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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH

O.A.No: 1343/95 Date of decision: 24 MAR 98

Between:

G. Sudhakar ..Applicant

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1. Union of India,
   through
   Secretary,Ministry of Finance,
   (Department of Revenue),
   Secretariat,
   New Delhi.
2. Collector of Customs and
   Central Excise, Guntur,
   Andhra Pradesh. .. Respondents

Counsel for the applicant : Mr. J. Sudheer
Counsel for the respondents : Mr. N.R. Devraj

Coram:

Hon'ble Shri A.V. Haridasan, ViceChairman,(EB)
Hon'ble Shri H. Rajendra Prasad, Member(A)

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(Per Hon'ble Shri A.V. Haridasan, Vice Chairman (EB)

The applicant while doing his Post Graduate course, was appointed as an Inspector of Central Excise on compassionate ground by order dated 11.7.1975 on the death of his father who expired on 8.7.1974 while serving the Department. The date of birth of the applicant (DOB for short) was entered in the Service Register as 11.4.1953 on his own declaration and as was entered in the SSLC book. Alleging that the applicant had then found out that his real DOB is 11.4.1955 and not 11.4.1953 that the DOB of his elder brother himself is 4.4.1953, the applicant after obtaining certificates of birth of himself and his brother from the Registrar of Birth and Death, Guntur Municipality (2) submitted a representation to the second respondent on 1.9.1989 requesting alteration of his DOB in the Service Records. This representation was rejected by the second respondent vide his order dated 5.12.1989 (Annexure-A IX). Aggrieved by that the applicant made another application to the Deputy Secretary to Govt. of India, Ministry of Finance, Department of Revenue on 25.1.1990 which was also rejected by the order dated 11.6.1990. The applicant has filed this application in the month of March, 1994 with a Misc. Application for condonation of delay. Being aware of the rulingof the Apex Court in Union of India Vs. Harnam Singh (1993 (2) SLR 42) wherein it was held that:

> "It would be appropriate and in tune with harmonious construction of the provision to hold that in the case of those Govt. servants who were already in servicebefore 1979 for a period of more than five years, and who intended to have their date of birth within a reasonable time after 1979 but in any event not later than five years after the coming into force ofthe amendment in 1979. This view would be in consonance with the intention of the rule making authority."

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The applicant has sought to have the Note-5 under Clause (m) of FR 56 declared as un-constitutional besides claiming on merits that he had a very genuine ground for having his DOB altered. The applicant has therefore filed this application for a declaration that the Note-5 under FR 56(m) is illegal, arbitrary without jurisdiction, discriminatory and violative of Article 14, 16, 21 and 311 of the Constitution of India and for striking down the order of the second respondent rejecting his request for alteration of DOB by order dated 5.2.1989 and the order of the Deputy Secretary to Govt. of India, Ministry of Finance dated 11.6.1990 directing the respondents to correct the DOB in his service record as 11.4.1955 instead of 11.4.1953.

2. It is seen that the application for condonation of delay for filing this application has been allowed by the bench and the application has been admitted.

3. The respondents have filed a reply statement opposingthe grant of the reliefs.

4. With meticulous care we have gone through the materials placed on the file and have also heard Shri Sudheer, learned counsel for the applicant and Shri N.R. Devraj, learned Senior Central Government Standing Counsel appearing for the respondents.

5. Before entering into a consideration of the genuineness of the applicant's claim that his DOB is 11.4.1955 and not 11.4.1953 as recorded in his Service Record as also in the educational records it is necessary to go into the challenge intothe constitutional validity of the impugned note under FR 56, for if the note is found to be constitutionally valid then it maynot be necessary to go into the merits of the applicant's claim.

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6. The constitutional validity of the note 5 under FR 56 introduced by Govt. of India, Ministry of Home Affairs, Deptt. of Personnel & Administrative Reforms Notification No. 19017/7/79-Ests.(A) dated the 30th November, 1979 published as S.O. 3997 in the Gazette of India dated the 15.12.1979 and which has taken effect from that date is assailed by the applicant mainly on the following grounds:

a) by introducing a limitation of 5 years for making application for alteration of DOB by impugned Note there is a discrimination between the two sets of Government servants viz. those who are in service since long prior to 1979 who have applied for alteration of their DOB without any limitation whatsoever and those who were appointed after 1979 suffer from the limitation. This discrimination being violative of Article 14 and 16 of the Constitution the impugned note is not sustainable.

b) The clause (a) and (b) of the impugned note are mutually contrary because while according to clause (b) if it is established that there was a genuine and bonafide mistake in regard to the entry of the DOB the DOB could be altered without any limitation of period whereas clause (a) puts a restriction of 5 years and therefore the impugned note is unsustainable in law.

c) As the impugned note only being an administrative/executive instruction cannot curtail the rights conferred on a Govt. servant to continue till the age of superannuation as guaranteed under Article 311 of the Constitution and therefore the note being violative of Article 311 of the Constitution is unsustainable;

d) As there is no nexus between the impugned note and the intention of the rule making authority to curtail vague andfake attempt of the employee to stay back in service at thefag end of their service, as this object could be achieved by making reasonable rule stating that one cannot apply for alteration of DOB prior to one's retirement by prescribing some limit thereto. Therefore the impugned provision is arbitrary and irrational.

7. We shall presently consider these grounds in seriatum.

The argument that by imposing a restriction that a request in regard to alteration of the DOB would be entertained only if it is made within five years of the entry into Govt. service of the official brought into effect w.e.f. 30.11.1979 would create two classes among Govt. servants viz. those who have been in service for long time prior to that who could have applied for alteration of DOB without any limitation whatsoever and who were appointed after that date, who would be entitled to seek alteration of DOB only within a period of five years of entry into service which is violative of Article 14 and 16 of the Constitution of India, on the face of it is absolutely untenable. After the introduction of Note 5 by amendment dated 30.11.1979 those who entered into Govt. service after that date as also those who were in service even prior to that date would be entitled to seek alteration of DOB only within a period of five years. Therefore the introduction of the Note 5 under FR 56 has not brought any unreasonable classification of hostile discrimination as contended by the applicant. In Harnam Singh's case, 1993(2) SLR 42,the Apex Court observed as below:

> Indeed, if a government servant already in service for a long time, had applied for correction of date of

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birth before 1979, it would not be permissible to non-suit him on the ground that he had not applied for correction within five years of his entry into service, but the case of government servant who applied for correction of date of birth only after 1979 stands on a different footing. It would be appropriate and in tune with harmonius construction ofthe provision to hold that in thecase of those government servants who were already in service before 1979, for a period of more than five years, and who intended to have their date of birth corrected after 1979, may seek the correction of date of birth within a reasonable time after 1979 but in any event not later than five years after the coming into force of the amendment in 1979. This view would be in consonance with the intention of the rule making authority."

The above observation would clearly show that after the introduction of the note-5 it would be applicable to the govt. servant who entered in service prior to 1979 as also those who entered the service thereafter uniformly.

8. The argument that clause (a) and (b) of Note-5 are mutually contradictory is also unfounded. Forthe purpose of easy understanding it would be profitable to extract the Note-5 and clause (a) to (c) which read as below:

"Note-5- The date on which a government servant attains the age of fifty eight years or sixty years, as the case maybe, shall be determined with reference to the date of birth declared by the govt. servant at the time of appointment and accepted by the appropriate authority on production, as far as possible, of confirmatory documentary evidence such as High School or Higher Secondary or Secondary School Certificate or extracts from Birth Register. The date of birth so declared by the govt. servant and accepted by the appropriate authority shall not be subject to any alteration except as specified in this note. An

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alteration of date of birth of a govt. servant can be made with the sanction of a Ministry or Department of the Central Government or the Comptroller and Auditor General in regard to persons serving in the Indian Audit and Accounts Department, or an Administrator of a Union Territory under which the government servant is serving if-

(a) a request in this regard is made within five years of his entry into Govt. service;

(b) it is clearly established that a genuine bonafide mistake has occurred; and

(c) the date of birth so altered would not make him ineligible to appear in any school or University or Union Public Service Commission examination in which he had appeared, or for entry into Govt. service on the date on which he first appeared at such examination or on the date on which he entered Govt. service."

A mere reading of this note with clause (a) to (c) would make it clear that alteration of the DOB of Govt. servants would be permissible only if the three conditions stipulated in clause (a) to (c) are satisfied. Therefore, it is idle to contend that clause (b) gives a Govt. servant an unfettered right to seek alteration of DOB without any limitation in regard to period of time. Hence,there is no inconsistency between clause (a) and clause (c).

9. Shri Sudheer, learned counsel for the applicant, argued that under FR 56, a Govt. servant has a right to continue in service and retire from service on the A/N of the

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last day of the month in which he would attain the age of 58 years and that retiring him on any date prior to that is opposed not only to the Rule 56 of the FR but also to the provisions of Article 311(2) of the Constitution which guarantees that a civil servant shall not be dismissed or removed from service or reduced in rank unless he has been told ofthe charges against him and an enquiry has been held in accordance with the rules. According to the learned counsel the age of 58 years is to be reckoned on the basis of the real DOB of the Govt. servant and not on the DOB which has been recorded in the Service record. The Govt. servant so long as he is in service has a right to get his DOB corrected at any time and to impose a restriction on this right by the impugned note amounts to deprival of his right to continue in service till the age of 58 years and violation of the guarantee under Article 311 (2) of the Constitution. He further argued that even a rule made under Article 309 of the Constitution would be invalid if it has the effect of curtailing the right conferred on a Govt. servant under Article 311(2) of the Constitution. The learned counsel placed reliance on the following rulings in support of his arguments. Sant Ram Sharma Vs. State of Rajasthan and another (1967 SLR 906), Shri Manak Chand Vaidya Vs. State of Himachal Pradesh and others (1976 (1) SLR 402), Moti Ram Deka Vs. N.E. Frontier Railway, (AIR 1964 SC 600). Under Rule 56 of the FR, a Govt. servant shall retire from service on the A/N of the last day of the month in which he attains the age of 58 years. What would be the date on which the Govt. servant would attain the age of 58 yesars should be ascertainable from the service record. That is the

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necessity for making an entry in the Service record of the Govt. servant while he enters into service basing on his own declaration and the DOB recorded in the matriculation certificate. Unless and until this DOB as entered in the service record is altered the date entered in the Service record has to be taken as the correct DOB of the Govt. servant. If the DOB of the Govt. servant is left to be determined on the basis of what he might try to establish at anytime before his retirement, there would be no definiteness in regard to the date of retirement which will jeopardise the legitimate expectation of persons who are juniors and awaiting promotion. The learned counsel invited our attention to the observation of the Supreme Court in Moti Ram Deka Vs. N.E. Frontier Railway which reads as follows:

> " It is necessary to emphasise that the rule making authority contemplated by Art. 309 cannot be validly exercised so as to curtail or affect the rights guaranteed to public servants under Art. 311(2). Once the scope of Art. 311(1) and (2) duly determined, it must be held that no Rule framed under Art. 309 can trespass on the rights guaranteed by Art. 311."

Basing on this observation the learned counsel argued that the impugned note which curtails the protection of a right of a Govt. servant to continue till the age of superannuation by placing a restriction on the period of making a request for alteration of DOB even if treated as one framed under Article 309 of the Constitution is invalid. The above argument is hollow and bald in view of the fact that the right of the Govt. servant to continue in service till the age of superannuation on the basis of the recorded entry of DOB is not curtailed by the Note-5 under FR 56. As has been observed by the Apex Court in the State of Assam V. Daksha Prasad Deka, AIR 1971 SC 173, until the DOB in the

service record is corrected, the Govt. servant cannot claim that he has been deprived of the gurantee under Article 311(2) of the Constitution by being compulsorily retired before attaining the true age of superannuation.

10. Strong reliance was placed by the learned counsel for the applicant to the following observation of the High Couort of Himachal Pradesh in Manak Chand Vs. State of Himachal Pradesh and Ors.(1976 (1) SLR 402):

> If on application made by the Government servant, the Government finds that there is substance in the claim it is bound to give efffect to the claim and alter the relevant entry in the service record. If the entry is found to be erroneous it must, in all fairness to the Government servant, be corrected. 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 executive direction without sanction of law, it cannot affect the exercise of the Government servant's right to show that the recorded entryi is erroneous. Now, the Government of India decision, on which the respondents rely, does not have the status of a statutory rule and, therefore, cannot defeat the legal right of the Government servant mentioned above. So far as it affeçts the determination of the true date of birth it must be considered ultra vires for the reasons set out above."

It is now well established that to fill up a gap in the statutory rule it is permissible that the Govt. can issue administrative instruction which would have the force of law. It is also settled that the administrative instruction can only supplement the rule but cannot subplant the Rule. In Union of India Vs. K.P. Joseph and Ors. (1973 (1) SLR 910), the Hon'ble Supreme Court observed as below:

> To say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties. It is because an administrative order can abridge or take away rights that we have imported the principle of natural justice of audi alteram partem into this area"

In Sant Ram Sharma Vs. State of Rajasthan and another (1967 (Vol.I) SLR 906 it was held:

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It is true that Govt. cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Govt. can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

Can the impugned Note-5 under FR 56 be said to be inconsistent with the spirit of the rules? The Rule 56 provides that a Govt. servant shall retire from service on the A/N of the last day of the month in which he attains the age of 56 years. This right of the Govt. servant has not been curtailed or abridged by the instructions contained in the impugned note. Unless the DOB entered in the Service record is altered or corrected the right of the Govt. servant is only to retire at the age of 58 years according to the recorded DOB. This right has not at all been abridged by the impugned note. Therefore, it is incorrect to say that the administrative instruction contained in note-5 is unsustainable as it abridges the right conferred under the rule. In the light of the above discussions we do not find any merit in the argument of the learned counsel of the applicant that the note is inoperative as it is a derogation of the Statutory Provisions.

11. The argument that there is no nexus between the rule and intention of the rule making authority to discourage fake claim for alteration of DOB is also without substance. The alteration of DOB of an officer is not a matter which affects him only. It has a chain reaction. The officers lower in the hierarchy of service aspiring for promotion would be adversely affected if the DOB of a senior officer is altered at the fag end of his service. Several persons would have even joined service expecting to get promotion on a particular date or dates, but for which they would not have probably accepted the appointment. The alteration of DOB of

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the officers would jeopardise this legitimate expectations of a junior officer. It is for this reason that the impugned note has been introduced. If a person does not request for alteration of his DOB on genuine ground within a period of five years then he cannot thereafter make any such request. This limitation according to us is perfectly justified. If even five years after joining service a person is not in a position to know whether the DOB recorded in his service record as also in the educational record is not correct, then he may have to spend the remainder of the period of his service taking that the DOB recorded is correct. It is with this object that the impugned note has been incorporated under FR 56. This definitely has intelligible differentia and bears a rational nexus to the objective sought to be achieved. The attack on the validity of the note on the basis that it does not bear any nexus to the objective sought to be achieved has therefore to fail.

12. In the light of the above discussion we are of the considered view that the note-5 under FR 56 is valid and does not suffer from any infirmity to render it constitutionally invalid.

13. Having found that note-5 under FR 56 is valid and enforceable the rejection of the applicant's request for alteration of his DOB made in the year 1989 cannot be faulted at all especially in view of the decision of the Supreme Court in the case of Secretary and Commissioner, Home Department and Others Vs. R. Kirubakaran (1993(5) SLR 585. The Apex Court has observed as below:

> " According to us, this is an important aspect, which cannot be lost sight of by the Court or the Tribunal while examining the grievance of public servant in

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respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be conclusive nature, is made out by the respondent, the Court or the Tribunal should not issue a direction, on the basis of the materials which make such claim only plausible. Before any such direction is issued, the Court or the Tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by anyrule or order. If no rule or order has been framed or made, prescribing the period within which such appliction has to be filed, then such application must be filed within the time, which can be held to be reasonable."

14. Learned counsel for the applicant inviting attention to the various annexures produced by the applicant in support of his claim that his real DOB is 11.4.1955 argued that this is a case when the applicant has more than 15 years to reach the age of superannuation and that it cannot be considered as an attempt of an employee reaching the fag end of the service to clinge on for some more time and that therefore in the peculiar facts and circumstances of the case it has to be held that the rejection of his request for alteration of the DOB by the second respondent was not proper. We are not impressed with this argument. May be the applicant's real DOB is 11.4.1955 as contended by him but he has not been vigilant in finding out this defect in his service record and getting it rectified within a reasonable period of time. It looks a little curious that the applicant was not aware of the real date of his birth being a member of a society where

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birthdays are celebrated. Even otherwise if he was two years younger than the majority of the students who studied with him in school he definitely would have known his DOB recorded in the SSLC Certificate was two years behind his real DOB. Why in the year 1989 alone the applicant cared to look at the marriage certificate of his parents is also not explained. Therefore, we are not satisfied that the facts of the case deserves any special dispensation. Further, the rules do not permit it.

15. In the result, the application is devoid of any merit and therefore, we dismiss the same leaving the parties to bear the costs.

(H. RAJENDRA PRASAD)
MEMBER (A)

24 MAR 98

MD

(A.V. HARIDASAN)
VICE CHAIRMAN (EB)

Deputy Registrar

(84)

O.A.1343/95.

To

1. The Secretary, Ministry of Finance, Union of India, Dept.of Revenue, Secretariat, New Delhi.

2. The Collector of Customs and Central Excise, Guntur, A.P.

3. One copy to Mr.J.Sudheer, Advocate, CAT.Hyd.

4. One copy to Mr.N.R.Devraj, Sr.CGSC. CAT.Hyd.

5. One copy to HHRP.M.(A) CAT.Hyd.

6. One copy to DR(A) CAT.Hyd.

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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH AT HYDERABAD

THE HON'BLE MR.JUSTICE A V Haridasan
VICE-CHAIRMAN (Ernakulam Bench)

AND

THE HON'BLE MR.H.RAJENDRA PRASAD:M(A)

DATED: 26-3-1998

ORDER/JUDGMENT:

M.A./R.A./C.A.No.

in

O.A.No. 1343/95.

T.A.No. (W.P.)

Admitted and Interim directions Issued.

Allowed

Disposed of with direction

Dismissed.

Dismissed as withdrawn

Dismissed for Default.

Ordered/Rejected.

No order as to costs.

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