

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Original Application No: 559/98

17.12.98
Date of Decision:

S.P.Shaikh

Applicant.

Shri S.K.Kudle

Advocate for
Applicant.

Versus

DRM (P) C.Riy., Solapur & Ors.

Respondent(s)

Shri R.R.Shetty

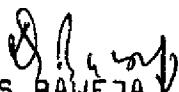
Advocate for
Respondent(s)

CORAM:

Hon'ble Shri. D.S.Bawej, Member (A)

Hon'ble Shri.

- (1) To be referred to the Reporter or not?
- (2) Whether it needs to be circulated to other Benches of the Tribunal?


(D.S.BAWEJA)
MEMBER (A)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

OA. NO. 559/98

Commenced this the 17th day of December 1998.

CORAM: Hon'ble Shri D.S.Bawaja, Member (A)

Sharfoddin Peersahab Shaikh,
R/o 130/24, Siddheshwar Path,
Solapur,

By Advocate Shri S.K.Kudle

... Applicant

v/s.

1. Divisional Railway Manager,
(P), Central Railway,
Solapur.

2. The Union of India,
through The Secretary,
Ministry of Railway,
Rail Bhawan, New Delhi.

By Advocate Shri R.R.Shetty

... Respondents

O R D E R

(Per: Shri D.S.Bawaja, Member (A))

This OA. has been filed by the applicant challenging the impugned order dated 9.1.1998 as per which his date of birth has been changed with a prayer to quash the same and reinstate the applicant in service from 1.2.1998 with all consequential benefits holding that as if the impugned order was never passed.

2. The applicant has stated his case as follows:-
The applicant was appointed as an untrained Ticket Collector in 1965 on Central Railway. His date of birth was recorded as 9.1.1941 in the Service record.

Subsequently, the applicant came to know that his actual date of birth was 30.5.1941 and after obtaining the birth certificate, he made a representation for change of date of birth in 1983. However, the applicant did not get any reply from the respondents. As per letter dated 26.11.1997, the applicant was asked to produce the School Leaving Certificate and Secondary School Certificate. The applicant as per his letter dated 27.11.1997 informed in reply to letter dated 26.11.1997 stating that he is not in possession of the original School Leaving Certificate and Secondary School Certificate and instead furnished a copy of the birth Certificate available with him. Thereafter, to his utter surprise, he received order dated 9.1.1998 informing him that his date of birth is changed to 9.1.1940 instead of 9.1.1941 and accordingly he will retire on superannuation from 31.1.1998. The applicant immediately represented against the same as per his letter dated 16.1.1998 followed by a reminder dated 27.1.1998. However, his representation was rejected as per letter dated 29.1.1998 and the applicant was retired from service from 31.1.1998. Feeling aggrieved by the same, the applicant has filed this application on 3.7.1998.

3. The main ground of attack of the applicant is that the date of birth 9.1.1941 recorded in the Service Book remained operative for 32 years and has been suddenly the date of birth changed as 9.1.1940 by the administration without any show cause notice to the applicant and thereby the action taken by the respondents is arbitrary and in violation of principles of natural justice. It is also further contended that

as per the extant rules provided in Rule 225 of Indian Railway Establishment Code, the date of birth could be changed only by General Manager and Respondent No. 1, i.e. Divisional Railway Manager has no power. Therefore, the impugned order passed by the Respondent No. 1 is honest.

4. The respondents have filed written statement justifying the action taken for changing the date of birth from 9.1.1941 to 9.1.1940. The respondents submit that the applicant had indicated his date of birth as 9.1.1940 in the form submitted by him for recruitment through Railway Service Commission. The applicant had also submitted a copy of the School Leaving Certificate indicating the date of birth as 9.1.1940. However, when the service record was prepared, the applicant recorded his date of birth in his own handwriting as 9.1.1941 and this entry went unnoticed. However, in 1997 when the service record of the applicant was being scrutinised in connection with the selection for the post of Chief Ticket Inspector, the discrepancy with regard to the date of birth of the applicant as recorded in the service book with reference to the documentary evidence furnished by him at the time of recruitment was discovered. The applicant was immediately asked as per letter dated 26.11.1997 to produce the School Leaving Certificate and the Secondary School Leaving Certificate. The applicant, however, did not furnish the original of these certificates but instead submitted a birth certificate. The respondents got the School Leaving Certificate available in the record from the concerned school and it was confirmed by the school verified

that the date of birth recorded as 9.1.1940 is correct as per the record of the school. After verifying these details, a reference was made to the Headquarters' office i.e., the Chief Personnel Officer, who is the competent authority for change in date of birth as per item No. 71 of Schedule of Powers in Establishment matters, a copy of which has been brought on record. After obtaining the sanction of the competent authority for change of date of birth, the applicant was advised of change of date of birth as per letter dated 9.1.1998. The applicant has been accordingly retired on 31.1.1998 as per his correct date of birth. The respondents submits that there is no violation of principles of natural justice as the correction in date of birth has been carried out as per the documentary evidence submitted by the applicant at the time of recruitment, based on which his date of birth/9.1.1940 is but the applicant had recorded his date of birth as 9.1.1941 in his own/writing. Therefore, all what the respondents have done is a correction of clerical mistake and therefore no show cause notice/required to be given to the applicant. The respondents also deny with regard to the averment of the applicant that he had submitted application for change of date of birth in 1983. The respondents plead that in view of what is brought out in the written statement, the applicant has no case and the application deserves to be dismissed.

5. The applicant has filed rejoinder reply contesting the averments of the respondents. The applicant has maintained that no order was passed by the competent authority for change in date of birth and the impugned order has been passed by a subordinate authority who is not authorised to effect change in date of birth in the service record. The applicant has made ~~some~~ allegations stating that the respondents have taken action to change his date of birth to victimise him as he belongs to minority community. He also alleges that the order passed by the respondents is colourable exercise of power and in controvension of principles of natural justice.

6. I have heard the arguments of Shri S.G. Kudle, learned counsel for the applicant and Shri R.R.Shetty, learned counsel for the respondents. The respondents have made available the original record containing the service sheet and the personal file of the applicant.

7. Before going into the merits of the grounds advanced by the applicant in challenging the impugned order changing the date of birth of the applicant, it would be expedient to consider the submissions of the respondents with regard to the date of birth based on the documentary evidence brought on record by them vis-a-vis the defence put up by the applicant in the OA. The respondents in the written reply have brought out that the applicant in his application form for recruitment through Railway Service Commission had indicated the date of

birth as 9.1.1940. The respondents have further stated that the applicant had also submitted a copy of the School Leaving Certificate and Secondary School Certificate along with the application form wherein the date of birth had been shown as 9.1.1940. The respondents further stated that at the time of recording the date of birth in the Service Sheet, the applicant in his own handwriting instead of indicating the date of birth as 9.1.1940 had written the date of birth as 9.1.1941. This discrepancy as per the respondents went un-noticed till 1997 when at the time of scrutiny of the service sheet with regard to the promotion as Chief Ticket Inspector, it was found that the date of birth recorded by the applicant was not according to the documentary evidence on record as submitted by the applicant at the time of recruitment. Thereafter, the respondents submit that the date of birth has been corrected as 9.1.1940 after obtaining the approval of the competent authority. The respondents have made available the original record containing the documents brought on record in reply. I have carefully gone through all the relevant documents. It is noted that the date of birth of the applicant as per the application form, school leaving certificate and the secondary school certificate is 9.1.1940. The applicant had recorded the date of birth in the service sheet in his own handwriting as required as per the rules, since the applicant was literate, as 9.1.1941. It is also noted that



reference has been made that the date of birth is recorded as per secondary school certificate. Since the school certificate available on record shows the date of birth as 9.1.1940 obviously, the date of birth has been wrongly recorded in the service sheet by the applicant. Whether the date of birth has been recorded as 9.1.1941 instead of the actual date of birth being 9.1.1940 as per the documentary evidence intentionally by the applicant or it is clerical mistake is difficult to say at this stage. However, since from the averments made by the applicant, ^{wherein} he claims that his actual date of birth is 30.5.1941 based on the date of birth certificate, it is quite likely that the applicant had intentionally written his date of birth as 9.1.1941. However, without going into this aspect, there is no doubt that based on the documentary evidence submitted by the applicant at the time of recruitment, his admitted date of birth should have been 9.1.1940 and not 9.1.1941. The applicant has stated that in 1983 he had made a request for change in date of birth with correction as 30.5.1941 based on the date of birth certificate obtained by him. The respondents have totally denied of having received any request. The applicant has also not brought any application on record. There is also no averment to the effect ~~as to~~ why the applicant kept quiet subsequent to submission of application in 1983 if accepted. In view of this, it is difficult to accept the contention of the applicant that he has sought the change in date of birth as 30.5.1941. In any way, the date of birth

as claimed by the applicant, if allowed will amount to seeking the change in date of birth at the fag end of the service. This, as held by the Hon'ble Supreme Court in several judgements, is not permissible. Further, the date of birth certificate obtained subsequently cannot form the basis for seeking the change of date of birth stating that the date of birth in the school leaving certificate or secondary school certificate was not correct. In fact the date of birth certificate is the documentary evidence which is required to be produced at the time of admission in the school to record the date of birth which then continues as the accepted date of birth for all purposes. Keeping all these facts in view, I have no hesitation to come to the conclusion that the correct date of birth of the applicant as per the documentary evidence submitted by the applicant himself at the time of recruitment is 9.1.1940 and not 9.1.1941 as recorded by him. Further, the applicant cannot seek the change in date of birth as 30.5.1941 based on the birth certificate obtained in 1983 at the fag end of his service.

8. With the above findings with regard to the correct date of birth, the grounds taken by the applicant in challenging the impugned order changing the date of birth of the applicant from 9.1.1941 to 9.1.1940 will be examined. The first ground taken by the applicant is that the order effecting the change of date of birth from 9.1.1940 to 9.1.1941 has been not passed by the competent authority. As

per the applicant, in terms of provisions in Rule 225 of the Indian Railway Establishment Code Vol.I, the date of birth can be altered only with the approval of the General Manager and in the present case, the approval of the General Manager was not obtained. This contention of the applicant has been controverted by the respondents stating that the approval of the Chief Personnel Officer, who is the competent authority for change in date of birth, has been taken. The respondents have brought on record the schedule of powers at 'R-3' to the written statement indicating the delegation of power to the Chief Personnel Officer. I have carefully gone through the document brought on record by the respondents and inclined to agree with the submission of the respondents. It is clear from the documents brought on record that the approval of the Chief Personnel Officer had been taken and who is the competent authority for alteration of date of birth in respect of non-gazetted railway staff. In view of this, the objection raised by the applicant is not sustainable.

9. The second ground and which is the core of the issue is that the alteration of date of birth which involves civil consequences has been done without giving any opportunity to the applicant. The applicant, therefore, contends that there is a violation of principles of natural justice and the impugned order gets vitiated and deserves to be set aside. The respondents, on the other hand,

have taken a stand that the action taken by the respondents is only a correction of a clerical mistake which had taken place while recording the date of birth and therefore no show cause notice was required to be given to the applicant. During arguments The applicant maintained that non-issue of show cause notice to the applicant before the change in date of birth is denial of principles of natural justice and he sought support of the judgement of Hon'ble Supreme Court in the case of State of Orissa & Ors. vs. Dr.(Ms.) Binapani Dei, AIR 1967 SC 1269 and Union of India vs. Jyoti Prakash Mitter, AIR 1971 SC 1093. I have carefully gone through these judgements of the Hon'ble Supreme Court. In the judgement in the case of Dr.(Ms.) Binapani Dei, the Hon'ble Supreme Court in Para 9 has held that "an order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fairplay". In the case of Union of India vs. Jyoti Prakash Mitter, their Lordships have held in Para 31 as under : -

".....Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed....."

In the present case, it is an admitted fact that before changing the date of birth no notice was issued to the applicant though the respondents had asked the applicant to submit the original of school leaving certificate and secondary school

certificate after the mistake in the date of birth was detected but no indication was given to the applicant as to why these certificates were being called for. Keeping in view what is held by the Hon'ble Supreme Court in the above referred judgements, the respondents/have informed the applicant about the mistake in recording of the date of birth and given him opportunity to explain as to how he had recorded the date of birth as 9.1.1941 and the documentary evidence with him to support the date of birth recorded in the service sheet. Since the date of birth recorded as 9.1.1941 which continued almost for 32 years, it is acceded that the applicant should have been given opportunity to show cause for the same and his explanation could have been placed before the competent authority before taking a decision for correcting the date of birth. The impugned order therefore is vitiated due to violation of principles of natural justice. Under these circumstances, the normal direction should be to set aside the impugned order but keeping in view the facts and circumstances of the present case, I am not inclined to do so in view of the reasons as discussed subsequently.

10. Hon'ble Supreme Court in the case Maharashtra State Board of Secondary & Higher Secondary Education vs. K.S.Gandhi & Ors., 1991 (2) SLR 682 has held that the applicability of the principles of natural justice is not a rule of thumb or a straight jacket formula as an abstract proposition of law. It would

also
be appropriate to reproduce the observation of
Hon'ble Supreme Court in Para 22 of the order
as under :-

".... The omnipresence and omniscience
of the principle of natural justice
acts as deterrence to arrive at arbit-
rary decision in flagrant infraction
of fair play. But the applicability
of the principles of natural justice
is not a rule of thumb or a straight
jacket formula as an abstract proposi-
tion of law. It depends on the facts
of the case nature of the inquiry and
the effect of the order/decision on
the rights of the person and attendant
circumstances."

Further, the Hon'ble Supreme Court in another case
of Karnataka Public Service Commission & Ors.
vs. B.M. Vijaya Shankar & Ors., 1992 (2) SCC (L&S)
362 have stated as under :-

"Natural justice is a concept which
has succeeded in keeping the arbitrary
action within limits and preserving
the rule of law. But with all the
religious rigidity with which it
should be observed, since it is
ultimately weighed in balance of
fairness, the courts have been
circumspect in extending it to
situations where it would cause more
injustice than justice. Even though
the procedure of affording hearing is
as important as decision on merits yet
urgency of the matter or public interest
at times require flexibility in applica-
tion of the rule."

11. Keeping in view what is observed by the
Hon'ble Supreme Court, the facts and the circumstances
in the present case are examined. I have recorded
the findings above that there is no doubt with ~~not~~
regard to the date of birth of the applicant.
The date of birth of the applicant based on the
documentary evidence submitted by himself at the
~~not~~
time of recruitment is 9.1.1940 and 9.1.1941 as

recorded. With this position, if the impugned order through which the date of birth of the applicant is changed is set aside, the direction would have to be reinstate the applicant in service and competent authority may be given then liberty to give show cause notice to the applicant and then pass a speaking order taking into consideration the explanation of the applicant. Such a direction which should normally flow once it is ~~is held~~ that the impugned order is bad in law and deserves to be set aside. This would mean that inspite of the fact that applicant is correct due for retirement based on the date of retirement but on the basis of the impugned order being bad in law, the applicant continues further in service for a period beyond the due date of retirement thus as per the correct date of birth and will get the benefit which is not legally available to him. Therefore, the impugned order though may be illegal but quashing aside of the same and directing reinstatement of the applicant in service would also be illegal as it will give a benefit to the applicant which is legally not available to him. Under such circumstances, the Tribunal is not expected to act mechanically and set aside the order as such an action would be only in supporting giving the benefit to the applicant which he cannot avail legally otherwise. In view of this, I decline to pass the order setting aside the impugned order. In this connection, I draw support from the Hon'ble Supreme Court in the case of ^{AIR 1966 SC 828/1} Gadde Venkateswara Rao vs. Government of Andhra Pradesh & Ors. In this case, the Hon'ble Supreme Court has noted that the order passed by the Government is bad since it was

passed without giving an opportunity to the aggrieved party who was prejudicially affected by the order. The High Court earlier had refused to quash the Government order. The Hon'ble Supreme Court while upholding the decision of the High Court observed as follows :-

"If the High Court had quashed the said order, it would have restored an illegal order - it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case."

From these observations, it would be seen that even if the order is bad and passed in violation of principles of natural justice, the Supreme Court held that High Court was right in not interfering with the order since the setting aside of such order would amount to restoring the illegal order.

12. The Hon'ble Supreme Court in another judgement in the case of Verma vs. Central Govt. Industrial Tribunal from Labour Court, AIR 1981 SCC 422, has held that in certain cases for uncertain situations, even if the termination order is held violative of Section 25-F, the court may deny relief or reinstatement. Keeping in view the facts and circumstances of the case and what is held by the Hon'ble Supreme Court in the above referred judgements, I do not consider that the present OA. is a fit case for setting aside the impugned order even though it is vitiated due to denial of natural justice. I, therefore, decline to exercise the jurisdiction of

judicial review in favour of the applicant for setting aside the impugned order.

13. In the result of the above, the OA is dismissed with no orders as to costs.


(D.S. BAWEJA)
MEMBER (A)

mrj.