
(2001) 05 CAL CK 0009
In the Calcutta High Court
Case No : Writ Petition No. 2696 of 1999

Swapna Saha

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 24-05-2001

Acts Referred:

Constitution of India, 1950 — Article 23

Citation : 106 CWN 477

Hon'ble Judges : Amitava Laha, J

Bench : Single Bench

Advocate : Saktinath Mukherjee, Shibdas Banerjee, Kalimuddin Mondal and Sankar Biswas, for the Appellant; Suproakash Banerjee and Arati Sircar, for the Respondent

Judgement

Amitava Laha, J.—The writ petition is made by the petitioner for the purpose of an approval of service since she is working in the school from 2nd August, 1982 as organiser teacher. Her name appeared in various Inspection Reports held on 11th April, 1983 and on 20th December, 1991. The original recognition of the institution was made as II Class Junior High School i.e. classes V & VI with effect from 1st January, 1974 and thereafter it has been upgraded. It appears that 16 posts were sanctioned in the said recognised Junior high school and 14 teaching and 2 non-teaching staffs (organizing) were approved in the said posts from time to time. One Smt. Hasi Dutta, the recognised Assistant Teacher retired from service on superannuation on 31st August, 1997. Therefore, a vacancy was created by virtue of such retirement On 20th July, 1997 the petitioner made an application giving details of the service tenure and to put the case of the petitioner before the appropriate authority for the purpose of approval of her service. The Managing Committee resolved in a meeting dated 20th July, 1997 itself that the case of the petitioner be recommended and forwarded to the District Inspector of Schools (S.E.), Barrackpore, 24 Parganas (North) for absorption against the vacancy caused by superannuation of Smt. Hasi Dutta with effect from 1st September, 1997. All necessary papers were sent to the

concerned District Inspector of Schools on 2nd August, 1997. In spite of receipt of the same, the concerned District Inspector of Schools was sitting tight over the matter without taking any effective steps for approval of the service of the petitioner against such sanctioned post. It is significant to note here that the Board permitted students of Class X of such school to sit in the Madhyamik Pariksha on and from the year 1982 till 1988 either by granting special permission or on the basis of the order of the Hon"ble High Court. It is further important to note that said Smt. Hasi Dutta had been working in the school as organiser teacher since 1st January, 1987 and her service was approved in the said school with effect from 15th December, 1987. Initially her service was approved for two years' continuous service and thereafter on permanent basis which will be evident from the Annexure "G" to the writ petition.

2. The petitioner contended that there is no chance in future in getting an employment in an educational institution having regard to the fact that the petitioner had already crossed the age bar prescribed under the rules. The respondent should have approved the service of the petitioner to save the family of the petitioner in these hard days. The petitioner further stated that as per the practice prevailing in the said school the services of the teaching and non-teaching staff were approved as organizing teaching and non-teaching staff by way of absorption. In the instant case, she has been rendering service from the year 1982 and, as such, the service of the petitioner ought to have been approved by way of absorption as was done by the authorities in the other cases. Several representations were made but all are in vain. It is further significant that the petitioner was appointed as organiser teacher on a monthly salary as per Government scale when the service of the petitioner would be approved by the Education Department after upgradation of the school or by creation or sanctioned of post if available, in recognised junior section. Since one sanctioned post is available by now there cannot be any impediment to regularize the petitioner on earlier occasion invoked the writ jurisdiction of this court being W.P. 13532/(W) of 1998 when by an order dated 10th December, 1998 a Single Bench of this Court was pleased to dispose of such writ petition directing the concerned District Inspector of Schools to consider and dispose of the case of the petitioner in accordance with the provision of law and by giving an opportunity of hearing and taking into consideration of all relevant notifications, circulars, Government orders in this regard as expeditiously as possible, preferably within a period of three months from the date of communication of this order. In pursuance of the said order the concerned District Inspector of Schools was pleased to hear out the matter on 2nd February, 1999 but till date no communication has been made with regard to such hearing.

3. It is also significant to note that one Smt. Chhaya Banerjee, another Assistant Teacher suddenly expired on 29th May, 1998. Therefore, another post became vacant. One Smt. Gita Banik had been serving in the institution on and from 1st September, 1982, junior to the petitioner moved the Hon"ble High Court at Calcutta on 2nd August, 1999 by way of a writ petition being W.P. No. 12430(W)

of 1999 and after contested hearing District Inspector of Schools was directed to regularize and/or absorb and/or approve the service of said Smt. Gita Banik in the place and instead of deceased teacher. It has been recorded in the order that it was submitted by the said respondents that another teacher is entitled to be absorbed. According to the petitioner, such teacher is no one than the petitioner. It was also recorded that the Learned Counsel appearing for the writ petitioner therein submitted that this writ petitioner has already been regularized in another vacancy. Such order is annexed with the writ petition as Annexure T.

4. According to the petitioner, her service ought to have been approved in view of the amended Rule 28(7) of the appropriate rules hereunder. The petitioner has been working as against available permanent vacancy even on and from 1st September, 1997 continuously for two years. Therefore, legally she is entitled to be approved. According to me, the petitioner wanted to make out four grounds:

(1) Petitioner has been working as an organiser teacher from 1982 continuously and when the service of other persons have been approved why her case will not be approved;

(2) In spite of filling up the vacancy through the Assistant Teacher, as Junior in service why the petitioner's service will not be approved;

(3) There is no legal impediment since the petitioner has valid qualification and there is a sanctioned vacant post which can be filled up through the petitioner:

(4) Alternatively, petitioner's service as against the permanent vacancy from 1st September, 1997 continuously for two years gives a room to the petitioner to regularize her service as per amended Rule 28(7) of the appropriate recruitment rules.

5. The petitioner has not made any fraud or sharp practice and due to her continuous service she will become age-barred for appointment in service elsewhere. When it is an admitted position in regularization of service of the incumbent junior to the petitioner to the Court of Law that another teacher is entitled to be absorbed and when the petitioner already submitted that she has already been regularized in another vacancy and when such statements to fact is arising out of the present petitioner why the formality of approval of the petitioner will not be given effect to.

6. The respondent authority contended before this court that the petitioner cannot claim her right to be regularized as organiser teacher since she was appointed on 2nd August, 1982 while the school was recognised as II Class Junior High School with effect from 1st January, 1974 and IV Class Junior High School from 1st January, 1979. The school authority had no right to accept anybody as organiser teacher after recognition of the school as per the rule. A permission was sought to be made by the school from the concerned District Inspector of Schools for appointment of "Assistant Teacher as per the prevailing recruitment rules. It was further contended that the name of the writ petitioner

was not included in the Inspection Report of the District Level Inspection Team. Since the School Service Commission was introduced in the year 1997 the recruitment of teachers will be made through such Commission. Giving permission to appear in the Madhyamik Pariksha cannot prove the eligibility of the writ petitioner for appointment as Assistant Teacher bypassing the recruitment rules or the School Service Commission Act, 1997. There is an admission that she has already crossed the age bar. Therefore, the concerned District Inspector of Schools has no right to approve the appointment of the writ petitioner since her name has not been sponsored by the Regional Service Commission in accordance with the School Service Commission Act, 1997. Her appointment was not given in accordance with the recruitment rules prevailing prior to introduction of such Act it has been further stated that the writ petitioner may be an organiser teacher for classes IX & X of the said school but the same has not been recognised. Until and unless the school is upgraded upto class X the writ petitioner cannot claim her appointment as organiser teacher, it has been further stated that in obedience to the order passed by a Single Bench of this court the concerned District Inspector of Schools took up a tearing on 2nd February, 1999 and informed his observation to the petitioner expressing inability in approving her appointment vide Office Memo No. 1B/LS dated 2nd February, 1999. It is categorically denied that the writ petitioner's service ought to be approved in view of Rule 2B(7) as alleged or at all. Appearing on behalf of the respondent authority, Learned Counsel contended before this court that no service of any of the teacher has been approved in view of the order passed by this court dated 2nd August, 1999 in W.P. 12430(W) of 1999 whereunder a teacher junior to the petitioner was directed to be absorbed in the available vacancy. However, in such circumstances, and upon hearing the matter at length this court was pleased to adjourn verdict on 5th December, 2000. Surprisingly thereafter the Learned Senior Counsel appearing for the petitioner, wanted to mention this matter on account of certain additional facts which was disallowed by the court but leave was granted to file supplementary affidavit in connection thereto. By filing such supplementary affidavit the Learned Counsel appearing on behalf of the petitioner contended before this court that the last statement was made by the Learned Counsel for the respondent that no one has given an approval of the service in view of the order passed on 2nd August, 1999 is absolutely false and frivolous. An Office Memo No. 614-A/LS dated 16th November, 2000 has been annexed in the affidavit to establish that in compliance with such order the petitioner therein, although junior to the petitioner herein was given, approval of appointment as teaching staff of the institution, one cannot think that the responsible officer of the State being District Inspector of Schools deliberately, misled the court by making any false submission that the service of the petitioner under the said writ petition has not been approved and/or regularized. This court has taken note of the facts seriously and directed the respondent to file their supplementary affidavit to come to an appropriate conclusion by giving further opportunity of hearing in respect of the matter. In turn, an affidavit was also filed on behalf of the respondent authorities by saying

that an order passed in connection with the case of the petitioner was earlier considered under an order dated 10th December, 1998 being W.P. No. 13532(W) of 1998 whereunder after recording of statement held as follows :

Hence any normal vacancy caused due to retirement/death/recognition shall be filled up by observing the Statutory Rules framed by the Govt. of West Bengal. The instant vacancy caused due to retirement of Smt. Hansi Dutta on 31.8.1997 (A.F.) shall be filled up by the school service commission after observing the procedural norms. It has been mentioned earlier that the school has been still enjoying the status of 4-class Junior High School wherein there are already 12 twelve teachers on the teaching staff against enrolment of students 182 (one hundred eighty two) for 4-class units. Hence, there is no scope for appointment of teachers in the said school at this stage.

In view of the aforesaid observation claim of the writ petitioner could not be considered and is thus set aside in strict compliance with order of the Hon''ble High Court, Calcutta. All concerned be informed accordingly.

7. In reply thereto the petitioner also by filing a rejoinder contended before this court that the petitioner was appointed as organiser teacher as per recruitment rules prevailing at the material point of time. The terms and conditions of such appointment of organiser teacher were that she will be given monthly salary as per Government scale and subject to approval of services after upgradation of the school (i.e. DC & X) and creation of any post and/or sanctioned post if available in recognised junior section. Therefore, when the sanctioned vacant post is available in the recognised junior section regularization or approval of the service of the petitioner cannot be ignored taking a fictitious plea that the school has not been recognised upto IX & X. The petitioner's service can be approved in terms of the Rule 28(7) of the recruitment rules 1969 which was available at the material point of time. There 14 sanctioned posts are available within which the petitioner is one of the candidates for such approval. The concerned District Inspector of Schools approved the services of the organizing staff as and when vacancies arose either due to superannuation or due to death. Therefore, when two vacancies arose on account of death and retirement of two incumbents and one has been already filled up in compliance with the order of the Single Bench of this court even being junior to the petitioner, the petitioners case cannot be ignored. No appeal was preferred from such order which can invalidate the claim inspite of being junior to the petitioner in whose favour the order was passed. Therefore, ignoring the case of the petitioner by the authority and taking step contrary to law in discriminatory. In the case in which Smt. Gila Banik was given service it was observed that the other teacher i.e. the petitioner is senior to such petitioner therein.

8. I have carefully considered various parts of the School Code to come to a definite conclusion in this respect. I find that Rule 2B(7) provides the appropriate rules for the purpose of Management of Recognised Government Institution (Aided and Unaided). Rule 1969 speaks that in all cases of appointment,

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 the 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 service in the institution provided that no appointment shall be made in a vacancy if it is not against a sanctioned post, permanent or temporary.

9. From the appointment letter it appears that she was given an appointment as organiser teacher on a monthly salary as per Government scale on 24th July, 1982 with the condition of having upgradation upto classes IX & X or creation of any post and/or sanctioned post, if available, to recognised junior section.

10. Therefore, having regard to the facts and circumstances of this case now it cannot be said that the petitioner is not working against a sanctioned post or the junior section has not been recognised. The appointment letter is specific that she will be accommodated in the junior section or to senior section subject to upgradation. Even if the court accepts the plea that the upgradation has not yet been done by the appropriate authority the legitimate claim of the petitioner about approval or regularization of service cannot be ignored on that score. Now, it is high time to verify the position from the School Code that what would have been the state of affairs of the teachers who are working in the schools from where the students are being sent either by the order of the Board or by the order of the court for the purpose of sitting in the Madhyamik/School Final Examination. I find from the Memo. 1124/Edn(S)/4A/53/87 dated 5th September, 1987 in its paragraph 2 that the qualified staff of a recognised junior high school which was granted special permission by the Board to send up the candidates for Madhyamik/School Final Examination may also be provided for appointment as organiser teacher or non-teaching staff consequent upon the school being upgraded to the high school provided that:

6. (a) The names of such teaching or non-teaching staff were recorded in the inspection report leading to such recognition;

(b) Such teaching or non-teaching staff possess prescribed qualification for the posts including academic and age qualification at the time of initial appointment;

(c) Such staff were appointed by the school on or before 10th March, 1979;

(d) That such teaching and non-teaching staff conformed to the staff pattern of a high school as laid down in G.O. No. 772-Edn.(s) dated 8th July, 1974.

11. Therefore, there cannot be an embargo upon the junior high school in accepting the teacher as organiser teacher and get their services in respect of sending students for the unreported unrecognized classes IX and X of such

institution. In doing so, if the school found that the services of such teachers are recognised in junior section and against the vacancy in view of the continuation of the services there is nothing in the law to restrain the hands of the authority from recognizing such services, it is to be noted hereunder that various controversies arose in respect of giving an appointment regular or irregular, being forgetful that there is a gulf of difference between an appointment and absorption. If a person has to be appointed there cannot be any doubt whatsoever the requisite rules existing for such recruitment must be followed, whereas in case of absorption in the event that there exist a statute or statutory rule or a policy decision of a State and an employee working in a particular post may be appointed as being absorbed as permanent staff in the post if he had been working for a long time.

12. Petitioners cited various decisions. In one case reported in 2000(2) CLJ 238 Dinabandhu Bandyopadhyay vs. The State of West Bengal & Ors., it has been held by a Single Bench of this Court that when one is engaged in continuous service for a long tenure he has to be absorbed in permanent cadre. Otherwise, such service will be construed derogatory to Article 23 of the Constitution of India.

13. A petitioner cited a decision reported in Rajpal Vs. State of Haryana and Others, where the Supreme Court held that the person similarly situated has already been taken into the service and their services regularized pursuant to the order of the Supreme Court the appellant being the only person left out who will be also entitled to some relief.

14. He has also cited a judgment reported in AIR 1998 SC 295 K.K. Krishnamacharyulu & Ors. vs. Sri Venkateswara Hindu College of Engineering & Anr. to establish the ground of equal pay for equal work. If the executive instructions issued by the Government have given right to claim pay scale at par with Government employees they will be entitled to pay parity with the Government employees. Possibly it was cited to show a comparable situation on a ground of discrimination. Upon visualizing the situation on the basis of the various judgments and upon observing that the authority concerned gave effect of regularization of service of one of the parties admittedly junior to the petitioners under a final order of the Court for which no appeal was preferred, this court cannot refuse the regularization of the petitioner's service.

15. Therefore, the writ petition stands disposed of. Service of the petitioner will be approved by the authority concerned within a period of one month from the date of communication of this order without fail from 1st September, 1997 when the vacancy arose. All consequential benefits will be given subject to approval of the service of the petitioner accordingly.

16. Thus the writ petition stands disposed of. No order is passed as to costs.

17. Prayer for stay is made, considered and refused.

18. Xerox certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites. All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the officer of the court in respect as above.