

Prajakta Vartak

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5518 OF 2021**

Vijay Karbhari Chaudhari

...Petitioner

vs.

The State of Maharashtra & Anr.

...Respondents

Mr. Ram Apte, Senior Advocate with Mr. Saurabh Oka for petitioner.

Ms. M. P. Thakur, AGP for the respondents.

**CORAM : DIPANKAR DATTA, CJ &
G. S. KULKARNI, J.**

DATE : SEPTEMBER 24, 2021

PC:

1. The Maharashtra Administrative Tribunal, Mumbai (hereinafter "the Tribunal", for short) has dismissed Original Application No.1096 of 2018 by a judgment and order dated January 20, 2020. The aggrieved original applicant is the petitioner in this writ petition dated April 29, 2021. He seeks an order to quash the impugned judgment and order and also for a direction upon the respondents to change his date of birth from June 01, 1971 to October 17, 1972 in the service records.

2. We have heard the parties at the stage of admission and propose to dispose of this writ petition at this stage without even inviting a reply affidavit from the respondents.

3. The petitioner joined Government service on October 09, 1997 as an Agriculture Extension Officer in Zilla Parishad, Raigad. On the basis of documentary evidence produced by him, the petitioner's date of birth in the service records was entered as "June 01, 1971". An application was made by the petitioner on November 17, 2000 seeking correction of his date of birth as "October 17, 1972" in place of "June 01, 1971". Such application came to be rejected by an order dated February 10, 2003. The petitioner challenged such order before the Tribunal by filing an original application, being O.A. No.949 of 2004. By an order dated January 05, 2006, the Tribunal dismissed the original application on merits. The petitioner did not challenge the order dated January 05, 2006 and the issue relating to change of date of birth, as claimed by the petitioner, attained finality. More than 7 years after dismissal of his original application, the petitioner once again applied for change of date of birth on

June 28, 2013. Such application was rejected on July 30, 2014. This order of rejection, however, was not challenged by the petitioner and he accepted the same. Instead of approaching the Tribunal challenging the order dated July 30, 2014, the petitioner waited for more than a year and on August 26, 2015 to be precise, applied once again for change of date of birth referring to Instructions introduced in Rule 38(2)(f) of the Maharashtra Civil Services (General Conditions of Services) Rules, 1981 (hereinafter "the 1981 Rules", for short). By an order dated May 22, 2018, the application of the petitioner dated August 26, 2015 was rejected on the ground that the conditions for effecting change in date of birth recorded in the service book in terms of the 1981 Rules have not been fulfilled; and also, that the petitioner's application having been rejected earlier, there was no provision for filing an appeal for having a fresh decision. This order dated May 22, 2018 was subjected by the petitioner to a challenge in the original application, out of which this writ petition arises.

4. It is in the aforesaid factual narrative that we are tasked to decide whether the Tribunal was justified in its dismissal of

the original application; if not, to what relief is the petitioner entitled.

5. Mr. Apte, learned senior advocate appearing for the petitioner contends that the Tribunal committed gross error in dismissing the original application on the ground that the petitioner's earlier original application had failed and that the order of dismissal was never challenged. According to him, the Tribunal failed to notice that after dismissal of the first round of litigation initiated by the petitioner before it on January 05, 2006, amendments were introduced in Rule 38 with effect from December 24, 2008 and the amended provisions of the Rules opened up a window for the petitioner to seek alteration in his date of birth as entered in the service records once again; and in terms of the Instructions added to clause (f) of Rule 38(2), the petitioner had duly exercised his right and there was absolutely no reason for the Tribunal to be swayed by its earlier decision of dismissing the first original application. It is the contention of Mr. Apte that since the petitioner had obtained photocopies of the original birth register and had placed the same before the authority

concerned for its consideration and the application having been rejected without application of mind to such fresh documents that the petitioner had since submitted, the Tribunal instead of dismissing the original application ought to have considered the claim of the petitioner on merits and allowed the same in view of clinching evidence produced by him that he was born on October 17, 1972. It is, thus, prayed that the petitioner be granted relief as claimed in the writ petition.

6. Opposing the writ petition, Ms. Thakur, learned AGP for the respondents contends that the Tribunal was perfectly justified in not entertaining the petitioner's claim. Referring to the order of the Tribunal spurning the petitioner's challenge that was laid sometime in the year 2004 and the fact that the petitioner had accepted the verdict of the Tribunal, she further contends that there is no provision in the 1981 Rules providing for further attempts at the instance of an employee to raise the same issue for being re-visited once an application for change of date of birth stands rejected. It is also her contention that the petitioner cannot avail the benefit

of the amended Instructions, below clause (f) of sub-rule (2) of Rule 38 of the 1981 Rules, inasmuch as both the instructions have to be read together and so read, it is sufficiently clear that Instruction (2) is subject to Instruction (1). The contention advanced before us is that Instruction (2) cannot come into play unless the condition mentioned in Instruction (1) is fulfilled, i.e., the application for change in date of birth is made within 5 (five) years of December 24, 2008. In the present case, she further contends, that the petitioner having submitted an application within 5 (five) years of December 24, 2008 and the same having been rejected on July 30, 2014 without such order being challenged and set aside, there can be no escape from the conclusion that the order dated July 30, 2014 was accepted by the petitioner without any reservation; and, the subsequent application dated August 26, 2015, which was admittedly made after 5 (five) years from December 24, 2008, was for all intents and purposes an application raising a 'dead' claim. On the basis of the aforesaid submission, it is prayed by her that the writ petition should be dismissed.

7. Initially, we carried an impression that Instructions (1) and (2) were inserted below clause (f) of sub-rule (2) of Rule 38 by way of an amendment and only because of such an amendment, the petitioner had sought to claim the benefit thereof. However, on perusal of the judgment of the Tribunal dated January 05, 2006 while dismissing the petitioner's first original application, we find that the petitioner, within 3 (three) years of entering service, had applied for change in date of birth as entered in the service records on the basis of an extract from the relevant birth register. Despite being in possession of such extract, the petitioner for reasons best known to him had not produced the same while entering service. The Tribunal had bestowed due attention to Instructions (1) and (2) below clause (f) of sub-rule (2) of Rule 38, as it then stood, and had recorded detailed reasons as to why the petitioner was not entitled to have his date of birth corrected. The relevant portions from the said judgment read as under: -

"7. The applicant has sought correction of his date of birth from 1.6.1971 as entered in the service book to 17.10.1972, which according to him is the date of birth entered in the birth register. The applicant has applied for change in the date of birth in November, 2000, i.e., within about 3 months of his entering the service. Under

Instruction (1) of Rule 38, 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. Subject to this instruction, Instruction No. (2) states that the correct date of birth of a Government servant may be determined, if he furnishes a proof of age in any of the forms stated therein. These includes School Leaving Certificate, Extract from a birth or baptismal register etc..... However, it is not under dispute that the applicant was aware of the entry in the date of birth register when he entered the service. It is not clear as to why he could not furnish the documents regarding birth register extract at the time of his entry into service. The learned Presenting Officer argued that Instruction No. (1) is relevant only if the Government employee had come across some other document after he joined Government service. In the present case, the relevant document, namely, extract from the date of birth register was available with the applicant at the time of his entry in Government service..... From Instruction (2)(i) it is clear that to ensure that convincing proof is forthcoming, the Government servant should be asked to produce both an extract from birth or baptismal register and a School Leaving Certificate or Secondary School Leaving Certificate indicating date of birth. The said instructions also state that an extract or certificate of birth where his name has been entered in the original birth register at the time of birth, should, however, be accepted as sufficient proof. In the present case, even though the documents were available with the applicant at the time of his entry in Government service, it appears that he did not produce the extract from the birth register. At any rate, the extract from the birth register did not contain his name, and, therefore the authorities were left with no option but to accept School Leaving Certificate...."

(emphasis supplied)

8. It appears from the aforesaid excerpt that the extract from the birth register though not produced by the petitioner at the time of entering Government service but produced later did not have his name incorporated therein. It also appears to us that the petitioner after issuance of circular letter dated December 31, 2012 by the State Health Information and Numbers of Birth Office, Pune (Rajya Arogya Mahiti va Jeevan Vishayak Aakdewari, Pune) drew inspiration and was also successful in procuring a further extract from the birth register wherein his name was incorporated with the date of birth as "October 17, 1972". It is, therefore, clear that the petitioner took advantage of the measure introduced by such circular letter to remedy the mischief as indicated therein (birth certificates should bear the name of the child born) and almost into the sixteenth year after entering service, procuring an extract from the birth register for the purpose of renewing his claim of change of date of birth despite earlier rejections, initiated a further process (fourth in the series) by submitting the application dated August 26, 2015 well beyond the period of 5 (five) years from December 24, 2008, and upon the rejection of the said application by the order dated

May 22, 2018 initiated the second round of litigation before the Tribunal.

9. Let us now consider the relevant rule, i.e., Rule 38 for our own satisfaction as to whether the petitioner could set up a case for interdiction. Clauses (a) and (f) of sub-rule (2), with the original and the amended Instructions, read as follows:

"38. Procedure for writing the events and recording the date of birth in the service book.

(1) ***

(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) ***

(c) ***

(d) ***

(e) ***

(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;

[Original Instructions, as it stood prior to December 24, 2008]

"Instruction.-

(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.

(2) Subject to (1) above, the correct date of birth of a Government servant may be determined, if he furnishes a proof of age in any of the following forms: -

- (a) His own statement or that of a parent, guardian, friend or relative;
- (b) School Leaving Certificate, Secondary School Certificate Examination/Matriculation Certificate or University Certificate;
- (c) Extract from a birth or baptismal register;
- (d) Horoscope;
- (e) Entry in family records or accounts books.

The proof at (a) above should not be accepted as sole proof of Government servant's age; also (b), (d) and (e) separately cannot always be depended on as reliable proof of age, while (c) cannot also furnish absolute proof unless the name of the child is registered.

(i) To ensure, as far as possible, that convincing and conclusive proof of age is forth coming, a Government servant should be asked to produce both an extract from a birth or baptismal register and a School Leaving Certificate or Secondary School Certificate Examination/Matriculation Certificate or University Certificate giving the date of birth. An extract or certificate of birth (such as a baptismal certificate) where his name has been entered in the original birth register at the time of birth, should, however, be accepted as a sufficient proof.

(ii) If a Government servant is unable to produce any of the documents referred to in (i) above, a full explanation should be obtained from him and unless he can adduce satisfactory reason for not producing them, other evidence such as horoscope, family records, accounts books, etc., should not be admitted.

(iii) Oral or written statements or affidavits of a Government servant or his relatives should not be accepted without the production of supporting evidence save in exceptional cases where the certifying authority is satisfied that for some good reason as direct evidence is available and that the person concerned is trustworthy and there is no reason to disbelieve him."

[Amended Instructions, as it stands post December 24, 2008]

"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."

10. Original Instruction 2(b) ordains that the date of birth, as appearing from the School Leaving Certificate, could be regarded as a documentary evidence based whereon an entry in the service record as regards date of birth could be made. Extract from a birth register could also be so regarded in terms of Original Instruction 2(c). As has been recorded in the judgment of the Tribunal, extracted supra, it is not known why the petitioner did not produce the extract from the birth register and instead, relied on the School Leaving Certificate. In any event, nothing substantial turns on it, because there

can be no gainsaying that once the date of birth of the petitioner was entered in the service record based on his School Leaving Certificate, such date of birth could only be altered/rectified based on the terms of clause (f) and not otherwise. The Instructions below clause (f) are nothing more than mere instructions and since they provide the procedure for alteration/rectification of date of birth, Instructions 1 and 2 in their original and amended avatar cannot be read independently and de hors clause (f), which is the substantive law. The petitioner could never make out a case in terms of clause (f) that an erroneous entry as regards date of birth was made because of want of care of some person other than him or that an obvious clerical error exists, which needs to be corrected. Procurement of documentary evidence well after spending in excess of a decade in service cannot be validly pressed into service for having a change of date of birth effected in the service records. In our considered view, the Amended Instructions 1 and 2 do not and cannot have overriding effect so as to render clause (f) redundant. The conditions stipulated therein would be the guiding factors for effecting change and only if one of such conditions is satisfied,

could an employee request for a change and upon following the procedure laid down in Instructions 1 and 2, as they presently stand, such change may be allowed.

11. The petitioner's claim for change in date of birth does not rest on satisfaction of any of the twin conditions stipulated in clause (f) of sub-rule (2) of Rule 38 and, therefore, the order dated July 30, 2014 (not challenged) was rightly passed and the petitioner having accepted the same, could not have taken recourse to filing a fresh application for change of birth, i.e., August 26, 2015. In fact, such application was not at all maintainable in law. No provision has been brought to our notice by Mr. Apte that permits repeated forays for having the date of birth changed. We overrule his contention that the Amended Instructions opened up a window for the petitioner. A 'dead' claim having been sought to be raised by the petitioner, was rightly not entertained.

12. We are also inclined to accept the contention of Ms. Thakur that, at any rate, no application for change of date of birth could have been filed by the petitioner 5 (years) beyond December 24, 2008 for the purpose of raising an illusory claim

before the Tribunal that because of an amendment effected in the 1981 Rules, it afforded him a fresh cause of action to approach the Tribunal seeking change of date of birth once again.

13. Having regard to the reasons assigned by the Tribunal in its judgment and order dated January 05, 2006 while dismissing O.A. No.949 of 2004, which has been accepted by the petitioner and thereby has attained finality, together with the reasons assigned by the Tribunal in the impugned judgment and order, with which we agree, as well as for independent reasons assigned by us as above, this writ petition appears to be an abuse of the process of Court as well as law.

14. Accordingly, the writ petition stands dismissed.

15. We would have been justified in imposing exemplary cost, but since the same could have an adverse effect on the remainder of the petitioner's service career, we refrain ourselves from doing so.

(G. S. KULKARNI, J.)

(CHIEF JUSTICE)