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Court No. 1.

CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD.

Registration (T.A.) No. 450 of 1987.

(Writ Petition No.2482 of 1979 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow.)

Nageshwar Nath

Petitioner.

....  
Versus

Union of India & others

Respondents.

....

Hon'ble Justice K. Nath, V.C.  
Hon'ble K.J. Raman, A.M.

(By Hon. Justice K. Nath, V.C.)

The Writ Petition, described above, is before us under Section 29 of the Administrative Tribunals Act,1985 for quashing the order dated 16.12.1978, contained in Annexure '4', and for a mandamus to treat the applicant to continue in service till 1982.

2. The petitioner, Sri Nageshwar Nath, entered into railway service on 6.6.1947 when his date of birth was initially recorded as 13.9.1924. The office appears to have found that different dates of birth flowed from different material available in the petitioner's service record and, therefore, as far back as 1962 the discrepancy was looked into. It was noticed that five different dates appeared from different materials. One of the materials under consideration was the Indian Army Discharge Certificate (IADC) of the petitioner. The office report shows that according to the certificate dated 13.5.1946 the petitioner's recorded age, during military service, was 21 years 8 months on 25.8.1942, which was the date of his enrolment. The Department took a decision that the date of birth should be determined on the basis of the Military Discharge Certificate (MDC), aforesaid, and on that basis the date of birth was corrected sometime to be 25.12.1920.

92

3. On the basis of the corrected date of birth, the petitioner appears to have informed in 1978 that he would retire from service on 31.12.1978. Against that intimation he made a representation dated 19.11.1978. In this representation he mentioned that his true date of birth was 1.1.1926, as recorded in the school certificate of which he attached a copy. He next mentioned that in the MDC, which was completed on 13.5.1946, his age was mentioned as 21 years and 8 months, hence his date of birth could be 13.9.1924. However, he went on to add that that date of birth (13.9.1924) was incorrect and was simply written by the recruiting officer because at the time of his recruitment he was below the minimum age of eligibility. He requested that his date of birth be corrected to be 1.1.1926.

4. This representation was considered and rejected by the impugned order dated 16.12.1978, contained in Annexure '4'. That annexure says that the petitioner's correct date of birth is 25.12.1920 and, therefore, he ought to be retired on 31.12.1978 and that it was not possible to accept the representation dated 19.11.1978.

5. It appears that accordingly the petitioner was retired physically from 31.12.1978. He filed Writ Petition No.5 of 1979 before the Lucknow Bench of the Hon'ble High Court. A statement was made on behalf of the petitioner before the Bench that the petitioner may make a representation against the impugned order and that the authorities concerned may look into; on that basis the petition was dismissed as not entertainable by the order dated 20.2.1979, as the petitioner had not exhausted the departmental remedy. Annexure '6' is the petitioner's memo of appeal dated 8.3.1979 to the General Manager, N.E.Railway, Gorakhpur, it is stated in the writ petition that no orders were forthcoming on his appeal and, therefore, the present writ petition was filed on 3.9.1979.

6. The case taken is that the MDC represents the correct date of birth of the applicant, according to which it ought to be

13.9.1924; and if that was so, the petitioner could not have retired prior to September, 1982.

7. In the reply it is pointed out that the petitioner had been setting up various dates of birth and that ultimately the Department itself accepted the MDC as the document, representing the correct date of birth of the petitioner which, according to the respondents, would prove the date of birth to be 25.12.1920 and, therefore, the petitioner was correctly retired in December, 1978.

8. We have heard the learned counsel for the parties at considerable length. Sri G.P. Agarwal, appearing on behalf of the respondents, has also placed before us the service record of the petitioner.

9. It may be pointed out at once that while the petitioner came up with inconsistent case regarding date of birth at different stages, so far as the present writ petition is concerned, both the parties agree that the age has to be determined on the basis of the MDC. We must repeat that in his own representation dated 19.11.1978 the petitioner had stated that his correct date of birth was 1.1.1926, as recorded in the school certificate, but that date was not acted upon because he would have been under age for the purposes of recruitment in the Military Service. He could not, therefore, take benefit of that date of birth in the present case because he had already taken advantage of the date of birth, as recorded in the MDC. The irony is that the applicant did not press ~~that~~ the date of birth recorded in the MDC when he made the representation dated 19.11.1978; he made a futile attempt to have the date rectified to be 1.1.1926. There is substance in the contention of the learned counsel for the respondents, inasmuch as that the petitioner's conduct is not fair in this regard.

10. Even so, the settled law is that where the parties agree to a common basis for determination of a fact, it is not for the

Court to travel beyond it, unless the Court itself holds it affirmatively that such admission is false and that there is some other true fact on which the decision can be based. All that may be done in the present case is to place our interpretation on the MDC and to find what should be the correct date of birth in accordance therewith.

11. Annexure '1' is a typed copy of a portion of the MDC. The learned counsel for the applicant has produced before us the original certificate, which we propose to rely upon for the purposes of the present case. This certificate will remain on the record in this case. The entry at Sl.No.2 of this certificate, which is described as 'Certificate of Service', is as follows :-

"2. Description at the time of completion of this form :

Age 21 years 8 months."

12. The question is as to what is the date of "completion of this form". The form states the petitioner's date of enrolment as 25.8.1942, the date of discharge as 10.7.1946 and, at the bottom, is dated and signed of 13.5.1946. There is a note at the bottom of the date of 13.5.1946, which runs as follows :-

"The signature of the soldier will not be affixed to this page until all entries are completed, and will then be regarded as a certificate that he understands the use of the form and accepts the correctness of the entries therein."

We may mention that just above the date of 13.5.1946, above this note, there is provision for "signataure of soldier," which bears the signature of the petitioner. The noticeable thing is that, according to the note, the petitioner could not affix his signature on the document until all the entries were completed and the date of discharge - 10.7.1946, is almost two months after the bottom date of 13.5.1946. It is plain, therefore, that this form could not have been completed before 10.7.1946, the date of discharge, which is

entered at one of the items at Sl.No. 1 of this certificate. The earliest date on which this form could be held to have been completed was 10.7.1946. The age of 21 years and 8 months must, therefore, be reckoned with effect from 10.7.1946. If that be so, the date of birth should be 10.11.1924 and in that event the applicant should have retired on 30.11.1982.

13. The respondents have determined the date of birth to be 25.12.1920 on the basis of the petitioner's date of enrolment, which was recorded as 25.8.1942, in the certificate. That was not correct because, according to the clear and unambiguous expression used at Sl.No.2 of the certificate, the age was to be recorded as at the "time of completion of this form".

14. The petitioner has claimed the date of birth to be 13.9.24 on the basis of the bottom date of 13.5.1946 on the certificate. That also is not correct because, as indicated above, the form could not be said to have been completed till that date. The result of the above findings is that on the material adopted by both the parties as the true basis for determining the date of birth, it must be held that the petitioner's date of birth should have been 10.11.24 and he could not retire before 30.11.1982.

15. The question ultimately is as to what relief the applicant ought to get. It is clear enough that the applicant himself had waiving stand from time to time and ultimately in his last representation dated 19.11.1978 he had disowned the date of birth as could follow from the MDC. The Hon'ble High Court did not ~~choose~~ <sup>it</sup> consider appropriate to grant any interim order; indeed no prayer for interim order appears to have been made for the petitioner, who had already retired. Admittedly, the petitioner had not been in job since after December, 1978. We think this is one of those cases where the petitioner may not be awarded arrears, in the totality of the circumstances as well as the petitioner's own conduct and the usual principle of "no work no pay". But the ~~peti~~

petitioner must get benefit of his continued service, so far pensionary benefits are concerned.

16. On <sup>a</sup> consideration of all the matters, we allow this petition in part and quash the impugned order dated 16.12.1978, contained in Annexure '4' and direct that the respondents shall treat the applicant to have continued in service till 30.11.1982. ~~as~~ On that basis the respondents shall accord all the pensionary benefits, which may be admissible to the petitioner, according to applicable rules, without making payment of arrears <sup>of salary and allowances etc</sup> for the period between December, 1978 and November, 1982. The respondents shall comply with these directions within a period of six months from the date of receipt of a certified copy of this judgment. In the circumstances of the case, parties shall bear their own costs.

*(Signature)*

MEMBER (A).

*(Signature)*

VICE-CHAIRMAN.

Dated: April 19, 1990.

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