

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH**

ORIGINAL APPLICATION NO 212 OF 2017

DISTRICT : MUMBAI

Shri Vilas Shankarrao Deshpande)
[As per service record],)
Assistant Police Inspector,)
Juhu Police Station, Mumbai-47.)
R/o: B-2/6, Police Officers Quarters)
Behind Borivli Police Station,)
Borivli [W], Mumbai.)...**Applicant**

Versus

The State of Maharashtra)
Through Principal Secretary,)
Home Department, Mantralaya,)
Mumbai 400 032.)...**Respondents**

Shri A.V Bandiwadekar, learned advocate for the Applicant.

Shri A.J Chougule, learned Presenting Officer for the Respondents.

CORAM : **Shri A.P Kurhekar (Member)(J)**

DATE : **07.01.2020**

ORDER

1. The applicant has invoked jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985 to challenge the

order dated 3.8.2016 passed by Respondent thereby rejecting the application for change of date of birth in service record.

2. The uncontroverted facts giving rise to the Original Application can be summarized as under:-

- (i) Applicant joined service on the post of Police Constable with Commissioner of Police, Pune on 16.12.1991.
- (ii) At the time of entry in service, his date of birth was recorded as 15.12.1963 on the basis of School Leaving Certificate.
- (iii) He made an application on 5.11.1999 requesting the Commissioner, Pune to change his date of birth as 25.1.1966 in place of 15.12.1963 claiming that his correct date of birth is 25.1.1966.
- (iv) However, Commissioner of Police, Pune, rejected his application by order dated 23.12.1999. (Exh. E, page 25 of the Paper Book).
- (v) However, later on applicant made representation on 1.6.2000 to the Government through Commissioner of Police, Pune for correction of date of birth in service record. (Exh. K, page 36 of the Paper Book).
- (vi) Commissioner of Police, Pune made reference to the Government by letter dated 26.7.2000 for necessary orders making it clear that earlier the application of the applicant is already rejected by order dated 23.12.1999. [Exh. F, page 26 of Paper Book].
- (vii) Government by order dated 3.8.2016 rejected the application of the applicant on the ground that it being made after 5 years from the date of joining of service, the same is not maintainable as per Rule 38 of the Maharashtra Civil Services (General Conditions of Services) Rules, 1981 as amended by Notification dated 24.12.2008.

3. Shri A.V Bandiwadekar, learned advocate for the applicant sought to assail the impugned order dated 3.8.2016 contending that the sole reason mentioned therein that the application being made after five years from the date of joining is not maintainable is totally erroneous as the limitation of five years for making the application for change of date of birth in service record is introduced for the first time by Notification dated 24.12.2008 and prior to it there was no such express limitation of five years. He has pointed out that prior to Notification dated

24.12.2008 all that application was required to be made normally within 5 years. He thus submits that the Notification dated 24.12.2008 has no retrospective effect and therefore the said ground for rejection is not sustainable in law. In this behalf, he has sought to place reliance on the judgment of Hon'ble Bombay High Court in **Ashok Pralhad Meshram Vs. Head Master, Zilla Parishad High School, 2014 (6) Mh.L.J 590**, wherein it has been held that the Notification dated 24.12.2008 has no retrospective effect. In so far as non-challenge to the order dated 23.12.1999, whereby the application was already rejected, he submits that the limitation has to be counted from the date of order dated 3.8.2016 passed by the Government in view of the proposal forwarded by the Commissioner of Police, Pune, himself. He further pointed out that as per the extract of birth register issued by the Tahsildar the correct date of birth of the applicant is 25.1.1966. But mistakenly, at the time of admission in School it was recorded as 15.12.1963. In this behalf, he also referred to the affidavit sworn before the Executive Magistrate, Indapur, wherein he stated that the date of birth of the applicant is 25.1.1966 and not 15.12.1963. He, therefore, submits that the impugned order is untenable in law and prayed for direction for correction of date of birth.

4. Per contra, Shri A.J Chougule, learned Presenting Officer strongly reiterated the averment made in reply. He submits that the application made by the applicant on 5.11.1999 for change in date of birth in service record has been rejected by the Commissioner of Police, Pune by order dated 23.12.1999, but the same is not challenged by the applicant and therefore, the Original Application is hopelessly barred by limitation. He has further pointed out that if the date of birth as 25.1.1966, which is sought to be corrected is considered then at the time of admission in Primary School he was below five years of age and therefore, it made him ineligible for admission in school as per Rule 128 of the Bombay Primary Education Rules, 1949. In this behalf, he further referred to the provisions contained in Rule 38 (2)(A)(i) & (ii) of Maharashtra Civil Services (General Conditions of Services) Rules, 1981 to point out that where the Government servant has gained advantage by representing

incorrect date of birth in School and date of birth sought to be corrected if make him ineligible for admission in School, then such alteration in date of birth is not permissible in law.

5. In view of the submissions advanced at the bar, the following points arises for determination:-

(i) Whether Original Application is within limitation?

(ii) Whether the applicant's date of birth as recorded in service book was so recorded due to want of care on the part of some persons other than individual in question or is obvious clerical error as contemplated under Rule 38 under Rule 38(2)(f) of 'Rules of 1981'.

(iii) Whether the date of birth of the applicant so altered would make him ineligible for admission in Primary School in terms of Rule 128 of Bombay Primary Education Rules, 1949.

6. The procedure for writing and recording the date of birth in Service Book and its correction is governed by Rule 38 of Rules of 1981. It will be useful to reproduce the relevant portion as amended on 24.12.2008 as follows.

“38. Procedure for writing the events and recording the date of birth in the service book.

(1) In the service book every step in a Government servant's official life, including temporary and officiating promotions of all kinds, increments and transfers and leave availed of should be regularly and concurrently recorded, each entry being duly verified with reference to departmental orders, pay bills and leave account and attested by the Head of the Office. If the Government servant is himself the Head of an Office, the attestation should be made to his immediate superior.

(2) While recording the date of birth, the following procedure should be followed:-

(a) The date of birth should be verified with reference to documentary evidence and a certificate recorded to that effect stating the nature of the document relied on;

- (b) In the case of a Government servant the year of whose birth is known but not the date, the 1st July should be treated as the date of birth;
- (c) When both the year and the month of birth are known but not the exact date, the 16th of the month should be treated at the date of birth;
- (d) In the case of a Government servant who is only able to state his approximate age and who appears to the attesting authority to be of that age, the date of birth should be assumed to be the corresponding date after deducting the number of years representing his age from his date of appointment;
- (e) When the date, month and year of birth of a Government servant are not known, and he is unable to state his approximate age, the age by appearance as stated in the medical certificate of fitness, in the form prescribed in rule 12 should be taken as correct, he being assumed to have completed that age on the date the certificate is given, and his date of birth deducted accordingly;
- (f) When once an entry of age or date of birth has been made in a service book no alteration of the entry should afterwards be allowed, unless it is known, that the entry was due to want of care on the part of some person other than the individual in question or is an obvious clerical error.

Instruction :-

(1) No application for alteration of the entry regarding date of birth as recorded in the service book or service roll of a Government servant, who has entered into the Government service on or after 16th August 1981, shall be entertained after a period of five years commencing from the date of his entry in Government service.

(2) Subject to Instruction (1) above, the correct date of birth of a Government servant may be determined, if he produces the attested Xerox copy of the concerned page of the original birth register where his name and time being in force regarding the registration of birth, and maintained at the place where the Government servant is born, such proof should be considered as an unquestionable proof for change of date of birth in service record.

(2A) At the time of scrutiny of the application, it shall be ensured that.-

(i) no advantage has been gained in school admission, entry into Government servant by representing a date of birth which is different than that which is later sought to be incorporated;

(ii) the date of birth so altered would not make him ineligible for admission in any school or University or for the Maharashtra 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 in the Government service.

(2B) No application for alteration of entry regarding date of birth of the Government servant pending with the Government on the date of commencement of the Maharashtra Civil Services (General Conditions of Services) (Amendment) Rules, 2006 shall be processed after the date of retirement of such Government servant and such application shall automatically stand disposed of as rejected on the date of retirement. Any such application made by the retired Government servant shall not be entertained.”

7. Thus, it is explicit that in terms of Rule 38(2)(f), the date of birth once recorded in Service Book should not be afterwards changed unless it is shown that the entry was taken due to want of care on the part of some person other than the individual in question or is an obvious clerical error.

8. As to point no. (i):- Undisputedly, earlier applicant had made an application for correction in date of birth on 5.11.1999 and the same was rejected by the Commissioner of Police, Pune on 23.12.1999, and the same was communicated to the applicant as seen from page 25 of the Paper Book. Commissioner of Police, Pune had rejected the application made by the applicant. Thereafter, applicant didn't take any steps to challenge the same within the period of limitation. True, later he again made an application on 1.6.2000. However, fact remains that his application, first in time was rejected by Commissioner of Police, Pune and the order was communicated to him. In such a situation, the question is to whether the Original Application is within limitation and the answer is in negative.

9. The submission advanced by learned counsel for the applicant that his client got fresh cause of action in view of order dated 3.8.2016 is fallacious and misconceived. It is true that the application made by the applicant on 1.6.2000 was forwarded by the Commissioner of Police, Pune to the Government and ultimately Government rejected the same by order dated 3.8.2016. It may be noted that while forwarding the proposal to the Government, Commissioner of Police, Pune in his forwarding letter dated 26.7.2000 made it clear that the application made by the applicant earlier has been already rejected being not made within five years from the date of joining of service. Whether at the relevant time, there was express limitation of five years for making an application for change in date of birth will be dealt with little later. Presently, suffice to say that the application made by the applicant first in time dated 5.11.19991 has been rejected by the Commissioner of Police, Pune and the same was admittedly communicated to the applicant. This being the factual position, the applicant ought to have challenged the order dated 23.12.1999 by availing legal remedy at the relevant time. However, he remained silent and preferred not to challenge the same. Later on he submitted another representation to the Government on 1.6.2000. Once the Commissioner of Police, who is competent to decide the application made by the applicant was rejected, subsequent representation made by the applicant would not extend the period of limitation, nor the order passed thereon by the Government on 3.8.2016 would give fresh cause of action to the applicant in so far as law of limitation is concerned.

10. As per Police Manual, Commissioner of Police, exercised his powers invoking clause 476 (3)(a) of Maharashtra Police Manual, who is the appointing authority and competent to pass necessary orders on the application. As such, it can't be said that the application was decided by the authority not competent and therefore, applicant got fresh cause of action in view of order dated 3.8.2016 passed by the Government.

11. The legal position that once representation made by the applicant is decided, cause of action starts from the date of communication of the

order and subsequent representations would not revive the period of limitation, is well settled. In this behalf, it would be apposite to refer to the judgment of Hon'ble Supreme Court in **State of Tripura & Ors Vs. Arabinda Chakraborty & Ors, (2014) 6 SCC 460**. Hon'ble Supreme Court held that the period of limitation commences from the date on which cause of action arises for the first time and simply making representations in absence of any statutory provisions, the period of limitation would not get extended. As such, in the present case, applicant got cause of action for the first time in view of rejection of his application by order dated 23.12.1999 and therefore, he ought to have filed the Original Application within period of limitation of one year as contemplated under Section 21 of the Administrative Tribunals Act, 1985. This being the settled position, representations made, which is not provided in the statute would not extend the period of limitation and therefore, the submission advanced by the learned counsel for the applicant that fresh cause of action accrued to him on 3.8.2016 whereby his representation was rejected is misconceived and untenable in view of the ratio laid down by the Hon'ble Supreme Court in **Arabinda Chakraborty case, [cited supra]**. Suffice to say that Original Application is hopelessly barred by law of limitation.

12. Point no. (ii) & (iii):- Even assuming for a moment that the Original Application is within limitation, in that event also in my considered opinion, applicant's case does not fit within the parameters laid down under Rule 38 of Maharashtra Civil Services (General Conditions of Services) Rules, 1981.

13. It is not the case of the applicant that at the time of admission in School, his date of birth as 15.12.1963 has been recorded due to want of care on the part of some person other than himself or is obvious clerical error as contemplated under Rule 38 (2)(f) of 1981 Rules. On the contrary, his contention is that his father wrongly recorded his date of birth as 15.12.1963 instead of 25.1.1966. True, applicant has also filed extract of date of birth from the office of Tahsildar to show that his date of birth is 25.1.1966. As such, the date of birth was recorded as per

information supplied by the parents and there is no obvious clerical error on the part of the department nor there is want of care on the part of person who recorded date of entry in service record. Material to note that applicant had passed S.S.S examination in the year 1980 as seen from S.S.C Certificate (page 21 of the Paper Book). In S.S.C Certificate, his date of birth is recorded as 15.12.1963. Though he has not produced Leaving Certificate of Primary School, it is very much clear that he must have enrolled his name in first standard (1980-10) in 1970. Thus even assuming that he didn't fail in any academic year, his date of admission in first standard would be 1970. Whereas he sought correction of date of birth as 25.1.1966. As such, on the basis of date of birth sought to be corrected at the time of admission of school in the month of June, 1970, he was 4 years and 4 months old child. This being so, obviously, he was below 5 years of age and ineligible for admission in Primary School in terms of Rule 128 of Bombay Primary Education Rules, 1949.

14. Now let us see relevant Rule 128 of 'Rules of 1949' which is as follows:-

“128. Admission of pupils:- (1) No approved school shall admit-

(a) a child who has not completed the 5th year of age on the date of admission.”

15. Material to note that Rule 38 of 'Rules of 1981', particularly clause [2A] specifically provides that while scrutinizing the application made for correction of date of birth, it shall be ensured that the concerned Government servant has not gained advantage while taking admission in School by representing date of birth which is different than the date of birth sought to be incorporated and further provides that it shall be ensured that the date of birth so altered could not make the concerned Government ineligible for admission in school. In the present case, it is explicit that only to get admission in school, the date of birth of the applicant is recorded as 15.12.1963. In other words, applicant had already gained disadvantage by incorporating date of birth as 15.12.1963 in School record. If his date of birth is considered as 25.1.1966, which is sought to be corrected, then obviously he was below 5 years of age and

ineligible for admission in school. Once applicant gained disadvantage by misrepresentation then he cannot be allowed to turn around and seek correction in date of birth else it would be amounting to double disadvantage. This being the position, there is no escape from the conclusion that the application made by the applicant does not fit in Rule 38[2A] of 'Rules of 1981'. Thus even assuming for a moment that Original Application is within limitation, in that event also, impugned order can hardly be faulted with.

16. Shri Bandiwadekar, learned advocate for the applicant submitted that the application made by the applicant is rejected on the sole ground of not making an application within 5 years from the date of entry in service. He has pointed out that the clause of limitation for making application within 5 years from the date of entry into service is introduced for the first time by virtue of Notification dated 24.12.2008 and it has no retrospective effect. He has further pointed out that before this amendment, all that Rule 38 provides that normally application ought to have been made within 5 years and the present matter being prior to amendment of 24.12.2008, the rejection on the ground of limitation of 5 years is illegal. He further canvassed that in view of decision of the Hon'ble Supreme Court in **Chandra Singh & Others Vs. State of Rajasthan & Anr, 2003 SCC (L & S) 951**, legality or otherwise of an order passed by a statutory authority must be judged on the face thereof as the reasons contained therein cannot be supplemented by an affidavit. As regards effect of amendment dated 24.12.2008, by Rules of 1981 and its prospective effect, he referred to the judgment of Hon'ble Bombay High Court in **Ashok Pralhad Meshram Vs. Head Master, Zilla Parishad High School, Palandur (Chauras) and Anr 2014 (6) Mh.L.J 590**.

17. True, in Ashok Pralhad Meshram's case cited supra, Hon'ble High Court considered Rule 38(2)(f) before amendment dated 24.12.2008 and the effect of amendment. Hon'ble High Court held that comparison of old rule and amended rules shows that the rule making authority has after amendment in 2008 has prohibited the employees from making any

application for correction in the date of birth after the period of five years from the date of entry in service but since the amendment is not retrospective, it must be read as prospective. Accordingly, the application made by the employee in that case on 20.11.2006 was held to be governed by old rules.

18. In my considered opinion, the decision in Ashok P. Meshram's case cited supra is of little assistance to the applicant in the present case as his application was already rejected by the Commissioner of Police, Pune on 23.12.1999, but he didn't take any steps thereafter to challenge the order. Therefore, the issue which have already attained finality due to non-challenging the same cannot be reopened in this Original Application, it being barred by law of limitation. In other words, even assuming for a moment that amendment of Rules of 1981 by Notification dated 24.12.2008 is prospective, in that event also there being no challenge to the order dated 23.12.1999, passed by the Commissioner of Police, Pune, rejecting the claim of the applicant, this Original Application is barred by limitation.

19. In so far as testing of legality of the impugned order on the ground other than the ground mentioned in the order is concerned, in the present case it is by virtue of provisions of Rule 38 [2A] read with Rule 128 of Bombay Primary Education Rules, 1949, in law itself the claim of the applicant is not sustainable, even if there is no reference to these provisions in impugned order dated 3.8.2016. Needless to mention that the Tribunal is under obligation to examine the existing legal position to find out whether the claim of the applicant is sustainable in law. Suffice to say that submission advanced by learned counsel for the applicant in this behalf holds no water.

20. The necessary corollary of aforesaid discussion of law and facts leads to sum up that the challenge to the impugned order dated 3.8.2016 is devoid of merit and the Original Application deserves to be dismissed. Hence the following order.

ORDER

The Original Application is dismissed with no order as to costs.

Sd/-
(A.P Kurhekar)
Member (J)

Place : Mumbai
Date : 07.01.2020
Dictation taken by : A.K. Nair.