

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, MUMBAI

ORIGINAL APPLICATION NO.: 402 of 2011.

Dated this Friday the 10th day of Feb., 2012.

CORAM : Hon'ble Shri Jog Singh, Member (J).

Hon'ble Smt. Leena Mehendale, Member (A).

Shri Mohan Mallu Rathod,
IPS-1986,
Special Inspector General of Police, (PCR)
Maharashtra, Mumbai.
R/at : 55/A-II, European Bungalows,
Sir Bhalchandra Road,
Dadar (East),
Mumbai – 400 014.

... **Applicant.**

(By Advocate Shri M. M. Sudame)

VERSUS

1. State of Maharashtra
through the Addl. Chief Secretary
to the Govt. of Maharashtra,
Home Department,
Mantralaya,
Mumbai – 400 032.

2. Union of India through the
Secretary to the Govt. of India,
Ministry of Home Affairs,
North Block, Rajpath,
New Delhi – 110 011.

... **Respondents**

(By Advocate Shri V.S. Masurkar along
with Shri S. G. Pillai).

ORDER

(11)

Per : *Shri Jog Singh, Member (J)*

The applicant in this O.A. is impugning order dated 01.03.2011 passed by Respondent No. 1 declining to correct the date of birth of the applicant in the service record.

2. The case of the applicant is that he was born in a Tribal family in remote area of District Yavatmal on 03.04.1955. At the time of admission in the primary school, his date of birth was wrongly recorded by the School Teacher as 01.08.1952, which has somehow continued in the service record. The applicant has been objecting to this wrong date of birth for the last many years.

3. The applicant was selected as Deputy Superintendent of Police by the Maharashtra Public Service Commission on 06.12.1977 and he was appointed to the IPS on promotion in the select list of 2001 by granting him 1995 batch of IPS by order dated 28.01.2002. The applicant has also agitated about his wrong date of promotion to the IPS in separate proceedings and for ante-dating his order of allotment to the IPS but that is a separate issue and has no bearing on the question involved in the present O.A.

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4. The applicant submits that after entering the State Service, he was posted as SDPO, Kolhapur, in May 1980 and he raided certain gambling den owned by one notorious person, namely - Shri Shivaji Oak, at whose instance the applicant remained involved in criminal prosecution for many years. He was also put under suspension. Finally the applicant has been given a clean chit by the Trial Court as well as High Court and strictures have been passed against the said gambler.

5. In the premises, the applicant submits that he remained involved in an unfortunate litigation because of no fault on his part. In fact, his confirmation in service was delayed for years together. However, on becoming aware of the wrong date of birth entered in his service record in the year 2003, he made representations as per the MCSR Rules and Government Resolution in the prescribed proforma for correction of his date of birth.

6. On 26.03.2007, the applicant's representation was rejected and he approached this Tribunal by way of file O.A. No. 472/2007 which was allowed

by order dated 05.08.2009 by setting aside the impugned order dated 26.03.2007. Liberty was granted to the applicant to approach the Tribunal in case his grievance was not met with by the respondents. That is how the applicant has approached this Tribunal once again by filing the present O.A. against the impugned order dated 01.03.2011 by which the request of the applicant for correction of date of birth has been mainly rejected on the ground that a discrepancy exists about the name of the applicant recorded in the Village Kotwal Book and in the Service Book. Consequently, the impugned order states that the applicant has all along used his date of birth as 01.08.1952 for various purposes, including entry into the service.

7. The case of the applicant is that the respondents have not taken into consideration the favourable material and evidence available on record to rectify their mistake in recording wrong date of birth in question. The applicant submits that the affidavit filed by Sub-Divisional Magistrate Pusad, on behalf of the Collector and District Magistrate, Yavatmal, has

been conveniently ignored by the respondents while passing the impugned order. The respondents are also silent about the Government of Maharashtra Gazette published on 6.08.2007 which gives a clear benefit to the applicant in the matter of correction of his date of birth. The applicant submits that respondents have also ignored that for more than two decades he remained involved in frivolous litigation at the instance of notorious criminals against whom he had waged a war when he was a young entrant into the State Police Service in the year 1980-1981 itself. Further, the applicant belongs to a backward community and his parents were totally illiterate and ignorant about the importance of correct date of birth.

8. The respondents have filed their reply and have mainly contended that the O.A. is barred by limitation and the impugned order dated 01.03.2011 is in accordance with the settled law. The respondents have also taken an objection that the case of the applicant should be placed before a Division Bench as he belongs to an All India Service. This objection was accepted by the

Tribunal and the matter has been heard and being decided by a Division Bench only. The respondents have also stated that if the date of birth of the applicant is corrected, as prayed for by him, it will deny promotions to many officers which are necessary parties. Mainly the respondents contend that the applicant entered the service on 06.12.1977 and, as such, he should have raised his grievance within a period of five years, i.e., by 14.08.1986.

9. We have heard both the learned counsel for the parties at length and perused the pleadings and documents annexed therewith minutely.

10. Admittedly, this is the second round of litigation. The applicant has earlier approached this Tribunal by way of O.A. No. 472/2007 impugning the order dated 26.03.2007 passed by the Home Department, Government of Maharashtra, i.e., Respondent No. 1. The tone and tenor of the present order dated 01.03.2011 is almost the same as the earlier impugned order dated 26.03.2007 which was quashed and set aside by an exhaustive order by this Tribunal on 05.08.2009. Paragraphs 11 to 20 of the said order are very

relevant for the present purpose and are reproduced herein below for the sake of convenience :

"11. The Respondent No. 4 further submits that on careful inspection of the relevant record such as the Village Kotwal Book of Village Udadi (Hansapur), it is revealed that in the Village Kotwal Book of Village Udadi (Hansapur) a permanent record is maintained in respect of Shri Chudamal @ Mallu S/o. Late Kasana Banjari having narrated below his name, the date of birth and death entries of his all children.

12. A perusal of the said affidavit further reveal that the Respondent No. 4 has got enquiries made from respectful citizens of Village Udadi, Hansapur also. The said affidavit clearly reveals that the applicant was born in the family of one Shri Chudamal Rathod, also popularly known as Mallu Rathod, i.e., the husband and his wife, Smt. Mangala Rathod, i.e. the father and mother of the applicant respectively.

13. I have heard counsel for the parties at length and perused the pleadings and documents annexed therewith. The impugned order dated 26.03.2007 is reproduced hereinbelow :

"With reference to the subject cited above, it is informed to you that, Shri M. M. Rathod, has joined State Police Service from 16.01.1978. As per the provisions of Maharashtra Civil Services (Services General Conditions) Rule 1981 and Govt. Of Maharashtra resolution GAD. dt. 02/03/1988, as Shri Rathod was in the State services, he should have within period of 5 years (latest before 14/08/1986) made representation regarding rectification in his date of birth. However, Shri Rathod did not make such application for the rectification of date on or before 14/08/1986.

In his representation regarding delay/explanations submitted by Shri Rathod vide his representation dated 19.05.2006, it is mentioned here that even though Shri Rathod

was under suspension w.e.f. 23/03/1983 to 01/05/1988 he was entitled for dearness allowances and that he was very much in the services of the State Government and he was not removed from the services. Taking into consideration the above mentioned factual position, it is not understood as to why Shri Rathod did not make application for the rectification of his Date of Birth within stipulated period. Therefore, the explanation submitted by Shri Rathod in his representation cannot be accepted.

The provisions of Govt. Circular dated 03/03/1988 regarding making application within the prescribed time limit is based on circular issued by Govt. Of India, on the basis of judgment by Hon'ble Supreme Court Civil Appeal No. 502/93 (Govt. Of India Vs. Harnam Singh). The representation of Shri Rathod does not fulfill the conditions of above cited judgment and circular issued by Govt. Of India and State Govt. Therefore, the representation of Shri Rathod cannot be considered.

2. Presently, Shri Rathod is serving as a member of the Indian Police Service. It is, therefore, the provisions of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 - Rule 16-A are applicable to Shri Rathod. It is, therefore, the correction in the date of birth of Shri Rathod cannot be done in absence of no clerical mistake in his date of birth in his service book.

In view of above, the request made by Shri Rathod vide his representation dt. 19/05/2006 regarding correction in his date of birth cannot be considered/accepted.

Shri Rathod may accordingly be informed and compliance report shall be submitted to Govt. Of Maharashtra."

The main ground on which the request of the applicant for correction of his date of birth has been rejected by the respondents is that the applicant did not make such a request within a period of five years.

14. The respondents have also relied upon the judgment of Hon'ble Supreme Court in the case of Union of India Vs. Harnamsingh [1993 SCC (L&S) 375] while rejecting the request of the applicant. In this connection, it is

pertinent to note that the Hon'ble Supreme Court's judgment in the case of Harnamsingh was based on a totally different facts and is not at all applicable to the applicant in the present case. It is a settled legal position and judgment of the Supreme Court is an authority on the facts of the matter and, therefore, there should be identity of facts. However, a perusal of the pleadings and records of the case in hand would go to show that the facts of the present case are entirely different than the facts of the case in Harnamsingh Singh (supra) and, therefore, the proposition formulated and accepted in Harnam Singh's case cannot be made applicable for rejection of representation of the applicant in the present matter. Therefore, there appears to be an error apparent on the face of the record in the matter of correct recording of date of birth of the applicant and the same is liable to be entertained by the respondents on merit and cannot be rejected solely on the ground of limitation.

15. The learned counsel for respondents in the written arguments dated 07.04.2008 has submitted in para 5 that "the applicant was appointed by the respondents on 06.12.1977. Therefore, even if the applicant is treated as State employee prior to induction in the IPS, even then five years limitation period will expire in his case on 14.08.1986 as per the State Government Resolution dated 03.03.1998 relied upon by the applicant himself. It is a matter of record that the applicant has not made any application for change of date of birth on or prior to 14.08.1986 and therefore also his grievance is not maintainable even considering the State Government Resolution dated 03.03.1998."

15.1 In this connection, it may be noted that the case of the applicant cannot be compared with those employees who, having entered the service, were aware of mistake in the matter of recording of their respective date of birth. And in such cases, they should have made representations within a period of 5 years after having been confirmed within two years of entry into service but in

the case of the applicant, undisputedly, his whole service career was in a fluid state as uncertainty was hanging over his head regarding the very survival in the service because of the false implication in certain cases at the behest of anti-social elements. This has led the applicant to fight for the service rather than to get the date of birth corrected. The claim of the applicant, therefore, cannot be rejected on the ground that he gave a declaration as to the date of birth in the beginning itself and, therefore, he is estopped. The doctrine of estoppel would also not be attracted in the present case because it is only after discovery of new evidence as to his correct date of birth that the applicant has approached the appropriate authority for consideration of and correction of the same. It may be observed that the clerical error mentioned in Rule 38 (2) of the MCS (General Conditions of Services) Rules, 1981, would definitely include and cover other genuine mistake in recording the date of birth, including the cases of the applicant. If the case of the applicant is not considered by the respondents on its own merit for correction of his date of birth, it would lead to injustice. The State Government is not at all precluded from considering and correcting the date of birth after the claim of the applicant is ultimately found in order by the respondents themselves.

16. In addition to the above said, the respondents have further relied upon Rule 16-A of All India Services (DCRB) Rules, 1978. However, the rule 16-A itself provides vide Sub-Rule 4 that the entry can be corrected if there is bonafide clerical mistake committed in accepting the date of birth. Rule 16-A (4), therefore, permits correction of bonafide clerical mistake and cannot be read as a complete bar to correction of date of birth even in a situation which exists in the present case. Even otherwise, the amended rules in force will not be applicable to the case of the applicant who has been appointed long back and before coming into effect the said amended rules. The same would be retrospectively applied in the case of the applicant who was admittedly kept under

suspension for a period of about 5 years at the initial entry of his service at the behest of some gamblers and anti-social elements.

17. At this stage, it may be relevant to note some of the judgments relied upon by the applicant in support of his case :

(i) In the case of Union of India Vs. Harnam Singh [AIR SCC (L&S) 375] the Hon'ble Supreme Court has rather held that a Government servant, who has declared his age at the initial stage of employment is, of course, not precluded from making 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 an irrefutable proof relating to his date of birth as different from the one earlier recorded. Relying upon Harnam Singh's case the applicant's representation was rejected by the respondents. In the case in hand, however, the applicant became aware of his incorrect date of birth in September, 2003, and made representation within a period of five years from the date he became aware of his incorrect date of birth, i.e., on 19.05.2006. Therefore, from the date of knowledge, the applicant's representation is within a period of five years.

In this context, it is pertinent to note Rule 38 of Maharashtra Civil Service (General Conditions of Services) Rules, 1981. Instruction No. 1 of the said Rule lays down that normally, no application for alteration of entry regarding date of birth as recorded in the service book or service roll of a Government servant, should be entertained after a period of five years commencing from the date of his entry in Government service. Therefore, the rule requires applications to be made within the period of five years calculated from the date of entry in Government service. However, the said rule does not cover the cases where knowledge itself was derived later on. In the instant case, the applicant has made a representation within the time limit of five years from the date of knowledge and, therefore, his application/representation should be considered on merits. Impugned order quotes

judgment of the Hon'ble Supreme Court in the case of Union of India Vs. Harnam Singh. However, the said judgment does not deal with the issue of date of knowledge and at any rate, the Harnam Singh's case was rejected because the date of birth was recorded on 20.05.1934 and it was not challenged between 1956 and 1991 almost for three and half decades. Harnam Singh's case clearly rules that Government servant who has declared his age at initial stage is not precluded from making request later on for correcting his age and it is open 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 recorded earlier. Therefore, equitable provisions such as delay and laches are required to be applied for condoning delay in making request and whether the applicant's claim is true or otherwise is required to be determined by the authority.

(ii) The Commissioner of Police, Bombay & Another Vs. Bhagwan V. Lahane [1997 (1) SCC 247] This case deals with Rule 38 of Maharashtra Civil Service (General Conditions of Services) Rules, 1981, it is observed that the petitioner therein, namely, Bhagwan Lahane, did not produce Secondary School Certificate which contains his date of birth as 12.11.1948. Although he made a representation within time, which was rejected later on, his proof of correct date of birth was found to be suspicious and, therefore, on facts the application was rejected. In the present case, the applicant has furnished irrefutable and reliable proof of his date of birth and has approached the Tribunal within a prescribed period of five years from the date of knowledge. Sub-rule 2 (f) of Rule 38 of Maharashtra Civil Service (General Conditions of Services) Rules, 1981, requires that when once the entry of age or date of birth has been made in the 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 persons other than individual in question or is an obvious clerical error. However, the said provisions cannot be applied in the case of the applicant because his erroneous date of birth was recorded in

the school records and carried into service records. The extract of birth certificate which is a conclusive proof of date of birth bears true and correct date of birth. But knowledge of the same was acquired by the applicant in the year 2003 and, therefore, the applicant is entitled to point out his correct date of birth within five years of acquisition of knowledge and the State Government is required to consider and decide the issue of correction of date of birth in accordance with and with reference to the documents referred to in Rule 38.

(iii) In Union of India Vs. Ramaswamy [1997 (IV) SCC 647] Rule 16 (a) of All India Services (Death-cum-Retirement Benefits) Rules, was considered in so far as applicability of old rules is concerned. In case of Government servants who are appointed from State Service to All India Services, Rule 16 (a) of All India Services (Death-cum-Retirement Benefits) Rules, 1971, is applicable and the Court held that it will apply to those who entered into service earlier.

In the case of Ramaswamy (supra), it was passingly observed that the rule of estoppel is applicable and Government servant who has declared his date of birth originally, cannot represent for recording a different date of birth. However, it may be noticed that this judgment in Ramaswamy's case is contrary to the judgment in Harnamsingh (supra) wherein it has been held that the Government servant is not precluded from seeking correction of his date of birth. Moreover, in the present case, the applicant is seeking correction in the State Government service book and such correction would automatically bind the Central Government which is merely an accepting authority.

(iv) In the case of State of U.P. Madhyamik Shiksha Parishad & Others Vs. Rajkumar Agnihotri [2005 (11) SCC 465] there was a particular rule, viz., Rule No. 2, which mentioned that the date of birth of a Government servant which is recorded in the Matriculation Certificate shall be the conclusive proof and no representation can be entertained for correction of date of birth. In view of this specific rule, the date of

birth was not changed in the said case. However, the facts of this case are totally different and rule for correction of date of birth is also not the same.

(v) In Ravinder Singh Gorkhi Vs. State of U.P. [2006 (5) SCC 584] the question of determination of age of juvenile offender came up before the Hon'ble Supreme. The Hon'ble Supreme Court ruled that Section 35 of Evidence Act would be applicable to Civil as well as Criminal cases and the documents admissible in evidence under Section 35 should be of such a nature that it is a public or official Register and entry therein has been made by a public servant in discharge of his official duty and it is a public document. The Hon'ble Supreme Court also held that the question of date of birth is required to be decided for variety of purposes such as for obtaining admission, appointment, contesting elections, registration of marriage, litigation before the Civil Court and in any of such cases, the Court of Law will have to apply the same standard as required in Section 35 of the Evidence Act. No different standard should be applied because Article 21 of the Constitution is abridged which guarantee right to life and livelihood.

(vi) In the case of State of Gujarat & Others Vs. Vali Mohamad Dosabhai Sindhi [2006 VI SCC 537] Rule 171 of Bombay Civil Service Rules was involved, which is identical to Rule 38 of Maharashtra Civil Service (General Conditions of Services) Rule, 1981. The Hon'ble Supreme Court noted that there are several rules governing request to change of date of birth. One of them is Rule 171 of the Bombay Civil Services Rule, 1959. This rule clearly provides that the request made for alteration of date of birth should not be entertained after the preparation of the Service Book of the Government servant and in any event not after the completion of the probation period or after five years of continuous service, whichever was earlier. The said rule categorically provides that once an entry of age or date of birth has been made in the Service Book, no alteration of the entry afterwards should be allowed unless it is shown that the entry was due to want of care

on the part of some person other than individual in question or is an obvious clerical error. In the instant case, there has been obvious error on the part of the Head Master in recording unverified date of birth and there has been further error on the part of the State Government in not directing the petitioner to produce birth certificate at the time of his appointment in service.

(vii) In the case of Desh Raj Vs. Bodh Raj [2008 (2) SCC 186] Section 35 of Evidence Act was referred and entry in the birth certificate were taken into consideration. It was held that an entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded. The entries regarding dates of birth contained in the school register and the secondary school examination have no probative value, as no person on whose information the date of birth of the aforesaid candidates was mentioned in the school record, was examined. In the absence of the connecting evidence, the documents produced by the respondents, to prove the age of the aforesaid two candidates have no evidentiary value. The Court further held that unless the parents or persons conversant with their date of birth were examined, the entry in the school register by itself will not have much evidentiary value.

(viii) In Mohamad Unis Khan Vs. U.P. Power Corporation Ltd. [Civil Appeal No. 6191 of 2008 (arising out of SLP (Civil) No. 5232 of 2006)] for the first time, the issue of limitation vis-a-vis the date of knowledge was considered and the Hon'ble Supreme Court observed that no material has been placed before us in regard to existence of a statutory rule fixing a time frame for filing an application for correction of the date of birth in the service record. Even if there was such a provision, the same, in our opinion, would not be of much significance as respondents had not shown that the mistake in the matter of recording of date of birth in

the service record was known to appellant at any earlier point of time. If appellant's contention is correct that he came to learn about it only in April, 1988 whereafter he filed a representation, it must be held that there was no delay on his part in this behalf. An employee may take action as is permissible in law only after coming to know that a mistake has been committed by the employer. Consequently, the applicant's date of birth was corrected and he was treated to have retired in the year 2006.

(ix) Recently, i.e., on 16.03.2009, the Hon'ble Supreme Court delivered judgment in the case of R.K. Jangra Vs. State of Punjab [Civil Appeal No. 1615 of 2009 arising out of SLP (C) No. 2389 of 2008] decided on 16.03.2009. The judgment is on Punjab Civil Services Rules. The rules require submission of representation for correction of date of birth within a period of two years. The petitioner in the case before the Hon'ble Supreme Court had joined his service in the year 1980 and recorded his date of birth as 04.01.1952. However, the appellant was issued birth certificate showing his date of birth as 03.01.1953. The applicant made a representation before the State Government for correction of his date of birth on 20.09.1995, which was rejected on 18.12.1995. The Hon'ble Supreme Court considering the plight of the poor and unfortunate petitioner, whose representation was delayed in bureaucratic wrangling, directed that his representation should be decided on merits. The present case in hand is identical with this ruling and he is also entitled for correction of date of birth.

18. In the peculiarity of the facts and circumstances of the case, the respondents, thus, cannot rely upon amended Rule 16-A(4) of All India Services (DCRB) Rules, 1978, retrospectively to reject the case of the applicant at the threshold on the ground of limitation without even looking into the facts and evidence. The Respondents are, in all fairness, required to consider the case of the applicant for correction of his date of birth on the basis of documents submitted by him, particularly when the respondents have not denied the authenticity of those

documents. The applicant has given sufficient evidence in support of this claim. The extract from the Birth and Death Register maintained by the Kotwal of the Village Udadi, where the applicant was born, is a very relevant and authentic document and is fully supported and corroborated by the affidavit filed on behalf of Respondent No. 4, i.e. the Collector and District Magistrate, Dist. Yavatmal.

19. In view of the above said discussion of law and facts, the case of the applicant cannot be rejected merely on the ground that he did not prefer a representation within a period of five years of limitation and deserves to be considered on its own merit in the light of various documents, particularly the Birth and Death Register maintained by the Village Kotwal. The impugned order dated 16.03.2007 is, therefore, quashed and set aside. The respondents are directed to reconsider the case of the applicant on the basis of material documents/evidence supplied by the applicant and consider it on merit and take a fresh decision in the whole matter within a period of three months from the date of receipt of a copy of this order. It is made clear that applicant will be at liberty to approach the appropriate forum as per law, in case his case is not considered favourably on merit within the stipulated period of three months.

20. The O.A. succeeds. No order as to costs."

11. A perusal of the above said order would reveal that the delay in raising the issue of correction of date of birth by the applicant was clearly condoned in the peculiarity of the facts and circumstances of the case. The applicant belongs to a nomadic tribe. His parents were totally illiterate. He has risen to the ranks by

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sheer dint of his hard work and merit. His parents recorded wrong date of birth, i.e., 01.08.1952 instead of 03.04.1955. This is evident from the affidavit filed on behalf of the Collector in the earlier round of litigation. All these favourable aspects and materials have been conveniently ignored by the respondents while passing the impugned order dated 01.03.2011 in question. It is the settled law of the land that favourable material and evidence must not be eschewed by respondents while passing administrative order which has the potential to affect the civil rights of the applicant in any manner. The impugned order, therefore, cannot be sustained in the eyes of law and fact.

12. In view of this backdrop and keeping in view the totality of facts and circumstances of the case, ends of justice would be met with if the whole matter is remanded to the respondents to objectively and dispassionately reconsider the case of the applicant for correction of his date of birth in question on the basis of available material and evidence on record and pass appropriate orders within a period of two months

from the date of receipt of a copy of this order.

The respondents shall also examine as to whether the applicant remains eligible for entry into M.P.S.C. if the date of birth, i.e., 03.04.1955, is given effect to as his true date of birth.

Ordered accordingly.

13. The O.A., thus, stands allowed in terms of above directions. No order as to costs.

(*Smt. LEENA MEHENDALE*)
MEMBER (A)

(*JOG SINGH*)
MEMBER (J)

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