

15

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, DELHI.

Regn. No. O.A. 423/1989. DATE OF DECISION: 6-2-1991.

Stanzen Tashi Applicant.

V/s.

Union of India & Anr. Respondents.

CORAM: Hon'ble Mr. P.C. Jain, Member (A).
Hon'ble Mr. J.P. Sharma, Member (J).

Shri B.B. Rawal, counsel for the applicant.
Shri K.C. Mittal, counsel for the respondents.

1. Whether Reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether their lordships wish to see the fair copy of the judgment? No.
4. Whether to be circulated to all Benches of the Tribunal? No.

Decc
(J.P. Sharma)
Member (J)

Cen
(P.C. Jain)
Member (A)

16

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(Judgment of the Bench delivered by
Hon'ble Mr. P.C. Jain, Member (A).)

JUDGMENT

The applicant joined as a Constable in Leh (Ladakh) in the J&K Police in November, 1951. He went on deputation to Intelligence Bureau (I.B.) in October, 1954 and continued to work in Ladakh. He was promoted as Head Constable in 1963. On the bifurcation of I.B. in 1968, he was allotted to Research and Analysis Wing (R&AW), Cabinet Secretariat, and was promoted as Assistant Field Officer (AFO) in April, 1973. He was absorbed in R&AW and appointed as A.F.O. (GD) in a substantive capacity with effect from 1.3.1983, at the stage of initial constitution of the Junior Executive Cadre vide Cabinet Secretariat's order dated 11.4.1984 (Annexure A-1). Government of J&K was requested, in the endorsement of the above order, to strike off his lien from J&K State Police with effect from 1.3.1983. He was appointed to officiate on promotion as Deputy Field Officer (D.F.O.) (G/D) in April, 1986 on a temporary basis vide Office Order No.315-E.5/86, dated 18/21-4-1986 (Annexure A-2). He was continued at Special Bureau, Leh (Ladakh). He was issued two Commendation Certificates on 24.5.1980 and on 1.5.1985. The applicant states that in September, 1986, he came across a seniority list of D.F.O.s (G/D) wherein his date of birth was shown as 28.1.1949 and date of joining service as 1.11.1976 in place of 15.8.1929 and 11.11.1951 respectively. He

17

submitted a representation dated 11.9.1986 pointing out the above discrepancies and to let him know the date of birth and the date of joining service as recorded in the service book, so that he does not face problem at the time of his retirement at a later stage; a copy of the representation is at Annexure A-5. He was informed vide Memorandum dated 10.12.1986 that the matter was receiving attention and he may await the issue of next seniority list (Annexure A-6). On 1st May, 1987, he states to have received two messages through signals -

- (1) to come down to SB Leh and submit documentary evidence regarding actual date of birth, and
- (2) for having been relieved w.e.f. 30th May, 1987

(AN) on reaching superannuation, from service.

When he reached Leh on 7.5.1987, he was served the Office Order dated 30.4.1987, according to which he stood relieved of his duties on 30.4.1987 (AN) and his name was to be struck off from the rolls of the Cabinet Secretariat with effect from the above date. He was handed over Memorandum dated 30.4.1987 relieving him on 30.4.1987 (AN) on retirement and Memorandum dated 4.5.1987 asking his explanation about the different dates of birth (Annexure A-7). Again he made a representation dated 15.5.1987, with which he endorsed a certificate from the Headmaster, Government Middle School, Saboo village where he had studied upto 3rd Standard, showing his date of birth as 15th Aug., 1929 as also an affidavit made by him before the District Magistrate, Leh. He prayed for revocation of the superannuation order on the basis of wrongly entered date of birth in the service book, which he sought to be corrected and also submitted that he was never shown his service book, nor informed of his correct date of birth much in advance of retirement in spite of his repeated requests (Annexure A-8). The Assistant Commissioner, Special Bureau, Leh had a discussion with the applicant on 26th May, 1987 when he was asked to get some more proof

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from his village about his date of birth from local records. He procured a certificate on 30.5.1987 from the Village Nambardar and two members of Village Samiti to the effect that his date of birth, according to the Birth and Death Register maintained by the Nambardar in the village, was 15.8.1929. He submitted the same to the Assistant Commissioner of Special Bureau, Leh with a forwarding letter dated 1.6.1987 (Annexure A-9).

2. It is the superannuation order dated 30.4.1987 retiring the applicant with effect from the afternoon of that date, which has been assailed by the applicant in this application under Section 19 of the Administrative Tribunals Act, 1985. He has prayed for:

- (i) a direction to the respondents to pay his pension and other superannuation benefits like gratuity, group insurance, leave encashment etc. immediately with penal interest;
- (ii) a direction to the respondents for payment of difference of pay and allowances drawn by him from 21.4.86 to 30.4.1987, as he was paid only for the post of A.F.C., while he actually worked as D.F.C. during this period;
- (iii) a direction to the respondents to treat him on duty upto 31.8.1987 as D.F.O. and payment as D.F.O. till that date with penal interest till actual payment; and
- (iv) a direction to the respondents to compensate him for the huge expenditure that he has been made to incur from coming down to Jammu and back to Leh and from Leh to Delhi and back with his forced stay of three months at Leh to realise his dues illegally denied to him.

3. The respondents did not file their reply in spite of opportunities given to them and, therefore, on 21.8.1989, the following order was passed by a Bench of this Tribunal:-

"Respondents have not filed their counter-affidavit within the time given to them. They have, therefore, forfeited their right to file the counter-affidavit and they are set ex-parte. Let this case be listed for final hearing in its turn."

The respondents filed a copy of their written statement on 29.8.89 i.e., after the time given to the respondents and after their right to file the same had been forfeited. A Bench of this Tribunal passed, inter-alia, the following order on 25.9.1989: -

"However, in the interest of justice, we direct that the counter-affidavit filed by the respondents be taken on record subject to the respondents' paying the cost of Rs.100/- to the applicant. The applicant may file rejoinder, if any, within two weeks."

As the cost was stated to have not been paid, a Bench of this Tribunal, inter-alia, passed the following order on 25.1.90: -

"The representative of the respondents requests for one week's time to seek instructions as regards compliance with the order of the Tribunal dated 25.9.1989. We do not consider it proper to give further time to the respondents. We, therefore, hold that the respondents have forfeited their right to file the counter-affidavit. List the case for final hearing in its turn."

In this background, the reply filed by the respondents had not been taken on record and the applicant had also not filed any rejoinder, though a copy of the reply had been served on the learned counsel for the applicant. However, learned counsel for the respondents appeared for the final hearing of the case and made oral submissions. We have perused the material on record and have also heard the learned counsel for the applicant.

4. At the outset, the learned counsel for the respondents assailed the order passed by the Tribunal forfeiting the right of the respondents to file their reply and awarding

a cost of Rs.100/- to the applicant. The order forfeiting the right of the respondents to file the counter-affidavit and setting them ex-parte was passed on 21.8.1989. No petition for review of this order was filed by the respondents. Similarly, no such petition was filed against the order dated 25.9.1989 wherein cost of Rs.100/- was awarded to the applicant. Same is the position with regard to the order passed on 25.1.90. Under Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987, such a petition could have been filed within 30 days from the date of the order. Learned counsel for the respondents urged that the Tribunal has no powers to either impose cost or to forfeit the right of the respondents to file their counter-affidavit. We are unable to uphold the above contention. Rule 12 of the Central Administrative Tribunal (Procedure) Rules, 1987 deals with filing of reply and other documents by the respondents. Sub-clause (1) of the above Rule provides that each respondent intending to contest the application, shall file reply to the application and the documents relied upon within one month of the service of notice of the application on him. Clause (5) of the same Rule provides that the Tribunal may allow filing of the reply after the expiry of the prescribed period. The provision in sub-clause (5) as above can be reasonably interpreted to mean that filing of the reply after the prescribed period may be allowed by the Tribunal on such terms and conditions as it may deem fit. If so, imposing of costs would be within the powers of the Tribunal in allowing to the respondents more time than what is prescribed and unless such permission is granted, the reply filed beyond the prescribed time cannot be taken on record. It may be pointed out here that as per the last order passed in this regard on 25.1.1990, respondents were not set ex-parte and accordingly, the learned counsel for the respondents was heard on the merits of the case.

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5. The learned counsel for the applicant stated at the bar that he does not press his prayer in regard to treating the applicant on duty upto 31.3.1987 and payment as Deputy Field Officer till that date, as also the prayer inherent in this prayer for correction of entry in the service record in regard to his date of birth.

6. The main question to be determined in this case thus is whether the continuation of the applicant in service upto 30.4.1987 would entitle him to all benefits of service upto that date. In endorsement at S1. No.2 of the impugned order dated 30.4.87, it is stated that according to entry in the service book, the applicant has gone past the superannuation age, as the date of birth recorded in the service book is 6.11.1927 according to Christian era. Based on this, the applicant was to retire on superannuation on 30.11.1985 (A.N.). However, the same endorsement states "that the date of retirement is subject to further verification of service records, and finalisation of pension papers will have to be made after reconciling the contradictory dates of birth furnished by him to the office from time to time and the date of birth recorded in his service book." The applicant has brought on record a number of papers, according to which his date of birth is 15.8.1929. Copy of the School Leaving Certificate (Annexure A-8) shows that his date of birth, according to the admission register is 15th August, 1929. The affidavit filed by him on 12.5.1987 also shows the same date of birth (Annexure A-8 - page 36 of the paper book). The certificate issued by the Nambardar of Village Saboo, to which the applicant belongs, and which is also signed by two other Members, shows the date of birth as 15.8.1929 according to the entry in the Birth and Death Register maintained by the Nambardar. This is at Annexure A-9. The applicant represented on 11.9.86 about the mistake in regard to his date of birth shown in the seniority list and this was much before he was actually retired. In reply

22

to this representation, respondents had informed "that the matter is receiving attention and may await the issue of next seniority list". There is no document on record before us to show if any further seniority list was issued and if so, when and what were the entries regarding the date of birth of the applicant in the seniority list. In his application dated 14.1.1980 for voluntary retirement, he has mentioned that his date of birth is August 1929. There is also nothing to show that the entry about the date of birth in the service record was ever shown to the applicant. In view of this as also in view of the facts stated above, it cannot be said that there was no dispute about the date of birth of the applicant and, as such, it was incumbent on the respondents to hold an inquiry with a view to determining the correct date of birth (STATE OF ORISSA Vs. Dr. (Miss) BINAPANI DEI & OTHERS (AIR 1967 S.C. 1269)). No such inquiry appears to have been held. Even if such an inquiry had been held, it could not be at the back of the applicant, particularly when the applicant had submitted documentary evidence in support of his contention. He furnished the documentary evidence in support of his contention on being asked to do so, and that too after he was retired on 30.4.1987, even though his representation dated 11.9.1986 had not been finally replied to.

7. The learned counsel for the respondents urged that the applicant had no right to continue in service after he reached the age of superannuation and, as such, it was not necessary to give any opportunity to show cause before he was actually retired. In this connection, he cited the judgment of the Supreme Court in the case of Dr. SURESH CHANDRA VERMA AND OTHERS Vs. THE CHANCELLOR, NAGPUR UNIVERSITY AND OTHERS (1990 LAB. I.C. 1628). In that case, the Supreme Court observed as below: -

"When, therefore, the services of the appellants are to be terminated in view of the change in the

position of law and not on account of the demerits or misdemeanour of individual candidates, it is not necessary to hear the individuals before their services are terminated. The rule of audi alterem partem does not apply in such cases and, therefore, there is no breach of the principles of natural justice."

That rule is strictly not applicable to the facts of the case before us inasmuch as it is not a question of termination of services, nor any question of change of law is involved herein.

8. The age of retirement on superannuation is prescribed in sub-clauses (a) and (b) of F.R. 56. Sub-clause (b) is not relevant for our purpose. According to sub-clause (a) "Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years". Thus, unless a Government servant is shown to have attained the age of 58 years, he cannot be retired on superannuation under the aforesaid provision. For this purpose, the date of birth is relevant. Mere entry in the service record, which itself does not appear to have been shown at any time to the applicant during his service, may not, in the facts and circumstances of a particular case, be a conclusive proof of the correct date of birth of / Government servant. A full Bench of the Himachal Pradesh High Court in Manak Chand V. State of Himachal Pradesh (1976 (1) SLR 402) Chief Justice Pathak, as he then was, speaking for the full Bench held: -

"A Government servant is entitled to show that the entry made in his service record does not represent his true date of birth. That is a right which flows from his right to continue in service until he reaches the age of superannuation. He is entitled to show that the recorded entry, which determines the date on which he attains the age of superannuation does not reflect the true position and that on its

misleading basis he is liable to be retired before he in fact attains the age of super-annuation. Shortly put, the erroneous entry will abridge the period during which he is entitled to continue in service, therefore, involved in his right to continue in service is his right to show that the recorded entry of his date of birth is erroneous. When such application should be entertained is a matter relating to procedure. A provision determining when the application should be entertained has the effect of limiting the exercise of the right of the Government servant to show that the recorded entry is erroneous. Such limit can be imposed only by a provision having the force of law."

As already stated above, on the first available opportunity, the applicant represented against the wrong entry about his date of birth on 11.9.1986. He was informed that the matter was under consideration and he may wait. After serving the notice of retirement on 30.4.87, he was asked about his correct date of birth. He furnished documentary evidence with his letter dated 15.5.87 and on 1.6.87. Thus, it cannot be said that the applicant had no right to continue in service after 30.11.85. He in fact was continued in service beyond that date without any pre-condition whatsoever. He was allotted Identification Number as D.F.O. (G/D) vide Memorandum dated 12.5.87 (Annexure A-10). Encashment of compensatory offs for a period of 15 days from 1st February to 26th April, 1987 was sanctioned to him vide Office Order No.268 Pers.11/88, dated 30.5.88 (Annexure A-11).

8. Sub-clause (1) of Rule 56 of the CCS (Pension) Rules, 1972 provides that "Every Head of Department shall have a list prepared every six months, that is, on the 1st January, and the 1st July each year of all Government servants who are due to retire within the next 24 to 30 months of that date." Rule 58 of the Pension Rules ibid provides that "Every Head of Office shall undertake the

work of preparation of pension papers in Form 7 two years before the date on which a Government servant is due to retire on superannuation, or on the date on which he proceeds on leave preparatory to retirement whichever is earlier." Thus, it was incumbent on the respondents to take timely action in respect of the retirement of the applicant on superannuation, if they were of the view that he was to retire on superannuation on 30.11.1985. Obviously, they failed to take any such action. The action on retirement taken by the respondents was sudden and without giving any opportunity to the applicant to show cause before his order of retirement from a date earlier than the date of superannuation as per the date of birth claimed by him, had been passed. Since the applicant has not pressed his prayer for correction of his recorded date of birth and his right to continue in service upto 31.8.1987, we are not giving any direction in this regard; but on the basis of the facts and the law on the subject as discussed above, the applicant cannot be deemed to have retired on superannuation on 30.11.1985 and he will be taken to have retired on 30.4.1987.

8. It appears that after the applicant was retired on 30.4.1987, his service from 1.12.1985 to 30.4.1987 has been treated by the respondents as being re-employment and his pay and pensionary benefits have been regulated accordingly. In view of our findings as above, to the effect that the applicant will be deemed to have continued in service upto 30.4.1987, the action of the respondents in treating the period from 1.12.1985 to 30.4.1987 as service on re-employment basis, cannot be upheld.

9. We had directed the respondents to give information in writing about the manner of calculation of pension and other pensionary benefits with his date of birth as 6.11.1927 and alternatively with his date of birth as 15.8.1929 as also the payments made to him ^{upto} ~~after~~ 30.10.90 and the manner of payments. This information was made available to us and

from a perusal of the same, we find that on account of the treatment of the applicant as having retired on 30.11.1985 and further period having been treated as re-employment, the applicant has suffered financially to a considerable extent. For example, his pension was sanctioned on a slab system, which ceased to be applicable with effect from 1.1.1986. Deductions had been made on account of fixation of his pay as on re-employment and so on. In view of our findings as above, this needs to be corrected.

10. In view of the foregoing discussion, the application is allowed as below: -

- (1) The applicant will be deemed to have continued in service upto 30.4.1987 (A.N.) and his retirement on superannuation will be taken as on that date.
- (2) The applicant shall be entitled to the pay of the post of Deputy Field Officer with effect from ^{the date} he assumed charge of the said post in pursuance of Office Order No.315 E.5/86, dated 18/21-4-1986 till the date of retirement on 30.4.1987.
- (3) The applicant will be entitled to leave for the service rendered upto 30.4.1987 and encashment of earned leave at his credit as on that date subject to a maximum of 240 days.
- (4) His pension and DCR gratuity shall be recalculated on the basis of retirement on superannuation on 30.4.1987 (A.N.).
- (5) It has not been shown that the applicant was a member of the Central Government Employees Group Insurance Scheme and, as such, no deduction from his pay towards contribution to the above scheme ^{as would have} ~~had~~ been made; as such, he would not be entitled to any payment on this account.
- (6) The payments on account of above dues shall be made to the applicant within three months of the receipt of a copy of this order by the respondents. A

complete statement of the payments due to the applicant and the manner of calculation shall also simultaneously be supplied to the applicant.

11. The O.A. stands disposed of in terms of the above directions, with costs on parties.

J. P. Sharma
(J.P. SHARMA)

Member (J)

(P.C. Jain)
(P.C. JAIN)

Member (A)

Dec 6/1991