

**(2010) 08 PAT CK 0199****Patna High Court****Case No:** C.W.J.C. No. 17087 of 2008

Mohan Sharma

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

**Date of Decision:** Aug. 6, 2010**Final Decision:** Allowed**Judgement**

Navin Sinha, J.

Heard learned Counsel for the Petitioner" and the learned Counsel for the State.

2. A counter affidavit is stated to have been filed on behalf of the State on 28.8.2009. The same is not available on the record, The Court therefore requested Counsel for the State to make available his copy for perusal so as not to hold up the proceeding on that ground. The office is directed to trace the counter affidavit and place the same on record.

3. Learned Counsel for the Petitioner submits that he passed matriculation in 1966. The matriculation certificate mentions his date of birth as 265.1951. He was appointed as a Constable on 6.10.1970. The Petitioner in 1973 on the basis of the aforesaid educational qualification was considered and promoted to the post of Literate Constable. The Respondents accepted the genuineness of the matriculation certificate and the entries therein. The Petitioner therefore is due for superannuation in accordance, with his date of birth mentioned in the matriculation certificate and not on 1.7.2008 as urged on behalf of the Respondents. The order dated 31.10.2008 which rejects his request primarily on the ground of entry in the service book of his year of birth as 1948 and that he has not made any request for correction in his date of birth within ten years of entry in service under Rule 96 of the Bihar Finance Rules, is contrary to law.

4. Counsel for the State urged that the Petitioner never filed any application within ten years of his entry in service for correction in his date of birth and at the fag end of his career, four months prior to his superannuation he has filed a representation.

The matriculation certificate was considered for promotion only as an eligibility education criteria.

5. The Petitioner is stated to have superannuated on 30.6.2008 as per his date of birth recorded in his service book as 1948. There can be no dispute about the fact that a belated application for correction in the date of birth especially at the fag end of the service should not be entertained. Similarly that an application for correction of date of birth must be filed within the time period specified under Rule 96 also cannot be questioned. But each case shall depend on its own facts and upon the facts shall lie the application of law. Undoubtedly the service book of the Petitioner mentions his date of year as 1948 and it was signed by him. The Petitioner would have been answerable for this entry especially when he had signed the service book. But the subsequent event satisfies this Court that the Respondents were themselves sanguine that not much credence had to be given to the entry made in the service book.

6. When the Respondents promoted him to the post of Literate Constable in 1973 it was on basis of his matriculation certificate. It has rightly been urged that the matriculation certificate has not been questioned by the Respondents and in fact is acknowledged in para 6 of the counter affidavit as the basis of the promotion. The matriculation certificate mentioned his date of birth. The Respondents found no error in it in so far as the issue of promotion is concerned and" accept the genuineness and correctness of the certificate and the entries therein. The Petitioner cannot be said to have two dates of birth. One for purpose of his superannuation and one for purpose of his promotion. The Respondents cannot bifurcate the matriculation certificate by accepting it for purpose of educational qualification and simultaneously reject the entries therein. The answerability primarily lies with the Respondents. This Court is satisfied in the facts of the case that any entry of the date of birth made in the service book stood corrected by the Respondents themselves in the year 1973. There shall be a presumption of deemed correction of the entries in the service book by a fiction of law and his date of birth stands corrected in his service book as 26.5.1951.

7. If by a fiction of law, the Respondents corrected the Petitioner's date of birth, the law envisages that if an imaginary state of affairs is supplanted as the real state of affairs, the fiction must be carried to its logical end. The mind must not boggle in between. The legal effect of a fiction has been discussed by the Supreme Court in Union of India and others Vs. M/s. Jalyan Udyog and another, at paragraph 18 in the relevant extract as follows:

18. ...By virtue of the fiction created by the proviso in the notification, the vessel is deemed to have been imported for breaking-up on the date it is broken-up. It is well settled that where a fiction is created by a provision of law, the Court must give full effect to the fiction, and as is often said, it should not allow its imagination to be boggled by any other considerations. Fiction must be given its due play; there is to

be no half-way stop. According to this notification, therefore, the date relevant for determining the value and rate of the customs duty chargeable in the case of two ships concerned in Jalyan Udyog is the date on which they were broken-up.

8. The date of birth being 26.5.1951 the Petitioner was over 19 years on his date of appointment on 6.10.1970.

9. The order dated 31.10.2008 is therefore not sustainable. It is accordingly set aside.

10. The Petitioner will stand reinstated in service till his scheduled superannuation as per his date of birth as 26.5.1951. In so far as the period in between removal and reinstatement is concerned the Petitioner is held entitled to only 25 % of the back wages. Any further claim for back wages on a representation by the Petitioner shall have to be the subject-matter of enquiry by the Respondents of the status of the Petitioner for the interregnum period whereafter they may pass appropriate orders in accordance with law.

11. The writ application stands allowed.