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**(2000) 09 CAL CK 0032**

**In the Calcutta High Court**

**Case No :** Constitutional Writ Jurisdiction W.P. No. 13715 (W) of 2000 C.A.N.  
No"s. 6781 and 6782 of 2000

Khagendra Nath Sau

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

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**Date of Decision :** 05-09-2000

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16, 226  
Recruitment Rules, 1991 — Rule 4E

**Citation :** (2001) 1 CALLT 145

**Hon'ble Judges :** Mohammad Habeeb Shams Ansari, J

**Bench :** Single Bench

**Advocate :** Mr. Parimal Kr. Dwari, Mr. Kishore Dutta and Mr. S.K. Faridullah, for the Appellant; Mr. Jayata Mitra and Mr. Achintya Kr. Banerjee, for the Respondent

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## Judgement

M.H.S. Ansari, J.—The petitioner in the instant case has prayed inter alia, for directions as under;

"(a) A writ in the nature of Mandamus commanding the respondents their men, agents and all of them to regularise the service of the petitioner in the respondent school in the additional post of Clerk where the petitioner was directed to work as Class-III additional post of clerk for a period of 28 years where the petitioner is rendering his service very effectively to the entire satisfaction of the respondents condoning the age bar for regularisation of the aforesaid post for which the concerned authority already given sanction vide Memo. No. 392/1 (125) GA dated 15/3/1999."

2. The case pleaded by the petitioner is that he was appointed as Class IV staff in the respondent school on 1.5.1968 and was duly approved by the concerned DIS (SE) vide Memo. No. 1903-S dated 4.5.1988 (annexure "B" to the writ application). The petitioner states that the respondent school authority engaged the petitioner to work in Class III Clerical post on account of increase in roll strength of the students in the institution from the year 1971 and since then the

petitioner has been entrusted with and is rendering service as Clerk to the utmost satisfaction of the school authorities. The petitioner relies upon a resolution said to have been taken by the school authorities that whenever additional post of Clerk is sanctioned the petitioner would be absorbed in the same post. The petitioner alleges that the respondent school authorities have not taken steps for regularisation of the service of the petitioner except giving false assurance to the petitioner. An additional post of Clerk was sanctioned vide Memo. No. 392/1 dated 15.3.99 and instead of regularising the service of the petitioner as a Clerk in that post, the school authorities. It is stated, are taking steps to fill up the same by calling for names from the employment exchange. The date of interview. It was stated is 19.3.2000. Interim relief was claimed to fill up the said post.

3. By an order dated 15.3.2000, Barin Ghosh, J., inter alia directed as under;

"..... I think the appropriate interim order would be, while calling for affidavit, to direct the school authority to complete the process of selection, issue letter of appointment and to obtain approval for such appointment but with the direction that the appointee shall not join the post without express leave of the Court."

4. Two applications were filed one by the candidate who was selected at the said interview and the other by the school authorities for leave of Court to join the school in question in terms of the said interim order dated 15.3.2000.

5. By order dated 18.8.2000, the said applications were directed to be listed along with the main writ application.

6. On 1.9.2000 arguments of the learned counsels were heard in the main writ petition.

7. It was the contention of Mr. Perimal Kr. Dwari, learned advocate for the writ petitioner that the petitioner has been rendering service as Clerk since 1971 and has been assured by the school authorities that he would be absorbed in the post when an additional post is sanctioned. The claim of the petitioner for absorption is valid and his legitimate expectation should be given effect to. Reliance was also placed upon the circular No. 25 Edn. (s) dated 10.1.1981.

8. Mr. Jayanta Mitra, learned advocate appearing for the school authorities, on the other hand, contended that the petitioner is admittedly an approved Group-"D" staff and can have no claim or right to be appointed in the post which is a Class-III post of Clerk except in accordance with the Recruitment Rules, 1991. The Circular No. 25-Edn (s) dated 10.1.81, it was contended has no application to the case of the petitioner. The aforesaid circular dated 10.1.81 is intended for absorption of such staff who have been appointed to meet the needs of the school prior to fixing of the norm of teaching and non-teaching staff by Government and those who were facing threat of notice of dismissal of service. The petitioner being an approved Group-"D" staff, the said circular has no

application, it was strenuously urged. Reliance was also placed upon the Special Bench Judgments of this Court in *Debasish Dutta v. State of West Bengal & Ors.* 1998(2) CLT 398. It was further urged by Mr. Mitra that the petitioner's alleged appointment was in a non-sanctioned post and cannot be regularised. The additional post sanctioned has to be filled up in accordance with the Recruitment Rules, 1991 and any appointment contrary thereto would be a nullity.

9. Admittedly, the petitioner is an approved Group-"D" staff. He is paid the salary and emoluments applicable to the said post. There is no rule nor any notification or circular which has been placed before Court, whereby change in status of an employee could be made from Class IV to Class-III post. Recruitment Rules 4E read as under;

"4 (e) All DIS (SE) shall maintain a roster to record the names of the qualified eligible approved non-teaching staff for appointment to the post of teaching/non-teaching staff and forward upto three names of eligible candidates for interview along with the candidates sponsored by the Employment Exchange."

10. Mr. Mitra submitted that the said provision applies to such teaching and non-teaching staff who have requisite qualification for appointment to the post and their names are to be maintained in a roster by the DIS (SE) to be sponsored by him for interview along with other candidates sponsored by the employment exchange.

11. The petitioner's case admittedly does not fall in that category as the petitioner's name has not been sponsored by the DIS (SE). The petitioner also did not found his claim on that provision nor claimed any right to be interviewed along with other candidate sponsored by the employment exchanged. The claim of the petitioner is for absorption on the ground that he has rendered service continuously for a long period of time.

12. In a recent judgment, the case of regularisation was considered in *Smt. Puspa Singh v. State of West Bengal & Ors.*, reported in 1999 (1) CLT 393 HC. A relevant portion of the said Judgment is extracted hereunder;

"3. The petitioners relied upon the decision in *Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others*, to contend that they were entitled to be regularised because they have been in continuous service without break and to the satisfaction of all concerned. This decision was considered subsequently by a larger Bench of the Supreme Court in *Ashwani Kumar and Others Vs. State of Bihar and Others*,

4. Briefly stated, the Supreme Court said that the question of regularisation would arise when :

(a) The appointment is made against an "available named vacancy."

(b) The appointment against such vacancy is made following the rules and regulations governing such appointment.

(c) The incumbent has been employed for a long period of time against such vacancy.

5. If any one of the factors were missing, regularisation cannot be granted.

6. This is the present law : See also L. N. Ghosh v. State of West Bengal, 1993(1) CHN 382."

13. Applying the said principles to the instant case, it will be seen that even on the petitioner's own showing the alleged appointment of the petitioner in the post of Clerk was not against an available named vacancy. Even according to the petitioner he was appointed as Clerk in a non-sanctioned post on the assurance that when the post is created he would be absorbed.

14. In Puspa Singh's case, the Court had also considered the questions from the angle of the roll strength of students and in paragraph "16", it was held as under;

"Assuming the school roll did have the number of students warranting the appointment of two additional teachers, but the justification for creation of a post, does not authorise the Managing Committee to create a post without the approval of the competent authority. There was thus no sanctioned post against which the petitioners claim to have been appointed."

and in paragraph "20", it was further held as follows;

"Whoever the appointing authority may be, the appointing authority can only appoint against a sanctioned vacancy and in accordance with the procedure prescribed."

15. As regards the applicability of the circular No. 25-Edn (s) dated 10.1.81, the arguments advanced by Mr. Jayanta Mitra command acceptance. A perusal of the said circular shows that it was intended to benefit such teaching and non-teaching staff who could not be absorbed against the sanctioned post though they have been working in the schools for years together without approval of Government because of being appointed prior to fixing of the norms of teaching and non-teaching staff by the Government. The petitioner was appointed as Group "D" staff and his service had been approved in that post. The said circular, therefore, would have no application to the petitioner.

16. For the reasons aforesaid, the petitioner is not entitled to the relief of absorption as prayed for. The writ petition is accordingly dismissed. Interim directions stands vacated. The school authorities shall proceed to complete the selection process in accordance with the law.

The applications CAN 6781 of 2000 and CAN 6782 of 2000 accordingly stands disposed of.

17. Petition dismissed