

REPORTABLE**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO.8225 OF 2012**

Gopal Prasad ... Appellant

versus

Bihar School Examination
Board & Others ... Respondent**J U D G M E N T*****Indira Banerjee, J.***

I have gone through the draft judgment prepared by my esteemed brother, but have unfortunately not been able to agree that the appeal should be dismissed.

2. The appeal is against an order dated 3.8.2012, passed by a Division Bench of the High Court of Judicature at Patna, dismissing Letters Patent Appeal No.1090 of 2012 and affirming

the order of the Single Bench dated 24.4.2017 dismissing the Writ Petition CWJC No. 7718 of 2012, filed by the Appellant.

3. The Appellant was appointed as Calligraphist-cum-Assistant of the Bihar School Examination Board on 20th May 1970, at about 15½ years of age . It is not in dispute, that on the date of appointment of the Appellant, that is, 20th May 1970 there was no minimum age prescribed for appointment to the post of Calligraphist-cum-Assistant. However, the minimum age of entry into pensionable service was 16 years. This meant that the period of service of an employee before attaining the age of 16 years, would not count towards pension.

4. By a Government circular dated 15th January 1998 issued by the Personnel and Administrative Reforms Department of the State of Bihar, the minimum age for appointment to an inferior service under the Government of Bihar was fixed at 18 years. The said circular, fixing the minimum age for appointment at 18 years, which was issued almost 18 years after the appointment of the petitioner, was prospective and applied only to

appointments made after issuance of the said circular.

5. The terms and conditions of service of employees of the Bihar School Examination Board are governed by the Bihar Service Code. Rule 73 of the Bihar Service Code *inter alia* provides that *“The date of compulsory retirement of a Government Servant is the date on which he attains the age of 58 years. He may be retained in service after the date of compulsory retirement with the sanction of State Government on public grounds, which must be recorded in writing.”*

6. On 15th January 2004, the Bihar School Examination Board resolved to treat the age of entry into service, of those incumbents who were below 18 years at the time of joining service, as 18 years at the time of their appointment.

7. The relevant extract of the resolution, as translated in English, is extracted hereinbelow for convenience:-

“Today dated 15th January, 2004 meeting of Board of Bihar Schools Examination Committee held in the Room of the Chairman. In which Dr. Jitender Singh, Chancellor, Patna University, Patna and Shri Subhash Chander Chaudhary, Assistant Teacher, C.M. High

School, Siwan participated as Members in addition to the Chairman.

Proceedings

Agenda No. 1 :

Agenda No.2 :

<p><i>Regarding employees having age less than 18 years appointed in the Committee</i></p>	<p><i>After analysis of the legal advice received in the light of the judgment taken in the meeting of the Committee held on 18.11.2003 about the employees having age less than 18 years appointed in the Committee, Hon'ble Member Dr. Jitender Singh, chancellor Patna University, Patna informed that proceedings should be initiated in Committee also under the letter No.1961 dated 12.11.1995 from the Secretary, Higher Education Department, Bihar Patna. According to the provision of the said letter, decision was taken unanimously that employees who have been appointed in the Bihar Schools Examination Committee at the age below 18 years, taking their age at 18 years as on the date of their appointment, they be superannuated on completion of age of 60 years in the case of Category-4 and on completion of age of 58 years in case of Category-3.</i></p>
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8. On a bare reading of the said resolution, it is patently clear that employees who had been appointed before attaining the age of 18 years, were to be deemed to have attained the age of 18 years on the date of their appointment and that they would superannuate on completion of 60 years of age if they were Category-4 employees and on completion of 58 years of age in case they were Category-3 employees. The age of 58 years for

category-3 employees was, later, during the tenure of service of the Appellant, increased to 60 years.

9. The resolution may not have perfectly been worded. In my view, the resolution was a beneficial one in the interest of those employees who would otherwise have been deprived of pensionary benefits for the period of service rendered by them before attaining the age of 18 years. Such employees were to be deemed to be 18 years on the date of their appointment, so that they were not deprived of pensionary benefits for part of their service period, but were to retire on attaining the age of retirement as prescribed in Rule 73 of the Bihar Service Code. The resolution might also have been necessitated by reason of irregular appointments after the Circular dated 15th January 1998 of persons who had not attained 18 years of age, to put all disputes with regard to the legality of their appointment to rest. It does not appear that the resolution was intended to retire employees who had joined service before attaining the age of 18 years, before completion of their actual age of retirement,

as per the Rules.

10. If it were the intent of the resolution, that employees appointed before attaining the age of 18 years, would retire before attaining the actual age of retirement, as per Rule 73 of the Bihar Service Code, the language and/or wording of the resolution would have been different. The resolution would then have expressly stated that, the date of birth of employees, appointed before attaining the age of 18 years, would, for the purpose of retirement, be deemed to be the date on which the concerned employee would have been born, if he/she were to complete 18 years of age on the date of appointment. The Resolution would clearly have stated that such employees would retire on attaining the age of retirement prescribed in the Bihar Service Code on the basis of their deemed date of birth, notwithstanding the fact that they may not have attained the age of retirement as per the Bihar Service Code as per their date of birth as recorded by the Bihar School Examination Board.

11. As observed above the date of retirement of the employees of the Bihar School Examination Board is governed by Rule 73 of the Bihar Service Code. No decision to decrease the age of retirement of employees who had joined service before attaining the age of 18 years, could in my view, have been taken without amending Rule 73 of the Bihar Service Code in accordance with law. There could be no question of amendment of any provision of the Bihar Service code merely by a resolution of the Bihar School Examination Board.

12. On 14th February 2004 an Office Order was issued to the Appellant, the contents of which, as translated, are extracted hereinbelow:-

“Shri Gopal Prasad, Assistant got appointment in Bihar School Examination Committee in the age less than 18 years, The minimum age for appointment in service in any of the Government (Semi-Government) Autonomous Institutions has been prescribed at 18 years. Decision has been taken in the meeting of the Bihar Schools Examination Committee held on 15.01.2004 that taking their age at 18 years as on the date of their appointment, they be superannuated on completion of age of 60 years in the case of Category-4 and on completion of age of 58 years in

case of Category-3.

Therefore, treating the age of Shri Gopal Prasad, Assistant at 18 years as on the date of his appointment i.e. 27.05.1970, as per the directions, orders are issued to record his date of retirement in Service books as 31.05.2010.”

13. The order dated 14th February 2004 in so far as the same purports to record the date of retirement of the Appellant as 31st May 2010 in his Service Book, is contrary to Rule 73 of the Bihar Service Code and also beyond the scope and ambit of the resolution taken on 15th January 2004. Any prescription of minimum age for appointment, subsequent to the appointment of the Appellant, could not retrospectively be applied to the Appellant.

14. From the pleadings filed in connection with this appeal, it is not clear whether the Appellant objected to the said Office Order dated 14th February 2004. In any case, an office order which is patently illegal and entails adverse civil consequence is not precluded from challenge on the ground that the aggrieved employee may not have objected to the office order, and more so, when the legality of similar orders was awaiting adjudication in Courts of law. There were various writ petitions pending in the

High Court, on the question of whether persons who had joined service before attaining the age of 18 years could unilaterally be retired before they actually attained the age of retirement stipulated in Rule 73 of the Bihar Service Rules, because they were to be deemed to have completed 18 years of age on the date of their appointment. It is also a matter of record that many of these writ petitions were decided in favour of the employees, instances of which have been given later in this judgment.

15. It is not in dispute that the Appellant's date of birth is 19th November 1954 as per the records of the Bihar School Examination Board. It is nobody's case that the date of birth of the Appellant as recorded, that is 19th November 1954, is not his correct date of birth.

16. The Appellant's date of birth being 19th November 1954 he was to complete 58 years of age on 19th November 2012. The age of retirement was, however increased to 60 from 58 years, before 18th November 2012. The Appellant's date of birth being 19th November 1954, he was to complete sixty years of age on 18th November 2014.

17. As observed above, long before the Appellant was appointed in service of the Bihar School Examination Board, Rule 5 in Appendix-5 of the Bihar Pension Rules was amended. The qualifying age of government servants for consideration of pensionary benefits was raised from 16 to 18 years. Governmental authorities, however, continued to appoint employees who had not attained eighteen years of age.

18. On or about 16th February 2012, the Appellant's son filed an application under the Right to Information Act, enquiring about the date of superannuation fixed by the Board for his father's retirement.

19. By a letter dated 26th March 2012 the Board informed the Appellant's son that in view of the decision dated 14th February 2004, the Appellant's age as on 27th May, 1970 was to be considered 18 years and therefore his retirement was to be on 31st May 2010, on completion of 58 years, which age had later been increased to completion of 60 years. The date of retirement would therefore be 31st May 2012.

20. Thereafter, the Appellant filed the writ petition CWJC

No.7718 of 2012 in the High Court of Patna challenging the communication dated 20th March 2012 under the Right to Information Act and also the order dated 14th February 2004.

21. By an order dated 24th April 2012, the Single Bench dismissed the writ petition, relying upon the Full Bench judgment of the Patna High Court In **Ragjawa Narayan Mishra and Another vs. Chief Executive Officer, Bihar Rajya Khadi Gramoudyog Board and Ors.**¹. The Full Bench of Patna High Court had held:-

“16. Be that as it may, one thing is certain that admittedly both the petitioners when they entered into the contract with the respondent Board they had not attained the age of majority. Apart from its legal impact and effect, the ramifications and end result on the status of a contract, in terms of the service relationship, a person could be said to have entered into a valid service, only, when he has attained the age of majority. So the minimum age prescribed at the entry point in the Government service has been 18 years. The maximum age prescribed for the exit point is 58 years. In other words, the total length of period of Government service in any case for pensionary benefits would not exceed 40 years. It is In this context, the Government Circular mentioned herein above needs to be considered. When there is a clear Rule provision anything contrary to or inconsistent with or incompatible to it, any circular or resolution or order, will not have any legal and valid effect to abridge the right enshrined in the Rule Provision. Even if the said circular of 1998 as relied upon by the petitioners is considered to be beneficial to them then, also, it cannot be read at this

1 . 2006 (1) PLJR 410

junction with the existing statutory provision incorporated in the Bihar Pension Rules, as well as, the Bihar Service Code. Therefore, from that point of view also the petitioners cannot be allowed to contend that they have right to continue even beyond the age of 58 years though provided in Rule 73 of the Bihar Service Code which prescribes the superannuation age of 58 years.

17. Thirdly, it is settled and established proposition of law and principles of jurisprudence that a person who takes undue advantage by one or other reasons at the entry point in the service cannot be allowed to urge that he be given higher benefit and if it is urged then clearly, it goes to show that something wrong or irregular has been done, at the entry point, in service. So the settled principle, also, creates a very strong impediment in getting the relief from this Court which is exercising extraordinary, prerogative, equitable and discretionary writ jurisdiction by invocation of the provision of Article 226 of the Constitution of India.

18. In our opinion, therefore, the impugned orders questioned in both the writ petitions, obviously, cannot be interfered with from any point of view as discussed hereinabove. The proposition of law, therefore, is made evidence and unambiguous that the superannuation age prescribed in Rule 73 of the Bihar Service Code will apply for retirement purpose and a person cannot be continued beyond the age of completion of 40 years in service. It is, therefore, evidently, clear that a Government servant who has completed 40 years of service or has attained the age of 58 years has to be superannuated in terms of the existing Rule provision. Our answer, therefore, is very clear and we answer this reference accordingly. The contradictory view in the aforesaid decisions referred to hereinbefore, shall not be a good law."

22. The mere fact that an employee may have been a minor at the time of his initial appointment is inconsequential in the absence of any law at the material time of his appointment, prohibiting appointment of 15/16 year old

minors. The Appellant who was 15½ years old may have been a minor, but certainly not a toddler. It is absurd that any rational employer, far less a statutory body, would appoint a toddler. The hypothesis of appointment of a toddler is far fetched and unrealistic. The apprehension of claims in future to appointment from persons less than 18 years of age is also baseless in view of the circular dated 15th January 1998 which fixes 18 years as the minimum age of retirement. The circular would govern subsequent appointments.

23. It may be true that a minor is incompetent to enter into a contract, as observed by my esteemed brother. A contract may not be enforceable against a minor. A contract executed by a minor may be voidable at the option of the minor. The minor may, on attaining majority, repudiate or ratify and accept the contract.

24. It is nobody's case that any of the concerned employees repudiated their contract of appointment on attaining majority. An employer who knowingly appoints minors with impunity, with its eyes open, cannot evade its obligations under the contract of employment, and that too after the employee has rendered service for almost two decades after attaining majority. The contracts can be said to have been ratified by the employees concerned, on attaining majority. It cannot, also be said, that an employee appointed when he was 15½ years old, attained any undue

advantage, when there was no minimum age for appointment at the material time.

25. The learned Single Judge dismissed the writ petition relying on the decision of the Full Bench in **Ragjawa Narayan Mishra** (supra), and the Division Bench dismissed the appeal from the decision of the learned Single Judge. The learned Single Bench, as well as the learned Division Bench, had no option but to follow **Ragjawa Narayan Mishra** (supra), since judicial discipline required the Benches of lesser strength to follow the decision of the Full Bench.

26. In my view, the interpretation of the Full Bench of Rule 73 of the Bihar Service Code in **Ragjawa Narayan Mishra** (supra) is misconceived and erroneous. Counsel appearing on behalf of the Appellant has rightly argued that there is no rule which prescribes the length of service as a criteria for superannuation. Neither Rule 73 of the Bihar School Code, nor Rule 57 of the Bihar Pension Rules, 1950 prescribed any limit to the length of service.

27. The Full Bench fell in error in proceeding on the basis of the length of service, when Rule 73 of the Bihar Service

Code prescribes a specific age of superannuation. As argued on behalf of the Appellant, Rule 73 of the Bihar Service Code prescribes an age of retirement. The said Rule does not make length of service a criteria for retirement.

28. The raising of the minimum qualifying age of the government servant for pensionable service, from 16 to 18 years, meant that if an employee entered service before attaining the age of 18 years, the period of service from the actual date of appointment till attainment of the qualifying age for pensionable service, would not count for the purpose of computation of pension/pensionary benefits.

29. In ***Ragjawa Narayan Mishra*** (supra), the Full Bench failed to appreciate that the circular of 1998 could have no manner of application to appointments that had already been made before the said circular was issued, and certainly not to appointments made almost two decades before issuance of the aforesaid circular, at a time when admittedly there was no minimum age for appointment to government service. Even assuming that the total length of Government

service for pensionary benefits cannot exceed the length of time between the date of attaining of 18 years and the attainment of age of 58/60 years as per Rule 73, that would mean that pensionary benefits would have to be computed on the basis of the length of service after completion of 18 years of age. In no case can an employee be retired before attaining 58 and/or 60 years of age, as prescribed in Rule 73 of the Bihar Service Code.

30. The finding of the Full Bench in ***Ragjawa Narayan Mishra*** (surpa), that the superannuation age prescribed in Rule 73 of the Bihar Service Code would apply for retirement purpose and a person could not be continued after completion of the retirement age is unexceptionable. In no circumstances could a government servant claim any right to continue in service after completion of the age of retirement prescribed in Rule 73 of the Bihar Service Code. However, since length of service is not a criteria for retirement under the applicable rule, that is Rule 73 of the Bihar Service Code, a government servant who had not completed the age of retirement as per his/her actual

date of birth recorded in the service records, cannot be made to retire on the ground of completion of 40 years of service or service in excess of 40 years. At best, the length of service would be deemed to be forty years for computation of pensionary benefits.

31. With the greatest of respect to the Full Bench, I am unable to agree that Rule 5 in Appendix-5 of the Bihar Pension Rules prescribing the qualifying age of the government servant for consideration of pensionary benefits and/or raising of such age from 16 years to 18 years makes any difference to the age of retirement prescribed under the Rule 73 of the Bihar Service Code.

32. The age of retirement and qualifying service for the purpose of retirement benefits are not one and the same. Qualifying service for retirement means that the length of service for the purpose of computation of retiral benefits would commence from attainment of the age of qualifying service of pension.

33. Thus, if the age of qualifying service for pension is 18

years, the length of service for computation of pensionary benefits would have to be computed from the date of attainment of 18 years of age. However, if the prescribed age of retirement is completion of 60 years, an employee cannot be forced to retire before attaining that age except on grounds provided in Service Rules. For example, an employee may prematurely be retired by way of disciplinary action, if the rules so provide.

34. When the age of retirement is governed by express rules, which do not prescribe length of service as a criteria of retirement, but provide for retirement upon attainment of age, an employee cannot be made to retire before attaining that age of retirement, only because he/she has served for a certain length of time, by a convoluted process of logical reasoning. My judicial conscience, also does not permit me to uphold the judgment under appeal, only because the High Court has, for a while, followed the Full Bench decision of that Court which has held the field for a while. The Full Bench decision was, in my opinion, erroneous. This Court has time

and again reversed its own decisions including those of Constitutional Benches, which have held the field for decades. To cite an example, the Constitution Bench Judgment of this Court in ***Atiabari Tea Co. Ltd. v. State of Assam***² which held the field for almost half century was overruled by a judgment of nine-Judge Bench judgment in ***Jindal Stainless Ltd v. State of Haryana***³. I see no reason why the judgment and order impugned should not be set aside.

35. The issues of whether a government servant could be superannuated from service on completion of 40 years of service even in the absence of any such rule, taking aid of Rule 73 of the Bihar Service Code, which only prescribed the age of superannuation and whether after completion of 40 years of service, a person could be retired from service, treating his age as 18 years at the time of entry in service, were considered by a Division Bench of the High Court of Jharkhand presided over by S.J. Mukhopadhaya, J. in ***Ganesh Ram vs. State of Jharkhand and Ors.*** numbered W.P.(S)

² AIR 1961 SC 232

³ 2016 SCC Online 1260 decided on 11.11.2016

No.1210 of 2003, reported in 2006(2) FLR 156 in the context of Rule 73 of the Bihar Service Code. The Bihar Service Code is applicable in the State of Jharkhand created pursuant to the Bihar Reorganization Act, 2000, and comprising areas that were earlier in the State of Bihar. The issues were answered in the negative in favour of the employees and against the State of Jharkhand and others. A copy of the judgment in **Ganesh Ram** (supra) is also annexed to the Paper Book as Annexure P-5.

36. In **Ganesh Ram** (supra) the Court found, and rightly, that there was no common minimum age of 18 years prescribed by the State of Bihar for appointment to service of the State, or in the State of Jharkhand. The minimum eligibility age varied from job to job. The Court observed and held:-

“7.....The definition of 'employee', as laid down under Section 2(i) of the Act, means any person, who is employed for hire or reward or to do any work, skilled or unskilled, etc. and also includes an employee, employed by the appropriate Government i.e. State Government or Central Government. Clause (a) to Section 2 defines

"adolescent" means a person, who has completed his fourteenth year of age but has not completed his eighteenth year. "Adult" has been defined under Clause (aa) of Section 2, which means a person, who has completed his eighteenth year of age and "child", as defined under Clause (bb) of Section 2, means a person, who has not completed his fourteenth year of age. Section 3 of Minimum Wages Act, 1948 while prescribes the manner in which the appropriate Government will fix the minimum rates of wages, under Sub-section (3) appropriate Government is empowered to fix different minimum rates of wages for "adults", "adolescent", "children" and "apprentices". This simply shows that even in the Government employment, an "adolescent", though minor, can be appointed for whom different wages may be fixed."

The High Court further noted:-

"8. The State of Bihar has issued Police Order No. 209-82, circulated vide Memo No. 6568/P2/43-271-88, dated 11th August, 1988. This Police Order is also applicable in the State of Jharkhand, in view of Section 84 of the Bihar Reorganization Act, 2000. As per this Order, in every distinct, out of the sanctioned strength of police force, two posts can be reserved in which dependent children of police force, below 18 years of age, can be appointed on compassionate ground, if the police personnel dies while on duty. Those children, so appointed, are commonly known "as Bal-Arakshi" and are paid minimum of the scale of pay of the post, without annual increment, till they attain majority. It is only on attaining majority, if the "Bal-Arakshi" so wishes and is qualified, they are appointed as Constable against such posts. The children, on appointment, are provided with two half-pants, two shirts two-sets of socks, one pair of shoes etc. This simply goes to show that there is no bar on appointment of a minor in the services of the State."

37. Of Course, as noted in the judgment in **Ganesh Ram**

(supra) after the enactment and enforcement of the Child Labour (Prohibition and Regulation) Act, 1986 employment of a child which means a person who has not completed 14 years of age is prohibited for certain types of work. However, the said Child Labour (Prohibition and Regulation) Act, 1986 is of no application in this case, because the petitioner was appointed long before the enactment and enforcement of the said Act and in any case he was above 14 years of age at the time of appointment.

38. The issue of whether an employee could be made to retire before completion of actual age of retirement as prescribed in Rule 73 of the Bihar Service Code on the basis of a deemed age was answered in the negative, against an employer and in favour of the employee in the following cases referred to in **Ganesh Ram** (supra):-

1. **Mokhtar Ahmad v. B.S.R.T.C. and Ors.** (1995(1) PLJR 183(DB)
2. **Mantu v. C.C.L.** (2001 (1) JCR 181)
3. **Kalanand Jha v. State of Jharkhand and Ors.** (2001 (3) JCR 228)
4. **Balkeshwar v. Central Coalfields Ltd.** (2002 (1) JCR 175)
5. **Pranadhar Prasad v. State of Jharkhand and Ors.** (MANU/JH/1137/2002).

39. I am of the view that the law has correctly been interpreted by the Division Bench of the High Court of Jharkhand in **Ganesh Ram** (supra). A person can only be retired on attainment of the prescribed age of retirement unless the rules expressly make length of service a criteria of retirement, as in the case of employees of the Bihar State Electricity Board, governed by

Notification dated 9th September 1997, issued under Section 79 (c) of the Electricity Supply Act, 1948, under which the date of superannuation prescribed was completion of 60 years of age or completion of 42 years of service, whichever is earlier.

40. The judgment in ***Nagaland Senior Government Employees Welfare Association and others*** (supra) referred to by my esteemed brother is in my view clearly distinguishable.

39. In the aforesaid case the applicable Rules expressly made completion of the length of service prescribed, a criteria for retirement.

41. This Court upheld the validity of Section 3 of the Nagaland Retirement from Public Employment Act, 1991 which provided:-

"S.-3. Retirement from public employment: (1) Notwithstanding anything contained in any rule or orders for the time being in force, a person in public employment shall hold office for a term of thirty-three years from the date of his joining public employment or until he attains the age of fifty-seven years whichever is earlier :

Provided that in special circumstances, a person under public employment may be granted extension by the State Government upto a maximum of one year;

Provided further that the Government may have the cases of all persons under public employment screened from time to time to determine their suitability for continuation in public employment after the attainment of the age of fifty years.

(2) All persons under public employment shall retire on the afternoon of the last day of the month in which he attains the age of fifty-seven years or on completion of thirty-three years of public employment whichever is earlier."

42. By the Nagaland Retirement from Public Employment (Amendment) Act, 2007 (the First Amendment Act, 2007) the age of retirement was enhanced to 60 years from 57 years. By the Nagaland Retirement from Public Employment (Second Amendment) Act, 2009 (the Second Amendment Act, 2009) the length of service of the State Government employees was increased to 35 years instead of 33 years. This Court held :-

“a provision such as that at issue which prescribes retiring the persons from public employment in the State of Nagaland on completion of 35 years’ service from the date of joining or until attaining the age of 60 years, whichever is earlier, does not suffer from the vice of arbitrariness or irrationality and is not violative of Articles 14 and 16 of the Constitution. The appeal has no merit and is dismissed with no order as to costs.”

43. As observed above, in this case Rule 73 of the Bihar Service Code does not prescribe any length of service as criteria for retirement. The prescribed age of retirement for employees of the category to which the Appellant belonged was 58 years, later increased to 60 years. The decision of the respondents to retire the Appellant before he attained the age of 60 years as per his actual date of birth, as recorded in the service records cannot be sustained.

44. I am of the view that the appeal should be allowed and the judgment and order of the Division Bench and the Single

Bench be set aside. The Appellant is entitled to a declaration that the Appellant was entitled to continue in service till 18th November 2014, being the date on which he completed 60 years of age, as per his service records, and shall be entitled to all consequential benefits including arrears of pay, if any, pensionary benefits etc.

45. Since we have not agreed, let the matter be placed before Hon'ble the Chief Justice of India for assignment to a larger Bench.

**MAY 28, 2020
NEW DELHI**

.....J
(INDIRA BANERJEE)

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 8225 OF 2012

GOPAL PRASAD

....APPELLANT(S)

VERSUS

**BIHAR SCHOOL EXAMINATION BOARD
AND OTHERS**

....RESPONDENT(S)

J U D G M E N T

Rastogi, J.

1. The present appeal is directed against the judgment dated 3rd August, 2012 passed by the Division Bench of the High Court of Judicature at Patna in Letters Patent Appeal No. 1090 of 2012 confirming the judgment of the Single Bench of the High Court dated 24th April, 2012 upholding that the appellant has rightly been retired from service on attaining the age of superannuation.

2. The brief facts relevant for the present purpose which manifest from the record are that the appellant was an employee of Bihar School Examination Board(hereinafter being referred to as "Board") and was initially appointed as a Calligraphist cum Assistant vide order dated 20th May, 1970 pursuant to which he joined service on 27th May, 1970. Although the date of birth of the appellant as per school records was 19th November, 1954 and at the time of entering into service on 27th May, 1970, he was 15 years 6 months and 8 days old. At the time of his entry into service, the retirement age of the employees of the Board was 58 years but at a later stage, the age of retirement was extended by the Government of Bihar from 58 years to 60 years, in consequence the Board also in its meeting held on 30th March, 2005 decided to extend the age of retirement of its employees from 58 years to 60 years and pursuant thereto, the date of compulsory retirement of the Board employee became the date on which one attained the age of 60 years.

3. Before the matter is examined on merits, it will be apposite to take note of the material provision of the rules relevant for the purpose. The services of the State Government employees are

governed by Bihar Service Code, 1952, Bihar Pension Rules, 1950. The age of superannuation has been prescribed under Rule 73 of the Bihar Service Code, 1952. At the same time, Rule 57 of the Bihar Pension Rules, 1950 effective from 20th January, 1950 prescribes the qualifying service, and further amended by Rule 5 of Section IV(Qualifying service) of the Pension Rules amended with effect from 23rd August, 1950. The rules relevant for the purpose are extracted hereunder.

Rule 73 of the Bihar Service Code, 1952

“The date of compulsory retirement of a Government servant is the date on which he attains the age of 58 years. He may be retained in service after the date of compulsory retirement with the sanction of the State Government on public grounds, which must be recorded in writing.”

Rule 57 of the Bihar Pension Rules, 1950 effective from 20th January, 1950

“For a Government servant in inferior service, qualifying service, shall not begin until the Government servant concerned attained the age of 16 years.”

Rule 5 of Section IV(Qualifying Service) of the Pension Rules effective from 23rd August, 1950

“The minimum age after which service for pension is raised from 16 to 18 years in the case of Government servant belonging to an inferior service (1) who enters service of the Government of Bihar, after the date on which this order came into force or (2) who, having entered such service on or before that date did not hold a lien or suspended lien on a permanent pensionable post under the Government of Bihar on that date.”

4. The reliance has also been placed by a Government Circular dated 15th January, 1998 issued by Personnel and Administrative reforms Department of the State of Bihar.

5. On a careful scanning of the aforesaid provisions, it clearly manifest that the pension rules were introduced in 1950 and after amendment was made under Rule 5 of the Pension Rules, 1950 effective from 23rd August, 1950, the minimum age of the qualifying service for pension became 18 years. It is not disputed that minimum age for entering into service under Bihar Service Code, 1952 has not been prescribed but still there cannot be any entry into service before one has attained the age of majority, i.e. 18 years as prescribed under the Rules, 1950 unless there is a specific rule to the contrary. Keeping in view the age of retirement, as in the instant case is of 60 years, the maximum qualifying service which one could render would be of 42 years.

6. The Board in its meeting held on 15th January, 2004 took a decision that those who have entered into service prior to attaining the age of 18 years, taking their age as 18 years as on the date of their appointment, they will be superannuated on completion of 60 years in the case of category-4 and on

competition of age of 58 years in the case of category-3. The extract of the Resolution of the Board meeting held on 15th January, 2004 placed at Annexure P-2 of the paper book, relevant for the purpose is extracted hereunder:-

“....

Agenda no. 2

<p>Regarding employees having age less than 18 years appointed in the Committee.</p>	<p>After analysis of the legal advice received in the light of the judgment taken in the meeting of the Committee held on 18.11.03 about the employees having age less than 18 year appointed in the Committee, Hon'ble Member Dr. Jitender Singh, Chancellor Patna University, Patna informed that proceedings should be initiated in Committee also under the letter No. 1961 dated 12.11.1995 from the Secretary, High Education Department, Patna. According to the provision of the said letter, decision was taken unanimously that employees who have been appointed in the Bihar Schools Examination Committee at the age below 18 years, taking their age at 18 years as on the date of their appointment, they be superannuated on competition of age of 60 years in the case of Category-4 and on completion of age of 58 years in case of Category-3.</p>
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7. Taking note of its resolution dated 15th January, 2004, the appellant was informed vide communication dated 26th March, 2012 that he has completed 42 years of qualifying service which

an employee could render and accordingly he stood retired from service on 31st May, 2012 after completing 42 years of qualifying service.

8. The claim of the appellant was that he should be retired from service on completing 60 years on the basis of his age recorded in the Board as well as in his service book, i.e., 19th November, 1954. It appears from the record that the controversy and conflict of opinion of the Division Bench of the High Court of Bihar was resolved by the Full Bench vide Judgment dated 5th January, 2005 by the High Court of Patna in the case of **Ragjawa Narayan Mishra and Ors. Vs. Chief Executive Officer, Bihar Rajya Khadi Gramoudyog Board and Ors.**¹ which was noticed by the Single Bench of the High Court and confirmed by the Division Bench in its impugned judgment while repudiating the claim of the appellant for continuation in service until he completes the age of 60 years on the basis of his age recorded in the Board, i.e. 19th November, 1954.

9. Learned counsel for the appellant submits that a person cannot be superannuated prior to his attaining the age of 60

¹ 2006(1) PLJR 410

years merely because he completes 42 years of qualifying service, in the absence of any such rule to the contrary. The aforesaid decision was in teeth of Rule 73 of the Bihar Service Code, 1952 which merely prescribes the age as the criteria for superannuation. There is no rule prescribing length of service as a criteria for superannuation and this has not been considered by the Full Bench which has been relied upon by the High Court in the impugned judgment in repelling the contention of the appellant.

10. Learned counsel for the respondents, on the other hand, while supporting the findings recorded by the Division Bench of the High Court in the impugned judgment submits that there was difference of opinion between the two Division Benches of the High Court and that has been resolved by the Full Bench in ***Rajjawa Narayan Mishra and Ors. case***(supra) and this has been followed consistently by the High Court and further submits that the entry into public employment could not be offered before one attains the age of majority i.e. 18 years as per Section 3 of The Majority Act, 1875, the age of superannuation would be 58 years/60 years, as the case may be, the total service which

logically one could render may not exceed in any case beyond 40/42 years of service and this what has been resolved by the Board in its meeting held on 15th January, 2004 and this was never the subject matter of challenge even by the appellant when he was communicated by letter dated 26th March, 2012 that he would be attaining the age of superannuation on 31st May, 2012 on completing 42 years of service.

11. Learned counsel further submits that Rule 73 of the Bihar Service Code, 1952 read with Rule 57 of the Bihar Pension Rules, 1950 and Rule 5 of Section IV of the Pension Rules makes it clear that there could not be any entry in the Government service before the person attains the age of 18 years even in the year 1970 when the appellant was appointed and if the age at the entry level and the exit level has been prescribed by the rule making authority, by no stretch, one could go ahead more than 40/42 years of service. In the given circumstances, when the appellant indisputedly had completed 42 years of service in May 2012, the decision of the respondent to retire him on superannuation cannot be said to be faulted with and it may not be revisited at this stage more so when it has been consistently

followed by the High Court for almost more than one and half decade and needs no interference.

12. The provisions of the aforesaid statutory rules which has been referred to supra envisage that the Government, by virtue of an amendment inserted rule 5 to the Bihar Pension Rules which came into effect w.e.f. 23rd August, 1950, much before the appellant entered into service of the Board, the qualifying age of a Government servant for consideration of pensionary benefits came to be 18 years in the Government service which came to be clarified by the Government by its order dated 15th January, 1998 making its intention clear to all its subordinates that 18 years shall be the age of Government servant entering into service.

13. There is no dispute that the service conditions of the employees are ordinarily governed by the statutory rules or in its absence, under regulations or administrative decisions having a binding force but the person who attains the age of majority alone be competent enough to enter into valid contract of service. Section 11 of the Indian Contract Act, 1872 defines as to who is competent to contract.

“Who are competent to contract – Every person is competent to contract who is of the age of majority

according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.”

14. The provision clearly manifests that for entering into valid contract of service, one has to attain the age of majority in terms of The Majority Act, 1875 and what could be the age of majority has been defined under Section 3 of The Majority Act, 1875 which is as under:-

“3. Age of Majority of persons domiciled in India-(1)

Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

(2) In computing the age of any person, the date on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day.”

15. Indisputedly, the appellant, in the instant case, was minor on the date of entry into service in May 1970 and unless there is a specific rule to the contrary, minor is not eligible/qualified to seek public employment. It is true that the minimum age at the entry level shall always be prescribed by the rule making authority. In the instant case, the State authority under its Pension Rules, 1950 prescribes the qualifying service of Government servant which was raised to 18 years by an

amendment made effective from 23rd August, 1950. If the minimum age at the relevant time was not prescribed under the Bihar Service Code, 1952, at least the Government is justified in taking assistance of the Pension Rules, 1950 to hold that the minimum age at the entry point shall be 18 years for all practical purposes. That apart, if the age at the entry level is left open ended, the minor of whatever age, can seek his eligibility for public employment leaving no lifetime of service one could render which is manifestly illogical and can never be the intention of the rule making authority.

16. Admittedly, in the instant case, when the appellant entered into service, he was 15 years and 6 months old and had not attained the age of majority and the minimum age at the entry point in terms of the Pension Rules, 1950 is 18 years and maximum age prescribed for exit point is 60 years as a logical consequence, the total length of service which one could render in the Government service may not exceed 42 years and when there is an unambiguous self-explicit provision, anything contrary to or inconsistent with or incompatible to it, any circular or resolution or order, will not have any legal and valid effect to

abridge the right enshrined in the scheme of Rules and this what has been considered by the Full Bench of the Patna High Court which was relied upon by the single Judge of the High Court while repudiating claim of the appellant in **Ragjawa Narayan Mishra and Ors.**(supra) as follows:-

“16. Be that as it may, one thing is certain that admittedly both the petitioners when they entered into the contract with the respondent Board they had not attained the age of majority. Apart from its legal impact and effect, the ramifications and end result on the status of a contract, in terms of the service relationship, a person could be said to have entered into a valid service, only, when he has attained the age of majority. So the minimum age prescribed at the entry point in the Government service has been 18 years. The maximum age prescribed for the exit point is 58 years. In other words, the total length of period of Government service in any case for pensionary benefits would not exceed 40 years. It is in this context, the Government Circular mentioned herein above needs to be considered. When there is a clear Rule provision anything contrary to or inconsistent with or incompatible to it, any circular or resolution or order, will not have any legal and valid effect to abridge the right enshrined in the Rule Provision. Even if the said circular of 1998 as relied upon by the petitioners is considered to be beneficial to them then, also, it cannot be read at this juncture with the existing statutory provision incorporated in the Bihar Pension Rules, as well as, the Bihar Service Code. Therefore, from that point of view also the petitioners cannot be allowed to contend that they have right to continue even beyond the age of 58 years though provided in Rule 73 of the Bihar Service Code which prescribes the superannuation age of 58 years.

17. Thirdly, it is settled and established proposition of law and principles of jurisprudence that a person who takes undue advantage by one or other reasons at the

entry point in the service cannot be allowed to urge that he be given higher benefit and if it is urged then clearly, it goes to show that something wrong or irregular has been done, at the entry point, in service. So the settled principle, also, creates a very strong impediment in getting the relief from this Court which is exercising extraordinary, prerogative, equitable and discretionary writ jurisdiction by invocation of the provision of Article 226 of the Constitution of India.

18. In our opinion, therefore, the impugned orders questioned in both the writ petitions, obviously, cannot be interfered with from any point of view as discussed hereinabove. The proposition of law, therefore, is made evidence and unambiguous that the superannuation age prescribed in Rule 73 of the Bihar Service Code will apply for retirement purpose and a person cannot be continued beyond the age of completion of 40 years in service. It is, therefore, evidently, clear that a Government servant who has completed 40 years of service or has attained the age of 58 years has to be superannuated in terms of the existing Rule provision. Our answer, therefore, is very clear and we answer this reference accordingly. The contradictory view in the aforesaid decisions referred to hereinbefore, shall not be a good law.”

17. One view has been expressed by the full Bench of the Patna High Court of which the reference has been made, the other view of the prospect which has been referred to by the Jharkhand High Court of which a reference has been made by the appellant in the appeal but what persuaded me further is that the judgment of the Full Bench of the Patna High Court dated 5th December, 2005 at least in the State of Bihar has been consistently followed for almost a decade and a half and learned

Single Judge/Division Bench has passed several orders placing reliance on the Full Bench of the Patna High Court. The view which has been expressed is one of the plausible view and, in my view, it would not be advisable to overturn only for the reason that the view expressed by the Jharkhand High Court appears to be more plausible in appreciating the scheme of statutory rules of which a reference has been made.

18. Indisputedly, the appellant cannot be allowed to contend that he has a right to continue upto the age of 60 years as per his date of birth recorded in the Board records in view of Rule 73 of the Bihar Service Code, 1952. From the scheme of Rules, it is clear that the superannuation age prescribed under Rule 73 of the Bihar Service Code, 1952 will apply for retirement purpose and the person cannot be continued beyond the age of completion of 42 years in service taking note of the Pension Rules, 1950. It clearly manifests that the Government servant who had completed 42 years of service on attaining the age of 60 years, both implicit, has to be superannuated in terms of the scheme of Rules and this what has been considered by the Full

Bench of the High Court in the judgment which has been relied by the High Court of Patna in the impugned judgment.

19. A two Judge Bench of this Court in ***Nagaland Senior Government Employees Welfare Association and Others Vs. State of Nagaland and Others*** 2010(7) SCC 643 had an occasion to examine the validity of Section 3 of the Public Employment Act, 1991 as amended by the Public Employment(Amendment) Act, 2007 which was substituted by the following provision:-

“3. (1) Notwithstanding anything contained in any rule or orders for the time being in force, a person in public employment shall hold office for a term of 35 years from the date of joining public employment or until he attains the age of 60 years, whichever is earlier.

(2) A person under public employment shall retire on the afternoon of the last day of the month in which he attains the age of 60 years, or in which he completes 35 years of public employment, whichever is earlier.”

This Court further held that fixation of maximum length of service as an alternative criterion for retirement from public service, by no stretch of imagination, can be held to be violative of any recognized norms of employment planning. Para 40 is extracted hereunder:-

“40. We are afraid, *K. Nagaraj case* [(1985) 1 SCC 523] instead of helping the appellants, rather supports the stand of the State. Fixation of maximum length of service as an alternative criterion for retirement from public service, by no stretch of imagination, can be held to be violative of any recognised norms of employment planning. There may be a large number of compelling reasons that may necessitate the Government (or for that matter the legislature) to prescribe the rule of retirement from the government service on completion of specified years. If the reasons are germane to the object sought to be achieved, such provision can hardly be faulted.”

20. In the instant case, apart from the scheme of rules of which a reference has been made, the appellant could not enter into service below the age of attaining majority, if there is no express provision of minimum age at the entry level under the Bihar Service Code as prayed, in isolation is accepted and the age at the entry level is left open ended, it will take us to a stage where a toddler or a minor of any given age can claim his eligibility to enter into public employment which is manifestly illogical and impermissible in law.

21. Thus, under the existing scheme of Rules, the qualifying service which one could render in any manner would not exceed 42 years and this what has been clarified by the Government by its circular dated 15th January, 1998 and that was taken note of

by the Board in its meeting held on 15th January, 2004 which was not the subject matter of challenge and the appellant was communicated of retirement on attaining full employment of 42 years rendered on 31st May, 2012, which, in my opinion, could not be said to be in contravention to the scheme of rules.

22. The appeal is without substance and is accordingly dismissed.

23. Pending application(s), if any, stand disposed of.

.....**J.**
(AJAY RASTOGI)

NEW DELHI
MAY 28, 2020