

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO.4336 OF 2022

Shankar s/o Arjun Nimsarkar,
Aged about 56 years,
Occupation – Service,
R/o. Sant Dnyaneshwar Ward,
In Front of Hari Om Sabhagruh,
Tq. Hinganghat, District Wardha

...PETITIONER

VERSUS

1. Zilla Parishad, Wardha
through its Chief Executive Officer.
2. Education Officer (Primary),
Zilla Parishad, Wardha
3. State of Maharashtra, through
Secretary, Department of Rural
Development, 25, Marzban Path,
Fort, Mumbai.
4. Zilla Parishad, Chandrapur
through its Chief Executive Officer

...RESPONDENTS

Shri P.D. Meghe, Advocate for the petitioner.
Shri D.R. Bhoyar, Advocate for respondent Nos.1 and 2.
Mrs. K.R. Deshpande, A.G.P. for the respondent No.3/State.

**CORAM : A.S. CHANDURKAR AND
URMILA JOSHI-PHALKE, JJ.**
RESERVED ON : AUGUST 30, 2022.
PRONOUNCED ON : SEPTEMBER 14, 2022.

JUDGMENT (Per Urmila Joshi-Phalke, J.)

Heard learned counsel for the parties.

2. **RULE.** Rule made returnable forthwith.

3. The petitioner has challenged the communication dated 14/07/2022 by respondent No.1 by which respondent No.1 rejected the representation of the petitioner for correction of his birth date in the service record.

4. The petitioner is a permanent resident of Hinganghat, District Wardha. As per his contention after passing 12th Standard he pursued his D.Ed. training. On 23/09/1986, the Zilla Parishad, Chandrapur published an advertisement calling applications for the post of Primary Teacher. He applied for the same and was selected by Zilla Parishad, Chandrapur. He was appointed at Zilla Parishad Primary School, Kanhalgaon under Panchayat Samiti, Chimur. As the birth date of the petitioner was wrongly recorded in a school leaving certificate as 29/08/1964 instead of 19/02/1966 he submitted an affidavit to the Panchayat Samiti, Chimur clarifying that his birth date was wrongly written in his school leaving certificate and his correct birth date is 19/02/1966. Accordingly, Panchayat Samiti, Chimur accepted the said

affidavit and recorded his birth date in service record as 19/02/1966. On 21/03/1988, respondent No.1-Zilla Parishad, Wardha published an advertisement inviting applications for Primary Teacher. As the petitioner is the permanent resident of Hinganghat, District Wardha and being his native district, he applied for the same and was selected as a Primary Teacher. As he was selected by the Zilla Parishad, Wardha he had resigned as a Primary Teacher, Zilla Parishad Primary School, Kanhalgaon, District Chandrapur. On 24/02/1989, the petitioner pointed out to the Chief Executive Officer, Zilla Parishad, Wardha that his birth date was wrongly recorded in school leaving certificate as 29/08/1964 and his correct birth date is 19/02/1966. He also submitted affidavit to respondent No.1 as previously he submitted to Zilla Parishad, Chandrapur. However, respondent Nos.1 and 2 refused to record the birth date of the petitioner in his service record as per the affidavit and asked him to make proper application for correction of date of birth which was recorded on the basis of school leaving certificate. On 23/02/1993, the petitioner had submitted an application for correction of date of birth to Block Education Officer, Samudrapur for forwarding the same to respondent Nos.1 and 2. As per the contention of the petitioner, in the meantime he passed B.A. and B.Ed. and was promoted as a Headmaster and presently he is working as a Headmaster, Zilla Parishad Primary School, Samudrapur. Though he submitted an

application within time, said application was not decided by respondent Nos.1 and 2, therefore, he approached to respondent Nos.1 and 2 under the Right to Information Act, 2005 (hereinafter referred to as the 'R.T.I. Act' in short). As he did not receive any information, he preferred an appeal to the First Appellate Authority under the R.T.I. Act and respondent No.2 directed to provide information to the present petitioner. Thereafter also the petitioner had submitted various representations to respondent No.1 and finally on 14/07/2022 respondent No.1 communicated to the petitioner that his representation regarding correction of date of birth is rejected. Hence this petition.

5. It is further the contention of the petitioner that in view of Rule 38 of the Maharashtra Civil Services (General Conditions of Services) Rules, 1981 (hereinafter referred to as the 'M.C.S.R. Rules' in short), he had submitted an application within five years. As per the Government Resolution dated 03/03/1998, the entire procedure is clarified regarding the correction of date of birth and he followed the same. Thereafter also respondent Nos.1 and 2 rejected his application. Said action of respondent Nos.1 and 2 is arbitrary, illegal and liable to be set aside.

6. The petition is strongly opposed by respondent Nos.1 and 2 by filing the reply. As per the contention of the respondents, the

petitioner on 23/02/1993 submitted his application for correction of date of birth that is after the lapse of period of 4 years and 11 months. The instruction appended to Rule 38 of the M.C.S.R. Rules specifically stipulate that no application for alteration of the entry regarding date of birth as recorded in service of Government Servant shall be entertained after a period of five years commencing from the date of his entry in Government Service. Present application is filed by the petitioner prior to 28 days of expiring the five years period from the date of his appointment. The petitioner was fully aware that initially he was in service of Zilla Parishad, Chandrapur wherein he had got corrected his date of birth on the basis of affidavit and birth certificate. A perusal of the birth certificate issued by the Municipal Council, Hinganghat shows that same is issued on 07/04/1981. Thus, the petitioner was having the proof of date of birth prior to his appointment but the petitioner had not taken any steps and started filing representations at the fag end of service tenure, hence the petition deserves to be rejected.

7. Heard Shri PD. Meghe, learned Counsel for the petitioner. He submitted that the petitioner had joined service at Zilla Parishad, Wardha as a Primary Teacher in the year 1988. Thereafter on 24/02/1989, the petitioner pointed out about his date of birth to respondent No.1 and accordingly submitted his affidavit regarding his

date of birth to respondent No.1. Thereafter within five years i.e. on 23/02/1993 in accordance with Rule 38 of the M.C.S.R. Rules he preferred an application for correction of date of birth. He also submitted his birth certificate issued by the Municipal Council, Hinganghat along with the said application. His application was not decided by the respondents at earliest opportunity though the petitioner had made several representations. As the petitioner had approached under the R.T.I. Act, said application was decided and without considering the provisions respondent Nos.1 and 2 rejected his representation. Thus, the action on the part of respondent Nos.1 and 2 is arbitrary, illegal and liable to be set aside.

8. On the other hand, Shri D.R. Bhoyar, learned Counsel for respondent Nos.1 and 2 and Mrs. K.R. Deshpande, learned Assistant Government Pleader for respondent No.3 submitted that the petitioner had filed an application for correction of birth date after 4 years and 11 months though he was aware that his birth date was recorded incorrect in the service book. The Municipal Council, Hinganghat had issued the birth certificate in the year 1981 then also the petitioner had not taken any steps to correct his birth date and, therefore, the application was rightly rejected by the respondents. In support of the contention, the learned Counsel for the respondents relied on the *State of Madhya*

Pradesh and ors. Vs. Premlal Shrivastava (2011) 9 SCC 664 wherein the Hon'ble Apex Court held that change of date of birth in service record at the end of career to be permitted only in exceptional cases, on irrefutable proof. The Government servant cannot claim as a matter of right correction of date of birth in service record after lapse of time fixed by employer, even if he has good evidence to establish erroneous entry.

9. After hearing both the sides and perusal of the record it appears that the petitioner was initially appointed at the Zilla Parishad Primary School, Kanhalgaon under Panchayat Samiti, Chimur. The extract of service book shows that his birth date was recorded in his service book issued by Block Education Officer, Panchayat Samiti, Chimur as 19/02/1966. It is also apparent that subsequently the petitioner was selected as a Primary Teacher by Zilla Parishad, Wardha in view of an advertisement published. After joining the service in Zilla Parishad, Wardha as a Primary Teacher he submitted an affidavit stating that his birth date was wrongly written in school leaving certificate and his correct birth date is 19/02/1966 instead of 29/08/1964. Said affidavit was filed by him on 18/01/1988. After filing of the affidavit his birth date was not corrected in service record, hence he again filed an affidavit on 24/02/1989 to correct his birth date addressing to Tahsildar, Hinganghat. As his birth date was not corrected by respondent Nos.1

and 2 on the basis of the said affidavits he filed an application on 23/02/1993 stating that his date of birth was wrongly recorded in the school leaving certificate as 29/08/1964 instead of 19/02/1966 and requested for correction of the same. Said application was supported with the birth certificate issued by the Municipal Council, Hinganghat in Form No.(9) and extract of the Birth Register. It is further apparent that he had submitted several applications for correction of date of birth but no action was taken and, therefore, he sought information under the R.T.I. Act. Finally his representation was decided on 14/07/2022 by which his representation was rejected. The record further shows that his birth date was registered with the Municipal Council, Hinganghat as 19/02/1966 and said birth date was registered with the Municipal Council, Hinganghat on the second day that is 20/02/1966. On the basis of birth register the birth certificate was issued by the Municipal Council, Hinganghat on 07/04/1981. This birth certificate is not denied by respondent Nos.1 and 2 in the reply filed by respondent Nos.1 and 2. Only the contention of respondent Nos.1 and 2 is that said application for correction of date of birth is filed after 4 years and 11 months. The relevant Rule 38 of the M.C.S.R. Rules which is reproduced hereunder for the reference :

“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 accounts 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 a 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 deduced 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.”

10. As per the said Rule the application for correction of birth entry is to be filed within five years. As per Rule 38(2)(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. There is an amendment of the said Rule by Maharashtra Amendment No.MCS.1007/CR-7/07/SER-6, dated 24/12/2008. The instruction Nos.1 and 2 as per the said amendment are :

(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, and

(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.

11. The petitioner had also relied upon the Clause (2) of the Government Resolution dated 03/03/1998 shows that the application for

such correction is to be filed within five years. Said Clause (2) is reproduced for the reference :

“२. शासन सेवेत प्रवेश केल्यापासून ५ वर्षांच्या आत जन्मदिनांकात दुरुस्तीसाठी अर्ज केला नसल्यास तो विचारात घेण्यात यावा अथवा कसे हा प्रश्न शासनाच्या विचाराधीन होता. सर्वोच्च न्यायालयाने दिवाणी अपील क्रमांक ५०२/१९९३ (केंद्र शासन विरुद्ध हरनामसिंग) याप्रकरणी दिलेला निवाडा व त्यासंबंधात केंद्र शासनाने काढलेले आदेश याचा विचार करून शासन आता असे आदेश देत आहे की, ज्या शासकीय अधिकाऱ्यांनी/कर्मचाऱ्यांनी महाराष्ट्र शासनाच्या सेवेत दिनांक १५ ऑगस्ट १९८१ पूर्वी व ज्यांनी दिनांक १५ ऑगस्ट १९८१ रोजी सेवेत प्रवेश केलेला आहे अशांच्या बाबतीत ५ वर्षांचा कालावधी दिनांक १५ ऑगस्ट १९८१ पासून गणण्यात यावा म्हणजेच दिनांक १५ ऑगस्ट १९८१ पूर्वी व दिनांक १५ ऑगस्ट १९८१ रोजी सेवेत प्रवेश केलेल्या अधिकाऱ्यांनी /कर्मचाऱ्यांनी दिनांक १४ ऑगस्ट १९८६ पर्यंत अर्ज केलेला असल्यास तो विचारात घेण्यात यावा. अन्य शासकीय अधिकाऱ्यांनी / कर्मचाऱ्यांनी सेवा पुस्तकात नोंदलेला जन्मदिनांक दुरुस्त करण्यासाठी सेवेत प्रवेश केल्यापासून ५ वर्षांच्या आत अर्ज केला असल्यासच तो विचारात घेण्यात यावा. सेवानिवृत्त अधिकाऱ्यांची/कर्मचाऱ्यांची जन्मदिनांक दुरुस्त करण्याबाबतची प्रकरणे विचारात घेण्यात येऊ नयेत.”

12. As per the said Clause (2) of the Government Resolution, the persons who entered in the service prior to 15/08/1981 and who entered in service on 15/08/1981, the period of five years will be calculated from 15/08/1981 and such persons should file an application on or before 14/08/1986. Other employees should file an application within five years and the application which are filed within five years are to be taken into consideration. Thus, in view of said Government Resolution, the application for correction of birth date is to be filed within five years. In the present case, admittedly the petitioner had filed an application within five years and said application is within time. The

reason assigned by the respondents is that in view of Government Resolution dated 03/03/1998 and in view of Rule 38(2)(f) of M.C.S.R. Rule his application is not tenable and rejected the same.

13. After perusal of the school leaving certificate it appears that the birth date of the petitioner was recorded as 29/08/1964. Admittedly, the petitioner had filed on record the birth register extract which shows that his date of birth is 19/02/1966 which was registered on 20/02/1966.

14. After having considered the material placed on record, the petitioner has established that his birth date was 19/02/1966 which was registered immediately on the next date with the Municipal Council, Hinganghat i.e. on 20/02/1966. After careful consideration of the entire material on record it is crystal clear that the correct date of birth of the petitioner is 19/02/1966. The petitioner had claimed the said birth date on the basis of record which was maintained by the Municipal Council, Hinganghat during their day to day activities. From the Rule 38 of the M.C.S.R. Rules, it is quite evident that it is obligatory upon the department to correctly record the date of birth of an employee in the service book. While recording the date of birth they have to follow the prescribed procedure. The entry made in the service book is treated as

final in terms of Rule 38(2)(f). Rule 38(2)(f) also states that 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.

15. In the instant case, the school leaving certificate was issued by the School wherein the petitioner was admitted. It appears that inadvertently said date of birth was wrongly recorded in the school record and on the basis of same respondent Nos.1 and 2 have recorded his date of birth as 29/08/1964. Though the petitioner had filed an affidavit it was not considered by the respondent Nos.1 and 2.

16. Learned Counsel for the respondent submitted that the application filed at the fag end is not to be considered. He placed his reliance on the State of Madhya Pradesh and ors. (supra). After going through the facts of the cited case, it appears that in the cited case birth date was recorded as 01/06/1942. The petitioner was appointed to the post of Police Constable in the year 1965 and said position was continued till 1990. Here petitioner had immediately after joining the service filed an affidavit and made a request thereafter after 4 years and 11 months i.e. within time he had filed an application. Therefore, the

judgment on which the respondents relied upon is no applicable in the present case.

17. This Court in the case of *Ashok s/o Pralhad Meshram Vs. Head Master, Zilla Parishad High School, Palandur (Chauras) and anr. 2014(6) Mh.L.J. 590* held that the appellant proved his correct birth date. Mistake in not making application within the five years on the part of appellant cannot be utilized to punish him for all times to come when in law his date of birth is 07/02/1959. Correction permitted to be carried out in all relevant records. It is held by the Court that there was an obvious clerical mistake in entering the birth date and it can be corrected. This Court in *Shriniwas s/o Prabhakar Karve Vs. State of Maharashtra and ors. 2017(3) Mh.L.J. 745* also held that the excuse for not considering the request of the petitioner in respect of a correcting his date of birth would not be available to the State Government. After having the considered material the conclusion is that incorrect date of birth was recorded in the service book of the petitioner without any fault of his part but due to want of care on the part of some other person though the petitioner has submitted the representation for correction of the said date of birth within the stipulated period of five years.

18. After having considered the facts in the present case, admittedly the petitioner had filed an application within five years

supported with birth record maintained by the Municipal Council, Hinganghat during their day to day activities. The date of birth which recorded in the record of Municipal Council is 19/02/1966 which was immediately registered with the Municipal Council on 20/02/1966. The material is sufficient on record to show that in school leaving certificate the birth date of the petitioner was wrongly recorded and, therefore, he has made out the case to show that the incorrect date of birth was recorded in the school leaving certificate and in his service book without his fault but due to want of care on the part of some other person. Though he had submitted the representation for correction of the said date of birth within the stipulated period of five years his date of birth was not corrected and wrongly his representation was rejected. The action of respondent No.1 rejecting his representation is illegal and without considering Rule 38(2)(f) as well as Government Resolution dated 03/03/1998, therefore, the said communication deserves to be set aside.

19. In the result, we pass the following order :

- (a) The writ petition is allowed.
- (b) The respondent Nos.1 and 2 are directed to record the date of birth of the petitioner in the service book as

19/02/1966 and in all other service records by correcting the service record of the petitioner.

(c) The petitioner shall be considered to have retired on attaining the age of superannuation on 28/02/2024.

(d) The respondents are directed to take necessary steps to extend the service of the petitioner till 28/02/2024 considering his birth date as 19/02/1966. On his reinstatement the petitioner would not be entitled to salary from 01/09/2022 till such reinstatement which should be effected within one week of receipt of copy of the judgment. The petitioner would be entitled to continuity of service for all other purposes.

20. Rule is made absolute in the aforesaid terms. There will be no order as to costs.

(URMILA JOSHI-PHALKE, J.)

(A.S. CHANDURKAR, J.)

**Divya*