

11

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. 1627 of 1988
T.A. No.

DATE OF DECISION 15.5.90

R.K. Kapoor Petitioner

Applicant in person. Advocate for the Petitioner(s)

Versus

Union of India & Others Respondent

Shri P.H. Ramchandani, Sr. counsel ~~Advocate~~ Advocate for the Respondent(s)


CORAM :

The Hon'ble Mr. B.C. Mathur, Vice-Chairman.

The Hon'ble Mr. T.S. Oberoi, Member (Judicial).

1. Whether Reporters of local papers may be allowed to see the Judgement ? ✓
2. To be referred to the Reporter or not ? ✓
3. Whether their Lordships wish to see the fair copy of the Judgement ? *see*

(T.S. Oberoi)
Member (Judicial)


(B.C. Mathur)
Vice-Chairman

12

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, DELHI.

Regn. No. OA 1527 of 1988 Date of decision: 15.5.90

R.K. Kapoor Applicant.

Vs.

Union of India and Others Respondents.

PRESENT

Applicant in person.

Shri P.H. Ramchandani, Sr. Counsel for the respondents.

CORAM

Hon'ble Shri B.C. Mathur, Vice-Chairman.

Hon'ble Shri T.S. Oberoi, Member (Judicial).

(Judgement of the Bench delivered by Hon'ble
Shri B.C. Mathur, Vice-Chairman.)

This is an application under Section 19 of the Administrative Tribunals Act, 1985, filed by Shri R.K. Kapoor, retired Director, Intelligence Bureau, Ministry of Home Affairs, against the impugned order No. 2/27/87-P&PW dated 4.2.1988 rejecting the applicant's contention that his retirement benefits should be calculated on the basis of attaining the age of 58 years on 1st January, 1986, and as such, he should be deemed to have retired on the 31st January, 1986.

2. The applicant joined the Indian Police Service on the basis of the Combined Competitive Examination held by the Federal Public Service Commission in 1949. According to the rules issued by the Commission, a candidate except for the Railway Services "must have attained the age of 21 years and must not have attained the age of 24 years on the 1st January, 1949, i.e., he/she must have been born not earlier than 2nd January 1925 and not later than 1st January 1928." The date of birth of the applicant is 1st January, 1928. The applicant joined the Indian Police Service on 1.11.1950 and superannuated from service on 31.12.1985 (afternoon) on attaining the age of 58 years (vide Annexures A-3, A-8 and A-9 to the application). The contention of the applicant is that his superannuation on 31.12.1985 was wrong and illegal.

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3. The emoluments drawn by the applicant at the time of retirement on 31.12.1985 were Rs. 6,485.00, including the basic pay of Rs. 3500.00 p.m. The A.G., U.P., sanctioned him pension at the rate of Rs. 2605.00 per month with effect from 1st January 1986 and death-cum-retirement gratuity amounting to Rs. 50,000.00 only was allowed (Annexure A-2 to the application).

4. In consequence of the implementation of the recommendations of the 4th Pay Commission, his pension was revised by the A.G., U.P. to Rs. 3100.00 vide orders dated 24.6.86. These calculations of pension and gratuity were based on his due retirement on 31.12.85. The applicant wrote to the A.G., U.P., and to the Government of India that since he had attained the age of 58 years only on 1st January, 1986, his retirement benefits should be given on the basis of his being deemed to have retired from service on or after 1.1.1986. Annex. A-1 is the impugned order rejecting his representation. The applicant has sought relief that it may be held that Rule 16(1) of the All India Services (Death-cum-Retirement Benefits) Rules read with Explanation below its second proviso is unconstitutional as it acts in a manner which is discriminatory and unfair towards those members of the All India Services whose date of birth falls on the 1st day of a month and that a directive be issued to the respondents to treat him as having attained the age of superannuation on 1st January, 1986 and treat him as having been in service till 31st January, 1986. Based on these dates, the applicant should also be allowed a gratuity of Rs. 1 lakh instead of Rs. 50,000.00 and a compensation of Rs. 5,395.00 being the difference of pay (Rs. 8,000.00) to which he was entitled for January, 1986 and the pension (Rs. 2,605.00) already paid to him. He has also asked for encashment of 6 months' leave based on the higher salary as admissible to officers who were in service on 1.1.1986 and also allow him pension at the rate of Rs. 3190.00 instead of Rs. 3100.00 with effect from 1.1.1986.

5. According to the recommendations of the Third Pay Commission, an officer retiring on any day during a month actually retires on the last day of that month. This has been done to simplify accounting

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work in regard to calculation of pay, pension, etc. The recommendations of the Third Pay Commission were accepted by the Government of India and the All India Services (Death-cum-Retirement Benefits) Rules, 1958, were amended with effect from 1st April, 1974. Sub-rule (1) of Rule 16 stated that a member of an All India Service shall be required compulsorily to retire from service with effect from the afternoon of the last day of the month in which he attains the age of 58 years. Subsequently, through Notification No. 25011/27/75-AIS(II) dated 6th October, 1975, the Department of Personnel & Administrative Reforms, inserted the following Explanation after the second proviso in sub-rule (1) of Rule 16 of the above Rules:

" Explanation - For the purpose of this sub-rule, a member of the Service whose date of birth falls on the 1st day of any month shall have attained the age of fifty-eight years on the afternoon of the last day of the preceding month".

(Annexure A-11).

The contention of the applicant is that the Rules were amended to simplify the accounting work in regard to calculation of pay and allowances, pension etc., and while by making the actual date of superannuation to the last day of the month, all the employees got the benefit except those whose date of birth falls on the first of a calendar month. Even this class of employees would have benefited if the letter and spirit of the recommendations of the Third Pay Commission were followed. However, insertion of the aforesaid Explanation specifically denied the benefit to this class of employees for which there is no rationale or justification.

5. The applicant has pointed out that a simple arithmetical calculation would show that the rule that a member of an All India Service whose date of birth falls on 1st of the month "shall have attained" the age of fifty eight years on the afternoon of the last day of the preceding month is absolutely contrary to the factual position. Considering the case of a person born on 1st of January of a year, his age should be calculated in the following manner:-

15

<u>Date</u>	<u>Age</u>
1st January	Born
2nd January	1 day old
3rd January	2 days old
4th January	3 days old
30th January	29 days old
31st January	30 days old
1st February	31 days old
2nd February	32 days old
31st December	364 days old
1st January of following year, i.e., <u>1st birth day</u>	365 days (i.e. one year old)
2nd birth day which will also fall on 1st January	2 years old
58th birth which will fall on 1st January	58 years old

Thus, a person born on 1st January will attain the age of 58 years on his 58th birthday, which will fall on the 1st January of corresponding year and not in the afternoon of the previous day (i.e. 31st December), which will be only 364th day of his 58th year.

6. The applicant also invited attention to Ministry of Home Affairs Memo No. 33/8/63-Ests (A) dated 4th May 1963 (Annex. A-12 to the application) which was issued in the context of increasing the retirement age from 55 years to 58 years. In this Memo it was stated that a Government servant whose date of birth was 1.12.1907 and "who was due to retire on 1st December 1962 on attaining the age of 55 years" would actually have performed duty till 30.11.1962 and he cannot be regarded as having retired before 1.12.62". Prior to 1st April, 1974, a member of the Service would be on duty till the 364th day of the 58th year of age and he would draw duty pay for that day and his retirement would then commence on the following day i.e., on the day on which he would attain 58 years, which would be the same as his 58th birth day. Thus, a member of the Service

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born on 1st January 1910 would have performed duty till 31st December 1967 and his retirement would commence on 1.1.1968. In view of the Explanation added to sub-rule (1) of Rule 16 of the aforesaid Rules, those members of the Service whose date of birth falls on the first day of a month, are discriminated against and the rule is unfair towards them. A member of the Service born on any other day of a month is allowed extension till the end of that month, while a person born on the first day of a month is required to retire on a day earlier than he actually attains the age of 58 years i.e. on the 364th day of the 58th year.

7. The applicant has stated that when Government decided in 1975 that a Government employee whose date of birth falls on the first day of any month would be considered to have attained the age of fifty-eight years on the last day of the preceding month, it was not expected that this rule, though discriminatory, would seriously and adversely affect the interests of the Government employee concerned although he would suffer some financial loss. Besides, when the Government announced some new retirement benefits for the Government servants, they would generally make them effective from the last day of any particular month. He invited attention to Ministry of Finance's O.M. dated 25th May, 1979 announcing liberalisation of pension through introduction of slab system (Annexure A-14 to the application). The Explanation to sub-rule (1) of Rule 16 of the All India Services (DCRB) Rules have proved highly discriminatory and unfair to the applicant in as much as has caused a heavy pecuniary loss to him in respect of retirement and gratuity benefits as announced by the Government following the recommendations of the Fourth Pay Commission. He has also pointed out to the Office Memorandum dated 4th May, 1963, (Annexure A-12 to the application) relating to the decision to increase the age of retirement from 55 years to 58 years. In this Memo Government accepted that a Government servant whose date of birth was 1.12.1907

would have attained the age of retirement (55 years) only on 1st December 1962 and that he would have retired only on that date i.e. 1.12.1962 and not earlier. He was to be treated on duty till 30.11.1962. As the applicant had attained the age of 58 years on 1.1.1986, he should be eligible to all retirement and consequential benefits admissible to all those who retired on or after 1st January, 1986. The applicant has also pointed out that the Department of Pension and Pensionary Welfare's Memo dated 16.4.1987 does not apply to him. Those orders would apply to "existing pensioners" i.e. a person who was drawing/entitled to pension on 31.12.1985" whereas the applicant was entitled to and actually duly paid for 31st December, 1985 and was not entitled to any pension on that date. The applicant became entitled to pension only from 1st January, 1986 and he did not draw any pension before that date. The claim of the applicant is that the Explanation below the second proviso to Rule 16(1) of the AIS (DCRB) Rules 1958 is violative of Section 9 of the General Clauses Act, 1897. As a rule cannot override a statute, the effect of Section 9 of the General Clauses Act 1897 is that in computing the period of 58 years of service to determine the point of superannuation, the date of his birth (terminus a quo) will have to be excluded and the closing day (terminus ad quem), namely, 1st January 1986 will have to be included. It is also claimed that it is unconstitutional for Government to introduce a discriminatory clause in the nature of Explanation below the second proviso to Rule 16(1) of the above Rules. as this deprives a small number of Government employees who happen to be fortuitously born on the first day of a month.

8. The respondents in their reply have stated that the applicant attained the age of superannuation on 31.12.1985. They have denied the claim of the applicant that as he attained the age of 58 years only on 1st January, 1986, he should be retired or deemed to have retired from service only on 31.1.1986. Besides, the Explanation below second proviso to Rule 16(1) of the relevant rules

is very clear on this. The Hon'ble Supreme Court in Civil Appeal No. 531 of 1986 in the case of Prabhu Dayal Sesma Vs. State of Rajasthan & Another - A.T.R. 1987(1) C.A.T. 389 - have upheld this view. Their Lordships in this have clarified that "in calculating a person's age the date of his birth must be counted as a whole day and he attains the specified age on the date preceding the anniversary of his birth day..... A legal day commences at 12-0' clock mid-night and continues until the same hour the following night. There is a popular misconception that a person does not attain a particular age unless and until he has completed a given number of years. In the absence of any express provision, it is well settled that any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birth day." As such, the applicant was required to superannuate on 31.12.1985. It has been explained that the date of retirement and the date of commencement of pension are two different events. For the purpose of calculating retirement benefits, a Government servant is governed by the provisions existing on the date of retirement of the Government servant. Since the applicant retired on 31.12.1985, he cannot claim benefits ^{available} as/ on or after 1.1.1986. However, provisions have already been made giving pre-1.1.1986 retirees benefits of modification in pension rules made effect from 1.1.1986 as far as the change in the calculation of pension from 'slab' formulae to "50%" formulae is concerned. The ratio of the judgment of the Supreme Court in the case of D.S. Nakara [@] cited by the applicant is fully met.

9. The respondents have stated that though the definition of "existing pensioner" given in the O.M. dated 16.4.1987 does leave room to conclude that those who retired on 31.12.1985 have been left uncovered, the intention was not so. This is borne ^{out} by the fact that the revised policy has been effective in respect of those who retired on or after 1.1.1986 which expression is not fulfilled by those who retired on 31.12.1985.

10. It has also been stated that as far as revised gratuity is concerned, the Hon'ble Supreme Court in its judgement dated @ A.I.R. 1983 S.C. 130

14th January, 1988, in Civil Appeal No. 897 of 1987 has held that prospective revision in the quantum of retirement gratuity cannot be allowed to those who had retired prior to the effective date of the revision. Revised gratuity provision revising the quantum of gratuity to Rs. 1 lakh came into operation in respect of those who retired on or after 1.1.1986, the applicant cannot claim advantage under the same.

11. The learned counsel for the respondents, Shri P.H. Ramchandani, raised the point of limitation. Shri Ramchandani said that the applicant knew about the rule which came into effect from 1st April 1974. He was very much in service at that time and he knew that he would retire on 31.12.1985, ^{and} it is not open to him to challenge any provision of this Rule after his retirement after a lapse of more than 12 years. Neither he nor anyone else belonging to the All India Services challenged this Rule and the application should be rejected due to laches on the part of the applicant. He said that the cause of action took place in 1975 when the Rule was amended and the Tribunal is not competent to adjudicate a matter where the cause of action took place more than 3 years prior to 1.11.1985. He agreed that perhaps in the past no one bothered to challenge the Rule as the consequences to a retiring officer were not of great value, but the law has to take its course irrespective of consequential effects. Consequential effects cannot be the basis for challenging any rule. Shri Ramchandani said that the applicant knew even earlier that by retiring on 31.12.1985, he would suffer some financial loss, may be a small amount and should have taken action to challenge the rule at that time. No fresh legal wrong has occurred and as such the matter cannot be entertained.

Shri Ramchandani said that
12. \angle it may be true that the other members of the Service who retired prior to 1986 did not bother about the rule as it would not have made a substantial difference in their pension or pensionary benefits, but merely because the pay of officers increased from 1.1.1986 and the amount of gratuity was also doubled with

effect from that date, the applicant cannot get advantage of the same as he had retired on 31.12.1985. He said that the legal concept as to how to calculate a person's age, the legal method and the popular method has been discussed in several cases under the Common Law of England which has been adopted by the Supreme Court in the case of Prabhua Dayal Sesma (Supra) and we have to go by the legal method.

13. The Hon'ble Supreme Court in the case of Prabhu Dayal Sesma Vs. State of Rajasthan and Another (Supra) have clearly stated that any specified age in law is to be computed as having been attained on the day preceding the anniversary of his birth day. The Division Bench of the Rajasthan High Court while reversing the orders of the Single Bench in Prabhu Dayal Sesma's case held that "the applicant in that case was born on January 2, 1956 and as such had attained the age of 28 years as soon as the first day of January, 1984 commenced." He had completed 28 years at 12 O'clock on the midnight of January 1, 1984. The Supreme Court reproduced the conclusion of the learned Judges in their own words "In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding the anniversary of his birth day". The learned Judges of the High Court referred to Section 4 of the Indian Majority Act, 1875 and have also relied on the decision in the case of G. Vatsala Rani Vs. Selection Committee for Appointment to Medical Colleges, Bangalore Medical College - AIR 1967 Mysore 135.

14. While going through Rule 11(b) of the Rajasthan State and Subordinate Services (Direct Recruitment by Competitive Examination) Rules, 1962, the Supreme Court examined the language of that Rule which said that a candidate "must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application.It was noted that "at first impression, it may seem that a person born on January 2, 1956 would attain 28 years of age only on January 2, 1984 and not on January 1, 1984. But this is not quite accurate. In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on

the day preceding the anniversary of his birth day. We have to apply well accepted rules for computation of time. One such rule is that fractions of a day will be omitted in computing a period of time in years or months in the sense that a fraction of day will be treated as a full day. A legal day commences at 12 O'clock midnight and continues until the same hour the following night. There is a popular misconception that a person does ^{not} attain a particular age unless and until he has completed a given number of years. In the absence of any express provision, it is well settled that any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birth day."

15. The judgment quotes Halsbury's Laws of England, 3rd edn., Vol. 37, para 178 at p. 100, where the law has been stated as follows:

"In computing a period of time, at any rate, when counted in years or months, no regard is generally paid to fractions of a day, in the sense that the period is regarded as complete although it is short to the extent of a fraction of a day....

Similarly, in calculating a person's age the day of his birth counts as a whole day; and he attains a specified age on the day next before the anniversary of his birth day."

The Supreme Court has also taken note of two English decisions on the point. in Rex V. Scoffin - LR (1930) 1 KB 741 and Re. Shurey: Savory V. Shurey - LR (1918) 1 Ch. 263 -. In the first case Lord Hewart, Chief Justice, held that the accused completed 21 years of age on February 16, 1930 and that he was one day more than 21 years of age on February 17, 1930 as he was born on February 17, 1909. In the other case, the question was whether a person attained a specified age in law on the anniversary of his or her birth day or on the day preceding the anniversary. It was held that ^{law does not} take cognizance of part of a day and the consequence is that person attains the specified age on the day preceding the anniversary of his birth day. It is in recognition of the difference between how a person's age is legally construed and how it is understood in common parlance.

16. The applicant, Shri R.K. Kapoor, said that the Supreme Court's judgement in the case of Prabhu Dayal Sesma should be seen in the

22

right perspective. He said that the Hon^{ble} Supreme Court had held in this case that "in the absence of any express provision it is well settled that any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birthday." He contended that the above principle enunciated by the Supreme Court applies to such cases where there is no express provision for computation of age. The age eligibility rule prescribed for a competitive examination should be interpreted on the basis of its plain language and wordings. The Rules for 1949 Competitive Examination clearly show that a candidate should have attained the age of 21 years and must not have attained the age of 24 years on 1st January, 1949 and that he should have ^{been} born not earlier than 2nd January, 1925 and not later than 1st January 1928. As such, he had not attained the age of 21 years on 1st January 1929 when he had applied for the Service. Shri Kapoor said that the Supreme Court after examining in depth the age eligibility rule prescribed by the Govt. of India and the UPSC for the 1985 IAS competitive examination for recruitment to All India Services agreed with the contention that according to this rule, a candidate would be considered to attain the prescribed minimum and maximum ages of 21 and 26 years, respectively, only on the relevant birth anniversaries. He emphasised ^{that} the rules prescribed for the competitive examination for recruitment to All India Services every year are precise, unambiguous and absolute. they are not capable of any other interpretation and as such the principle of attaining a particular date preceding the birth day would not be applicable in such cases. A legal day commences at 12 O'clock midnight and continues until the same hour the following night and that "attainment" and "completion" of a particular age are two different events and that a person attains a specified age on a particular day as soon as the day commences but he completes that age at 12 O'clock in the midnight of the same day; thus, both the events of attainment and completion of an age takes place on the same date.

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16. The applicant has tried to establish six main points independently and jointly to support his case. To recapitulate, these are:

(i) Before its amendment on 1.4.1974, sub-rule (1) of Rule 16 of the All India Services (DCRB) Rules read with Article 14 of the Civil Services Regulations retired each member of the Service on the day he attained the age of 58 years (55 years upto 30.11.62) and he was considered to have attained that age only on his 58th birth anniversary. (Annexures A-13 and A-11 to the application). Article 14 of the Civil Services Regulations reads as follows:

"When a Government servant is required to retire, revert or cease to be on leave, on attaining a specified age, the day on which he attains that age is reckoned as a non-working day and the government servant must retire, revert, or cease to be on leave (as the case may be) with effect from and including that day. This rule applies to all government servants, Civil, Military or Naval."

It was pointed out that the 'Audit Instructions' noted below FR-56 are identical with Article 14 of the Civil Service Regulations.

According to the applicant, this position was accepted by the Government vide their Memo dated 4th May, 1963 (Annexure A-12 to the application) and that the Supreme Court also confirmed it vide their observations in the case of State of Assam Vs. Padma Ram Borah (AIR 1965, SC 473). However, the amendment of the rule to its present form on 1.4.74 and the addition of the 'Explanation' to it resulted in differential and highly discriminatory treatment between those born on the first of a month and those on the other days of the same month and as such it is violative of Articles 14 and 16 of the Constitution.

(ii) The wordings of the age eligibility rule prescribed by the Government and followed by the U.P.S.C. every year since 1947 lay down that a candidate would be considered to attain the prescribed minimum age of 21 years or the maximum age of 24 or 26 years only on

his relevant birth anniversary (Annexures A-22, A-23, A-25, A-26 and A-28), but at the time of retirement, a Member of the Service born on the 1st of a month is considered to attain the age of 58 years not on his 58th birth anniversary but on the preceding day. Thus, adoption of different methods for computation of age at the time of recruitment and retirement is arbitrary and violative of the Constitution. This method of computation also follows the Supreme Court ruling in the case of General Manager, S.E. Railway Vs. Rangachari (AIR 1982: SC 36).

(iii) The retirement of an officer born on 2nd, 3rd or a subsequent day of a month is not related to the date on which he attains the age of 58 years, but he is due to retire on the last day of that month. Exception has been made ^{the case of} in officers born on the 1st of a month which again is discriminatory. A member born on the 1st of a month should be considered to have attained the age of 58 years on its 58th birth anniversary and not on the preceding day.

(iv) The method of computation of age of all government servants should be the same at all times. According to the applicant, even now Government servants occupying certain posts or holding some offices retire only on the day on which they attain some specified age, say, 65 or 62 years although such an officer hands over charge in the afternoon of his last working day.

(v) In regard to grant of additional retirement benefits, following the recommendations of the 4th Pay Commission, Government adopted a deliberate policy of discrimination towards Government servants who retired from service on 31.12.85. Since 1st April, 1974, government servants generally retire only on 12 dates in a year which fall on the last day of any of the twelve months, but the retirement benefits, specially the increased gratuity sanctioned after the Fourth Pay Commission were made applicable to only those who retired on or after 1.1.1986 instead of granting the same to those who retired on 31.12.1985. The prescription of this artificial, discriminatory and arbitrary date of entitlement by the executive

action does not meet the standards of constitutionality as its effect is to deny benefits to persons retiring on 31.12.1985.

(vi) The applicant's retirement benefits were fixed on the basis of Memo dated 16.4.87 (Annexure A-17 to the application). These orders apply only to the "existing pensioners" who were defined as those drawing pension or were entitled to it on 31.12.85. As the applicant started drawing pension only with effect from 1.1.86, he, therefore, became entitled to it only from that date. He should, therefore, have been sanctioned retirement benefits as admissible on or after 1.1.1986. The applicant was, therefore, arbitrarily tagged to the category of "existing pensioners" as on 31.12.85.

17. We have gone through the pleadings and the arguments by the applicant and the learned Sr. Counsel for the respondents. There is no doubt that it appears somewhat hard and unfortunate that the applicant loses a lot of financial benefits as he is deemed to have retired on 31.12.85 and the benefits emanating from the recommendations of the 4th Pay Commission started from 1.1.1986. In the result, the applicant loses a sum of Rs. 50,000.00 in gratuity alone and the amount of pension and leave encashment are also affected. While this appears very unfortunate, we have to examine the whole matter from the point of view of law.

18. As far as the point of limitation raised by Shri Ramchandani, is concerned, it is true that the amendment to the rules took place in 1975, but it cannot be said that the cause of action, as far as the applicant is concerned, arose then and there and that he should have challenged the same at that time itself. He has actually been affected by the rules when he superannuated on 31.12.85 and, therefore, the question of limitation should not normally arise. The applicant could always hope that the rules might be amended between 1975 and 1985.

19. Reliance has been placed by the applicant on Section 9 of the General Clauses Act which we feel is not relevant. It is laid down therein that in any Act or Regulation, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and, for the purpose

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26

of including the last in a series of days or any other period of time, to use the word "to". The provision affords guidance for the purpose of computation of time where a period is marked both by a terminus a quo and a terminus ad quem. Considering the wording of the relevant Explanation to the Rules, there is no scope for the application of the provision in Section 9 of the General Clauses Act.

19. It may be difficult for us at this stage to declare the amendment of the rules made in 1975 as unconstitutional as the rules specify that a person attains any specified age on the day preceding the anniversary of the birth day and this is the general law also, laid down by the Hon'ble Supreme Court in the case of Prabhu Dayal Sesma Vs. State of Rajasthan and Another (Supra).

A rule can be declared void only if it is a misconceived, arbitrary, ~~xxxxxxx~~ ^{bar} perverse or against any provision of the Constitution.

This rule has been applied to all government servants, at least since 1975, uniformly and it derives strength from Halsbury's Laws of England as well as the English law laid down in various cases, including Rex v. Scoffin and Savory v. Shurey (supra). The Hon'ble Supreme Court have themselves made a distinction between the difference in age as legally construed and as understood in common parlance. The applicant took a lot of pains to point out that important functions of national importance like the 40th anniversary of our independence, Republic Day, the birth day celebrations of leaders like Pt. Jawahar Lal Nehru and others are always celebrated on the anniversary and not on the day preceding the birth anniversary. He relies on the arguments and calculations of age as mentioned in para 5 of this judgement where a person born on 1st January becomes one day old on the 2nd January and as such on the 31st December of that year he is only 364 days old and becomes one year old only on the 1st January of the following year. The principle laid down under the English law or by the Hon'ble Supreme Court is that any fraction of a day must be treated as a whole day and a person born any time on the 1st of a month

27

would become one day old on the midnight of the same day, and, therefore, he does not become one day old on the 2nd January but on the 1st January itself. In view of the clear distinction between a legal age and birth anniversaries as understood commonly or popularly, the amendment to the All India Services (DCRB) Rules in 1974 cannot be considered as arbitrary, discriminatory or violative of the Constitution. The Explanation to a Rule is also a part of the Statutory Rule. Government have been following the convention of retiring a Government servant on the day preceding his date of birth anniversary uniformly. The contention of the applicant is that in some cases persons who are to retire at the age of 62 or 65 years are retired on the date they were born although they cease working on the last work^{ing}/day preceding the date of birth. It is noted that functionaries like Judges, Chairman and Members of the Central Administrative Tribunal who retire either on a tenure basis or on attaining the age of 62 years or 65 years, hand over charge of their office on completion of the tenure on the day preceding their 62nd or 65th birth anniversary. It is, therefore, a common universal practice in Government that a person retires on the day preceding his birth day. The applicant accepts that a person due for retirement on the 1st of January hands over charge on 31st December of the preceding year, but actually retires on the 1st of January and, therefore, under the existing rules must retire on 31st of January as anyone retiring during the month actually continues in service till the end of the month.

20. Although the applicant has cited a number of Supreme Court rulings, it is interesting that both the applicant as well as the respondents rely on the Supreme Court ruling in Prabhu Dayal Sesma Vs. State of Rajasthan & Another (supra)'s case. The respondents rely on the findings of the Supreme Court: "any specific age in law is to be computed as having been attained on the day preceding the anniversary of the birth day" while the applicant uses the same ruling by emphasising that in the absence of any express provision, the above rule will apply. His case is that when there are express provisions in the rules in his favour, the method of computation

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adopted in Prabhu Dayal Sesma's case cannot be applied in his case. It will be useful to examine the rules. As discussed earlier, it is not possible to declare the amendment to the All India Services (DCRB) Rules, 1958 as illegal as they follow the general law as laid down by the Supreme Court and generally follow the established English law on the subject. The Rules as amended in 1974 are clear and do not support the contention of the applicant at all. It has been emphasised by the applicant that he has been recruited to the Service on the basis of the rules applied by Government and followed by the Federal Public Service Commission on the question of age limits. The applicant entered the Indian Police Service on the basis of the Combined Competitive Examination held by the Federal Public Service Commission in 1949. According to the rules, a candidate "must have attained the age of 21 and must not have attained the age of 24 on the 1st January 1949 i.e. he/she must have been born not earlier than 2nd January 1925 and not later than 1st January 1928". It implies that a person born on 1st January 1925 would be overage by one day on 1.1.1949. Therefore, the rules also accept that a person born on 1.1.25 on 1.1.49 would be 24 years and one day. Even in common parlance when we speak of a calendar year, it is from 1st January to 31st December and, therefore, a year starting on 1st January will complete 12 months or one year on 31st December of the same year. If a person's last working day is on the preceding day, he draws the salary of the post till the last working day which is one day before his birth anniversary. Pension etc. have to be calculated on the basis of the salary drawn by him on that day, and, therefore, the applicant would deem to have drawn his last salary only on 31.12.85 and calculations regarding pensionary benefits would be based on that basis only. The point raised regarding "existing pensioners" has been explained in the arguments advanced by the learned counsel for the respondents (para 9 of the judgement) and these are accepted.

21. We do not consider it discriminatory to fix a cut off date for providing any particular benefit. In fact, benefits like

the benefits under the 4th Pay Commission have to be given from a particular date. The 4th Pay Commission had recommended benefits with effect from 1.4.86, but the Government made them applicable from 1.1.1986. Had the Government accepted the recommendations of the Pay Commission, applying the date 1.4.1986, there would have been no grievance as far as the applicant is concerned, but it would have hurt people who retired between 2.1.86 and 1.4.86. As discussed earlier, it is unfortunate that the applicant having been born on 1.1.28 is deprived of a lot of financial benefits recommended by the 4th Pay Commission, but he cannot get the benefit resulting from the recommendations of the 4th Pay Commission on the basis that he retired on 1.1.86 and, therefore, deemed to continue in service upto 31.1.1986. The practice adopted in the case of the applicant is universally adopted in all cases and anyone born on the 1st of a month is deemed to have retired from that date and gets benefits of pension on the basis of service till the previous day. If the last working day of an officer is the last day of a month, the last working day cannot be extended by another month. It is true that persons born on 2nd, 3rd or a subsequent day of a month continue till the end of the month, but in their cases the last working day is a part of that month and not of the previous month. Although we have a lot of sympathy with the applicant, we are unable to provide any relief to him under the existing rules and must follow the basic principle enunciated by the Hon'ble Supreme Court that in computing the age, fractions of a day must be treated as a full day and that a person attains the age of superannuation on the day preceding the anniversary of his birth day. In view of this, we hold that the respondents have correctly superannuated the application on 31.12.85 and no relief can be provided to the applicant. In the circumstances, the application is dismissed. There will be no orders as to cost.

(T.S. Oberoi)
Member (J)

(B.C. Mathur)
Vice-Chairman

15.5.90