

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Subrata Talukdar

And

The Hon'ble Justice Supratim Bhattacharya

FMA 1120 of 2021

With

CAN 1 of 2021

Pardeshi Jeswara

-Vs

Union of India & Ors

For the Appellant : Mr. Subir Sanyal
Mr. Surendra Kumar Sharma.

For the Respondents : Mr. Nilay Sengupta
Ms. Sujata Mukherjee

Heard On : 05.04.2023

Judgement Delivered On : 27.06.2023

Supratim Bhattacharya, J.:-

- 1.** The instant appeal has been preferred by the appellant /writ petitioner being aggrieved by the judgement and order dated 25.01.2021 passed in WPA 4611 of 2018 with CAN 1 of 2020.
- 2.** The challenge in the writ petition was thrown by the present appellant/ writ petitioner to a letter of superannuation dated 04.05.2017 issued by the Kolkata Port Trust, whereby informing the writ petitioner that he will retire from the trustees service with effect from 30.04.2018 during the afternoon, on attaining the age of superannuation.
- 3.** The appellant was the writ petitioner in the writ petition while the respondents herein were the respondents in the writ petition.
- 4.** Hon'ble Single Bench recorded the submissions placed by the appearing parties and, *inter alia*, directed as follows while disposing of the writ petition:

“... By an order dated November 19, 2019 passed in WP 4611 W of 2018 This Court directed the Kolkata Port Trust to arrange for an ossification test of the writ petitioner to determine his actual age. It is submitted that the SSKM Hospital has conducted the ossification test but has not circulated the report between the parties.

In those circumstances the Superintendant of SSKM hospital shall, within a period of 7 days from the receipt of the server copy of this order, make available the result of the

ossification test and report to Kolkata Port Trust as well as the writ petitioner positively and mandatorily.”

- 5.** The fact of the instant lis is that the appellant /writ petitioner had joined the Kolkata Port Trust on 26.09.1983 as an employee and has superannuated on 30.04.2018 that is after serving for 35 years. The date of birth as recorded in the service book has not been altered by the respondent during such period of service of the appellant/writ petitioner and at the fag end of his service the respondents have disputed the date of birth of the appellant/writ petitioner.

Earlier vide an order dated 03.01.2018 passed by an Hon’ble Single Bench in writ petition No. 30057 (W) of 2017 the respondents herein were directed to rely upon the service records of the appellant/writ petitioner and also the other relevant documents produced by the appellant writ petitioner in support of his claim.

Thereafter by an order dated 06.09.2019 in writ petition 4611 (W) of 2018 another Hon’ble Single Bench of this Hon’ble Court was pleased to observe that “ in the entire records of the Kolkata Port Trust, in the Aadhar Card, PAN Card, Voters Identity Card as well as in all other documents of Kolkata Port Trust, the date of birth of the writ petitioner has been recorded as April 8, 1963.”

In spite of the aforementioned observations by the two Hon’ble Single Benches the opposite parties that is Kolkata Port Trust have not paid heed on

the contrary the trust has stuck to their own agenda and has superannuated the appellant writ petitioner during the afternoon of 30.04.2018. This has given rise to the impugned writ petition.

The crux of the instant lis is as to whether the impugned Judgement and Order passed by the Hon'ble Single Bench, only directing the hospital to submit the ossification test report, is in accordance with law or not.

- 6.** The Ld. Counsel appearing on behalf of the appellant/ writ petitioner has submitted during his exhaustive argument that the respondents have compelled the appellant to be superannuated from the said service of the Port Trust with effect from 30.04.2018 on the basis of such a date of birth which is not recorded in the service record of the appellant/ writ petitioner. The Learned Counsel has further submitted that the Hon'ble Single Bench has failed to appreciate the fact that the respondent authorities cannot be permitted to raise a dispute as regards to the correctness of the entries in the service register of an employee at the fag end of his service life.

The Ld. Counsel has further submitted that the permission to reopen the accepted date of birth of an employee specially on the eve or shortly before the superannuation would be an impetus to produce fabricated record. He has further submitted that it is not at all correct to direct the appellant/ writ petitioner to undergo ossification test to prove his age after 35 years of his service in the Port Trust. He has further

submitted that ossification test is not a conclusive proof of age but it is not more than an opinion. Ld. Counsel has further submitted that unilateral exercise of correcting age entered in the service book on perception that error was being corrected, without granting opportunity of hearing to the appellant, at the fag end of his service tenure is not at all permissible. The Ld Counsel banking upon the aforesaid facts and circumstances has prayed for rejection of the impugned order.

- 7.** The Ld. Counsel appearing on behalf of the respondents has reiterated the point that the ossification test which has been directed by the Hon'ble Single Bench is the correct step for assessing the age of an employee. The Ld. Counsel has supported the impugned judgement passed by the Hon'ble Single Bench relying upon the fact that while examining the case on the basis of available documents as produced by the petitioner as well as the documents available in office records, it is seen that different age was recorded in respect of the writ petitioners date of birth on various occasions. Some times the year of birth of the writ petitioner has been recorded as 1958 while on other occasions it has been recorded as 1963 or 1969. The Ld. Counsel has further submitted that the Kolkata Port Trust authority has issued a circular dated 18.01.1990 wherein it has been categorically mentioned as follows:

“In the cases where no supporting document is available against date of birth already recorded (un-tampered) on the service sheet of an

employee, un-tampered recording of age of Service Sheet/ Kalamaju sheet may be accepted as the age of the concerned employee". It was also mentioned that "... Before accepting the age recorded in the Service Sheet/Kalamaju sheet without basis, the concerned Department should confirm through registrar, Dock Hospital whether the age of the same persons was assessed any time earlier."

Banking upon the fact that at the time of medical examination during the year 1983 and upon the recording of the age in G-53 form the Ld. Counsel appearing on behalf of the respondents submitted that the order passed by the Hon'ble Single Bench is in accordance with law.

- 8.** On going through the impugned order it reveals that the Hon'ble Single Bench has directed the Superintendent of the SSKM Hospital to make available the result of the ossification test and report to the Kolkata Port Trust and the writ petitioner within 7 days from receipt of the server copy of this order.

From the impugned order it also reveals that vide order dated 19.11.2019 the Hon'ble Single Bench in the said writ petition had directed the Kolkata Port trust to arrange for an

ossification test of the appellant/ writ petitioner to determine his actual age.

Where there is controversy /dispute as regards to age and in this instant case it is the moot point for consideration, ossification test provides a pathway towards determining the just conclusion. In the instant case the Hon'ble Single Bench has directed for collection of the ossification test report. The appellant/ writ petitioner has also been granted liberty to take further steps pursuant to receipt of the ossification test report.

Having heard the parties and considering the material placed, the attention of this Court is drawn to a reasoned order of the respondent, Kolkata Port Trust passed by its Deputy Chairman on 20th March 2018. The operative portion of the reasoned order is as follows:

“And whereas, while examining the case on the basis of available documents as produced by the petitioner as well as available in office records, it is seen that his age was recorded differently on various occasions and his year of birth was recorded sometime as 1958, 1963 and 1969 etc.

Kopt earlier issued a Circular on 18.1.1990 wherein it was categorically mentioned as follows:

In the cases where no supporting document is available against date of birth already recorded (untampered) on the service sheet of an employee untampered recording of age of service sheet / Kalamaju sheet may be accepted as the age of the concerned employee” It was also mentioned that “... before accepting the age recorded in the service sheet/ kalamaju sheet without basis the concerned Department should confirm through Registrar, Dock Hospital whether the age of the same person was assessed any time earlier”

And whereas, in the instant case the untampered initial age record is as per G-53 Form, where his age was assessed medically “appears to be about 25 years of age on 07.04.1983” This is the untampered initial age recording in the records maintained by KoPT. Subsequently, when Service Book was issued to the petitioner a different age was recorded without having any basis;

And whereas, as per provision of Fundamental Rules, alteration of date of birth can be made, if it is clearly established that a genuine bona fide mistake has occurred. The age record as per medical assessment (G-53 Form)

appears to be the original and initial document and a bonafide mistake was occurred while subsequently Service Book was provided to the petitioner sometime during his service life;

And whereas, this is a case of bona fide mistake and hence, that “bona fide mistake” should not be given cognizance for the purpose of determining of the age of superannuation in KoPT. Since all the documents submitted by the petitioner viz, Voter ID card, PAN Card, Aadhaar Card, ID Card are post dated i.e., much after 1983 therefore, the age recording of these documents should have no impact in determining the age of superannuation of the petitioner, who had no such valid documents at the time of medical assessment occurred in 1983. He should be superannuated after attaining 60 years of age on the basis of medical assessment of age held in 1983, prior to his appointment and accordingly, the date of superannuation falls on 30.04.2018(A.N.);

And therefore on the basis of the above KoPT Circular and Fundamental Rule, Shri Pardeshi Jeswara should superannuate from service after attaining 60 years of age on the basis of medical assessment held in 1983 prior to this appointment;

And accordingly, the date of superannuation of Shri Jeswara falls on 30.042018(A.N.) ”

In view of the above mentioned reasoned order this Court finds that several factual aspects have arisen with regard to the assessment of the true age of the appellant/writ petitioner. It is not disputed by the appellant/writ petitioner that his year of birth has been differently recorded with his employer that is KoPT as 1958, 1963 etc., as reflected by the reasoned order. It is also an admitted official position as stated in the Circular dated 8th of January 1990 of the KoPT that acceptance of an age recorded in the servicesheet/Kalamaju Sheet without basis should be confirmed through Registrar, Dock Hospital. It also transpires that the document submitted by the appellant/writ petitioner in the form of Voter Card, PAN Card, Aadhar Card, Id Card are post-dated that is issued much after 1983, on which the age is recorded in the service book.

The aforesaid factual aspects are not challenged by the appellant/writ petitioner who only contends that the unilateral

action of the employer/KoPT to alter the age at the fag end of his service career is legally impermissible.

It is by now trite in law that a writ Court is not the forum for reconciling divergent factual issues which would normally lie in the domain of the Civil Court. However, since divergent facts have emerged connected to age of the writ petitioner, the only method of reconciliation in the facts of this case available to a writ Court is by directing an ossification test.

To the mind of this Court a result of the ossification test with a margin of error provided would be an useful tool in assisting the adjudication since both the parties have come up with hugely divergent facts connected to the year of birth of the appellant/writ petitioner.

Appropos, such discussion this Court is respectfully of the view that the pronouncement reported in (2017) 2 SCC 210 at Paragraph 32 thereof by the Hon'ble Apex Court to the facts and circumstances of that case arises out of the conclusive position of an ossification test in relation to a charge under the Juvenile Justice Act. This Court finds in the facts of this case that the ossification test

directed by the Hon'ble Single Bench having regard to contrary evidence produced by the employer/KoPT and appellant/the writ petitioner can be the only available useful tool to assist in the further adjudication of the dispute.

Equally, this Court finds that the ossification test puts to rest the dispute arising out of the purported attempt by the employer to unilaterally correct the age of the employee/writ petitioner/appellant in the service book although it stands recorded in the reasoned order dated 30th of March, 2018(supra). The appellant/writ petitioner did not participate in the hearing in spite of a notice served upon him. To such extent the principle of audi alteram partem as underscored in the reported authority of (2022) 6 SCC 211 stands addressed by the direction of the Hon'ble Single Bench granting both parties the opportunity to address the Court on the basis of the ossification test.

In view of the aforementioned fact the result of such ossification test is to be finally placed before the Hon'ble Single Bench for further adjudication.

Accordingly, the order of the Hon'ble single Bench stands modified to the extent that the result of the ossification test shall be now placed before the Hon'ble Single Bench in WPA 4611 of 2018 which now stands remanded to the Hon'ble Single Bench for further hearing, which will take appropriate decision on the basis of further facts.

FMA 1120 of 2021 with **CAN 1 of 2021** stands accordingly **disposed of.**

Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.

Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I Agree.

(Subrata Talukdar, J.)

(Supratim Bhattacharya, J.)