

**HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

SWP No.2418/2015

MP No.01/2015

Date of Decision:27.04.2018

Shaheena Akhter

Vs.

State of J&K & ors.

Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge

Appearance:

For the Petitioner(s) :Mr. M. A. Qayoom, Adv.

For the Respondent(s) :Mr. S. A. Naqashbandi, AAG.

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes/No

1. Petitioner has prayed for the following reliefs:

- I) By issuance of a writ of certiorari or any other appropriate writ order or direction, the impugned communications bearing No. HD/Estt/933 dated 24-06-2015 addressed by respondent No. 4 to respondent No. 3 And letter No. IND/DOH/56/2012 dated 24-08-2015 addressed by respondent No. 1 through respondent N. 2 to respondent No. 4 be quashed.
- II) By issuance of a writ of mandamus or any other appropriate writ, order or direction, the respondents be directed to correct the date of birth of the petitioner from 21-09-1959 to 03-03-1964 and allow her to remain in service till she would attain the age of superannuation on the basis of said correct date of birth viz. 03-03-1964 and pay her the salary, pension and other benefit accordingly.

2. Respondents failed to file their counter affidavit. Their right to file stand closed in terms of order dated 29.11.2016. However, during the course of hearing on 11.04.2018, learned AAG submitted the counter affidavit, same stand taken on record along with annexures in the shape of photocopies.

3. The persistent claim of the petitioner has been that her date of birth is 03.03.1964 instead of 21.09.1959 as recorded in the first page of her service book and in this regard she has been continuously representing to the respondents. Finally, respondent No.4-Director, Handicrafts Department, Kashmir, Srinagar vide communication No.HD/Estt/A/933 dated 24.06.2015, has conveyed to the respondent No.3-Financial Commissioner, Industries and Commerce Department, that in terms of SRO 310 of 1995, the petitioner ought to have submitted the application for alteration of date of birth within a period of six months from the date of issuance of said SRO or within five years from the date of her entry into government service which the applicant (petitioner) has not done, as such, application is hit by the doctrine of laches and delay.

4. Referring to the said communication, respondent No.2-Under Secretary to Govt. Industries & Commerce Department, vide his No. IND/DOH/56/2012 dated 24.08.2015, has conveyed to the respondent No.4-Director, that in terms of Rule 35-AA(c) of the J&K Civil Service Regulations, the date of birth once recorded in the service record cannot be altered if a request with documentary proof is not made within a period of five years of entry of the employee into government service, as such,

request of the petitioner cannot be considered. Aggrieved whereof, instant petition has been filed.

5. The two important issues which crop up for determination are:-

(1) Whether the date of birth of the petitioner is 03.03.1964?

(2) If the answer to issue No.1 is in affirmative, then as to whether date of birth recorded in the first page of the service book i.e. 21.09.1959 can be altered?

6. **Issue No.1: Whether the date of birth of the petitioner is 03.03.1964?**

(i) Petitioner, admittedly, initially was appointed as Assistant Craftsman on consolidated basis in the year 1984. She was regularized as Junior Assistant vide order No.157-IND of 1991 dated 21.06.1991 in the pay scale of Rs.900-1830(pre-revised). On regular appointment, her service book was prepared.

(ii) The date of superannuation has to be determined with reference to the date of birth declared by the government employee at the time of appointment and accepted by the appointing authority. Same was governed by Note 2 to Regulation 35-A of the J&K Civil Service Regulations (for short CSR), which is quoted here-under:

“Note 2.—The age to be entered in the service records of an official should be that as entered in his university certificate, but if he has no university qualification it

should be one that is entered in his school certificate duly verified as correct, by a Gazetted Officer of the Education Department. In the case of literate staff, it should invariably be in the employees own hand and in the case of others, they will be required to produce some documentary evidence if available i.e. horoscope or an extract properly attested from the Municipal Birth Register in support of their date of birth which shall be recorded by a responsible Gazetted Officer in their record of service and witnessed by any other responsible employee of the office.

In case, an illiterate person cannot produce any documentary evidence of his date of birth, it will be ascertained by the head of the office provided he is a Gazetted Officer or by a superior Gazetted Officer in case such head of the office is a Non-Gazetted official in any manner considered suitable which may include the certificate of a competent medical officer. The date so ascertained will be recorded in the service records of the Government Servant under proper attestation of a responsible Gazetted Officer. In all the cases, enumerated above a note will be kept under the date of birth itself recorded in the service record specifying the source from which the same has been ascertained.”

The date of birth was to be recorded on the basis of his school certificate duly verified as correct by a Gazetted Officer of the department.

(iii) Perusal of the record pertaining to the petitioner as produced by learned AAG reveals that while preparing the papers for regularization, the details of the petitioner regarding her engagement on consolidated basis and other particulars were prepared, as signed by the petitioner, and certified by Assistant Director, Handicrafts, Srinagar, who in clear terms certified that the information has been prepared in reference to the authentic records available in the office/obtained from the concerned M.M/ACM with the

assistance of Handicrafts Training Officer concerned. Date of birth of the petitioner is clearly reflected as 03.03.1964 based on school leaving certificate. Why the same date of birth had not been acted upon and not recorded on the first page of service book of the petitioner is a million-dollar question which has remained to be answered. Petitioner unnecessarily has been dragged into prolonged departmental communicatory system and finally into litigation.

(iv) It appears that on regularization in the year 1991, when the petitioner was appointed, her school certificate was not taken into consideration. The Assistant Director, Handicrafts, Srinagar, vide his communication No.HD/AD/Trgs/1589 dated 24.09.1991, had deputed the petitioner to Chief Medical Officer, Srinagar, for ascertaining her age/fitness. The Chief Medical Officer, Health & Family Welfare, Srinagar, has issued certificate dated 21.09.1991 certifying to have examined the petitioner and found to have no disability, the date of birth of the petitioner is recorded as 03.03.1964. Same is further qualified by the words as recorded therein i.e. “she is about twenty-seven years old”.

(v) It appears that the respondent department had constituted a Committee which has determined the age of the petitioner as 32 years as on 21.09.1991 when as per medical certificate, on 21.09.1991, the date of birth of the petitioner was certified by Chief Medical Officer as 03.03.1964.

(vi) The petitioner had submitted an application to the respondent No.4 on 15.09.1993 stating therein that her date of birth has been wrongly recorded as 1959 whereas her actual date of birth, as per record of Chief

Medical Officer as well as school record, is 03.03.1964. Proof of the same was alleged to have been enclosed with the application. The said application is shown to have been received by the respondent office on 16.09.1993.

(vii) The matter remained as it is. In the meanwhile, a seniority list of Junior Craft Instructors was issued by the respondent department wherein date of birth of the petitioner was shown as 21.09.1959. The petitioner filed objections before the respondent No.4 on 24.07.1997, highlighting therein that her date of birth has not been correctly recorded and that at the time of appointment she was referred to Chief Medical officer, Srinagar, for age determination where her age was determined as 27 years as on 21.09.1991 as was conveyed to the department by the Chief Medical Officer, therefore, necessary correction in the said seniority list may be effect.

(viii) Deputy Director, Handicrafts, has send the representation of the petitioner to the Assistant Director, Handicrafts, vide his No. HD/DDT/1324 dated 17.09.1997, advising him to direct the official(petitioner) to submit the original school leaving certificate. Thereafter when nothing was heard, the petitioner submitted another application to respondent No.4 on 03.06.2008 mentioning therein that her age was determined by the Chief Medical Officer as 27 years as on 21.09.1991 based on which her date of birth was worked out as 03.03.1964. Further added that her father's marriage was performed on 8th September, 1960, how could she have been born in the year 1959. In support of the application, photocopy of the Nikah Nama of her father was annexed showing marriage to have been performed on 8th September, 1960.

(ix) Petitioner again submitted an application on 28.04.2010 to the Assistant Director, Handicrafts, District Budgam, for correction of date of birth. Again on 19.05.2010, she has submitted another application to the respondent No.4 for correction of date of birth. She had also submitted a duplicate provisional-cum-character/discharge certificate issued by Govt. Higher Secondary School, Soura, Srinagar, wherein her date of birth is recorded as 03.03.1964 and shown to have read upto to 10th class. Along with said provisional certificate, she had also submitted a verification certificate issued by the school authorities regarding genuineness of the certificate.

(x) Respondent No.4-Director, appear to have taken up the matter for verification of said certificate with the Directorate of School Education, as is clear from the letter dated 06.03.2012 send from the Directorate of School Education Kashmir to the Principal Govt. Higher Secondary School, Soura, Srinagar. The Principal of the said school, vide his communication No.GHSS/85-86 dated 03.04.2012, has conveyed to the Joint Director, School Education, that the duplicate discharge certificate vide No.010 dated 21.04.2010 in favour of Shaheena Akhter (petitioner herein) is as per records of the school. Joint Director, School Education, vide his communication No. DSEK/OSD/IMW/Misc/1609-10 dated 14.05.2012, conveyed to the respondent No.4-Director, that the verification report sought from Principal GHSS, Soura is advanced for further necessary action.

(xi) Deputy Secretary to Government, Industries Department, vide his letter No.IND/DOH/56/2012 dated 02.08.2012, addressed to respondent

No.4, had requested to intimate the reasons for delay in settling the claim of the lady officer (petitioner). Respondent No.4, vide his communication No.HD/Estt./2635 dated 06.10.2012, conveyed to the Commissioner/Secretary to Government, Industries and Commerce Department, that the Committee of officers was constituted for determining the age of the Instructor (petitioner) along with two representatives of the J&K Handicrafts Teachers Union. The official (petitioner) has put her signature on the age determination report in token of acceptance of the age determined as 32 as on 21.06.1991 which works out as 21.09.1959 as per date of birth assessed by the Committee constituted for the purpose. Subsequently, the official (petitioner) after the lapse of prescribed tenure of service has submitted the school leaving certificate issued by the Principal Govt. Girls Higher Secondary School, Soura, Srinagar, vide his No.010 file No.01 dated 21.04.2010 for correction of date of birth as indicated 03.03.1964 as per date of birth mentioned in the school certificate. Then has mentioned that in terms of SRO 310 of 1995, the applicant (petitioner) ought to have submitted the application for alteration of date of birth within six months from the date of issuance of said SRO or within a period of 04 years from the date of her entry into Government service, which has not been done.

7. The Under Secretary to Government, Industries Department, vide communication No.IND/DOH/56/2012 dated 12.12.2012, addressed to respondent No.4, has precisely asked for following information:

- (1) What action has been taken on the representation of the petitioner as received in

the office of Directorate on 16.09.1993 followed by one more copy on 24.07.1997;

- (2) What action was initiated when Chief Medical Officer had intimated the date of birth of the official as 03.03.1964 instead of 21.09.1959;
- (3) What necessitated verification of particulars of date of birth of the petitioner from the Directorate of School Education, J&K, Srinagar;
- (4) To furnish age determination Committee's report submitted at the time of regularization of services of the petitioner.

8. Thereafter the Under Secretary to Government in continuation to the said letter dated 12.12.2012, vide reminder dated 03.04.2013 asked for furnishing the requisite reply. Then again Under Secretary to Govt. vide communication No.IND/DOH/56/012 dated 10.07.2013, asked respondent No.4, to furnish the following documents:

- (1)Provisional-cum-Character/discharge certificate;
- (2)Date of birth certificate;
- (3)CMO's certificate

9. Again vide letter dated 02.01.2014, Under Secretary to Govt. Industries Department asked respondent No.4 to furnish the date of dispatch of letter addressed to Chief Medical Officer, Srinagar, receipt of letter from

Chief Medical Officer and attested copy of first page of service book of the petitioner.

10. Then again vide letter dated 22.04.2014, Under Secretary to Govt. Industries Department, asked the respondent No.4 to furnish the complete information/reply as the reply submitted is not in conformity with the letter dated 02.01.2014.

11. Petitioner again moved an application before respondent No.4-Director, on 26.06.2014 for redressal of her grievances regarding correction of her date of birth

12. Finally, respondent No.4 vide impugned communication dated 24.06.2015 conveyed to the Financial Commissioner, Industries & Commerce Department, that in terms of SRO 310 of 1995, petitioner has not submitted the application for alteration of date of birth within the prescribed period of six months from the date of issuance of said SRO. It is on the basis of said communication, Under Secretary to Govt. Industries Department, vide communication impugned dated 24.08.2015, conveyed to the respondent No.4 that the request of the petitioner cannot be considered.

13. The genuineness of provisional certificate of the petitioner issued by Govt. Higher Secondary School, Soura, Srinagar, is not in dispute. Admittedly, she had not done her matriculation, had read only up to matriculation and her discharge certificate, which has been duly verified by the Board of School Education, wherein her date of birth is recorded as 03.03.1964, is not disputed. The Chief Medical Officer, in the year 1991,

had certified her date of birth as 03.03.1964 with a further clarification by recording as under:

“She is about twenty-seven years old”

14. It is also an admitted fact that the application for correct of date of birth had been submitted by the petitioner on 15.09.1993. Though learned AAG contended that no such application had been received by the respondents but such a contention is not acceptable in view of communication dated 12.12.2012, addressed by Under Secretary to respondent No.4-Director, Handicrafts, wherein respondent No.4 has been specifically asked as to what action has been taken on the representation of the petitioner submitted by her and received in the office of Directorate on 16.09.1993 followed by second application dated 24.07.1997 and the copies of same had been enclosed with the said communication, therefore, to say that the petitioner had not submitted application in the year 1993 is not acceptable.

15. It is also an admitted fact that the petitioner while filing objections regarding seniority position as was notified, had specifically mentioned that her date of birth is 03.03.1964 whereas same has been wrongly recorded even in the seniority list as 21.09.1959. It is the respondent department who at the time of appointment of the petitioner had referred her to Chief Medical Officer for age determination who had determined and certified her age as 27 years as on 21.09.1991 which was worked out as 03.03.1964 but same was not acted upon instead respondent department appear to have constituted a departmental committee and on the basis of report of the said

committee, her age as on 21.09.1991 has been taken as 32 years. It is not forthcoming from the counter affidavit as now submitted by the respondents, as to under what law Committee was constituted and as to on what basis said Committee determined the age of the petitioner as 32 years on 21.09.1991 when in terms of Note 2 to Regulation 35-A of CSR, as it then was, date of birth was to be recorded on the basis of school certificate or on the basis of medical report.

16. Under what circumstances and how the Committee was constituted for determining the age of the petitioner when Chief Medical Officer had already certified her age, that too when she was referred by the respondent department. There is no explanation to the same, therefore, date of birth recorded on the first page of the service book as 32 years on 21.09.1991 is totally arbitrary. Same position is further exposed by two facts:

(1) Chief Medical Officer had certified age of the petitioner to be 27 years as on 21.09.1991 and the date of birth was worked out as 03.03.1964;

(2) The discharge certificate issued by Govt. Girls Higher Secondary School, Soura, Srinagar, and verified by the department through Board of School Education and found to be correct wherein her date of birth is recorded as 03.03.1964.

Therefore, in the stated facts and circumstances, regarding date of birth of the petitioner, there is no doubt in concluding that her date of birth is 03.03.1964.

17. **Issue No.2: If the answer to issue No.1 is in affirmative, then as to whether date of birth recorded in the first page of the service book i.e. 21.09.1959 can be altered?**

(a) Petitioner, on regularization, has been appointed on 21.06.1991. On 15.09.1993, she has moved an application for rectifying her date of birth contending therein that her date of birth is 1964 not 1959. Thereafter petitioner submitted various reminders. Though inter-departmental communications as referred to hereinabove in detail would suggest that, in fact, petitioner had filed application in time but no decision was taken.

(b) There has been another development i.e. for enabling a Government servant to seek alteration of date of birth, SRO 310 has been notified on 29th November, 1995, which provide that in exercise of powers conferred by proviso to Section 124 of the Constitution of Jammu and Kashmir, Regulation 35-A of the Jammu and Kashmir Civil Service Regulations, 1956, is amended. Regulation 35-AA has been inserted below Note 2 of Regulation 35-A. Clause (c) and (d) of Regulation 35-AA are applicable.

(c) In the communication dated 24.06.2015, in essence, it has been observed that in terms of SRO 310 of 1995, the petitioner has not filed application for alteration of her date of birth within a period of six months from the date of issue of SRO nor had applied for correction of date of birth within five years from the date of her entry into Government service. It is on the said basis, vide other impugned communication dated 24.08.2015, request of the petitioner for correction of date of birth has been declined.

(d) Respondents have adopted a hyper technical approach. Firstly, petitioner, in fact, had filed application for correction of her date of birth in the year 1993, means within five years from the date of her entry into Government service. Same remained pending all along, not decided either way. Then inter-departmental communications and further representations of the petitioner have also remained pending, as is clear from the inter-departmental communications as referred to above, means upto 2015, basic application filed in the year 1993 followed by other applications, remained pending and no decision had been taken, means application for alteration of date of birth was pending. When it is so, whether there was a requirement of filing fresh application when SRO 310 was notified? Answer has to be no. the petitioner under a *bona fide* and general belief that her application is already pending, has not filed fresh application. The respondents ought to have considered the same and should not have taken a stand that after SRO 310 was notified, petitioner was required to file fresh application.

18. Similar issue cropped up for determination before the Division Bench in the case of “**State of J&K & ors. Vs. Ghulam Fatima**” (CDLSW No.89/2017) decided on 20.03.2018. Paras 10 to 13 of the judgment are relevant to be quoted:

“10). True it is that the respondent should have represented within five years from the date of entry into service which she has not and, admittedly, after ten years she has filed the representation. Be that as it may, the said representation was not considered but was kept

pending, in the meantime, SRO 310 was notified on 29th November, 1995.

11) Regulation 35-AA of CSR pertains to determination of date of birth. Clauses (c) & (d) of Regulation 35-AA are relevant to be quoted:

(c) Alteration of Date of birth.

The date of birth so declared by the Government servant and accepted and once recorded by the appropriate authority (as specified in clause (b) above) in the service book or any other record of service of the Government servant, as the case may be, shall not be subject to any alteration, except in the case of a clerical error without the orders of the Government. No alteration of date of birth of a Government servant shall be made by the Government (Administrative Department) unless a request in this regard is made by the concerned Government servant within a period of five years of his/her entry into Government service and it is clearly established that a genuine/bonafide mistake has occurred:

Provided that in case of Government servant in service on the date of issue of this Notification, a request for alteration of his/her date of birth may be considered by the Government, for reasons to be recorded in writing, if an application to this effect is made within a period of six months from the date of issue of this Notification:

Provided further that the date of birth so altered would not make him/her ineligible to appear in any school or University/Board or Public Service Commission Examination in which he had appeared or for entry into Government service, on the date on which he first appeared at such examination or on the date on which he entered Government service.

(d) Notwithstanding the provisions contained in clause (c) above regarding alteration of date of birth, Government, however, reserves the right to make a correction in the recorded age of Government servant at any time, against the interests of the Government employee when it is satisfied that the age recorded in his/her service book or in the history of services of the concerned Government servant is incorrect and has been incorrectly recorded with the object that the said Government employee may derive some unfair advantage therefrom”.

12) As per Proviso, an application was to be filed within six months reckoning from 29th November, 1995, which, according to learned counsel for the appellants was not filed but the fact of the matter is that the application of respondent was already pending, that was not rejected, therefore, keeping in view object of SRO 310, that application should have been considered. It cannot be a ground of the appellants that a fresh application was required to be filed within six months from the date of notification. Respondent under *bona fide* belief that her application is already pending for alteration of date of birth has not chosen to file fresh application, rightly so. No exception can be taken to the same. The appellants, in the light of SRO 310, were bound to consider the same application as was pending before them.

13) SRO 310 inserting Article 35-AA has an object of correcting the date of birth of those in-service employees whose date of birth, for any reason, was incorrectly recorded. The respondent had a cost iron case demanding

correction/alteration in her date of birth by reflecting actual date of birth as per the matriculation certificate issued under serial No.18290. To allow the date of birth to remain in the service record as it was reflected in terms of cancelled matriculation certificate issued under serial No.8268, would not be in consonance with the position of date of birth of the respondent.”

19. In view of the law laid down, in the stated facts and circumstances of the instant case also, there was no requirement of filing any fresh application. While concluding so, it was the legal obligation of the respondents to have corrected the date of birth of the petitioner by recording it as 03.03.1964 instead of 21.09.1959.

20. For the stated reasons and circumstances, writ petition succeeds. Impugned communications dated 24.06.2015 and 24.08.2015 are quashed. The respondents are directed to correct the date of birth of the petitioner in the first page of the service book by recording it in conformity with the date of birth as recorded in the duly verified discharge certificate issued by Government Girls Higher Secondary School, Soura, Srinagar, where the petitioner had read up to 10th class and also in conformity with the certificate issued by Chief Medical Officer, Health & Family Welfare, Srinagar, dated 21.09.1991, which he had certified only when the petitioner was referred to him for physical fitness and age determination on the date of her entry into government service. Recording of date of birth of the petitioner in the service book as per school certificate shall be consistent with the requirement of law i.e. Note 2 of Regulation 35-A of J&K Civil

Service Regulations, as it then was and even now in accordance with Regulation 35-AA(a)(ii) of J&K Civil Service Regulations.

21. Disposed of as above along with connected MP.

22. The record as produced by learned AAG is returned to him.

(Mohammad Yaqoob Mir)
Judge

Srinagar
27.04.2018
"Bhat Altaf" PS'

