equally applicable to all services under the Government?

Again, the answer is *no*. This rule only applies to the members of All India Services.”

25. In the considered view of the Court, once a view was taken that Rule 16A did not apply, continuing to examine the Petitioner’s case in light of the decision in *Union of India v. C. Ramaswamy* (*supra*), which was made in the context of an officer of the All India Services (‘AIS’) and where the AIS (DCRB) Rules were relied on and interpreted, was not proper. The DoPT decided to adopt the aforesaid decision on the basis that general principles in accepting/altering date of birth of an officer would apply regardless of the service to which he belongs “as long as he is covered under Rule that he has clear parallels with Rule 16A of the AIS, DCRB Rules.”

26. The central issue was whether there was a bonafide error on the Petitioner’s part in entering the correct date of birth in her service record. While it is true that the date of birth declared by the Petitioner at the time of her initial appointment i.e. 30th January, 1958 was the date entered in the service record, the fact that she applied for a change within five years of joining the service and the fact that she got her date of birth in the matriculation certificate altered to reflect the correct date of birth, cannot be overlooked. Once the certificate was issued by the PSEB, obviously, by following the due diligence procedure, the Respondents could not refuse to accept that change. It is unfortunate that despite the MoL on more than one occasion agreeing to incorporate the change, the DoPT decided not to accept that advice. The Court finds no justification in the Respondents rejecting the

Petitioner's request on the rigid ground that a "bonafide clerical error would normally be the one where an officer has indicated a particular date of birth in his application form or any other document at the time of his employment but, by mistake or oversight, a different date has been recorded."

27. The bonafide error could be on the part of the authority which prepared a matriculation certificate as was in the present case, which then compelled the Petitioner to declare the date mentioned in the matriculation certificate as her date of birth. The bonafide of the request is demonstrated with the fact that the Petitioner did not wait till the last minute just prior to her date of superannuation to make the request, she made it within five years of joining.

28. For all of the aforementioned reasons, the Court sets aside the decision dated 2nd June, 2017 conveyed to the Petitioner rejecting her request and the corresponding decision dated 9th July, 2018 passed by the CAT dismissing OA No. 2544/2017.

29. The petition is allowed to the extent that, the Petitioner's date of birth will now stand corrected in the records as claimed by her i.e., 31st January, 1960 on the basis of which her superannuation date would be 31st January, 2020. The consequential relief to the Petitioner will be that she will not be entitled to any arrears of pay or any reinstatement since only one day is left, but for the purposes of calculation of her pension, the notional date of retirement would be taken as 31st January, 2020 accounting for the increments that the Petitioner would have earned if she had continued in service. The revised PPO be issued within 12 weeks from today.

30. The petition is disposed of in the above terms. The pending applications are also disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JANUARY 30, 2020

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