

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.7237 OF 2008
(Arising out of SLP No. 23646 of 2007)**

State of Bihar & Ors.

Appellants

Versus

Pandey Jagdishwar PrasadRespondent

J U D G M E N T

TARUN CHATTERJEE,J.

1. Leave granted.
2. This appeal is directed against an order passed by a Division Bench of the High Court of Judicature at Patna, by which the respondent had questioned the legality and validity of an order dated 22nd of August, 2006 passed by a learned Judge of that Court, whereby the

learned Judge had rejected the Writ Petition filed by the respondent.

3. The Writ Petition was filed by the respondent raising grievances against the order of the appellant dated 4th of December, 2004 directing recovery of the amount of salary for two years paid to the respondent on account of a dispute with regard to his date of birth despite the fact that the respondent had worked during that period. The appellant, by the order dated 4th of December, 2004, as noted herein earlier, directed recovery of the salary on the basis of that order, which was affirmed by a learned Judge of the High Court. Therefore, the only question that was raised before the Division Bench was whether the order passed by the State Authority dated 4th of December, 2004 and affirmed by the learned Judge was justified or not. The Division Bench, by the impugned order, had allowed the appeal and set aside the

order of the learned Judge and quashed the order of the authority effecting recovery from the retiral dues and also directed the appellant to return and repay the amount recovered till the date of payment. It is this order, which is now under challenge before us by way of a Special Leave, which on grant of leave, was heard in presence of the learned counsel for the parties.

4. Before we consider the questions raised before us in support of the appeal, let us narrate the relevant facts leading to the filing of this appeal.

5. The respondent, at the relevant point of time, was working as a Correspondence Clerk (class III) in the office of the Executive Engineer, Rural Engineering Organisation, Works Division, Sasaram in the State of Bihar. On 14th of August, 1973, the service book of the

respondent was opened and two dates of birth of the respondent viz. 11th of February, 1944, and 11th of February, 1946, were recorded simultaneously in his service book. It may be mentioned here that inspite of two dates of birth having been entered into service of the respondent, the State Authorities did not correct or delete any of the dates mentioned above for the entire period the respondent was in employment with the State Authorities. According to the first mentioned date of birth, the respondent ought to have retired on 28th of February, 2002. But he retired on 29th of February, 2004 according to the other mentioned date of birth in his service book. As noted herein earlier, on 4th of December, 2004, a reasoned order was passed vide memo no. 340, in the context of an order dated 11th of October, 2004, passed in C.W.J.C. No. 12886 of 2004, in which the respondent claimed for payment of

retirement benefit such as pension, gratuity, leave encashment, etc.

6. By this order, the respondent was ordered to be retired on 28th of February, 2002, on the basis of his date of birth mentioned in his service book i.e. 11th of February, 1944, which was based on his matriculation certificate. As noted herein earlier, by the order dated 4th of December, 2004, the appellant passed an order directing recovery of the excess amount drawn by the respondent.

7. Thereafter, on 12th of February, 2005, by the memo Nos. 30 and 31 of the Executive Engineer, Work Division, Sasaram sanctioned the amount of gratuity and also ordered for deduction of excess amount from group insurance of the respondent in twenty equal installments. The Executive Engineer R.E.O.

Works Division, Sasaram through the memo no. 05 dated 4th of March, 2005, made a refixation of the amount paid to the respondent under Bihar Government Employees Essential Group Insurance Scheme. Aggrieved thereafter, the respondent filed a Writ Petition before the High Court of Judicature at Patna and the High Court, by an order dated 2nd of August, 2006, dismissed the writ petition of the respondent, in which it was observed that he was not entitled to refund as he had worked beyond the date of his superannuation for which he alone was responsible.

8. Feeling aggrieved by this order of the learned Judge of the High Court, the respondent filed an appeal before the Division Bench of the High Court which quashed the recovery order issued by the appellant, as well as the orders of the learned Judge. The Division Bench, as noted

herein earlier, directed refund of the amount already recovered from the respondent with interest at the rate of 6 percent per annum from the date of recovery till the date of payment. Being thus aggrieved, the appellant has filed this appeal before this Court.

9. We have heard the learned counsel appearing on behalf of the parties and perused the materials on record as well as the impugned judgment. It appears that the department raised a controversy in regard to the date of birth after about 31 years of service of the respondent. It is an admitted position now that the amount directed to be recovered, has already been recovered from the retiral dues of the respondent which has been ordered by the Division Bench to be refunded to the respondent with interest @6%. It is true that the date of birth mentioned in the Matriculation Certificate

should be treated as the date of birth of the respondent. But it would be open to the employee to place documents before the authorities that the date of birth shown in the service book taken from the matriculation certificate was incorrect. There has been no such document placed on record to corroborate the same except an affidavit sworn by the respondent, which is on record. Therefore, the respondent ought to have retired on 28th of February, 2002, on the basis of his matriculation certificate which shows his date of birth as 11th of February, 1944 as recorded in his service book. The learned counsel appearing on behalf of the appellant argued that since the service book of the respondent was in custody in which one of the date was mentioned as 11th of February, 1944, he ought to have retired on 28th of February, 2002, and therefore, he had fraudulently continued to serve the

appellant till 29th of February, 2004 thereby receiving undue payment of salary and other allowances. We find no merit in this argument. It is to be noted that there was no question of fraud committed by the respondent before the learned Single Judge or even before the Division Bench of the High Court. The Division Bench, in the impugned judgment, had on this account subsequently mentioned this, which is quoted as under :-

“In the present case, there was no dispute about the fact that there is no allegation of misrepresentation or fraud purported to have been perpetrated by the appellant-original writ petitioner.”

10. Such being the position and in the absence of any allegation of the misrepresentation or fraud made by the appellant, the appellant cannot be permitted to raise the allegation of misrepresentation or fraud for the first time in this Court. Moreover, for the sake of argument, even if we consider that the respondent had fraudulently entered

another date of birth in his service book, as had been alleged, it should have come to the notice of the authorities during his course of service, and not after he had attained the age of superannuation after the expiry of the date mentioned in the service book which was based on the affidavit of the respondent. To the contrary, none of the officials responsible had noticed this during his service period, even during his time of promotions when the service book was required to be inspected by the officials. Therefore, it clearly points out to the gross negligence and lapses on the part of the authorities concerned and in our view, the respondent cannot be held responsible to work beyond his date of birth as mentioned in the matriculation certificate when admittedly in the service book after affidavit, some other date of birth was also evident. In view of the aforesaid circumstances, the appellant ought to have deleted the date of birth entered in the service book of the respondent on the basis of his affidavit as the appellant had already accepted the date of birth of the respondent on the basis of his matriculation certificate which was also produced by the

respondent. The appellant alleged that the respondent had entered a second date of birth in his service book at a later period of time. The respondent vehemently negated this contention stating that two dates of birth were entered simultaneously in his service book by the department officials. It is not needed for this Court to verify the veracity of the statements made by the parties. If at all the respondent entered the second date of birth at a subsequent period of time, the authorities concerned should have detected it and there should have been a detailed enquiry to determine whether the respondent was responsible for the same. It has been held in a catena of judicial pronouncements that even if by mistake, higher pay scale was given to the employee, **without there being misrepresentation or fraud, no recovery can be effected from the retiral dues in the monetary benefit available to the employee.** This Court in the case of *Kailash Singh vs. The State of Bihar and Ors.*, [2004 (1) PLJR 289 (SC)], held that recovery sought to be made from the salary of the employees on the ground of alleged over stay in service on

the basis of age assessed or considered, despite the fact that the employee has worked during the period of alleged over stay could not be made. In ***Sahib Ram vs. State of Haryana & Ors.***, [1995 Supp. (1) SCC 18], this Court has held that even if by mistake, higher pay scale was given to the employee, without there being misrepresentation or fraud, no recovery can be effected from the retiral dues in the monetary benefit available to the employee.

11.As noted hereinearlier, in the service book of the respondent, two dates of birth have been mentioned, which is not permissible. It cannot be conceived of that the authorities could not examine the possibility of two dates of birth to be entered in the service book of the respondent. They ought to have deleted the initial date of birth based on the matriculation certificate if the appellants were of the view that the affidavit sworn by the respondent was correct and the date of birth appearing in the

matriculation certificate must be found to be incorrect, it is needless to say that the affidavit sworn by the respondent must be on the basis of documents produced by the respondent to show that the date of birth entered in the service book initially was incorrect. Instead, the appellant had not issued any notice of retirement of the respondent on 28th of February, 2002, which was the date for retirement of the respondent on his attaining superannuation, i.e. on the basis of the date of birth shown in the matriculation certificate. On the other hand, the appellant allowed the respondent to work and got works from him and paid salary. Only for the first time, the appellant took note of two dates of birth after he had completed two years from the date of his actual date of retirement. Without going into the question whether the appellant was justified after completion of two years from the actual

date of retirement to deduct two years' salary and other emoluments paid to the respondent, we may say that since the respondent had worked during that period without raising any objection from the side of the appellant and the appellant had got works done by the respondent, we do not think that it was proper at this stage to allow deduction from his retiral benefits, the amount received by him as salary, after his actual date of retirement. Considering the fact that there was no allegation of misrepresentation or fraud, which could be attributed to the respondent and considering the fact that the appellant had allowed the respondent to work and got works done by him and paid salary, it would be unfair at this stage to deduct the said amount of salary paid to him. Accordingly, we are in agreement with the Division Bench decision that since the respondent was allowed to work and was paid

salary for his work during the period of two years after his actual date of retirement without raising any objection whatsoever, no deduction could be made for that period from the retiral dues of the respondent.

12. In ***Kailash Singh vs. State of Bihar & Ors.***

[2005 (13) SCC 576], this Court observed that the employer-State would not be entitled to recover the salary paid in excess after the due date of superannuation. In our view, this decision was practically based on the concession made by the State before this Court.

Again in ***Hari Singh vs. State of Bihar & Ors.***

[2000 (10) SCC 284], this Court held that since the Government had never put the employee on notice to indicate that the date of birth as entered in the service book was incorrect though it could have done so and since no notice had been given to the employee concerned for accepting a date of birth other

than the one entered in the service book, the order of retirement could not be sustained. From the aforesaid decision, it is evident that it was the duty of the State to put the employee on notice about his date of retirement and not having done so, the appellant was not entitled to recover the excess amount paid to the respondent.

13. A further argument was advanced by the learned counsel for the parties before the High Court as well as before us on the applicability of Rule 96 of the Bihar Finance Rules for settlement of dispute regarding the date of birth. In view of our discussions made herein above and in view of the fact that we have accepted the observations of the Division Bench of the High Court that since the appellant had allowed the respondent to work beyond his due date of superannuation without raising any objection and in the absence of misrepresentation and fraud to be attributed to the respondent, it is not necessary for us in the peculiar

facts and circumstances of the case to go into the question of interpretation of Rule 96 of the Bihar Finance Rules which is kept open for decision in an appropriate case.

14. Before parting with this order, we may refer to a decision of this Court strongly relied on by the learned counsel for the appellant, namely, ***Radha Kishun vs. Union of India and Ors.***, [(1997) 9 SCC 239]. Learned counsel for the appellant relying on this decision sought to argue that even if the respondent had worked after his due date of superannuation without having any objection from the appellant, the appellant was entitled to deduct the amount already received by the respondent from his retiral benefits. This case, in our view, is clearly distinguishable from the present case. In the above-mentioned case, there was no dispute as to the date of retirement of the appellant in that appeal, as there was no controversy in the date of birth of that appellant. There was only one

date of birth mentioned, and he had not retired on the basis of his date of birth so entered. Therefore, he had wrongly extended his service beyond the date of his superannuation. But in the present case, there were two dates of birth recorded in the service book of the respondent. Therefore, there was a clear confusion in the mind of the respondent as to whether the appellant had accepted his corrected date of birth as entered in his service book when admittedly authorities concerned did not serve any notice of retirement on the basis of the initial entry of date of birth in his service book. It should also be kept in mind that the respondent might have expected that second date of birth shown in the service book was accepted by the authorities for that reason he was allowed to continue in his service and was paid salary. In the absence of any proof that the respondent had manipulated his date of

birth by entering a second date at a later stage, and that he had any malafide intentions to continue his service, beyond his date of his retirement, we are of the view that the decision in the case of ***Radha Kishun vs. Union of India and Ors. (Supra)***, would not be applicable in the facts of the present case.

15. There is another aspect in this matter. Although we have directed that the excess amount paid for two years to the respondent as salary cannot be recovered from the respondent, but we make it clear that for fixing the retiral benefits, the period of two years in respect of which salary was received by the respondent cannot be taken into consideration and the respondent would be entitled to fixation of retiral benefits as on the date of his superannuation i.e. 28th of February, 2002.

16. Accordingly, we do not find it necessary to interfere with the order of the Division Bench of the High Court in the peculiar facts and circumstances of the case in the exercise of our power under Article 136 of the Constitution accepting the directions made in paragraph 15 of this judgment.

17. For the reasons aforesaid, the appeal is dismissed subject to above directions. There will be no order as to costs.

.....J.
[TARUN CHATTERJEE]

NEW DELHI
.....J.
DECEMBER 11, 2008
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