

WPO/172/2017
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

JUGUNU LAL KORI & ORS.
VERSUS
STATE OF WEST BENGAL & ORS.

For the Petitioners : Mr. Soumya Majumdar, Advocate

Mr. Victor Chatterjee, Advocate

For the Respondents : Mr. Partha Bhanja Chowdhury, Advocate

Mr. Ravi Kumar Dubey, Advocate

Heard on : 9th January, 2023.

Judgment on : 23rd March, 2023.

RAJA BASU CHOWDHURY, J.:

1. The present writ application has been filed, *inter alia*, challenging an Award dated 7th June, 2016 passed by the 7th Industrial Tribunal, Kolkata.
2. The substituted petitioners are the legal heirs of the original petitioner, who had died during the pendency of the writ application. The original petitioner in the aforesaid writ application claims to be an employee of the respondent no.3.
3. It is the original petitioner's case that at the time of entry into the service, his date of birth was recorded as 1st January, 1956. It is

stated that the original petitioner is an illiterate person. He all along proceeded on the premise that the aforesaid date of birth was recorded in his service book. Notwithstanding the aforesaid on 2nd April, 2008, the original petitioner's service was terminated by way of superannuation, thereby curtailing his service career by six years.

4. The original petitioner being illiterate could not apprehend the ill motive on the part of the respondent no.3 as regards manipulation of his date of birth. Subsequently upon appreciating that his date of birth had been altered in the service book, the original petitioner with the help of the union lodged a complaint with the Labour Commissioner, Government of West Bengal on 10th August, 2010. The conciliation having failed, the appropriate Government was, *inter alia*, pleased to refer the dispute for adjudication before the 7th Industrial Tribunal, Kolkata, by framing the following issues.

“1. Whether termination of service of Sri Kalicharan Kori by way of superannuation with effect from 02.04.2008 is justified?”

2. To what relief, if any, is the worker entitled?”

5. Before the Tribunal the original petitioner filed his statement of claim/written statement and also adduced both oral and documentary evidence. The aforesaid proceeding was contested by the respondent no.3 by filing written statement and by adducing both oral and documentary evidence.

6. On contested hearing, the learned 7th Industrial Tribunal was, inter alia, pleased to hold that the original petitioner was lawfully superannuated and as such the reference was not maintainable and accordingly, decided the issue no.1 against the original petitioner. Consequentially the Tribunal refused to grant any relief in favour of the original petitioner. Being aggrieved, the instant writ application has been filed. During pendency of the writ application the original petitioner having died, his death has been recorded and in his place and stead, the present petitioners who claim to be the legal heirs of the deceased petitioner, have been substituted.
7. Mr. Majumdar, learned advocate representing the petitioners, submits that the date of birth of the original petitioner as recorded by the respondent no.3 is 1st January, 1956. He says that the respondent no.3 is covered by the provisions of Employees' State Insurance Act (in short, "the said Act") and the original petitioner being otherwise entitled to the benefits under the said Act, was issued an Identity Card, in terms of Regulations 17 and 95A of the Employees' State Insurance (General) Regulation, 1950, (hereinafter referred to as, "the said regulation"). Placing reliance on regulation 17 of the said regulation, he submits that the aforesaid Identity Card is a statutory document issued as per the said regulation.

8. By further drawing attention of this Court to a pension payment order, issued by the Employees' Provident Fund Organisation which is appearing at page 42 of the writ application, he submits that in ordinary course, pension papers are processed through the employer and the date of birth disclosed in the pension record is based on service record maintained by the employer. By referring form 10C of the Employees' Pension Schemes, 1995, it is submitted that the particulars in such form, are in ordinary course filled up by the employee and it is only on the basis of the certification of the employer, that the same are forwarded to the Employees Provident Fund Organisation.
9. The management of the respondent no.3 had issued the superannuation notice by ignoring the date of birth of the original petitioner as recorded in the service book. By referring to the superannuation notice, it is submitted that such superannuation notice did not indicate the date of birth of the original petitioner and as such, the original petitioner upon receipt of the aforesaid notice, had no knowledge that the respondent no.3 had issued such notice dehors the recordings made in the service book. Subsequently when such illegality was detected the matter was referred to the Tribunal on the failure of conciliation, and the original petitioner had filed a written statement and had, *inter alia*, prayed for the following reliefs:-

“(i) That the termination order issued by the company is illegal, unlawful, inoperative and violative of principle of natural justice;

(ii) The workman be entitled to get all benefit including wages from the period from 2.4.2008 to 2.4.2014 with consequential benefit;

(iii) And/or such other order or orders as deem fit and proper.”

10. In course of hearing before the Tribunal the identity card issued by the ESI Authorities and the pension payment order issued by the Employees Provident Fund Organisation were marked as exhibits. While being cross-examined the management witness was confronted with both the identity cards, one issued by the ESI Authorities and the other issued by the Employees Provident Fund Organisation, the management witness had accepted both the documents and did not dispute the same. The said witness, however, could not produce the service records which was prepared at the time of the original petitioner's entry in service. The records prepared ordinarily at the time of entry in service, cannot be altered unless good reasons are shown. It is the original petitioner's case, that his service records all along recorded his date of birth as 1st January, 1956 and that original petitioner all along proceeded on the premise, that his date of birth had never been altered. He says that although the original petitioner had sought for an age proof certificate from the

management, in the year 1992, however, in view of the identity card issued by the ESI Authorities in the year 1997, the certificates issued by management, and recordings made therein loses much of its significance.

11. It is submitted that the original petitioner had not filed any proceeding for correction of his date of birth but it is a case for premature termination on retrenchment. In this context reliance is placed on section 2(oo) of the Industrial Disputes Act 1947, (in short the said Act), which defines retrenchment.
12. He submits that the Tribunal had erred in overlooking and ignoring the vital piece of evidence, forming exhibits 1 and 2 which obviously had been issued on the basis of the service records maintained by the respondent no.3, and in placing reliance on the age proof certificates issued by the management which had no basis, the management's witness also failed to demonstrate the basis on which the certificates had been issued.
13. The original petitioner had within a reasonable period, immediately after becoming aware with regard to the illegalities committed by the respondent no.3, had approached the Labour Commissioner, whereupon issues were formulated and referred to the Tribunal for adjudication.
14. The Tribunal had acted with material irregularity in conducting the proceedings and in adjudicating the dispute raised by the original

petitioner, which were formulated and referred to the Tribunal for adjudication. The Tribunal failed to exercise jurisdiction, in not deciding the disputes by, *inter alia*, holding the petitioner having reached the age of superannuation, the employee and employer relationship having come to an end, no application for correction of age is permissible.

15. According to Mr. Majumdar, the Tribunal posed unto itself a wrong question and also ignored the reference made before it. By once again drawing attention of this Court to the order of reference dated 7th April 2014, which is recorded in the Award, it is submitted that Tribunal was required to adjudicate whether the termination by way of superannuation with effect from 1st of April, 2008 was justified or not. Despite the aforesaid, the tribunal simply returned a finding that the reference is not maintainable, thereby refusing to adjudicate the same, and has thereby failed to exercise jurisdiction vested in him. He submits that this is a case of premature retirement, which is akin to retrenchment. By placing reliance on a judgment delivered by this Hon'ble Court in the case of ***Hindusthan Paints Supply Company v. State of West Bengal and Ors.***, reported in **(1998) 1 CHN 541**, it is submitted that this Hon'ble Court while considering a similar case, returned a finding that premature retirement is akin to retrenchment and is amenable to reference under section 10 of the said Act.

16. He also places reliance on a judgment delivered by the Hon'ble Gauhati High Court, in the case of **Sri Binda Prasad Singh v. Presiding Officer, Labour Court, Dibrugarh and Anr.**, reported in **2003 LLR 545**, in support of his contention that the retirement of workman by the management before the date of superannuation, not only amounts to termination of service but such dispute of termination squarely falls within the purview of adjudication under the provisions of Industrial Disputes Act, 1947. He then relies on the judgments delivered by the Hon'ble Supreme Court in the case of **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D. ED) & Ors.**, reported in **(2013) 10 SCC 324** and in the case of **Jayantibhai Raojibhai Patel v. Municipal Council, Narkhed & Ors.**, reported in **(2019) SCC OnLine 1071**, in support of his contention that whenever termination were held to be illegal, payment of back wages ought not to be denied.

17. In the given facts, it is submitted that the award passed by the Tribunal cannot be sustained and should be set aside and consequentially the petitioners should be allowed to get adequate relief in the form of back wages payable to the original petitioner. He further submits since the original petitioner, not only crossed the actual age of superannuation but also died during the pendency of the writ application, back wages ought not to be denied to the legal heirs of the original petitioner.

18. *Per contra*, Mr. Partha Bhanja Chowdhury, learned Advocate representing the respondent no.3 submits that the original petitioner all along, since his entry in service and especially since 1986, was aware with regard to his date of birth as recorded in the service book. In the year 1986, at the instance of the original petitioner, the respondent no.3 had certified his date of birth. Again in the year 1992, a similar certification was issued.
19. By drawing attention of this Court to pages 71 and 72 of the writ application, it is submitted that the original petitioner during his cross examination was confronted with the certificates issued in the year 1987, as also in the year 1992. Although the original petitioner had denied receipt of such certificate issued in the year 1987, the receipt and contents of the certificate issued in the year 1992 had not been denied.
20. By referring to exhibit-B, which is a certificate dated 15th May, 1987, he submits that the original petitioner duly acknowledged and accepted the date of birth as recorded therein. The original petitioner had also acknowledged and accepted another age proof certificate in the year 1992. By drawing attention of this Court to pages 108 and 109, of the writ application, he submits that from the aforesaid certificates being Exhibits-B and D, it would be apparent that the date of birth of the original petitioner was 1st January, 1950.

21. From the aforesaid, it also appears that all along the original petitioner was aware with regard to his date of birth and at no point of time raised any objection. Subsequently in the year 2008, the original petitioner was issued superannuation notice. Even after receipt of the superannuation notice, the original petitioner did not object and had accepted his superannuation and the benefits arising therefrom. It is only subsequently in the year 2010, the original petitioner lodged a belated complaint.
22. It is submitted that the original petitioner had waived his right, if any, and there subsists no employee and employer relationship, for the dispute to be referred to the Tribunal. The original petitioner while being cross-examined had stated that his application is for correction of his date of birth and, as such, there is no irregularity on the part of the Tribunal in proceeding on the basis of the case as made out by the original petitioner.
23. He says that ordinarily no correction of date of birth is permissible at the fag end of the service career and in the instant case, the original petitioner had already been superannuated from service. In support of his aforesaid contention, he places reliance on judgments of the Hon'ble Supreme Court in the case ***Burn Standard Co. Ltd. and Ors. v. Dinabandhu Majumdar & Anr.***, reported in **(1995) 4 SCC 172**, and in the case of ***State of Maharashtra & Anr.***

v. Gorakhnath Sitaram Kamble & Ors., reported in **(2010) 14 SCC 423**.

24. According to Mr Chowdhury the onus was on the original petitioner to come forward and demonstrate his actual date of birth. The original petitioner having not come forward and having accepted his date of birth as recorded in the service record, had waived his right, if any. He further submits that once an employee and employer relationship ceases by way of superannuation, there is no question of having one's date of birth corrected. In support of the aforesaid proposition, he relies on a judgment of the Hon'ble Court in the case of ***Rabindra Nath Banerjee v. Union of India & Ors.***, reported in **(2002) 93 FLR 223 (Cal)**.

25. I have heard the learned advocate appearing for the respective parties and considered the materials on record. I find that the Tribunal had been directed to adjudicate whether the termination of service of Kalicharan Kori by way of superannuation, with effect from 2nd April 2008 is justified and to what relief, if any, is the worker entitled. From the records of the proceedings before the tribunal, it would be apparent that the original petitioner had joined the services in the year 1977 and was made permanent sometimes in the year 1984. A notice of superannuation was issued in 2008, notifying his superannuation with effect from 1st April 2008. Although the original petitioner had

initially accepted his superannuation, yet later he raised a dispute, which was referred to the Tribunal for adjudication. I find that the Tribunal by the impugned award has concluded that since the original petitioner was superannuated, the original petitioner had ceased to be a workman within the meaning of section 2(s) of the said Act, and as such could not raise a dispute within the meaning of Section 2(k) of the said Act and had consequentially held the order of reference is not maintainable. To counter the aforesaid finding, Mr. Majumdar learned advocate representing the petitioner has claimed the aforesaid reference to be a case of illegal termination from service. He says that while referring the dispute between the parties to the Tribunal, the appropriate Government, had categorically framed issue no.1 which in no uncertain terms called upon the Tribunal to ascertain whether the termination order, issued by the company was illegal or unlawful or inoperative or violative of the principle of natural justice. I find that it has been strenuously argued that the Tribunal had posed unto himself a wrong question and had ignored the reference made to it. In this context, it would be relevant to refer to the definition of the workman under section 2(s) and retrenchment under section 2(oo) from the said Act, the same are extracted below:

“Section 2(s) *"workman" means any person (including an apprentice) employed in any industry to do any manual,*

unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957).

or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.”

“Section 2(oo) *“retrenchment” means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-*

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

[(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]

(c) termination of the service of a workman on the ground of continued ill-health;]”

26. From the aforesaid definitions, it would be apparent that premature retirement can also be considered as retrenchment as retrenchment includes termination by the employer of the service of the workmen for any reason whatsoever other than punishment inflicted by way of disciplinary action but the same does not include either voluntary retirement or retirement on reaching the age of superannuation or termination by way of non-renewal of the contract or termination of service on the ground of continued ill health. From the reference made to the Tribunal it would, thus, be apparent that the Tribunal was required to consider whether the workman had been terminated by way of retrenchment.

27. The judgment relied on by Mr. Majumdar in the case of ***Hindusthan Paints Supply Company.***, (supra) supports the

above view. It, however, appears that the original petitioner accepted the superannuation notice and all consequential benefits thereon. The aforesaid factual finding has been returned by the tribunal which remains unchallenged.

28. I may add that the Ashim kumar Ghosh, an officer of the respondent no.3, has claimed in his affidavit in chief, that prior to engaging the original petitioner, in the year 1977, he was sent for medical examination to the company's doctor, who after due examination, recorded the date of birth of the original petitioner as 1st January 1950. It is, on the basis of the aforesaid recording that the original petitioner was appointed as a temporary workman. Subsequently, he was appointed against a permanent vacancy on 24th September 1984 and once again prior to making him permanent, he was sent for medical examination, after medical examination his date of birth was recorded as 1st January 1950.

29. At the instance of the original petitioner, a certificate disclosing the date of birth of the original petitioner was issued by the respondent no.3, in the year 1987, which is marked as exhibit-B. The original petitioner's application addressed to the respondent no.3, praying for an age proof certificate has also been exhibited and marked exhibit-C. Subsequently in the year 1992, the original petitioner once again approached the respondent praying for age

proof certificate, which was issued to him on 19th October, 1992, the same is marked as exhibit-D. In both such certificates dated 15th May 1987 and 19th October 1992, being exhibits B and D respectively, the date of birth of the original petitioner had been mentioned as 1st January, 1950. The aforesaid certificates are contemporaneous documents and the same remained unchallenged for more than a decade. The notice of superannuation dated 29th February 2008, has also been exhibited, which is marked as exhibit-F. The said document has not only been acknowledged and accepted by the original petitioner but the same was acted upon and consequent upon superannuation, the original petitioner had also accepted his retiral dues.

30. After more than two years therefrom, sometimes in the month of April 2010 the original petitioner through his advocate lodged a claim of wrong recording of his date of birth. The communication exchanged between the Swapam Kumar Ghosh, advocate for the original petitioner and the respondent no.3, have also been exhibited in the present proceedings. Upon scrutiny by the tribunal, the identity card issued by the Employees' State Insurance Corporation which was exhibited as exhibit 1 and the pension payment order issued by the Provident Fund Authorities reveals that the year of birth of the original petitioner had

been mentioned as 1956. The tribunal upon taking into consideration all aspects of the matter, inter alia, including the exhibits, evidence adduced, concluded that the original petitioner having accepted his superannuation and having received his entire superannuation benefits, the claim of the original petitioner was barred by the principle of waiver and acquiescence. I find that the Tribunal also took note of the age proof certificates, and the factum of the original petitioner being made aware about his date of birth as recorded in the service records.

31. There is, however, no cogent explanation as to why no steps were taken by the original petitioner seeking alteration/correction of his date of birth during his service tenure. The attempt made by the advocate for the original petitioner to impeach such certificates, by contending the respondent no.3 had held back best evidence in the form of service book is unacceptable. Since the original petitioner had been kept informed of his date of birth, he ought to have sought for correction of the same contemporaneously if any error was detected. For more than 18 years, no steps had been taken by the original petitioner praying for correction of his date of birth. I find that the definition of retrenchment specifically excludes retirement from service on reaching the age of superannuation. Since the original petitioner had been superannuated and since such superannuation was

accepted by the original petitioner the same cannot tantamount to retrenchment, within the meaning of Section 2(oo) of the said Act, and as such cannot be considered to be illegal. The tribunal had categorically arrived at finding that the original petitioner had accepted his superannuation and the consequential benefits without raising any objection.

32. In the light of the aforesaid, the judgments cited by Mr. Majumder in the case of **Sri Binda Prasad Singh**, (supra) does not support the original petitioner's case. The aforesaid judgment delivered by the Hon'ble Gauhati High Court is factually distinguishable. In the said case the management of the workman while relying on an agreement known as "staff recruitment" (minimum benefit) Scheme which provided that a clerical staff shall retire at the age of 58 years, unless his service is extended by the management, was issued a notice of superannuation dated 15th November, 1991, informing that the workman would attain age of 58 years during January 1992 and that he would retire from service with effect from 1st February, 1991. The workman in the said case being aggrieved by the notice of superannuation wrote back to the management that he would reach the age of 58 years on 25th January 1993 and not in January 1992. It is in the context of the facts of the case that the Hon'ble Guahati Court had returned a finding that retirement before the age of

superannuation would tantamount to premature retirement or a forcible retirement and the Hon'ble Court while observing as such in paragraph 17 and in paragraph 18 thereof was, inter alia, pleased to observe as follows:

***“17.** A bare reading of section 2A clearly shows that retirement on superannuation is per se not covered by section 2A. That is to say, an industrial dispute relating per se to retirement cannot be raised by the individual workman, who stands retired or is sought, to be so retired. What is, however, of utmost importance to note is that a dispute under section 2A arises between an individual workman and his employer. Though retirement on superannuation is not same as termination of service, the fact remains as in a case of present nature, that when the workman disputes the age of his superannuation as fixed by the employer, what basically the dispute, which so arises, relates to forcible termination of service by the employer before the date of superannuation. Viewed from this angle, the dispute in the instant case is a dispute of termination of service and it, therefore, squarely falls within the purview of section 2A and, hence, the reference is not bad in law.*

***18.** In other words, whether retirement on superannuation amounts to termination of service in a given case depends on the facts of the case and it cannot be laid down as an invariable rule that retirement from service will never amount to termination of service. If the date of superannuation falls in dispute, then, the*

retirement of a workman by his management will amount to termination of service before the date of superannuation arrives.”

33. As such whether retirement or superannuation amounts to termination of service in a given case would depend upon the facts of the case.

34. I find that the original petitioner in the instant case stand on a different footing. Here the original petitioner had accepted his superannuation. The aforesaid judgment, as such, does not assist the petitioners. The two other judgments relied on by Mr. Majumder delivered by the Hon'ble Supreme Court in the case of **Deepali Gundu Surwase** (*supra*) and **Jayantibhai Raojibhai Patel** (*supra*) also does not assist the petitioners. The aforesaid judgments are distinguishable in the facts of this case. Both the aforesaid judgments relate to entitlement of back wages on reinstatement by the Tribunal. Admittedly in this case the original petitioner had accepted his superannuation including benefits thereon. The original petitioner had never questioned recording of his date of birth while in service. The original petitioner did not produce any unimpeachable document to establish his date of birth. There is no dispute with the proposition of law laid down in the judgments relied on by Mr. Majumdar. It, however, must be remembered that a judgment is an authority for what it decides. A

little variation in facts can alter the outcome and the very the basis of the judgement.

35. The Tribunal rightly concluded that the original petitioner was aware that his date of birth was recorded as 1st January 1950. Therefore, the superannuation was lawful and justified. The finding rendered by the Tribunal that consequent upon superannuation, the original petitioner no longer remains a workman within the meaning of Section 2(s) of the said Act, has to be read in the light of the other observations made by the Tribunal. Once the superannuation notice is upheld and the original petitioner is deemed not to have been retrenched, the original petitioner loses his right to maintain the reference or to be entitled to any relief. I do not find any illegality on the part of the learned Tribunal in dismissing the reference, I, however, modify the answer to the first issue by, inter alia, declaring that termination of original petitioner was lawfully made and his superannuation from service by the respondent no.3 was justified. Since, the superannuation is held to be lawful, the petitioners are not entitled to any other benefits including back wages for the period from 2nd April 2008 to 2nd April 2014 or for any other benefits, in any form.

36. With the aforesaid observations the writ application is disposed of.

37. There shall be no order as to costs.

38. Urgent certified copy of this order and judgment, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with all necessary formalities.

(RAJA BASU CHOWDHURY, J.)

sm/akg/