

Regd. No. HSE/830/2012-14

ESTD. 1938

RNI - 1083/67



ESTD. 1950

SUPREME COURT JOURNAL®

Weekly Law Journal

**Judgments of
Supreme Court & Articles**

FOCUS

* Court can neither legislate nor issue a direction to the Legislature to enact in a particular manner.

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* In taxation there is broader power of classification than in some other exercises of legislation.

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* Legislative power can be exercised only by the legislature or its delegate and none else.

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MODE OF CITATION

2012 (2) SCJ

8th March 2012

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Annual Subscription for the Year 2012. ` 5400/- (in 8 Vol.)
Single Part of Supreme Court Journal for
Subscribers ` 200/- and for others ` 250/-

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Conclusion

Capacity of human mind is unfathomable. It is not possible to eliminate cyber crime from the Cyber Space. It is quite possible to check them. History is the witness that no legislation has succeeded in totally eliminating crime from the globe. The only possible step is to make people aware of their rights and duties (to report crime as a collective duty towards the society) and further making the application of the laws more stringent to check crime. Undoubtedly the Act is a historical step in the cyber world.

CHANGE OF DATE OF BIRTH IN SERVICE RECORDS: A STUDY IN THE LIGHT OF SUPREME COURT DECISION IN SATISH KUMAR MITTAL'S CASE*

By

Prof. (Dr.) Mukand Sarda**

(1) Disputes very frequently arise with regard to changes sought to be made in the service records of an employee. The right of an employee to change his date of birth and that of the employer to deny such a right exercised beyond a certain period time, has given rise to spate of litigations in Courts. While the concerned Governments insist on its rules that the application seeking a change should be made within a specified period, the employees try to assert their right to ask for a change at any time, when they get information – authentic and documentary evidence providing reliable and unimpeachable evidence in support of their claim.

* *State of Haryana v. Satish Kumar Mittal and another*: 2010 (7) SCJ 992 = AIR 2010 SC 3312.

** Principal & Dean, Bharati Vidya Peet New Law College, Pune.

(2) The Supreme Court explained the importance of the date of birth in *Harnam Singh's case*¹ thus:-

- (i) A Govt. servant, after entry into service acquires the right to continue in service, till the age of retirement, as fixed by the State in exercise of its powers, regulating conditions of service, unless the services are dispensed with on other grounds contained in the relevant service rules after following the procedure prescribed therein.
- (ii) A Govt. servant, who has declared his age at the initial stage of the employment is, of course not precluded from making a request later on for correcting his age;
- (iii) It is open to the Govt. servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded;
- (iv) The request for a change can be made even if no period of limitation is prescribed for seeking correction of date of birth, he must do so without any unreasonable delay;
- (v) In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on grounds of laches or stale claims, is generally applied by the Courts and tribunals;
- (vi) It is nonetheless competent for the Government to fix a time-limit, in the service rules, after which no application for correction of date of

1. *Union of India v. Harnam Singh*, AIR 1993 SC P.1367.

birth of a Govt. servant can be entertained;

- (vii) A Govt. servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim as a matter of right, the correction of his date of birth, even if has good evidence to establish that the recorded date of birth is clearly erroneous;
- (viii) The law of limitation may operate harshly but it has to be applied with all its rigour and the Courts or tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire; and
- (ix) Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age.

3) The Supreme Court reiterated the ratio in *Harnam Singh's Case*² in *State of U.P. v. Shiv Narayan Upadhyaya*³ in these words:-

"As such, unless a clear case on the basis of clinching materials, which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the Court or the tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible"

4) The Supreme Court in *Kirubakaran's Case*⁴ provided out, the consequences

of the change of date of birth in these terms:-

"..... It need not be pointed out that any such direction for correction of date of birth of the public servant concerned has a chain reaction, in as much as others waiting for years, below him for their respective promotions are affected by this process. Some are likely to suffer irreparable injury, in as much as, because of the correction of the date of birth, the officer concerned continues in office, in some cases for years, within which time many officers, who are below him in seniority waiting for their promotions may lose the promotions for ever. Cases are not unknown when a person accepts appointment keeping in view the date of birth of his immediate superior. Before any such direction is issued, the Court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed and within the time fixed by any rule or order. If so rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be filed, within the time, which can be held to be responsible".

The ratio in *Kirubakaran's Case*,⁵ besides laying down norms relating to correction in the date of birth, makes it emphatically clear that the request of the employee should not be considered keeping in view only his interest but also other considerations as well.

2. Supra.

3. AIR 2005 SC 4192.

4. AIR 1993 SC 2647.

5. Supra.

(5) It has been observed that a Government Servant approaches the Court on the eve of his retirement.⁶ The reasons for waiting for a request to make throughout the period of his service (say for 33 years of service to earn a full pension) does not merit any consideration except to strengthen the point of his desire to continue in service for more time and avoid the retirement because of many family or other personal considerations. Retirement results in loss of income and deprivation of several service benefits like residential accommodation, House rent allowance and other allowances eligible only during the period of service.

(6) The ratio in *Satish Kumar Mittal*⁷ is based on the strict rule of interpretation that no petition be entertained after the expiry of the period of limitation on any ground whatsoever. This is in accordance with the general principles of limitation.⁸ It fails to take into account the exceptional cases where the period of limitation can be condoned and petitions are considered and relief granted, "if sufficient cause is shown for not filing within the period prescribed"⁹. However, taking into consideration the consequences of giving an opportunity to change the date of birth beyond the expiry date, there is a need to provide a remedy for substantial justice to the affected party, in order to effectively guarantee the right to continued service consistent with Art 21 of the Constitution and to make the law to suit the actual reality. The following suggestions are made:-

6. *State of U.P. v. Gulaichi*, AIR 2003 SC P.4209, *State of Punjab v. S.C.Chadha* 2004(3) SCC P.394; *State of Gujarath v. Vali Mohamed Dosabhai Srinidhi* AIR 2006 SC P.2735.

7. *Supra*.

8. Sec 5 of the Indian Limitation Act.

9. See Sec 6 of the India Limitation Act.

- (i) An application for change of date of birth can be made, even after the prescribed period or reasonable time as may be considered proper, if sufficient cause is shown for not filing the same within the prescribed/reasonable time as the case may be. Even if sufficient cause is shown, the court has the discretion to condone or not, depending on the facts and circumstances of each case;
- (ii) In all cases, where delay is condoned, all parties who are likely to be affected by a change of date of birth, shall be given a reasonable opportunity to challenge the condonation petition. In cases, where a change of date of birth does not affect anybody the condonation may be granted, at the discretion of the Court;
- (iii) No petition to condone delay may be entertained within a period of two years prior to the age of superannuation of the Govt. servant concerned.
The Court may presume that a petition within two years of the date of retirement is motivated with a desire only to continue in service;
- (iv) All petition for condonation of delay shall be supported by adequate and cogent documentary evidence, which can be rebutted by any interested person;
- (v) The reasons for effecting a change in the date of birth must be stated in clear terms, so that an appeal remedy is available to parties to challenge the decision. No conclusive evidence or finality clause shall be introduced in the

adjudication and must be open to challenge.

- (vi) In case, where the change of date of birth is recorded, the person concerned shall not be eligible for increments, promotions or other service benefits, unless the Court orders otherwise.

The pay, which he has drawn prior to two years before retirement alone shall be protected. No addition in pension may be allowed during the extended

period on account of change of date of birth;

- (vii) Even in cases, where the change of date of birth is recorded, the servant concerned may be allowed to opt for voluntary retirement, as not to impose additional financial burden to the State;

- (viii) It must be permissible for Courts to impose any conditions, which are considered reasonable, while acceding to the change of the date of birth.

Journal Section Ends