
(2002) 01 CAL CK 0032
In the Calcutta High Court
Case No : Writ Petition No. 36 (W) of 2002

Sabita Paul (Das)

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 22-01-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2002) 1 CALLT 1

Hon'ble Judges : Mahemmad Habeeb Shams Ansari, J

Bench : Single Bench

Advocate : Malay Bosu, Swapan Kumar Dutta, S.K. Rakshit and Tarun Sen, for the Appellant; Dipankar Dutta, for the Respondent

Final Decision : Dismissed

Judgement

M.H.S. Ansart. J.

1. The background facts, in brief, leading to the filing of the writ application are as under;

2. One Smt. Bandana Das was an approved teacher of respondent school (Blmagar Shivkali Girls' High School. Birnagar, Dist. Nadia) and was granted leave for one year and thereby a leave vacancy occurred in the institution. The District Inspector of Schools (SE) granted prior permission for filling up the said leave vacancy (annexure "P3"). In the said prior permission the nature of vacancy has been described as "lien leave vacancy for one year with effect from September 27, 1995 to September 25, 1996". Pursuant thereto an advertisement was published in newspapers and in response thereto petitioner applied for the post in question and appeared before the Selection Committee constituted for the said purpose. Thereafter, the panel prepared by the Selection Committee was submitted for approval and the DIS (SE) by his order dated March 1, 1996 (annexure P-7") accorded approval to the same. The petitioner herein being the first empanelled candidate was accorded appointment by letter

dated March 2, 1996 (annexure "P8"). Therein it was clearly specified that the appointment was against "lien vacancy" vice Smt. Bandana Das, Assistant Teacher. It was further stated in the appointment letter that:

"The appointment is purely temporary and subject to the conditions laid down in the existing Recruitment Rules (regarding appointment against Lien Leave Vacancy)."

3. Post appointment approval as required under the Recruitment Rules was granted by the DIS (SE) (annexure "P9") therein also against the name of the petitioner; the nature of vacancy and its duration has been stated as "Lien Leave vacancy one year w.e.f. September 9, 1995 to September 25, 1996". Thereafter, it appears that an application was filed by the aforesaid Smt. Bandana Das, then serving Head Mistress in Santipur Saratkumari Girls' High School praying for granting her another year's leave with effect from September 26, 1996. The said application was considered by the Managing Committee and it was resolved that the aforesaid Smt. Bandana Das be granted another year's lien as an Assistant Teacher with effect from September 26, 1996 (annexure "P10"). It has further been recorded in the said resolution that the petitioner be allowed to continue her service against lien for another year with effect from September 26, 1996 and that petitioner be reappointed against lien for another year. The Secretary was directed to make proper arrangement for submitting necessary papers for taking prior permission from the DIS (SE), Nadia, for allowing the petitioner to continue her service against the vacancy lien (second year w.e.f. September 26, 1996). Upon such application having been made by the School authorities DIS (SE), however, accorded approval to the petitioner continuing for a period of 6 months in the said leave (lien) vacancy w.e.f. October 1, 1996. The petitioner was accordingly informed of the same by the Managing Committee that she has been appointed Assistant Teacher with effect from October 1, 1996 for 6 (six) months vide leave lien of Smt. Bandana Das (annexure "P12") dated November 26, 1996.

4. Thereafter, petitioner made representations for being regularized in the said post (annexure "P13") and as no action was taken thereon petitioner preferred WP No. 3157 (W) of 1997 which was disposed of by orders dated August 20, 2001 (p. 64).

5. As much reliance has been placed by the petitioner upon the said order, relevant portion thereof is extracted hereunder;

"The school authority applied for filling up the said lien vacancy after obtain prior permission from the District Inspector of Schools (SE) and following the regular recruitment process. The writ petitioner was appointed in the said lien vacancy. The said Smt. Das did not come back to join to the concerned school and the service of the writ petitioner was time to time extended. The first extension was with prior approval of the District Inspector of Schools, the further extension have not been approved by the District Inspector of Schools are claimed by the

learned counsel, appearing for the State. The writ petitioner is working in the said post since 1996. The appointment of the writ petitioner was, although on a lien vacancy, given by the school authority after obtaining prior permission from the District Inspector of Schools. The writ petitioner since then is working in the said regular post. The appointment was given to her by observing the regular recruitment process as suggested by the District Inspector, Schools. Since the original incumbent has not come back to join the school I do not find any reason to why the writ petitioner's service cannot be approved. It is not a case where the appointment has been given by the school authority at their whims. It is well-settled principle of law that since the appointment has been given by observing the recruitment rule and since the writ petitioner is working in a regular post her service must be regularised. In that event, this writ petition must succeed.

The District Inspector of Schools (SE). Nadia, is directed to approve the appointment of the writ petitioner in the regular post as she is working in the concerned school. The District Inspector of Schools (SE), Nadia, must act in terms of this order and will approve the same within a period of four weeks from the date of communication of this order. If the District Inspector of schools (SE), Nadia, desires to reject such approval on any other ground, he must assign reasons there for and to communicate his decision to school authority and the writ petitioner within the time stipulated herein."

6. However, by his order dated October 4, 2001 communicated to the petitioner by memo No. 230/(3)/Law/SE (annexure P16"), the D1S (SE), Nadia, rejected the claim for approval of appointment of the petitioner against permanent vacancy for the following reasons",

"That Smt. Sabita Paul--the petitioner--was appointed against the leave on lien vacancy of Smt. Bandana Das for a limited period. The petitioner was appointed against leave vacancy while the vacancy caused due to resignation of Smt. Das is a permanent one. The rules of recruitment in regular/permanent vacancy and those for short-term vacancy are quite different. The selection of candidates for the permanent vacancies lies with the School Service Commission inviting applications through leading newspapers zone-wise and also through written tests, but for short-term vacancies no such procedure are followed. Further, roster of vacancy for the short-term and that for the permanent vacancy is not the same.

Moreover, the appointment of the petitioner against lien vacancy was approved for a limited period beyond which the petitioner should have no claim though she was allowed to continue under order of the Hon"ble Court and paid her salaries.

In view of the facts here in above, the undersigned in the capacity of the District Inspector of Schools (Secondary Education). Nadia, rejects the claim for approval of appointment of the petitioner against the permanent vacancy."

7. In the instant writ application the above order (annexure "P16") has been questioned.

8. Mr. Malay Basu, learned Senior Advocate appearing along with Mr. Swapan Kumar Dutta, Mr. S.K. Rakshit and Mr. Tarun Sen at the outset submitted that by the Impugned order dated October 4, 2001 the District Inspector of Schools has set at naught the order of this Court passed in WP No. 3157 (W) of 1997 and, therefore, the said order cannot be sustained and must be quashed and set aside. Elaborating the said contention it was submitted that the Court in its said order dated August 20, 2001 has held that the appointment of the petitioner was in accordance with Recruitment Rules and since the writ petitioner is working in regular post, the service of the petitioner has to be approved. It is further contended that a positive direction was issued by the Court to approve the appointment of the petitioner in regular post. The District Inspector of Schools (SE) was bound by the said order and not having appealed against the same and allowed the said order to attain finality, he could not have issued the impugned memo dated October 4, 2001. Construing the latter part of the Court's order, It was contended by Mr. Basu that rejection of approval could be made by the DIS (SE) on "any other ground" and not on the grounds, which have been held in favour of the petitioner by Court. Reliance has been placed by Mr. Basu upon Judgment of the Supreme Court in *Abant Mahato v. Kanchan Kumar Sinha and Ors.* 2000 (9) SCC 527.

9. Mr. Dipankar Dutta, learned counsel for the School Authority has supported the stand of the petitioner.

10. No doubt, as contended by Mr, Malay Basu, learned advocate for the petitioner, the Court in its order dated August 20, 2001 in WP No. 3157(W) of 1997, observed that the appointment of writ petitioner was, although on a leave vacancy, given by the school authority after obtaining prior permission from DIS (SE) the appointment was made by observing regular recruitment process as suggested by the DIS (SE). It was further, observed that since the original incumbent has not come back to join the school there was no reason as to why the writ petitioner's service cannot be approved. It is also true as contended by Mr. Malay Basu that direction was Issued by Court to approve the appointment of writ petitioner in regular post within the time framed by Court. What is however, significant is that by the very same orders discretion was given to the District Inspector of Schools (SE) to reject such approval on any other ground, the condition being that" he must assign reasons therefor.

11. The order passed by the DIS (SE) is a reasoned order. The reasons as contained in the Impugned memo are the grounds which had not been considered by Court not formed the basis of the Judgment of Court dated August 20, 2001. In other words, the rejection by DIS (SE) is on grounds other than those noticed in the Order of Court. None of the grounds stated in the Impugned order have formed the basis of the Order of Court. I, therefore, cannot accede to the aforestated contention of Mr. Malay Basu, learned advocate for the petitioner. The matter would have been entirely different if mandamus had been issued by Court without conferring discretion upon the DIS (SE) to pass an order if he

desires to "reject such approval on any other ground." the grounds of rejection stated in the impugned order are different and distinct from those, in the Order of Court.

12. The judgment relied upon by the learned counsel for the petitioner is thus distinguishable on the facts of this case.

13. As can be seen from the Impugned order of the DIS (SE) (extracted supra) distinction has been drawn between a permanent appointment and an appointment in a lien vacancy. The DIS (SE) has held that the Rules of Recruitment in regular/permanent vacancy and those for short-term vacancy are quite different. It is further held by the DIS (SE) that the appointment of petitioner was in a lien vacancy and was approved for a limited period beyond which the petitioner should have no claim.

14. In my view, therefore, what has to be tested in the instant writ application is whether the reasons contained in the impugned order can be sustained.

15. In *Sudhangshu Sekhar Baidya v. State of West Bengal and Anr.* 2001(1) Lab 1C 212, this Court considered a similar contention with regard to approval of appointment in leave vacancy though in the context of a class four staff and in the light of the Recruitment Rules which were in force prior to coming into force of the School Service Commission Act, 1997.

16. As the appointment of the petitioner was made in 1995 and thereafter, for further six months with effect from October 1. 1996, let us assume that the case of the petitioner would have to be considered in the light of the rules then in vogue and not those framed under the School Service Commission Act which came into force subsequently.

17. In the aforesaid judgment *Sudhangshu Sekhar Baidya* (cited supra) this Court observed that the distinction between a temporary appointment in a permanent post and an appointment of a temporary nature in a temporary vacancy has to be borne in mind, service law Jurisprudence recognizes such distinction. Reference was made in that Judgment to Rule 3(d) of Recruitment Rules wherein provision has been made for appointment in temporary vacancies. The said Rule is extracted hereunder:

"For appointment in temporary vacancies of more than three months but less than one year advertisement shall be made in State level daily newspapers with complete address of the school and other relevant particulars."

18. The Management Rules 28 & 28(7) were also considered in that Judgment and construed as under:

"Rule 28(I)(i) and (II) also make the distinction between the appointment of employees on permanent basis against permanent posts and appointment of employees on temporary basis against permanent or temporary vacancies dealt with in Clause (11)."

19. Rule 28(7) of the Management Rules which deals with probation prior to confirmation in respect of the case of permanent appointment as also temporary appointment against permanent post was then referred to, which for sake of convenience is extracted hereunder and the construction placed thereupon;

"(7) In all cases of appointment, both permanent and temporary, the Committee shall issue letters of appointment, specifying the terms and conditions of such appointment. In the case of a permanent appointment, a teacher or an employee appointed on probation shall be confirmed on the expiry of the period of probation unless an order to the contrary is issued at least six weeks before the date on which confirmation normally falls due. In the case of an appointment on temporary basis against a permanent post the teacher or the employee so appointed shall be confirmed on completion of two years" continuous satisfactory in the Institution:

Provided that no appointment, shall be made in a vacancy if it is not against a sanctioned post, permanent or temporary."

Under the said Rule, in the case of permanent appointment, the employee is to be confirmed on the expiry of the period of probation. In the case of appointment on temporary basis against a permanent post, the employee so appointed shall be confirmed on completion of two years" continuous satisfactory service in the Institution."

20. In the Instant case the appointment of petitioner was on temporary basis against temporary vacancy. All the proceedings referred to supra will disclose that the appointment of petitioner was in a lien vacancy and the duration for which the appointment has been offered to the petitioner has also been categorically stated in the proceedings of the DIS (SE) as also in the appointment letters Issued to the petitioner by the school authorities. The petitioner appeared at the Interview pursuant to an advertisement made in newspapers in terms of Rule 3(d) of Recruitment Rules. The petitioner was not appointed on probation. Whereas in terms of the Recruitment Rules in case of permanent appointment against permanent vacancy as also for temporary appointment against permanent vacancy, the procedure prescribed is by calling for names from the Employment Exchange and after selection appointment is made on probation and confirmed after expiry of the prescribed period of probation in terms of Rule 28(7). The appointment of petitioner was, thus, not one on permanent basis against a permanent vacancy, it was also not on temporary basis against a permanent vacancy. In the case of petitioner both the appointment as also the vacancy against which she was appointed as of temporary nature. Such appointments of temporary nature in temporary vacancies are normally made in the exigencies of administration. They are some times referred to as adhoc or casual or temporary or stop gap. Appointments of this nature are made for various reasons. Sometimes such appointments are made because although extra hands are required to meet the work load, there are no sanctioned posts against which regular recruitment can be made.

Sometime such appointments are made, as in the Instant case, when the regular employee has proceeded on leave or as in the case of *Shuvhobrota Mondal v. State of West Bengal* reported in 2000 Lab 1C 478(Cal) when the regularly recruited employee is placed under suspension pending disciplinary enquiry.

21. In the case of *Shuvhobrota Mondal*, cited supra, the claim for permanent appointment was rejected holding that, "The petitioner having been appointed against a suspension vacancy for a temporary period not even on probation, therefore, she cannot claim right to be appointed permanently."

22. For the reasons aforesaid and in terms of the Judgment in *Sudhangshu Sekhar Baidya*'s case, cited supra, no infirmity can be found with the impugned order passed by the DIS (SE) rejecting the claim of the petitioner for permanent appointment.

23. As can be seen from annexure "P-10" being copy of the resolution of the Managing Committee adopted at the meeting held on August 1, 1996, the substantive post holder was granted lien for a further year w.e.f. September 27, 1996. The vacancy of a permanent nature. If at all, can arise in the said post only after it has been vacated by the substantive post holder. In the instant case such vacancy can be said to have arisen only after the lien of Smt. Bandana Das terminated on September 25, 1997. The said vacancy being of permanent nature against permanent post can only be filled up in accordance with Recruitment Rules and not by absorption. As by the date of the Order of the Court (August 20, 2001) the vacancy in question had not been filled up and the College Service Act, 1997 having come into force, the said vacancy can now only be filled up as held by DIS (SE) in the impugned order in accordance with the said Act and the Rules framed there under.

In my view, therefore, there is no warrant for interference with the order passed by the District Inspector of Schools (SE), Impugned in the instant writ application.

It is however, clarified that if and when the said vacancy is sought to be filled up It shall be open to the petitioner to apply for the said post and be considered along with other eligible candidates in accordance with law.

With the observation, as above, writ application is accordingly dismissed. No costs.

Let urgent xerox certified copy of this judgment and order be furnished to the appearing parties. If applied for. on priority basis. Later 22-1-02

24. After the Judgment was pronounced learned counsel for the petitioner prayed for stay of the operation of the Judgment for a period of 3 weeks on the ground that the petitioner is continuing in service. The said prayer was considered and rejected.