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ITEM NO.1A
(for Judgment)

COURT NO.3

SECTION IV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 480 OF 2013 @ SLP(C)No. 35941/2011

LAKSHMIBAI NAT.INST.OF PHY.EDU.& ANR. Appellant (s)

VERSUS

SHANT KUMAR AGRAWAL Respondent(s)

WITH Civil Appeal NO. 481 of 2013 @ SLP(C)No. 29901/2011

Date: 11/02/2013 These Appeals were called on for judgment today.

For Appellant(s)

Mr. Nitin Bhardwaj, Adv.

For Respondent(s)

Mr. Tayenjam Momo Singh, Adv.

Hon'ble Mr. Justice G.S.Singhvi pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice H.L.Gokhale.

The Appeals are allowed, the impugned judgment is set aside and the orders passed by the learned Single Judge dismissing the writ petitions and the review petition filed by the respondent are restored.

[SUMAN WADHWA]
COURT MASTER

[PHOOLAN WATI ARORA]
COURT MASTER

Signed non-reportable judgment is placed on the file.

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 480 OF 2013
(Arising out of SLP(C) No. 35941 of 2011)

Lakshmibai National Institute
of Physical Education and another
...Appellants

versus

Shant Kumar Agrawal

...Respondent

with

CIVIL APPEAL NO. 481 OF 2013
(Arising out of SLP(C) No. 29901 of 2011)

J U D G M E N T

G. S. Singhvi, J.

1. The question which arises for consideration in these appeals filed against judgment and order dated 6.7.2011 passed by the Division Bench of the Madhya Pradesh High Court in Writ Appeal Nos. 194 and 195 of 2009 is whether the respondent, who got his date of birth recorded in the service book on the basis of the judgment and decree dated 13.10.1976 passed by IIIrd Additional Civil Judge, Class II, Gwalior (for short, 'the trial Court') by suppressing the fact that the same had been reversed by Additional District Judge, Gwalior (lower appellate Court), can rely upon the said date of birth for the purpose of continuing in service beyond the age of superannuation.

2. The respondent passed Higher Secondary School Certificate Examination conducted by the Board of Secondary Education, Madhya Pradesh (for short, 'the Board'). In the certificate issued by the Board on 17.6.1963, the respondent's date of birth was recorded as 20.2.1942.

3. The respondent was appointed as Lower Division Clerk in the office of Commissioner, Settlement and Director of Land Records, Madhya Pradesh on 27.5.1965. He worked in that office till 3.8.1966. After about five years, he made an application for change of his date of birth from 20.2.1942 to 15.1.1948, which was rejected by the competent authority vide order dated 19.11.1971.

4. The respondent challenged the aforesaid decision in O.S. No.165-A/1974 and prayed that his correct date of birth be declared as 15.1.1948 and the Board be directed to incorporate the same in the Higher Secondary School Certificate. In the written statements filed on behalf of the State of Madhya Pradesh and the Board, it was pleaded that the date of birth shown in the certificate issued in 1963 was correct and the suit is liable to be dismissed as barred by time because the same was filed much after expiry of the period of limitation.

5. The trial Court did not deal with the issue of limitation with requisite seriousness and decreed the suit vide judgment dated 13.10.1976 by relying upon the date entered in the birth certificate issued by Municipal Corporation, Gwalior. The trial Court held that the correct date of birth of the respondent is 15.1.1948 and he is entitled to get the same entered in the Higher Secondary School Certificate.

6. The State and the Board challenged the judgment and decree of the trial Court in Civil Appeal No.7-A/1977. The same was allowed by the lower appellate Court vide judgment dated 27.7.1977 on the ground that the suit filed by the respondent in 1974 was barred by time. The second appeal and the special leave petition filed by the respondent were dismissed by the High Court and this Court respectively vide orders dated 3.4.2006 and 31.7.2006. The application filed by the respondent for review of order dated 31.7.2006 was also dismissed by this Court.

7. After reversal of the decree passed in his favour by the trial Court, the respondent was appointed as Personal Assistant in the services of appellant No.1. At the time of preparation of the service book, the respondent produced copy of the judgment of the trial Court and got his date of birth recorded as 15.1.1948. After some time, the Registrar of the appellants called upon the respondent to produce the original Higher Secondary School Certificate. However, instead of doing so the respondent submitted reply dated 30.7.1999 and claimed that the date of birth recorded in the service book, i.e., 15.1.1948 is the correct date of birth. The

management of appellant No.1 rejected the respondent's reply and retired him from service vide order dated 28.2.2002.

8. In the meanwhile, the respondent filed Writ Petition No.1822/2001 for issue of a mandamus to the appellants to promote him to the post of Deputy Director and refund Rs.47,411/-. After passing of order dated 28.2.2002, the respondent amended the writ petition and prayed for quashing of his retirement. He pleaded that the date of birth recorded in the service book, i.e., 15.1.1948 was conclusive and he could not have been retired by assuming it to be 20.2.1942. He also pleaded that the action taken by the management is liable to be declared as vitiated due to violation of the rules of natural justice because before retiring him on the basis of an assumed date of birth no notice or opportunity of hearing was given to him. In support of his case, the respondent produced birth certificate dated 25.2.1970 and duplicate certificate issued by the Board showing his date of birth as 15.1.1948.

9. The appellants contested the writ petition and pleaded for dismissal thereof by asserting that at the time of preparation of the service book, the respondent got his date of birth recorded on the basis of the judgment and decree of the trial Court without disclosing that the same had already been reversed by the lower appellate Court and despite two communications sent by the Registrar he did not produce the original Higher Secondary School Certificate and the Mark-sheet.

10. After considering the rival pleadings and documents, the learned Single Judge allowed the writ petition and quashed the retirement of the respondent by relying upon Note 5 appearing below Fundamental Rule 56 and the judgment of the trial Court in O.S.No.165-A/1974. The learned Judge referred to the entries made in the Register of Birth and Death and held that the management of the appellants was not justified in asking the respondent to produce Higher Secondary Certificate. He further held that the recorded date of birth of the respondent could not have been changed without giving him opportunity of hearing.

11. The review application filed by the appellants was dismissed by the learned Single Judge by recording the following observations:

"This Court had interfered in the matter as there was non-observance of FR 56 and Note 5 with regard to non-grant of opportunity in the matter of changing the date of birth in the service book of the petitioner (S.K. Agrawal) so also action taken by the Registrar with regard to change of the date of birth as the petitioner was appointed by the Board of Directors, this Court had only observed in paragraph 11 that action taken for changing the date of birth without recording reasons is not correct. Under such circumstances, the respondents were only required to take action after hearing the petitioner and they were at liberty to proceed in the matter after giving due opportunity of hearing to the petitioner and under the provisions of law. If, subsequently, certain facts have come on record, the applicant should give reasonable opportunity to the employee and then take action. For this, review or recall of the order passed by this Court is not necessary.

This Court having decided the petition in question on the basis of other grounds and not merely on the basis of the judgment passed by the learned trial Court, no case is made out for review or recall of the order. However, it is clarified that keeping in view the observations made by this Court in paragraph 11 of the order dated 8.7.2003 passed in W.P. No.1822 of 2001, the employer/applicant shall take action after complying with the requirements of law."

(emphasis supplied)

12. During the pendency of Writ Petition No.1822/2001, the management suspended the respondent and issued Memo dated 6.9.2005 for holding an inquiry on the charge of producing fake documents for getting his date of

birth recorded as 15.1.1948. However, after dismissal of the review application, Memo dated 6.9.2005 was withdrawn and fresh chargesheet dated 5.10.2005 was issued for holding an inquiry under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short, 'the CCS Rules') on the following charges:

"ARTICLE -1

Shri S.K. Agrawal, Assistant Director of LNIPE (Deemed University), Gwalior has hidden the order passed by the District Court in Appeal on 27th July, 1977 from the Institute and thereby got entry in the Institute in a fraudulent manner.

He has thus acted in a manner unbecoming of an officer of LNIPE, Gwalior thereby contravening Rule 3 (1) (iii) of the CCS (Conduct) Rules, 1964.

ARTICLE - II

Shri S.K. Agrawal, Assistant Director of LNIPE (Deemed University), Gwalior has made false declaration about his date of birth before the Institute and submitted judgment and decree passed by the Civil Court on 13th Oct. 1976 as confirmatory documentary evidence, which was already quashed as on the date of his entry in service.

He has thus acted in a manner unbecoming of an officer of LNIPE, Gwalior thereby contravening Rule 3 (1) (iii) of the CCS (Conduct) Rules, 1964.

ARTICLE-III

Shri Agrawal's appointment in the Institute is vitiated as he was over-age at the time of the entry. Thus, he has caused huge pecuniary losses to the Institute by way of entire pay and allowances paid to him during the period of his service with the Institute.

He has thus acted in a manner unbecoming of an officer of LNIPE, Gwalior thereby contravening Rule 3 (1) (iii) of the CCS (Conduct) Rules, 1964.

ARTICLE - IV

Shri S.K. Agrawal, Assistant Director of LNIPE (Deemed University), Gwalior had hidden vital information of order passed in appeal and went to the Hon'ble High Court against retirement order of the Institute on false affidavit.

He has thus acted in a manner unbecoming of an officer of LNIPE, Gwalior thereby contravening Rule 3(1)(iii) of the CCS (Conduct) Rules, 1964."

13. The respondent filed reply dated 11.10.2005 and denied the allegations leveled against him. He also filed Writ Petition No.108/2006 for quashing the order of suspension and the inquiry proceedings. The High Court entertained the writ petition and directed that final order shall not be passed in the disciplinary proceedings. Soon thereafter, the management passed Resolution dated 12.1.2006 and retired the respondent with retrospective effect from 28.2.2002 by treating 20.2.1942 as his correct date of birth. This was followed by an order for recovery of the salary and allowances paid to the respondent from 1.3.2002.

14. The respondent challenged Resolution dated 12.1.2006 and the order of recovery in Writ Petition No. 1991/2006. He pleaded that in view of the orders passed by the High Court in Writ Petition No.1822/2001 and MCC No. 543/2005 the management did not have the jurisdiction to retire him from service by treating his date of birth as 20.2.1942. The appellants defended their action by stating that the respondent had been retired after giving

him opportunity of hearing.

15. By an order dated 11.9.2008, the learned Single Judge dismissed both the writ petitions but quashed the order passed by the management for recovery of the salary and allowances paid to the respondent for the period during which he actually discharged his duties. The learned Judge rejected the respondent's plea that he did not know about the judgment of the lower appellate Court which had set aside the decree passed by the trial Court by observing that the appeal had been decided after hearing the parties. The learned Judge further observed that in view of the order passed in MCC No.543/2005, appellant No.1 was entitled to pass fresh order after complying with the rules of natural justice and precisely this was done by the management.

16. The respondent sought review of the order passed by the learned Single Judge but could not convince him to accept his plea that the date of birth recorded in the service book was conclusive and he could not have been retired by assuming his date of birth to be 20.02.1942.

17. Writ Appeal No.195/2009 filed by the respondent questioning the dismissal of Writ Petition No.1991/2006 was allowed by the Division Bench of the High Court, which held that reversal by the lower appellate Court of the trial Court's judgment in O.S. No.165-A/1974 was inconsequential and the management of the appellants could not have retired the respondent ignoring the date of birth recorded in the service book, i.e., 15.1.1948. The Division Bench further held that the date of birth recorded in the service book of the respondent could not have been altered on the basis of entry made in the mark sheet of the Higher Secondary School Certificate Examination by ignoring the entry made in the birth certificate issued under the Registration of Births and Deaths Act, 1969 (for short, 'the 1969 Act'). In support of this conclusion, the Division Bench referred to the judgment of this Court in *Jabar Singh v. Dinesh* (2010) 3 SCC 757. The Division Bench also disposed of Writ Appeal No. 194/2009 filed by the respondent against the order passed in W.P. No.108/2006 and set aside order dated 9.3.2009 passed in R.P. No.23/2008 by the learned Single Judge.

18. Shri Anoop G. Chaudhari, learned senior advocate appearing for the appellants argued that the impugned judgment and order are liable to be set aside because while deciding Writ Appeal No.195/2009, the Division Bench of the High Court committed serious error by relying upon the decree passed in O.S. No.165-A/1974 which had been set aside by the lower appellate Court and the High Court and this Court refused to interfere with the judgment of the lower appellate Court. Learned senior counsel submitted that once the decree passed in favour of the respondent was set aside, the findings recorded therein will be deemed to have become non-existent and the same could not be made basis for entertaining the respondent's claim that his date of birth was 15.1.1948. He further submitted that copy of birth certificate dated 25.2.1970 issued by the Corporation cannot be taken into consideration for deciding the controversy relating to the respondent's date of birth because if he is treated to have been born on 15.1.1948, then he would have been a minor as on 27.5.1965 and could not have been appointed as Lower Division Clerk in the office of Commissioner, Settlement and Director of Land Records, Madhya Pradesh. Shri Chaudhari emphasized that after securing employment on the basis of his date of birth as 20.2.1942, the respondent was estopped from claiming that his correct date of birth is 15.1.1948.

19. Ms. Prerna Mehta, learned counsel for the respondent supported the impugned judgment and argued that in view of the law laid down in *Jabar Singh v. Dinesh* (supra) the Division Bench of the High Court cannot be said to have committed any error by relying upon the respondent's date of birth recorded in the birth certificate issued by Municipal Corporation, Gwalior.

20. We have considered the respective arguments and carefully scanned the record. It is not in dispute that the action taken by the management of the appellants, which became subject matter of challenge in the writ petition filed by the respondent was preceded by full compliance of the rule of audi alteram partem. The respondent was issued notice and was given opportunity to explain as to why the date of birth recorded in the

service book on the basis of the decree passed by the trial Court in O.S.No.165-A/1974 may not be changed because the lower appellate Court had reversed the judgment of the trial Court. In the reply filed by him, the respondent did rely upon the birth certificate issued by the Corporation but the same was not accepted by the management for cogent reason. If 15.1.1948 was to be treated as correct date of birth of the respondent, then he could not have been appointed as Lower Division Clerk on 27.5.1965.

However, the fact of the matter is that he was appointed as Lower Division Clerk and served in that capacity for about one year. Learned counsel for the respondent could not explain as to how her client, who claims to have been born on 15.1.1948, could be appointed in Government service at the age of 17 years and 4 months. She also failed to draw our attention to any provision in the service rules which postulate appointment of a minor in the Government service. Therefore, the entry made in the birth certificate issued on 25.2.1970 cannot be made foundation of a declaration that the respondent's correct date of birth was 15.1.1948.

21. There is another reason for our inclination to set aside the impugned judgment. At the time of joining as Lower Division Clerk in the office of Commissioner, Settlement and Director of Land Records, Madhya Pradesh, the respondent did not produce any evidence showing his date of birth as 15.01.1948. At the time of his appointment in 1986 as Personal Assistant in the employment of appellant No.1, the respondent did not produce birth certificate dated 25.2.1970 issued by the Corporation. Rather, he got the date of birth entered in the service book by producing copy of the judgment of the trial Court, which had already been set aside by the lower appellate Court on 27.7.1977. If the respondent was possessed with the certificate issued by the Corporation under the 1969 Act, then there was no earthly reason for not producing the same for the purpose of recording of date of birth in the service book. However, the fact of the matter is that instead of relying upon the birth certificate, the respondent produced copy of the judgment of the trial Court and got his date of birth recorded as 15.1.1948 by suppressing the fact that the lower appellate Court had reversed the judgment of the trial Court. Therefore, the Division Bench of the High Court committed serious error by setting aside the orders passed by learned Single Judge.

22. Before concluding, we may mention that even though the respondent had challenged the departmental proceedings in W.P.No.108/2006, he did not question the report of the inquiry officer, who found him guilty on all charges except charge No.3 and the disciplinary authority imposed penalty of 10% cut in the basic pension w.e.f. 1.3.2002 and no argument was advanced on the legality of order dated 15.2.2011 passed by the competent authority.

23. In the result, the appeals are allowed, the impugned judgment is set aside and the orders passed by the learned Single Judge dismissing the writ petitions and the review petition filed by the respondent are restored.

.....J.
[G.S.]

SINGHVI]

.....J.
[H.L.]

GOKHALE]

New Delhi,
February 11, 2013.