GAHC010033102021

2024:GAU-AS:10015

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1215/2021

SIVA PRASAD BEZBARUAH
S/O LATE DHANESWAR SIL
RESIDENT OF VILLAGE JOWARDDIN, PO KAITHALKUCHI, PS BELSOR, NALBARI, 781370

VERSUS

THE UNION OF INDIA AND 5 ORS
THE DEPARTMENT OF MINISTRY OF CONSUMER AFFAIRS, FOOD AND PUBLIC DISTRIBUTION, GOVT. OF INDIA, AND IT IS REPRESENTED BY THE SECRETARY , REGISTERED HEAD OFFICE AT KRISHI BHAWAN, NEW DELHI 110001

2:THE CHAIRMAN AND MANAGING DIRECTOR
FOOD CORPORATION OF INDIA
GOVT. OF INDIA
16-20
BARAKHAMBA LANE
FIRE BRIGADE LANE
BARAKHAMBA
NEW DELHI 110001

3:THE EXECUTIVE DIRECTOR (NE)
FOOD CORPORATION OF INDIA
GOVT. OF INDIA
GLP BUILDING
ULUBARI
GS ROAD
GUWAHATI 07
DIST KAMRUP M ASSAM

4:THE GENERAL MANAGER (REGION)

GS ROAD
PALTAN BAZAR
ABOVE FBB
MT TOWER
(3RD TO 5TH FLOOR)
GUWAHATI 08
DIST KAMRUP M ASSAM

5:THE DIVISIONAL MANAGER

FOOD CORPORATION OF INDIA
DIVISIONAL OFFICE AT GUWAHATI
MITRA BUILDING
ASHRAM ROAD
ULUBARI
GUWAHATI 07
KAMRUP M ASSAM

6:THE MANAGER (PERSONAL)
FOOD CORPORATION OF INDIA
DISTRICT OFFICE AT GUWAHATI
MITRA BUILDING
ASHRAM ROAD
ULUBARI
GUWAHATI 07
KAMRUP M ASSA

Advocate for the Petitioner : MR. L K BORAH, SC, F C I,MR. J PAWE

Advocate for the Respondent : ASSTT.S.G.I., MR. P K ROY

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner	: Mr. LK Borah, Advocate
For the Respondents	: Mr. PK Roy, Sr. Advocate
	Mr. S Chakraborty, Advocate
Date of Hearing	: 21.08.2024
Date of Judgment	: 03.10.2024

JUDGMENT AND ORDER(CAV)

1. Heard Mr. LK Borah, learned counsel for the petitioner. Also heard Mr. PK Roy, learned Senior counsel for the respondent Food Corporation of India, assisted by Mr. S Chakraborty, learned counsel.

2. The challenge in the present writ petition is an order dated 30.12.2020, whereby the petitioner was asked to go on superannuation allegedly after the completion of 42 years of service. It is the case of the petitioner that his actual date of retirement is 28.02.2026 as per the date of birth recorded in his matriculation pass certificate i.e. 1st of March, 1966, which is also recorded in his service book. on the other hand, it is the case of the respondent that the petitioner had entered the service before attaining majority and therefore, he cannot be allowed to serve more than 42 years in total.

3. Before dealing with the arguments advanced by the learned counsel for the parties, let this court record certain important facts that are not in dispute for proper appreciation of the issues involved in this case.

I. The petitioner was appointed by the Management of FCI District Staff Canteen Committee under the signature of the Ex-Officio Chairman of such Committee on 22.12.1978. The appointment order reflects that the petitioner will have to produce, amongst other documents, the certificate of proof of age in original. The appointment order further reflects that the petitioner was appointed as a canteen bearer on a purely temporary basis with Rs.75 per month as salary.

II. Subsequently, the service of the petitioner was regularized with effect from 26.09.1983 and from the said date the petitioner was getting regular scale of pay.

III. It is to be noted herein that during the course of service, the petitioner successfully passed HSLC examination in the year 1985 under the Secondary Board of Education, Assam and the date of birth of the petitioner

was recorded as 01.03.1966. Therefore, admittedly, when the petitioner was engaged as a Canteen bearer on 22.12.1978, the age of the petitioner was 12 years 9 months 14 days.

IV. On 23.06.2017, the petitioner was asked to submit his original educational qualification certificate and age proof certificate. Accordingly, the petitioner submitted his HSLC pass certificate along with a forwarding letter on 27.07.2017.

V. On 30.12.2020, the impugned office order was issued by the Divisional Manager, FCI whereby the petitioner was asked to go on superannuation on completion of 42 years of service in December 2020 against the date of joining on 22.12.1978.

VI. The petitioner preferred a representation on 31.12.2020 before the Division Manager and another on 20.01.2021 on the ground that the petitioner should be allowed to continue till the attainment of age of 60 years as per his date of birth recorded in his official document/matriculation certificate. When such representation was not considered, the present writ petition is filed by the petitioner.

4. Mr. LK Borah, learned counsel for the petitioner argues that the service of the petitioner was regularized on 26.09.1983 and had been granted regular salary as a regular employee with effect from the said date. He further contends that the petitioner had successfully passed HSLC examination in the year 1985 under SEBA and as per HSLC certificate his date of birth is 01.03.1966 and the said HSLC certificate of the petitioner has not been challenged by the respondent rather such date of birth was incorporated in the service record and therefore, it is contended by Mr. Borah, learned counsel for the petitioner that the temporary service during period of minority of the petitioner cannot be counted as a regular service and his service may be considered as Boy Service. It is his further argument that the petitioner was not granted any service benefit like the other regular employees during his temporary service. The learned counsel for the petitioner further argues that the respondent authorities have taken the plea of the petitioner being employed for 42 years for effecting forceful retirement

before his actual date of superannuation on attaining the age of 60 years, however, there is no such provision in the service rule and in fact there is no any codified law for retirement of an employee after completion of 42 years of service. While concluding his argument, Mr. Borah submits that the petitioner has not violated any departmental law, rules and regulations of the respondent department and respondent authorities ousted the petitioner most illegally and arbitrarily by way of the impugned order dated 30.12.2020.

5. Per contra, Mr. PK Roy, learned Senior counsel for the respondents submits that while issuing the order of appointment on 15.12.1978, the petitioner was asked to produce a certificate in original in proof of age and the petitioner could not show any provision in any rule, which postulate appointment of a minor in the service. The HSLC certificate dated 26.07.1985 submitted by the petitioner was acquired much after the date of initial appointment in the year 1978 and therefore that cannot be made as the foundation of any declaration that the date of birth of the petitioner was 01.03.1966. The petitioner has to be a major on the date of his initial appointment on 15.12.1978 and therefore, retiring the petitioner on superannuation on 31.12.2020 is correct, logical and reasonable. It is contended by the learned Senior counsel that a person can be appointed in a Govt. Service on attaining a minimum age of 18 years and such a person is required to be superannuated on attaining the age of 60 years. Therefore, a person can serve for a maximum of 42 years even if it is assumed that he has entered service at the age of 18 years and therefore, taking the 42 years of total service from the initial date of appointment, the petitioner was asked to go on superannuation. According to him, the petitioner cannot be allowed to have benefits at both ends i.e. in the entry and the exit.

6. Referring to the decision of the Hon'ble Apex Court in ***Lakshmibai National Institute of Physical Education & Anr. vs Shant Kumar Agarwal*** reported in ***(2013) 11 SCC 595***, Mr. Roy submits that unless the employee claiming benefit for the service rendered below 18 years is able to show that there is a provision in the service rule which postulates appointment of a minor in Government service, the birth

certificate submitted by the employee subsequently cannot be made the foundation of a declaration that the employee's date of birth of the minor age, is the correct date of birth. Mr. Roy further submits that a person can be held to have entered into a valid service only when he has attained the age of majority and a person, who takes undue advantage, by one or other reason, at the entry point in the service, cannot be allowed to urge that he be given higher benefit. Referring to the decision of Hon'ble Apex Court in ***Nagaland Senior Govt. Employees Welfare Association & Ors vs State of Nagaland & ors*** reported in ***(2010) 7 SCC 643***, Mr. Roy, learned Senior counsel submits that fixation of maximum length of service as an alternative criterion from retirement from public service, by no stretch of imagination can be held to be violative of any recognized norms of employment planning.

7. I have given anxious consideration to the submissions made by the learned counsel for the parties.

8. As discernible from the argument of Mr. P K Roy, learned Senior Counsel, the reason for asking the petitioner to go on superannuation is that the petitioner entered into service of FCI on 22.12.1978 and at that point of time, the petitioner was aged 12 years, 9 months, 21 days and that by virtue of the extant service norms, nobody can be appointed below the age of 18 years. It is the contention of the respondent that every employee can serve for a maximum period of 42 years taking note of the minimum age for entry into service to be 18 years and the age of superannuation being 60 years. Thus, from the aforesaid, the basic issue before this court is whether the respondent authorities are correct in taking the total service period of the petitioner to be 42 years from the date of his initial appointment as canteen boy till the issuance of the impugned order.

9. From the material available on record it is clear that the petitioner was appointed as a casual/temporary canteen bearer on 15.12.1978. In terms of the matriculation certificate, on the said date, the age of the petitioner was 12 years. The petitioner was regularized with effect from 26.09.1983. On the said date, the age of the petitioner

was 17 years 6 months 25 days. The appointment order appointing the petitioner as temporary canteen bearer in the year 1978 clearly stipulates that the petitioner is treated as a temporary employee at the initial wage of Rs. 75/-. Such order of appointment does not confer any right and /or any privileges admissible to a person substantively employed. Such order of appointment, in the considered opinion of this court, did not create any relationship of master and servant between the petitioner as an employee under the Food Corporation of India Ltd. in as much as admittedly the appointment order was issued by Canteen Management Committee, which consists of representative of Staff of FCI. It is also important to note that at that point in time, no scale of pay or any other benefit admissible to a regular employee was granted to the petitioner. It is also not a case that the canteen run by the FCI is a statutory canteen. Law is by now well settled that the statutory canteen, which is required to be established under the statute and the non-statutory canteen, which is run by the committees, stand on a different footing. It is true that the canteen in question was run on certain subsidies given by the FCI, however, the grant of such subsidy shall not make the engagement of the petitioner a substantive status during the temporary period till his service was regularized in 1983.

10. In the aforesaid factual backdrop, in the considered opinion of this court, the service of the petitioner from 22.12.1978 till 26.09.1983 was temporary in nature and therefore the date of service is to be counted for the purpose of calculating the period of service with effect from the date when the petitioner was absorbed in service of the FCI.

11. There is a bar in engaging children below 18 years as workers/ labour. It is also important to record herein that entering into service on a temporary basis in certain organizations of the Central Government, including the Railways, before attaining the age of 18 years is not germane. Such service before the attainment of 18 years of age has also been recognized by the Union of India as "Boy service". Such decision of the Government of India is reflected in different communications, more particularly, in the Ministry of Home Affairs communication vide MHA Memo No. F.41/61/60-Est (C) dated

16.11.1961, wherein a "Boy Service" has been defined as service rendered by a temporary employee before attaining the age prescribed and such period is permitted to be counted for the limited purpose of computing three years, for declaration of service to be quasi-permanent. However, in such cases also, for the purpose of pension, the minimum age to be taken is 18 years.

12. Though Food Corporation of India does not exclusively mention any boy service in its Staff Rules, 1971, the aforesaid principle as regards boy service is taken note of by this court for the reason that in a given case, entering into temporary service before 18 years is recognized in certain circumstances.

13. Be that as it may, in the considered opinion of this court, for the reasons recorded herein above, the date of entry into the service of the petitioner, to calculate the date of superannuation shall be the date when the service of the petitioner was regularized i.e. the services rendered before the date of regular appointment cannot be included for determination of the period of service for superannuation.

14. Accordingly, for the reasons recorded herein above, in the considered opinion of this court, the ground taken by the FCI that the petitioner had illegally entered into temporary service as a canteen boy and therefore, his service is to be counted to be 18 years on the date of entering into temporary service and accordingly he had attained the superannuation, cannot be accepted. However, at the same time, the petitioner cannot be also allowed to have the benefit in both ends i.e. while entering into service before 18 years and while superannuating at the age of 60 on the basis of the date of birth recorded. Therefore, in the considered opinion of this court, it will be just to allow the respondent employer to superannuate the petitioner counting his age to be 18 years on 29.06.1983, when the petitioner's service was regularized inasmuch as such Course of action is legally permissible under the policy of the Union of India, more particularly in Boy Services.

15. In view of the aforesaid, even if it is assumed that 42 years should be the total length

of service of an employee and the entry into the service should be minimum 18 years of age, 42 years of service is to be counted from entering into government service/service of the corporation, which in the present case is the date of regularization i.e. 26.09.1983. Accordingly, the date of superannuation of the petitioner shall be 26.09.2025 and not 26.09.2020. However, the petitioner was superannuated from service treating 15.12.1978 as the date of entry into the Govt. service. In the considered opinion of this court, in view of the settled proposition of law as recorded hereinabove the action of the respondent superannuating the petitioner is an arbitrary and unreasonable exercise of power infringing the right guaranteed to the petitioner under Article 14 of the Constitution of India.

16. That being the position, such determination is required to be interfered with. Accordingly, the present writ petition stands allowed by setting aside the impugned order dated 30.12.2020. The petitioner be reinstated in service forthwith. The respondent FCI shall be at liberty to superannuate, the petitioner in terms of the determination made hereinabove.

17. Now coming to the claim of back wages, which has been verbally argued by the learned counsel for the petitioner, this court records that there is no pleading regarding claim of back wages. The law is well settled that when a back wage is claimed on reinstatement, the initial burden is upon the employee to establish that he was not gainfully employed during the period when the person was deprived from his service and it is equally well settled that such a right for back wages is not automatic, only for the reason of setting aside the order under challenge by a court and same will depend upon the given facts of each case. In the case in hand, though this court is of the unhesitant view that the petitioner was deprived of his right by the employer in arbitrary exercise of power, however to grant back wages, the petitioner is to satisfy that he was not gainfully employed during the said period, though, once such burden is discharged, the onus shifts upon the employer. Be that as it may, in absence of any pleading and material to suggest that the petitioner was not gainfully employed, this court is not entering into merit of such claim, however, with a liberty to the petitioner

to claim such back wages, if so desires and in the event such claim is made, the same be considered as per law.

18. Accordingly, the present writ petition stands disposed of. Parties to bear their own costs.

JUDGE

Comparing Assistant