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MOHD. YUNUS KHAN

v.

U.P. POWER CORPORATION LTD. AND ORS.

(Civil Appeal No. 6191 of 2008)

OCTOBER 22, 2008

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[S.B. SHINHA AND CYRIAC JOSEPH, JJ.]

Service Law:

C *Date of birth – Wrongly recorded in service book as 27th February, 1934 instead of 1st July, 1948, the actual date of birth – Representations of Appellant-employee not considered by employer – Date of birth of Appellant treated as 27th February, 1934 and he was made to retire in 1992 prior to his actual due date of retirement – Writ petition by Appellant – Order of retirement stayed by Single Judge of High Court with interim direction for payment of salary – Payment later on stopped by employer – Writ petition ultimately allowed – Order set aside by Division Bench in intra-Court appeal – On appeal, held: No opportunity was given to Appellant to file proof to show his correct date of birth – Respondent-employer did not comply with principles of natural justice – Treating the date of birth as 1st July, 1948, Appellant is held to have retired in the year 2006 – He would not, however, be entitled to the entire back wages, as for substantial period he was paid salary although he did not work and further he approached Supreme Court after a long time – Direction issued that 50% of back wages be paid except for period during which salary was paid to him – However, for calculation of pensionary and other retiral dues, he is treated to have continued in service till date of his superannuation.*

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The Appellant-employee came to know in 1988 that his date of birth was wrongly recorded in the service book as 27-2-1934 instead and in place of his actual date of birth which was 1-7-1948. The said error apparently occurred

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because the date of birth of another employee with the same name was 27-2-1934. A

Appellant filed representations, however the same were not considered and in 1992, Appellant was made to retire by treating his date of birth as 27-2-1934. B

Appellant filed writ petition. The order of retirement was stayed by Single Judge of High Court with interim direction for payment of salary. Payment of salary was later on stopped by Respondent-employer. The writ petition was ultimately allowed. The order was set aside by Division Bench in intra-Court appeal. Hence the present appeal. C

Allowing the appeal, the Court

HELD: 1. No material has been placed in regard to existence of a statutory rule fixing a time frame for filing an application for correction of the date of birth in the service record. Even if there was such a provision, the same would not be of much significance as respondents had not shown that the mistake in the matter of recording of date of birth in the service record was known to appellant at any earlier point of time. If appellant's contention is correct that he came to learn about it only in April, 1988 whereafter he filed a representation, it must be held that there was no delay on his part in this behalf. An employee may take action as is permissible in law only after coming to know that a mistake has been committed by the employer. [Para 12] (1120-D, E, F) D E F

2.1. Appellant was to retire, even treating his date of birth as 27th February, 1934, in 1992. In that view of the matter the representation filed by appellant in the year 1988 should have received due and expeditious consideration at the hands of the authorities. Had such a step been taken, the principles of natural justice of giving an opportunity of hearing to the other employee with same G H

A name could also have been complied with. Even the records of both the employees could have been verified with reference to the other documents as also the names of the parents of the parties, if necessary, in presence of each other. No such step had been taken by the Board. Particularly when respondent No.5, the Executive Engineer, indeed found that such a mistake had been committed and recommended for correction thereof, the Board, which is a 'State' within the meaning of Article 12 of the Constitution, was obligated to rectify the same. In the factual position of the case, Appellant should have been given an opportunity of hearing. He should have been given an opportunity to file further proof to show that his date of birth was in fact 1st July, 1948. [Paras 13, 16] (1120-G, H; 1121-A, B;1122-F)

D 2.2. Appellant was medically examined by Chief Medical Officer on or about 3rd October, 2002, who had opined that his age at that point of time was about 54 years. Even during the pendency of the writ petition, respondent No.2, the Executive Engineer, Electricity Distribution Division-1, requested the Deputy General Manager, Electricity Distribution Division, to record appellant's date of birth as 1st July, 1948. His salary, however, was directed to be stopped on the basis of a legal advice of the counsel for respondents dated 8th October, 2003 with effect from 14th October, 2003. Furthermore it does not appear that appellant had been given even the retrial benefits for such a long period. [Paras 17, 18] (1122-G, H; 1123-A, B)

G 2.3. Appellant is held to have retired in the year 2006 treating his date of birth as 1st July, 1948. Appellant would not, however, be entitled to the entire back wages as he did not work for a long time. Even he had approached this Court after a long time. There was a delay of 549 days (in respect of SLP against the main order) and 128 days (in respect of the SLP against the order passed in review). H For a substantial period he had been paid salary, although

he did not work. It is directed that 50% of back wages may be paid save and except for the period during which salary has been paid to the Appellant. However, for the purpose of calculation of pensionary and other retiral dues, he shall be treated to have continued in service till the date of his superannuation and for the said purpose increments, if any earned by him, as also the revision in pay shall be taken into consideration. [Para 19] (1123-C, D, E)

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 6191 of 2008

From the final Judgment and Order dated 17.5.2004 & 8.7.2005 of the High Court of Judicature at Allahabad in Special Appeal No. 359 of 2004 & Review Application No. 106236 of 2004 respectively

Pramod Swarup for the Appellant.

S. Barthakur, Aneesh Mittal and Sunil Kumar Jain for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Consequence of a wrong recording of a date of birth in the service book of appellant by the authorities of the respondents is the question involved in this appeal which arises out of a judgment and order dated 17th May, 2004 passed by the High Court of Judicature at Allahabad in Special Appeal No. 359 of 2004 and judgment and order dated 8th July, 2005 passed in Review Application No.106236/04 in Special Appeal No. 359/2004.

3. The basic fact of the matter is not in dispute.

Appellant was appointed on or about 1st July, 1968 as Patrolman by respondent No.5. His date of birth in the service book was recorded as 27th February, 1934. However, in the school leaving certificate of appellant, his date of birth was recorded as 1st July, 1948.

A In April, 1988 when appellant approached the office of respondents at Basti to know the quantum of leave balance in his account, he came to know that his date of birth had been wrongly recorded as 27th February, 1934 in stead and place of 1st July, 1948. He immediately filed a representation.

B Respondents, however, did not take any action thereupon till September, 1989. Appellant filed another representation on 2nd September, 1989. The said representation was forwarded to the office of respondent No.5, the Executive Engineer, EDD, C U.P. State Electricity Board, Govind Nagar, Kanpur for correction of the date of birth in appellant's service book alongwith his school leaving certificate.

D 4. Indisputably in the employment of respondent-Corporation, another employee by the name Mohd. Yunus Khan had been working. For all intent and purport it now stands admitted that the date of birth of the said Mohd. Yunus Khan (not the appellant herein) was 27th February, 1934 and the same has been wrongly recorded in the service book of appellant. By an order dated 7th April, 1992, payment of salary to appellant was stopped on the premise that he should have retired with effect from 29th February, 1992. He received a letter from respondent No.4, Sub-Divisional Officer (SDO), Basti, dated 7th April, 1992 asking him to explain the correct position. He did so. He allegedly also appeared before the authority.

E F 5. Appellant again filed a school leaving certificate of 5th class with a view to show that his date of birth was 1st July, 1948. Unfortunately the medical certificate of Mohd. Yunus Khan S/o Amjad Khan was attached to the service book of the appellant as a result whereof the said confusion arose. He, however, was made to retire from 29th February, 1992.

G H 6. Aggrieved by and dissatisfied therewith appellant filed a writ petition before the High Court which was marked as Civil Misc. Writ Petition No.18688 of 1992. By reason of a judgment

and order dated 23rd March, 2004 the said writ petition was allowed by a learned Single Judge of the High Court opining :- A

“From the record of the case, I find that it is an admitted case of the respondents that due to inadvertence at their level the medical certificate of Mohd. Yunus Khan S/o. Amjad Khan wherein the date of his birth mentioned as 27.2.1934 was wrongly placed in the record of the petitioner instead of the school leaving certificate wherein the date of birth of the petitioner was mentioned as 1.7.1948. This finding is based on the personal enquiry made and submitted by the concerned Executive Engineer, the appointing authority of the petitioner. The petitioner is being wrongly retired from his service prior to the due date of his retirement treating his date of birth as 27.2.1934 instead of 1.7.1948 and he has still got many more years in service. The payment of the salary of the petitioner as per the interim order passed by this court has been stopped by the respondents on the basis of the opinion of the counsel for the respondent which is unwarranted.” B
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7. An intra court appeal was preferred by respondents which, by reason of the impugned judgment, has been allowed. A review petition filed by appellant thereagainst stands dismissed. E

8. Mr. Pramod Swarup, learned counsel for appellant urged that in view of the fact that the mistake on the part of the authorities of the respondents stood conceded, the Division Bench of the High Court must be held to have applied the wrong principles in allowing the intra court appeal preferred by respondents. F

9. Mr. Sunil Kumar Jain, learned counsel appearing for the respondents, on the other hand, would submit that confusion arose because of two different offices had taken two different stands. G

10. The Division Bench of the High Court, although, may H

A be correct in holding that representation for correction of the
date of birth should be made as expeditiously as possible so
as to enable the employer to pass an appropriate order there-
upon, but the said principle, in our opinion, has no application
in a case of this nature, where a mistake on the part of the au-
B thorities stands admitted.

11. There were two Mohd. Yunus Khans. Their fathers' names were different. The other Mohd. Yunus Khan was son of Amjad Khan, whereas appellant is son of Mujibullah Khan.

C According to appellant, the medical certificate in respect of other Mohd Yunus Khan was attached to his service book and the school leaving certificate showing his date of birth was attached to the service records of other Mohd Yunus Khan.

D 12. No material has been placed before us in regard to existence of a statutory rule fixing a time frame for filing an application for correction of the date of birth in the service record. Even if there was such a provision, the same, in our opinion, would not be of much significance as respondents had not shown that the mistake in the matter of recording of date of
E birth in the service record was known to appellant at any earlier point of time. If appellant's contention is correct that he came to learn about it only in April, 1988 whereafter he filed a representation, it must be held that there was no delay on his part in this behalf. An employee may take action as is permissible in law
F only after coming to know that a mistake has been committed by the employer.

13. Appellant was to retire, even treating his date of birth as 27th February, 1934, in 1992. In that view of the matter a representation filed by him in the year 1988 should have re-
G ceived due and expeditious consideration at the hands of the authorities of the Board. Had such a step been taken, the principles of natural justice of giving an opportunity of hearing to the other Mohd Yunus Khan could also have been complied with. Even the records of both the employees could have been veri-
H fied with reference to the other documents as also the names

of the parents of the parties, if necessary, in presence of each other. No such step admittedly had been taken by the Board. Particularly when respondent No.5, the Executive Engineer, indeed found that such a mistake had been committed and recommended for correction thereof, the Board, which is a 'State' within the meaning of Article 12 of the Constitution of India, was obligated to rectify the same. Such a mistake being totally in the hands of the authorities of the Board, stricto sensu even the principle of natural justice was not required to be complied with so far as appellant was concerned. Principle of justice was required to be complied with only in respect of other Mohd Yunus Khan for affording him an opportunity of hearing. However, it appears from the record that other Mohd Yunus Khan had expired in 1980.

14. The Division Bench of the High Court, in our opinion, committed a serious error in not considering this aspect of the matter. The Writ Petition was filed by the appellant before the High Court in the year 1992 i.e. immediately after he was made to superannuate.

15. The Executive Engineer himself by a letter dated 18th April, 1992 directed the Sub-Divisional Officer, Electricity Distribution Division-II, Basti as under :-

"In the Service Book of the aforesaid employee, date of birth (27.2.34) is recorded/mentioned. This has been written on the basis of the certificate dated 27.02.74 given by the Chief Medical Officer, Kanpur and on inspection it was found that this Certificate is in respect of the other employee Sri Mohd Yunus son of Sri Amjad Khan. The correctness of the same has been done by the undersigned. Therefore you are advised that for recording the correct date of birth of Sri Mohd Yunus Khan son of Mujibullah Khan working in your Division, you at your level kindly get the age certificate from Chief Medical Officer and thereafter accordingly proceed and inform about the said proceeding to the undersigned."

A 16. The said order has not been complied with. No explanation has been offered by the Board as to why administrative discipline was not maintained. It is not the contention of the Board that the Executive Engineer in doing so acted mala fide or otherwise biased. IN any view of the matter his opinion was based
B on the materials on record.

In fact in paragraph 11 of the counter affidavit before the High Court it was stated :-

C "11. That in reply to the contents of paragraph 6 of the writ petition it is stated that as the date of birth of the petitioner was recorded in the Service Book by Executive Engineer, Electricity Distribution Division, Kanpur the same was to be corrected by said Distribution Division and hence the Service Book of the petitioner was sent to the respondent
D No.5 for necessary action.

Despite the same, it was averred in paragraph 13 :-

E "13. That the contents of paragraph 9 of the writ petition are not admitted as written. The date of birth written in Service Book was 27.02.1934. There was no solid material before the answering respondent on the basis of which he could proceed to make the correction in the date of birth. Further the date of birth written in the Service Book was final and it could not be altered."

F If that was the factual position, appellant should have been given an opportunity of hearing. He should have been given an opportunity to file further proof to show that his date of birth was in fact 1st July, 1948.

G 17. It, however, appears that the operation of the order making him to retire was stayed by the Court. It furthermore appears that appellant was medically examined by Chief Medical Officer, Basti on or about 3rd October, 2002, who had opined that his age at that point of time was about 54 years. Even during the pendency of the writ petition, respondent No.2, the Executive Engineer, Electricity Distribution Division-1, Basti, re-
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requested the Deputy General Manager, Electricity Distribution Division, Basti, to record appellant's date of birth as 1st July, 1948. His salary, however, was directed to be stopped on the basis of a legal advice of the counsel for respondents dated 8th October, 2003 with effect from 14th October, 2003. A

18. Furthermore it does not appear that appellant had been given even the retrial benefits for such a long period. B

19. For the reasons aforementioned, the impugned judgments cannot be sustained and they are set aside accordingly. Appellant is held to have retired in the year 2006 treating his date of birth as 1st July, 1948. Appellant would not, however, be entitled to the entire back wages as he did not work for a long time. Even he had approached this Court after a long time. There was a delay of 549 days (in respect of SLP against the main order) and 128 days (in respect of the SLP against the order passed in review). For a substantial period he had been paid salary, although he did not work. We direct that 50% of back wages may be paid save and except for the period during which salary has been paid to him. However, for the purpose of calculation of pensionary and other retiral dues, he shall be treated to have continued in service till the date of his superannuation and for the said purpose increments, if any earned by him, as also the revision in pay shall be taken into consideration. The appeal is allowed to the aforementioned extent with costs. Counsel's fee assessed at Rs.25,000/- C D E

B.B.B.

Appeal allowed. F