

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble Justice Rajesh Bindal
and
The Hon'ble Justice Aniruddha Roy

W.P.S.T. 107 of 2020

Dr. Arindam Roy
vs.
The State of West Bengal & Ors.

For the Petitioner:

Mr. D.N. Ray, Advocate,
Mr. D. Nandy, Advocate and
Mr. Biswaroop Nandy, Advocate.
-Through VC

For the Respondent:

Mr. Jyotosh Majumder, Advocate and
Learned Government Pleader,
Mr. Biswabrata Basu Mullik, Advocate,
Mr. Raja Saha, Advocates.

Heard on: January 06, 2021.
Judgment on: January 19, 2021

ANIRUDDHA ROY, J.

1. The present writ petition has been filed challenging the impugned order dated December 9, 2020 passed by the West Bengal Administrative Tribunal (for short 'the Tribunal') in O.A. No. 434 of 2020 (Dr. Arindam Roy vs. The State of West Bengal & Ors.) (for short 'the Original Application') whereby the said Original Application filed by the writ petitioner was disposed of directing the first respondent to dispose of the representation dated November 11, 2020, filed by the petitioner by passing a reasoned order and to make necessary communication thereof.

2. It was submitted on behalf of the petitioner that there is an extreme urgency in the matter. In case the petitioner is not allowed to join AIIMS by January 21, 2020, he will lose the opportunity and would suffer immense and irreversible injury and prejudice. Accordingly, the petitioner prayed for redressal of his grievance completely in this present writ petition on merit of its case. Considering such prayer and finding a urgency in the matter this Court proceeds to hear the petitioner on merit for final disposal of the writ petition, even though the representation filed by the petitioner has not yet been decided by the first respondent. The parties had also agreed to the same.
3. It is the arbitrary and illegal action on the part of the respondents, as alleged by the petitioner, by not allowing him to join on the post of Assistant Professor in the Department of Ophthalmology at All India Institute of Medical Science (for short 'the AIIMS'), Kalyani, retaining his lien on the post he is working presently, is under challenge in the present petition.
4. The petitioner on September 4, 2017 had joined the West Bengal Medical Education Service (for short 'the State Medical Service'), Department of Health and Family Welfare as a Resident Medical Officer-cum-Clinical Tutor (for short 'the RMO'), pursuant to notification dated August 7, 2017, in the Department of Ophthalmology, NRS Medical College and Hospital, Kolkata (for short 'the Medical College'). After his joining at the Medical College, the petitioner was

posted on detailment at Regional Institute of Ophthalmology, MCH Campus, Medical College, Kolkata, pursuant to an office order dated May 22, 2018. The petitioner is presently serving at the said detailed Post.

5. Pursuant to an advertisement dated January 22, 2019 issued by the AIIMS for the Post of Assistant Professor, the petitioner applied for the same and received a call for interview. The petitioner vide his letter dated March 5, 2019 applied to the second respondent requesting to grant him "No Objection Certificate" to enable him to appear in the said interview. The second respondent by its communication dated March 14, 2019 issued permission in favour of several candidates including the petitioner. The permission granted by the second respondent also stipulated that it was meant for 'appearing in the interview only'. The candidates had to obey F.D. Memo No. 4499-F(P) dated August 26, 2016 and the West Bengal Service Rules, 1971 (for short 'the 1971 Rules') and also the discretionary power of the authority. On the same day i.e. March 14, 2019 the second respondent also granted a 'No Objection Certificate' in favour of the petitioner to the extent that if he is selected for the Post of Assistant Professor in the Department of Ophthalmology in AIIMS, he would be relieved from duty to take up the said Post in AIIMS.

6. On October 22, 2020 the appointment letter was issued by AIIMS in favour of the petitioner containing the terms and conditions of his appointment.

7. The petitioner vide his letter dated November 11, 2020 made a representation to the respondents and requested for retaining his lien on the post he is working and let him join on the post of Assistant Professor, Ophthalmology at AIIMS. No heed was paid to the said representation.
8. The petitioner claimed that he has a right to retain lien on the substantive post in the State Medical Service under the 1971 Rules and he is entitled to exercise such right. Such right had been denied by the respondent State Authorities. The petitioner further claimed that he is required by January 21, 2021, failing which he would lose the opportunity to join AIIMS and would suffer immense and irreversible prejudice.
9. Being aggrieved by the alleged inaction on the part of the State Authorities by not allowing him to retain lien, the petitioner moved the Tribunal by filing the Original Application. The said Original Application was disposed of by the Tribunal at the thresh hold, at the motion stage by passing the order impugned, directing consideration of the representation of the petitioner.
10. Mr. D.N. Ray, the learned counsel appearing with Mr. Biswaroop Nandi, Advocate, on behalf of the petitioner submitted that the petitioner had joined in the State Medical Service on September 4, 2017 and had served for more than two years without any interruption or complaint. Referring to a notification

dated August 7, 2017 issued by the Government of West Bengal, he submitted that the terms and conditions mentioned therein govern the employment of the petitioner. Pursuant to the said notification, he submitted that the service of the petitioner would continue provisionally for six months or until further order with effect from his date of joining. Mr. Ray further submitted that the said provisional period of six months was never extended in the case of the petitioner and he had continuously serving his employer for two years and as such by operation of the various applicable provisions of the relevant Rules and law the appointment of petitioner became permanent. He then referred to a certificate dated March 7, 2019 issued by the third respondent whereby it was certified that the petitioner was a regular employee of the West Bengal Medical Education Service, who joined service as RMO on September 4, 2017 and presently working as RMO, Regional Institute of Ophthalmology, Kolkata, since June 1, 2018 and would retire on November 30, 2043.

11. Mr. D.N. Ray, learned counsel, then referred to Rules 17 to 21 of the 1971 Rules, Part-I and submitted that unless it is provided in the Rules, a government employee on substantive appointment to any permanent post acquires a lien on the post and seizes to hold lien on any other post. He submitted that Rule 20 of the 1971 Rules, Part-I deals with the situations and provisions whereby lien of a government employee on a permanent post, which he holds substantively, shall be suspended. He then submitted that, as a permanent post holder in the State Health Service, which he holds

substantively, he is entitled to retain lien and the question of suspension of lien had not arisen in the facts and circumstances of this case, which could prompt the State respondents, not to allow the petitioner to retain his lien on the post he is working. Thus, the respondent authorities are obliged to allow the petitioner to retain his lien. Mr. Ray, the learned counsel, then referred to the provisions of West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979 (for short 'the 1979 Rules'). He placed much reliance upon Rule 5 of the 1979 Rules and submitted that in terms of Rule 5 (1)(a) and 5(1)(b) thereof, a government employee shall be deemed to be permanent on completion of continuous temporary service for two years after his initial appointment on a post of service or cadre and such government employee shall be confirmed and made permanent on satisfactory completion of the period of probation. Where passing of any departmental examination is essential before confirmation, the provisions of Chapter I of the Services (Training and Examination) Rules, West Bengal shall have to be complied with. In the facts of this case, it was argued that, since the petitioner had successfully completed uninterruptedly two years of service after his initial appointment, and since there is no requirement of any departmental examination before confirmation, the petitioner is deemed to have completed his probation period and become a permanent employee and as such he is entitled to retain lien as per the Service Rules.

12. In support of his contention Mr. Ray, placed reliance upon the judgment of the Hon'ble Supreme Court *in the matter of: T.R. Sharma -versus- Prithvi Singh and Ors., reported in (1976)1 SCC 226.*
13. According to him, the interpretation of the relevant Rule depends upon the expression a government servant on 'Substantive Appointment', which includes permanent appointment of the petitioner in the State Medical Service, which by fiction of law he enjoys immediately after completion of his two years of service from the date of joining and as such he is entitled to retain his lien. It was then submitted that, the relevant Rule of the general conditions of service of the 1971 Rules, Part-I being Rule 34A deals with resignation. Such Rule provides for a lock in period of five years within which the petitioner cannot resign from his service. So retention of lien was the only option for him to enable him to join at AIIMS.
14. Mr. Jyotosh Majumder, Advocate, the Learned Government Pleader, along with Mr. Biswabroto Basu Mullik, Learned Advocate, appearing for the State respondents, at the outset submitted that the petitioner is neither a permanent employee nor can he be construed as such, therefore, the relevant Service Rules do not permit the petitioner to retain lien on the post he is working.

15. The Learned Government Pleader referring to the said rules, submitted that the appointment on permanent post means substantive appointment with confirmation and an appointment on probation means appointment on trial before confirmation. He further referred to Rule 5 of the 1979 Rules and submitted that on completion of the period of probation the appointing authority shall either issue formal declaration making the probationer permanent or to take such action as may be considered necessary in terms of provisions of Part-A of Chapter I of the Services (Training and Examination) Rules, West Bengal. A formal declaration is, therefore, a mandatory requirement to be made by the appointing authority for making the probationer permanent. In the instant case no such formal declaration was made. Referring to Rule 5(1) of the said 1979 Rules, he submitted that, in the absence of such formal declaration the petitioner shall be deemed to be on probation. The status of the petitioner is, thus, still a probationer and not permanent. It was further submitted that it is true that Rule 34(A) of the 1971 Rules, Part-I, provides for a lock in period of five years for resignation but there is no Rule for deemed confirmation after expiry of probationary.

16. Mr. Majumder, then referred to the notes mentioned under Rule 19 of the 1971 Rules, Part-I and submitted that an employee who is on probation, cannot claim any lien. In support of his contention the learned Government Pleader placed reliance upon the judgments of the Hon'ble Supreme Court *in the matter of: S. Narayana vs. MD. Ahemedulla Khan and Ors., reported in (2006) 10*

SCC 84 ;State of Madhya Pradesh and Ors. Vs. Sandhya Tomar and Anr., reported in (2013) 11 SCC 357 ;Triveni Shankar Saxena and Ors. Vs.State of Uttar Pradesh and Ors., reported in 1992 Supp (1) SCC 524 and High Court of M.P. through Registrar and ors vs. Satya Narayan Jhavar reported in (2001) 7, SCC 161.

17. The Learned Government Pleader, in addition to his legal submissions further submitted that during this pandemic situation arising due to COVID-19, the human lives in the world have been suffering and this State is also not an exception thereto. In as much as, there is scarcity of doctors in the State Medical Service to treat the society at large considering the persons affected during this pandemic situation. The doctors who are employed with the State Medical Services, considering the exigency and scarcity of doctors might have to be posted and shifted to the places wherever their services are required on an emergency basis. Considering this, it is also not just and reasonable to allow a doctor in the State Medical Services to proceed elsewhere more so when he is not entitled to the same as per the Rules.

18. Mr. D.N. Ray, Learned Counsel, on behalf of the writ petitioner submitted that, even if the writ petitioner joins AIIMS, Kalyani, he would still remain within the State and serve the society at large in the State during this COVID-19 situation. Hence, unless his lien is allowed, to which he is lawfully entitled to and is allowed to join AIIMS, Kalyani on or before January 21, 2021, the

infrastructure of the State to provide treatment to the persons affected by COVID-19 would not suffer any prejudice.

19. After hearing the submissions made on behalf of the parties and upon perusal of material before this Court, it appears that the facts are not in much dispute. The only issue which requires consideration is whether the petitioner had become a permanent employee of the State Medical Services and is entitled to retain lien on the post he is working to pursue his new assignment with AIIMS.
20. The petitioner was appointed in the West Bengal Medical Education Service and joined on September 9, 2017. He applied for permission to appear in interview for a post in AIIMS before the second respondent on March 3, 2019 and the permission was granted to the petitioner on March 14, 2019, subject to certain conditions. Necessary 'No Objection Certificate' was also issued on the same day. It is, therefore, evident that the request for no objection made by the petitioner and the consequential permission and the No Objection Certificate issued thereupon, were all before completion of the period of two years from the date of joining of the petitioner, when admittedly the petitioner was in probation. So the question of receiving such permission or No Objection Certificate from the respondent No.2 by the petitioner before completion of period of probation did not and could not arise. In as much as, on a true and proper construction of Rule 3(a) and 3(b) of the 1979 Rules, it is evident, that appointment on permanent post means substantive appointment with

confirmation and for probation such an appointment is on trial before confirmation. From a plain reading and proper construction of Rule 5 of the 1979 Rules, it is clear that a government employee, being the petitioner herein, shall be deemed to be on probation on till such time a specific order is passed by the competent authority for making him permanent. Such a formal declaration must contain recording of satisfaction of the appointing authority as to the performance of the petitioner to make him permanent. It is the undisputed position on record that no such formal declaration was issued by the appointing authority in favour of the petitioner to make him permanent.

21. The relevant rules of the 1979 rules governing the petitioner require a specific act on the part of the employer by issuing a formal declaration for the purpose of confirmation and even if the maximum period of probation of two years, as contended by the petitioner had expired, no such formal declaration being made for confirmation by the appointing authority of the petitioner, he cannot be deemed to have been confirmed merely because the period of probation, according to him or otherwise, had expired.
22. Rule 17 to 21 of the 1971 Rules- Part I deal with lien. A plain reading of Rule 17 of the said Rules and on proper construction thereof it is evident that a government employee on substantive appointment to any permanent post acquires a lien on the post, therefore, to avail of the right of lien a government employee must have a substantive appointment to any permanent post. In the

facts and circumstances of this case the petitioner is not holding any permanent post, hence, is not entitled to claim right of lien as provided under the relevant Rules under Chapter 3 of the 1971 Rules, Part-I.

23. In the instant case, the petitioner claims his right primarily on the basis of the document being the order of permission dated March 14, 2019 issued by the second respondent for appearance in the interview of AIIMS and the 'No Objection Certificate' dated march 14, 2019 issued by the second respondent, which were the documents issued to the petitioner contrary to the said established due process of law and as such no right can flow from such documents. In as much as when there is a clear statutory provision, the petitioner cannot claim any advantage from the said two documents, which are contrary to such statutory provisions. In as much as, there is no estoppel against the statute. Therefore, even if the said two documents exist, the same cannot give rise to any right to the petitioner to become a permanent employee in a substantive capacity which he is otherwise not in the eye of law and he cannot enforce the same in court. A person can be said to acquire a lien on the post only when he has been confirmed and made permanent on that post or not earlier. As on today there is no such order and not even a prayer in the petition to treat the petitioner as such.

24. The judgments, relied upon by the Learned Government Pleader on behalf of the State respondents, have laid down the law on the subject which are still

holding the field. It is thus, well settled that to avail of the right of lien an employee must be in permanent employment in substantive capacity.

25. The ratio decided in **T.R. Sharma's case (supra)** relied upon by the petitioner, deals with termination of lien of an employee relating to a government servant on a permanent post which he holds substantively being appointed in a substantive capacity. Such is not the instant case. The issue involved in the instant case is whether the petitioner is a permanent employee in a substantive capacity of the State employment and is accordingly entitled to retain lien. Thus, the ratio has no application in the facts and circumstances of the case.

26. In so far as, the submission of the State respondents that if the petitioner joins AIIMS, Kalyani, the State Medical Service may suffer during this COVID-19 situation and considering the counter argument made on behalf of the petitioner in this regard, as noticed above, we are of the considered view that the AIIMS, Kalyani, is no doubt a premier and esteem medical institute of high repute and though the petitioner would remain at Kalyani within the State of West Bengal but considering the prevailing pandemic situation if any emergency arises where immediately the scarcity of doctors is to be met in any part of the State, it can immediately deploy the petitioner, wherever his service is required. Such cannot be a scenario in the event the petitioner joins AIIMS, Kalyani. Thus, considering the gravity for the present prevailing pandemic

situation in the State, this Court cannot lose its sight of that and as such the submission of the petitioner in this regard, are not acceptable by this Court.

27. In view of our foregoing discussions there is no merit in the present writ petition and the same is hereby dismissed.
28. Before parting with the order, this Court is constrained to make certain observation regarding the casualness with which the second respondent had acted. He should have been more careful in issuing no objection certificate in favour of the petitioner, when the petitioner had not even completed the tenure of two years of probation from the date of his joining and was not even a permanent confirmed employee in the State. However, this Court has been informed in the course of the hearing that the person concerned, being the then second respondent, had retired from his service, no action can be taken against him.
29. There shall, however, be no order as to costs.

(Aniruddha Roy, J.)

I agree

(Rajesh Bindal, J.)