

State Of U.P. And Anr vs Shiv Narain Upadhyaya on 28 July, 2005

Equivalent citations: AIR 2005 SUPREME COURT 4192, 2005 (6) SCC 49, 2005 AIR SCW 5179, 2005 LAB. I. C. 3613, 2005 ALL. L. J. 3445, (2005) 6 ALL WC 5363, (2005) 3 KER LT 754, (2005) 33 ALLINDCAS 116 (SC), (2006) 2 ALLMR 8 (SC), 2005 (3) SERVLJ 113 SC, 2005 (5) SCALE 678, 2005 (33) ALLINDCAS 116, 2005 (7) SRJ 141, (2005) 6 JT 444 (SC), 2005 (6) JT 444, 2005 (5) SLT 557, 2006 (2) ALL MR 8 NOC, 2005 SCC (L&S) 794, (2006) 1 MAD LW 568, (2005) 5 SCJ 654, (2005) 8 SERVLR 197, (2005) 5 SUPREME 194, (2005) 3 CIVILCOURTC 143, (2005) 3 SCT 665, (2005) 106 FACLR 910, (2005) 3 LAB LN 1093, (2005) 5 SCALE 678, (2005) 3 ESC 451, 2006 (1) AIR JHAR R 83

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Bench: Arijit Pasayat, H. K. Sema

CASE NO.:

Appeal (civil) 5489 of 2003

PETITIONER:

State of U.P. and Anr.

RESPONDENT:

Shiv Narain Upadhyaya

DATE OF JUDGMENT: 28/07/2005

BENCH:

ARIJIT PASAYAT & H. K. SEMA

JUDGMENT:

J U D G M E N T ARIJIT PASAYAT, J.

State of Uttar Pradesh and Executive Engineer, Sharda Sahayak Khand-36, Jaunpur, U.P. calls in question legality of the judgment rendered by a Division Bench of the Allahabad High Court holding that the respondent's date of birth was 1.9.1939 and not 1.9.1930 as claimed by the appellant-State.

Factual background in a nutshell is as follows:

The respondent-employee was engaged as Class IV employee on 2.1.1972. In the service records the date of birth was indicated to be 1.9.1930. By order dated 31.1.1991 the Executive Engineer-appellant no.2 intimated the respondent-employee

that he had superannuated on 30.9.1990 having completed 60 years of age. It was indicated that by mistake he was allowed to work for three months more and paid, and, therefore, direction was given to refund the amount. The said order dated 31.1.1991 was challenged by the respondent in a writ petition. His stand was that according to the school records his date of birth was 1.9.1939 and without any opportunity he had been pre-

maturely retired nine years earlier. It appears that the High Court directed production of the service records. By the impugned order dated 11.10.2002 the High Court allowed the writ petition holding that the State had failed to produce the service record in spite of opportunities granted and, therefore, the petitioner's stand that his date of birth was 1.9.1939 was accepted.

In support of the appeal, learned counsel for the appellant submitted that the High Court's view that service record was not produced is clearly erroneous. On the contrary along with affidavit dated 19.9.2002, copy of the service book of the respondent-employee was filed. The High Court did not take note of the said record. The document on which the respondent-employee placed reliance was issued on 27.2.1991, after the order dated 31.1.1991 was issued. A copy thereof is annexed as Annexure P-4 to the present appeal. According to learned counsel for the appellant the same makes very interesting reading. Most of the columns requiring information have been indicated to be nil. The respondent had himself signed in the service book on 27.4.1977 where his month and year of birth were recorded to be September, 1930. Additionally, in the seniority list of Works Supervisor dated 2.9.1983 the respondent-employee was shown as Chowkidar and his date of birth was indicated to be 1.9.1930. In the group insurance scheme document dated 6.11.1985, and document relating to surplus staff (Letter No.1153/Sh.S.Kh.36/W-3 dated 10.6.1987 same is the position.

According to learned counsel for the appellant these clearly demolish the respondent's claim about his birth. At no point of time the respondent-employee had questioned the correctness of the entry made in the service book. After the order was passed on 31.9.1991 for the first time he produced a document, which was issued after the order dated 31.1.1991. All these according to him render High Court's judgment unsustainable.

There is no appearance on behalf of the respondent in spite of the service of notice.

Normally, in public service, with entering into the service, even the date of exit, which is said as date of superannuation or retirement, is also fixed. That is why the date of birth is recorded in the relevant register or service book, relating to the individual concerned. This is the practice prevalent in all services, because every service has fixed the age of retirement, and it is necessary to maintain the date of birth in the service records. But, of late a trend can be noticed, that many public servants, on the eve of their retirement waking up from their supine slumber raise a dispute about their service records, by either invoking the jurisdiction of the High Court under Article 226 of the Constitution of India or by filing applications before the concerned Administrative Tribunals, or even filing suits for adjudication as to whether the dates of birth recorded were correct or not.

Most of the States have framed statutory rules or in absence thereof issued administrative instructions as to how a claim made by a public servant in respect of correction of his date of birth in the service record is to be dealt with and what procedure is to be followed. In many such rules a period has been prescribed within which if any public servant makes any grievance in respect of error in the recording of his date of birth, the application for that purpose can be entertained. The sole object of such rules being that any such claim regarding correction, of the date of birth should not be made or entertained after decades, especially on the eve of superannuation of such public servant. In the case of *State of Assam v. Daksha Prasad Deka* (1970 (3) SCC 624), this Court said that the date of the compulsory retirement "must in our judgment, be determined on the basis of the service record and not on what the respondent claimed to be his date of birth, unless the service record is first corrected consistently with the appropriate procedure." In the case of *Government of Andhra Pradesh v. M. Hayagreev Sarma* (1990 (2) SCC 682) the A.P. Public Employment (Recording and alteration of Date of Birth) Rules, 1984 were considered. The public servant concerned had claimed correction of his date of birth with reference to the births and deaths register maintained under the Births, Deaths and Marriages Registration Act, 1886. The Andhra Pradesh Administrative Tribunal corrected the date of birth as claimed by the petitioner before the Tribunal, in view of the entry in the births and deaths register ignoring the rules framed by the State Government referred to above. It was, inter alia, observed by this Court:

"The object underlying Rule 4 is to avoid repeated applications by a government employee for the correction of his date of birth and with that end in view it provides that a government servant whose date of birth may have been recorded in the service register in accordance with the rules applicable to him and if that entry had become final under the rules prior to the commencement of 1984 Rules, he will not be entitled for alteration of his date of birth."

In *Executive Engineer, Bhadrak (R&B) Division, Orissa and Ors. v Rangadhar Mallik* (1993 Supp.(1) SCC 763), Rule 65 of the Orissa General Finance Rules, was examined which provides that representation made for correction of date of birth near about the time of superannuation shall not be entertained. The respondent in that case was appointed on November 16, 1968. On September 9, 1986, for the first time, he made a representation for changing his date of birth in his service register. The Tribunal issued a direction as sought for by the respondent. This Court set aside the Order of the Tribunal saying that the claim of the respondent that his date of birth was November 27, 1938 instead of November 27, 1928 should not have been accepted on basis of the documents produced in support of the said claim, because the date of birth was recorded as per document produced by the said respondent at the time of his appointment and he had also put his signature in the service roll accepting his date of birth as November 27, 1928. The said respondent did not take any step nor made any representation for correcting his date of birth till September 9, 1986. In case of *Union of India v. Harnam Singh* (1993(2) SCC 162) the position in law was again re- iterated and it was observed:

"A Government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth,

if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay."

An application for correction of the date of birth should not be dealt with by the Courts, Tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. This is certainly an important and relevant aspect, which cannot be lost sight of by the Court or the Tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of clinching materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the Court or the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the Court or the Tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove about the wrong recording of his date of birth, in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the Court or the Tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their date of birth in the service books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The Court or the Tribunal must, therefore, be slow in granting an interim relief or continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and thereby caused injustice to his immediate junior.

The position was succinctly stated by this Court in the above terms in *The Secretary and Commissioner Home Department and Ors. v. R. Kirubakaran* (JT 1993 (5) SC 404) As observed by this Court in *State of Tamil Nadu v. T.V. Venugopalan* (1994 (6) SCC 302) and *State of Orissa and Ors. v. Ramanath Patnaik* (1997 (5) SCC 181) when the entry was made in the service record and when the employee was in service he did not make any attempt to have the service record corrected, any amount of evidence produced subsequently is of no consequence. The view expressed in *R. Kirubakaran's* case (supra) was adopted.

These aspects were also reiterated in State of U.P. and Ors. v. Gulaichi (Smt.) (2003 (6) SCC 483 and State of Punjab and Ors. v. S.C. Chadha (2004) (3) SCC 394).

The High Court has clearly erred in holding that the service book was not produced. As the records reveal along with the affidavit a copy of original service book was filed. The documents have also been annexed in the present appeal. As is clearly evident from the copy of the service book, more particularly the respondent-employee had on 27.4.1977, signed the service book which contained his date of birth as per Christian era. Additionally, the documents referred to above indicated the date of birth to be 1.9.1930. This was also not challenged at any time.

Above being the position the High Court was clearly in error in holding that the date of birth of the respondent- employee was 1.9.1939, contrary to what has been recorded in the service book. We find that the respondent-employee had rendered service till the order dated 31.1.1991 was passed. It would not be equitable to direct refund of salary received by him upto 31.1.1991 beyond the actual date of superannuation i.e. 30.9.1990. However, the period beyond the actual date of superannuation i.e. from 30.9.1990 to 31.1.1991 shall not be reckoned towards his retiral benefits.

The appeal is allowed to the aforesaid extent with no order as to costs.