guilty of contempt of Court? The answer must necessarily be in the negative. Take another instance where a compromise is arrived at between the parties and a particular property having been allotted to A, he has to be put in possession thereof by B. B does not give possession of this property to A. Can it be said that because the compromise decree has not been implemented by B, he commits the offence of contempt of Court? Here also the answer must be in the negative and the remedy of A would be not to pray for drawing up proceedings for contempt of court against B but to approach the executing court for directing a warrant of delivery of possession under the provisions of the Code of Civil Procedure."

The ratio of the above decision is fully attracted to the facts of the present case. We do not find that the appellants had given any undertaking to the court and the question of any breach does not arise. The learned Rent Controller erroneously assumed that the compromise arrived at between the parties before it was in the nature of an undertaking given to it.

(14) The learned Single Judge is in error in issuing the directions stated above. We set aside the order of the learned Single Judge. However, we make it clear that the order of the Rent Controller is executable and the respondent if so advised, can take out execution of the order. The appeal is allowed. The rule is discharged. As and when the execution petition is filed the learned Rent Controller will expeditiously dispose of the same.

S.C.K.

Before V. Ramaswami, C.J. and G. R. Majithia, J.

RAM SINGH ARORA,—*Petitioner.*

versus

STATE OF PUNJAB AND ANOTHER,—*Respondents.*

Civil Writ Petition No. 590 of 1988

November 29, 1988.

Constitution of India, 1950—Arts. 226 and 227—Writ of Mandamus—Scope—Petitioner representing for effecting a change in his date of birth—Enquiry into complicated question of facts—Representation rejected by Government—Such rejection whether can be challenged by filing a writ of Mandamus.

Held, that in the circumstances of the present case the writ of mandamus cannot be issued and even otherwise where an enquiry into complicated question of facts would arise the High Court in its discretion, would decline to go into the same in a petition under Art. 226 of the Constitution of India, 1950. (Para 22).

Petition under Articles 226/227 *of the Constitution of India praying that* :—

(*i*) *a writ in the nature of certiorari or any other appropriate writ, order or direction quashing the order of respondent No.* 1, *dated 3rd December,* 1987 *by which the petitioner's request for correcting the date of birth from* 1st *July,* 1931 *to* 11*th June,* 1932 *has been turned down, be issued.*

(*ii*) *respondent No.* 1 *be directed to allow the change in the date of birth of the petitioner on the basis of his Matriculation Certificate from* 1st *July,* 1931 *to* 11*th June,* 1932.

(*iii*) *the relevant record may be ordered to be summoned from the office of the respondents.*

(*iv*) *the filing of the certified copies of the Annexures may kindly be dispensed with.*

(*v*) *the service of the advance notices of the writ petition on the respondents may also be dispensed with as the petitioner has no time to serve the respondents.*

(*vi*) *any other writ, direction or order be issued to the respondents and any other relief to which the petitioner may be found entitled by this Hon'ble Court may also be granted.*

(*vii*) *the costs of the petition may be awarded to the petitioner.*

R. S. Mongia, Sr. Advocate, (J. S. Sathi, Advocate), *for the Petitioner.*

H. S. Bedi, Addl. A.G. (Pb.), *for the State of Punjab.*

N. S. Pawar, Sr. D.A.G. (Hy.), *for the State of Haryana.*

JUDGMENT

G. R. Majithia, J.—

(1) This writ petition is for the issuance of a mandate to the State of Punjab to carry out a correction of the entry in the service record of the petitioner of his date of birth. In the service record, the date of birth is recorded as July 1, 1931 and a direction is sought for correcting it to June 11, 1932.

(2) The petitioner, on the partition of the country in the year 1947, shifted to Patiala. He joined service in the Pepsu High Court as Class-IV employee in the year 1949. He did not have any record of his date of birth. On the basis of a medical certificate, his year of birth was recorded as 1931 A.D. under the directions of the Chief Justice of Pepsu High Court. In the year 1952, the petitioner passed the Matriculation examination held by Panjab University and his date of birth was recorded as June 11, 1932. The petitioner filed a representation to the Registrar of Punjab and Haryana High Court through the District and Sessions Judge, Bathinda. It was stated in the representation that the petitioner came to know of a judgment delivered by the Punjab and Haryana High Court titled as *H. P. Handa, Judicial Magistrate* v. *State of Punjab* (1), in which it was held that the administrative instructions contained in Annexure 'B' to Chapter VII of the Punjab Financial Rules, Volume I, for moving the appropriate authorities for correcting date of birth within two years from the date of entry into service were omitted with effect from November 7, 1973 and there was no time prescribed for getting the date of birth corrected. The High Court forwarded the representation to the Government of Punjab. The Government,—*vide* communication dated December 3, 1987 informed the High Court that it regrets its inability to accede to the proposal. On the basis of this communication, intimation was sent to the District and Sessions Judge, Bathinda by the High Court that the Government has expressed its inability to accede to this Court's proposal for correction of date of birth of the petitioner. The petitioner has challenged the order of the State Government dated December 3, 1987 and has also sought a writ of mandamus for correcting the date of birth of the petitioner in his service record.

(3) The writ petition came up for motion hearing and the Bench *prima facie* felt that the writ petition was not maintainable. It desired the Advocates General for the States of Punjab and Haryana to assist the Court for disposing of the same.

(4) What is *mandamus* was stated as under in the Halsbury's Laws of England, Third Edition, Volume II, Page 84 :—

> "159. The order of mandamus (b) is an order of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice,

(1) 1984 (3) S.L.R. 737.

directed to any person, corporation, or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right (c); and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual (d)."

(5) The Apex Court in *Mani Subrat Jain etc etc* v. *State of Haryana and others* (2), stated the scope of Mandamus. In this case, the question arose under the following circumstances :—

(6) The High Court invited applications from eligible members of the Bar to fill up two vacancies in the quota of direct recruits from the Bar in the Haryana Superior Judicial Service. The High Court recommended to the Haryana Government the names of the two appellants in the appeals before the Supreme Court for appointment as District/Additional District and Sessions Judges. The Government of Haryana rejected the recommendation. Thereupon the two appellants filed a writ petition in the High Court challenging the order of rejection and asked for a mandamus to the State Government for appointment as District/Additional District and Sessions Judges. The High Court dismissed the writ petition and the matter was taken to the Supreme Court wherein it was held thus :—

"The initial appointment of District Judges under Article 233 is within the exclusive jurisdiction of the Government after consultation with the High Court. The Governor is not bound to act on the advice of the High Court. The High Court recommends the names of the persons for appointment, but it is not obligatory on the Governor to accept the recommendation. Nor is the Government bound to give reasons for not accepting the recommendations of the High Court."

(2) A.I.R. 1977 S.C. 276.

And on these premises, the Apex Court declined to issue the writ of mandamus and held as under :—

> "It is elementary though it is to be restated that on one can ask for a mandamus without a legal right. There must be a judicially enforceable right as a legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by someone who has a legal duty to do something or to abstain from doing something (See Halsbury's Laws of England 4th Ed. Vol. 1, paragraph 122); *State of Haryana* v. *Subhash Chander*, (1974) 1 SCR 165 (A.I.R. 1973 S.C. 2216); *Jasbhai Motibhai Desai* v. *Roshan Kumar Haji Bashir Ahmed* (1976) 3 SCR 58 (A.I.R. 1976 S.C. 578) and Ferris Extraordinary Legal Remedies paragraph 198."

The same proposition was reiterated in *The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd.* v. *Sipahi Singh and others* (3).

(7) The duty which can be enjoined by mandamus, may be the one imposed by the Constitution ; a statute or by rules or orders having the force of law. The petitioner has not shown that he has a legal right to the performance of a legal duty by the respondents against whom the mandamus is sought. Mandamus does not lie to enforce departmental instructions not having any statutory force. The petitioner could not bring to our notice any such legal right for the performance of which the legal duty is cast on the respondents.

(8) The learned counsel for the petitioner referred to the following authorities to highlight his submission that writ of mandamus is the only efficacious remedy for effecting the correction in the service record of the date of birth of the petitioner :—

> "*Bhanwarsingh Bhupsingh* v. *State of M.P.* A.I.R. 1963 Madhya Pradesh 335, *Shri Sohan Singh Bawa* v. *State of Haryana and another*, 1967 S.L.R. 934, *H. C. Darbara Singh* v. *The Punjab State* 1967 C.L.J. (Punjab and Haryana) 70, *Shri Manak Chand Vaidya* v. *State of Himachal Pradesh*

(3) A.I.R. 1977 S.C. 2149.

and others 1976 (1) S.L.R. 402, *Hari Parshad Handa* v. *The State of Punjab and another* 1984 (3) S.L.R. 737, *S. Selvavinayagam* v. *State of Tamil Nadu and another* 1985 (3) S.L.R. 412, and *Brigadier Pirthvi Rai* v. *The Union of India and another* 1986 (1) S.L.R. 754."

(9) In *Bhanwar Singh Bhupsingh Rajput's case* (supra) the facts were as under :—

(10) The writ petitioner was retired from service attaining the age of 55 years and his date of birth was taken to be August 13, 1907. According to the petitioner his real date of birth was December 18, 1911 and that date had been accepted for the purpose of his life insurance by the Life Insurance Department of the Holkar State a far back as December 7. 1934 after getting him medically examined on December 22, 1932, he had passed the Patwari examination in the year 1928 from the State of Jhalarapatan and the certificate of passing dated October 26, 1928 issued under the signature of the Revenue Minister mentioned his date of birth as December 18, 1911 but the respondent State treated his date of birth as August 13, 1907 on the basis of a medical certificate issued by the State Assistant Surgeon. The petitioner challenged his retirement on the ground that on the date of retirement, he had not attained the age of superannuation and the State ought to have taken his date of birth as December 18. 1911. It was in this context the Bench observed that when a complaint was made by the Government servant that his date of birth was not correctly recorded. an opportunity of hearing ought to have been afforded. The order of retirement was issued in violation of sub-clause (2) of Article 311 of the Constitution. These observations were made on the peculiar facts of that particular case.

(11) In *Sohan Singh Bawa's case* (*supra*), a Single Bench of this Court held that when the request for correction of the date of birth in the service record has to be rejected, an opportunity ought to be afforded to the concerned official to prove the fact of his real age before his representation is rejected.

(12) In this judgment, the question was not raised that mandamus could not be issued by the High Court to the State Government for correcting the date of birth in the service record. This Court only observed that when the representation has to be rejected, an opportunity be granted to the aggrieved Government official.

(13) In *H. C. Darbara Singh's case* (*supra*), a civil suit for declaration was filed by the Government servant to the effect that he was entitled to continue in police service till June 13, 1969 and his proposed retirement on the basis that he was born on July 1, 1907 and not on June 13, 1914, was not justified. The Subordinate Judge dismissed the suit holding that suit was not maintainable because the claim in the suit did not relate to a civil right. On appeal this Court held that the proceeding under Article 226 of the Constitution of India and by a regular suit does not differ. Proceedings under Article 226 of the Constitution are proceedings by way of alternative remedy which is more efficacious than ordinary remedy of a civil suit.

(14) In *Shri Manak Chand Vaidya's case* (*supra*), the writ petitioner sought a direction for quashing a notice dated October 26. 1972, issued by the Chief Medical Officer, Kangra, retiring him from service with effect from March 12, 1973. During the pendency of the writ petition, the petitioner retired from service and it was contended on behalf of the State that the writ petition had become infructuous and the remedy, if any, lay by bringing a suit for arrears of salary. This contention was negatived by the Bench and the Bench directed the State to consider the application of the petitioner for correction of his age in his service record and it was held as under :—

> "Accordingly, the writ petition is allowed. The petitioner is entitled to an order directing the respondents to consider his application for correction of his age in his service record. In case the claim of the petitioner is found valid, he will be given all consequential benefits flowing from the corrected entry in the service record of the petitioner. There is no order as to costs."

This judgment has got no bearing to the facts of the case in hand.

(15) In *Hari Parshad Handa's case* (*supra*), the Government servant brought a civil suit for declaration as to what was his correct date of birth. The Subordinate Judge granted the declaration and held that the correct date of birth was the one which was contended by the plaintiff and also granted the relief of mandatory injunction. On appeal by the State the District Judge upheld the

finding of the trial Court as so far as the date of birth was concerned but deleted the relief of mandatory injunction. The aggrieved plaintiff came up in second appeal. The learned Single Judge of this Court held that the relief of mandatory injunction ought to have been granted and to the extent to which it was refused by the District Judge, the judgment of the District Judge was modified so as to restore that of the trial Court.

(16) In *Selvavinayagam's case* (*supra*), the aggrieved Government servant got a decree from civil Court as to what was his actual date of birth. On the basis of the Civil Court decree, he moved his employer for effecting necessary change in the service record by altering his date of birth. The Single Bench of the Madras High Court issued the necessary writ and directed the respondents to pass a fresh order with regard to the date of birth of the employee keeping in view the civil court decree.

(17) In *Brigadier Prithvi Raj's case* (supra), the writ petitioner migrated to India on the partition of the country. He joined the Indian Army and on the basis of a medical examination, his date of birth was entered as March 1, 1933. During the course of his service, he passed the Matriculation examination and in the application form for the said examination, he again entered his date of birth as on March 1, 1933. Subsequent thereto, the Commandant, Indian Military Academy, Dehra Dun, addressed a communication to the Panjab University requesting that a decision be taken on the application submitted by the writ petitioner wherein he has contended that his actual date of birth is May 12, 1935 and a request was also made to the University to make necessary changes in his certificate of Matriculation examination. The Syndicate of the Panjab University accepted the request and corrected his date of birth in the Matriculation certificate as on May 12, 1935. The Army Headquarter forwarded the papers to the Central Government but the Central Government rejected the petition and refused to effect any change in the service record relating to the date of birth. A representation was filed by the petitioner but it was rejected. Thereafter, the writ petition was filed in this Court. In the written statement, the defence was taken by the respondents that as per the instructions issued by the Central Government, an application for correction of date of birth had to be filed within two years from the entry into service. Since the application was filed after the expiry of two years, the request was turned down, although in

the case of other three officers, the date of birth in the service record was altered after the expiry of two years. The learned Single Judge of this Court observed that the administrative instructions could not be taken into consideration to deprive the writ petition of the vested rights to get his date of birth corrected in accordance with the one which has been actually found and incorporated in his Matriculation certificate issued by the Panjab University. The learned Single Judge after so holding and quashing the order of the respondents further issued a direction to the respondents to correct the date of birth of the writ petitioner from March 1, 1933 to May 12, 1935 in the service record. The learned Single Judge was correct to the extent to which he had quashed the order of the respondents refusing to carry out the correction in the date of birth but is in error in further issuing directions to correct the date of birth from March 1, 1933 to May 12, 1935. The observation "I direct the respondents to correct the date of birth of the petitioner from March 1, 1933 to May 12, 1935, in his service record, as mentioned in the Matriculation Certificate Annexure P/2 issued by the Panjab University" is not justified and we over-rule the judgment to this extent. The learned Judge after quashing the impugned order could have issued directions to the respondents to reconsider his case in the light of the observations made in the judgment and it was for the appropriate authorities to take such decision as were justified under the circumstances of the case. In the instant case, the State Government after looking into the entire material refused to make any alteration in the date of birth of the writ petitioner.

(18) Mr. Bedi, the learned counsel for the State, submitted that the question as to what is the exact date of birth is a complicated question of fact which can only be gone into in appropriate civil suit and a remedy under Article 226 of the Constitution cannot be invoked and in support of his submission be relied upon *State of Orissa* v. *Dr. (Miss) Binapani Dei and others* (4), and *Laxaman Swain* v. *Managing Director, Steel Authority of India Ltd. Rourkela* (5).

(19) In *Binapani Dei's case* (*supra*), the writ petitioner was a Doctor who has appointed as Assistant Surgeon in the Orissa Medical Service on June 12, 1938. On the date of joining service, she

(4) A.I.R. 1967 S.C. 1269.
(5) 1985 (2) S.L.R. 225.

declared her date of birth as April 10, 1910. In the normal course, she was due for superannuation after completion the age of 55 years on April 10, 1965 but in consequence of a notification issued by the state, the age of superannuation was raised from 55 to 58 in respect of all the Government servants. Some anonymous complaint was received wherein it was stated that the writ petitioner had misstated her age when she was admitted into service of the State. After enquiry, a show cause notice was issued to the writ petition as to why her date of birth should not be accepted as April 4, 1907. She submitted representation and stated that her date of birth was correctly recorded in the service record when she was entered in the Orissa Medical Service. The State determined the date of birth as April 16, 1907 and retired her from service on April 16, 1962. She was granted extension before the passing of that order till July 15, 1963. This order was challenged by her. The Orissa High Court accepted the writ petition holding that the order passed by the State Government declaring Dr. Binapani Dei to be superannuated on April 16, 1962 on the footing that her date birth was April 16, 1907, amounted to compulsory retirement before she attained the age of superannuation and was contrary to the rules governing her service conditions and amounted to removal within the meaning of Article 311 of the Constitution. It was held that she was not given a reasonable opportunity of showing cause against the action proposed to be taken in regard to her and the order was quashed. The State was dissatisfied with the order of the High Court and the matter was taken to the Supreme Court. The Supreme Court dismissed the appeal *inter alia* holding that the State was not precluded from holding enquiry if there existed sufficient grounds for holding such enquiry and for refixing her date of birth but the decision of the State Government could be based on the result of an enquiry conducted in manner consonant with the basic concept of justice. An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fair play and the person again whom an enquiry is held must be informed of the case he is called upon to meet and the evidence in support thereof and in these premises, it was held as under :—

> "The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons vested invested with authority to adjudicate upon matters involving civil

consequences. It is one of the fundamental rules of our constitutional set up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed; it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

(20) In these premises, the Apex Court held that the decision based upon an enquiry which were held contrary to the basic concept of justice was of no value and the order of compulsory retirement was annulled. The learned counsel for the State pressed this decision into service to highlight his submission that when the decision hinges on the determination of a question of fact after proper evidence, that can only be done in a civil suit and not by invoking the extraordinary jurisdiction under Article 226 of the Constitution.

(21) The following observations in *Laxman Swain's case* (*supra*) are very relevant in the present case :—

"Date of birth of a person is intermingled with his status which is directly connected with the civil right of that person such as the right to office, the right to franchise, the right to continue in service up to a particular age and even dealing with property. This has been clearly explained in a Division Bench decision of this Court reported in *State of Orissa* v. *Indupali Baba Ji* 37(1971) C.L.T. (Notes 170) 135; I.L.R. 1971 Cutt. 1368. Normally such a civil right is to be enforced in a suit since what is the date of birth of a person being an inference from proved facts is a question of fact. Where an enquiry into complicated questions of fact would arise, the High Court in its discretion in appropriate cases would decline to enter upon enquiry into the same in a petition under Article 226 of the Constitution and may refer the party

claiming the relief to a suit as has been laid down by the Supreme Court in the decision reported in *State of Orissa* v. *Dr. (Miss) Binapani Dei* A.I.R. 1967 S.C. 1269."

(22) Accordingly, we hold that in the circumstances of the present case, the writ of mandamus cannot be issued and even otherwise where an enquiry into complicated question of facts would arise, the High Court in its discretion, would decline to go into the same in petition under Article 226 of the Constitution. The writ petition is dismissed.

(23) In the circumstances of the present case, we relegate the petitioner to a civil suit where the disputed question of fact will be gone into after recording evidence oral and documentary and after giving the parties adequate opportunity of hearing. We direct that the Civil Court will dispose of the suit within three months from the date, the plaint is filed before it.

P.C.G.

Before J. V. Gupta and Ujagar Singh, JJ.

HOSHIARPUR CENTRAL COOPERATIVE BANK LTD.,
—Petitioner.

versus

THE URMAR HARMONIUM REED WORKSHOP AND OTHERS,
—Respondents.

Civil Revision No. 430 of 1980.

November 30, 1988.

Code of Civil Procedure (V of 1908)—S. 51—Arbitration award —Validity of such award not challenged in appeal—Award becoming final—Execution of such award—Power of the executing Court—Whether the executing Court can go behind the award.

Held, that the executing Court could only declare an award a nullity if it was passed without jurisdiction and/or the defect, if any was not curable. It is in this context that it has been laid down that the executing Court cannot go behind the decree or the award. It could only do so if it was made by the Arbitrator who had no