

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 2186 of 2016

Sk. Bashiar Rahaman

Vs.

The State of West Bengal & Ors.

For the Petitioner : Mr. Sandip Kr. Bhattacharya

...advocate

For the State : Mr. Jahar Lal De
Mr. Robiul Islam

... advocates

For the respondent no. 3 : Md. Salahuddin
Md. Ahsanuzzaman
Md. Raziuddin

..... advocates

Heard on : 08.12.2022

Judgment on : 23.12.2022

Hiranmay Bhattacharyya, J.:-

1. The writ petitioner has prayed for absorption as Rent Collector in the Office of the Board of Waqf, West Bengal (for short “the

Board”) and to allow periodical promotions, incremental benefits as well as retiral benefits including pension.

2. The writ petitioner claims to have been appointed sometimes in the year 1989 as Rent Collector in the office of the Official Mutawalli and is presently working under the Direct Management Section of the Board as a Rent Collector. The then Chief Executive Officer of the Board allowed the scale of pay of Rs. 3350-6325 to the petitioner with effect from 01.04.1997. It is the further case of the writ petitioner that the Board approached the Government on several occasions for absorbing him to the post of Rent Collector but no positive response came from the end of the Government. In the meantime, the Governor was pleased to approve the creation of 52 additional posts for the Board including four posts of Rent Collector **(LDA)** by a Government order no. 558-MD dated 11.04.2008. After creation of such posts, the Board in its meeting held on September 5th, 2008 resolved that the writ petitioner be absorbed against the posts of Rent Collector **(LDA)** with grade pay with effect from 01.09.2008 as per the rules and regulations of the Board.
3. The Chief Executive Officer of the Board by a letter dated 06.03.2009 sought for administrative approval for absorption of the writ petitioner under the regular establishment of the Board from the Secretary, Minority Affairs and Madrash Education. The writ petitioner, by a letter dated May 31st,

2011, requested the Chief Executive Officer of the Board to take immediate action for his absorption and to grant all service benefits in accordance with law. The writ petitioner alleges inaction on the part of the respondent authorities.

4. Mr. Bhattacharyya, learned Advocate for the petitioner referred to the provisions laid down under Section 24 of the Waqf Act, 1995 (for short “the 1995 Act”) and contended that the Board in consultation with the State Government shall determine the number of officers and other employees as well as the details thereof. He further contended that the function of the State Government ended with the approval and creation of 52 Additional Sanctioned posts for the Board and the Chief Executive Officer has the exclusive authority to make appointments to the said posts created and approved by the State Government. He contended that regularisation/absorption of the appointment of the petitioner is permissible under Article 162 of the Constitution of India and further ratification of appointment with retrospective effect is permissible as held by the Hon’ble Supreme Court in the case of ***Maharashtra State Mining Corporation vs. Sunil reported at 2006 (5) SCC 1996.***

5. Mr. Bhattacharyya contended that the expression “consultation” appearing in Section 24(1) of the 1995 Act does not in any manner abrogate the right of the Board to appoint persons in the vacant posts and consultation does not mean

seeking concurrence or consent from the State Government. In support of such contention, he relied upon the decision of the Hon'ble Supreme Court in the case of ***Supreme Court Advocate-on-Record Association and others vs. Union of India*** reported at **(1993)4 SCC 441**. He also submitted that Article 162 of the Constitution permits executive action in the absence of any legislation and in support of such contention he placed reliance upon a decision in the case of ***B.N. Nagarajan and others vs. State of Mysore and others*** reported at **AIR 1966 SC 1942**.

6. Mr. Bhattacharyya also relied upon an unreported decision in the case of ***Pritam Kanjilal vs. State of West Bengal and others*** delivered on August 18, 2022 in WPA 10784 of 2017 in support of his contention that the writ petitioner can be absorbed in the vacant posts of Rent Collector. Mr. Bhattacharjee also relied upon a decision of Hon'ble Supreme Court in the case of ***Ashok Kumar Sahu vs. Union of India and others*** reported at **2006 (6) SCC 704**.

7. Mr. Dey, learned Advocate representing the State contended that the appointment of the petitioner as Rent collector by the Official Mutawalli is an illegal one as he was not appointed against any sanctioned posts nor by following any selection process. Mr. Dey further contended that the Official Mutawalli did not have the power to appoint the writ petitioner as Rent Collector after expiry of his term of Official Mutawalli.

8. By referring to the Memo dated July 27, 1999 issued by the Secretary to the Government of West Bengal, Mr. Dey contended that the State do not have any objection to the retention of the 07 employees including the writ petitioner engaged by the Ex-Official Mutawalli of the Waqf Estate provided the fund required for the purpose of payment of salaries etc., is borne out of the earnings of the Waqf Estates. Mr. Dey concluded by submitting that a person illegally appointed do not have any right to be absorbed or get his appointment regularized.
9. Mr. Salahuddin, the learned Advocate appearing for the Board contended that the Board moved the Government for absorbing the petitioner to the post of Rent Collector. He further contended that after creation and sanction of the 52 additional posts by the Government, the Board in its meeting adopted a resolution to absorb the writ petitioner as the Rent Collector with Grade Pay with effect from September 1, 2008 and thereafter sought for necessary administrative approval from the Government. He contended that there is no inaction in so far as the respondent no. 3 is concerned. He placed reliance upon Section 24 of the 1934 Act to highlight the power of appointment of officers and servants of the Board.
10. Heard the learned Advocates for the parties, and perused the materials placed.

11. Record reveals that one Md. Asraf Ali was appointed as Official Mutawalli under Section 41 of the Bengal Waqf Act, 1934 (in short “the 1934 Act”) and his term expired on 25.03.1986. The writ petitioner claims to have been appointed sometimes in the year 1989 by the Official Mutawalli but the fact remains that such appointment was made after expiry of his term as Official Mutawalli. Therefore, the said appointment was made by a person without an authority to make such appointment.
12. Moreover, by virtue of Section 24 of the 1934 Act the power of appointing the officers and the servants of the Board have been vested upon the Commissioner. Therefore, the argument of Mr. Bhattacharyya that the appointment of the writ petitioner under the 1934 Act was valid is not acceptable to this Court as even under the 1934 Act the Official Mutawalli was not empowered to appoint the officers and the servants of the Board.
13. The petitioner continued to perform his duties as a Rent Collector even after the coming into force of the 1995 Act. It is evident from the Government Order no. 558-MD dated 11.04.2008 that the Governor has been pleased to approve under the provision of Section 24 of the 1995 Act, the creation of 52 additional posts under the Board including four posts of Rent Collector (**LDA**). It appears from the said Government Order that the pay scale fixed for the post of Rent Collector is 3350-6325 plus usual allowances. It was further specified in

the said Government Order that Regulation under Section 110 of the 1995 Act for the terms and conditions of services in respect of new category of posts created by the said Government order to be made before any recruitment is done.

14. In exercise of the powers conferred under Section 110 of the 1995 Act, the Board, with the approval of the State of West Bengal, framed the West Bengal Waqf Regulations, 2008 (for short "2008 Regulations) and a notification was issued being number 1604 dated 05.11.2008.
15. After the creation of 52 additional posts vide Government order dated 11.04.2008 and prior to the 2008 regulations being notified on 05.11.2008, the Board in its meeting held on 05.09.2008 resolved that the writ petitioner be absorbed against the post of Rent Collector with Grade Pay with effect from 01.09.2008 and sought for administrative approval for absorption of the writ petitioner in the regular establishment of the Board by a memo dated 6th March, 2009.
16. The learned Advocate for the petitioner would contend that since the decision to absorb the writ petitioner as Rent Collector in the said vacant post was taken at a point of time when the 2008 Regulations did not see the light of the day, the terms and conditions as well as the mode of recruitment as laid down under the 2008 Regulations cannot be made applicable to the case of the writ petitioner as the writ

petitioners were appointed even prior to the coming into force of the 1995 Act. He would further contend that since the petitioner was appointed in view of the provisions under the 1934 Act, the petitioner has a right to be absorbed in the vacant post of Rent Collector.

17. The writ petitioner claims to have been appointed sometimes in the year 1989. Therefore, by no stretch of imagination, the writ petitioner can be said to have been appointed in the vacant posts created by virtue of the Government Order no. 558-MD dated 11.04.2008. Moreover, the said Government order dated 11.04.2008 specifically provides that appointment under such posts created by the said Government Order would be in accordance with the Regulations framed under Section 110 of the 1995 Act.
18. The writ petitioner was appointed by a person who did not have any authority and/or power to appoint him at the relevant point of time. He was also not appointed by following the provisions of the 1934 Act which was prevailing at the time of his appointment. The petitioner could not substantiate that his appointment was a regular one and that he was appointed against a sanctioned post. Therefore, this Court is of the considered view, that the appointment of the writ petitioner was nothing but an illegal one and not an irregular appointment which can be regularised.

19. It is well-settled that an illegal appointment cannot be regularized by this Court in exercise of its powers under Article 226 of the Constitution of India. The Hon'ble Supreme Court in the case of **Secretary, State of Karnataka and ors. vs. Umadevi (3) and ors.** reported at **(2006) 4 SCC 1** held that the High Court's acting under Article 226 of the Constitution should not ordinarily issue directions for absorption, regularisations or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee has worked for a sufficient period of time, he would not be entitled to any right to be absorbed or made permanent in the service. The Supreme Court in the said decision held thus-

"43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could

not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.”

“45. While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain -- not at arm's length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned

knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.”

20. Therefore, by applying the aforesaid proposition laid down by the Hon'ble Supreme Court of India in **Umadevi (3) (supra)**, this Court holds that the writ petitioner cannot claim to be absorbed in the posts of Rent Collector created and approved vide Government Order dated 11.04.2008 merely on the ground that he is rendering service for a long time even prior to the coming into force of the 1995 Act.

21. Reliance placed by Mr. Bhattacharyya on the memorandum no. 8305-F dated September 26, 2005 issued by the Special Secretary to the Government of West Bengal Finance Department is misplaced as the same is applicable in cases where the employees are initially recruited on contract basis with the approval of the Appointment Committee of the

Cabinet (ACC) after following the norms, rules and methods as applicable to the relevant posts and if they are still continuing in contract service be brought under regular establishment against regular vacancies in which they have been initially appointed with the approval of ACC. The said memorandum do not have any manner of application to the facts of this case as the preconditions for regularization as indicated in the said memorandum has not been satisfied in the case on hand.

22. In the case of ***Pritam kanjilal (supra)*** the writ petitioner therein was appointed in the sanctioned post after following the norms and rules for such selection and also possessed requisite qualifications for such post. It was specifically held therein that the writ petitioner stands on a better footing than a person whose appointment is an irregular one. The said decision being distinguishable on facts is not applicable to the case on hand.
23. There is, however, no quarrel to the proposition of law laid down by the Hon'ble Supreme Court in ***B.N. Nagaranjan (supra)*** that there is nothing in Article 309 of the Constitution of India which abridges the power of the executive to act under Article 162 of the Constitution of India without a law. The issue involved in the case on hand is whether a person illegally appointed can be regularized in service which was not in issue in the said reported case. In view thereof, the decision in the

case of ***B.N. Nagaranjan (supra)*** is of no assistance to the petitioner.

24. The decision of the Hon'ble Supreme Court in the case of **Supreme Court Advocate-on-Record Association (supra)** was with regard to the issue of appointment of Judges to Supreme Court and High Courts and primacy to opinion of Chief Justice of India as head of Judiciary in the consultative process. The said decision being distinguishable on facts has no manner of application to the case on hand.
25. There is no quarrel to the proposition of law laid down by the Hon'ble Supreme Court in ***Ashoke Kumar Sahu (supra)*** that there is a distinction between the expressions "approval" and "acceptance". In the case on hand, the Board sought for administrative approval from the Government for absorbing the writ petitioners in the vacant posts of Rent Collector created vide Government Order dated 11.04.2008. It is not a case of ratification as argued by Mr. Bhattacharyya. Therefore, the said decision is not of any assistance to the petitioner.
26. In ***Maharashtra State Mining Corporation (supra)***, the Managing Director did not have the authority to pass the order of dismissal but, subsequently, the Board of Directors passed a resolution ratifying the action taken by the Managing Director in respect of the disciplinary action taken against the

delinquent. The said decision being distinguishable on facts has no manner of application to the case on hand.

27. This Court is of the considered view that in order to fasten the State with the financial liability in respect of the appointments to the posts created vide Government order dated 11.04.2008, approval of the State is necessary.
28. For the reasons as aforesaid, this Court is not inclined to pass any direction upon the State of West Bengal for absorption of the writ petitioner in the post of Rent Collector under the Board of Waqf (West Bengal). The writ petition accordingly fails and the same stands dismissed without any order as to costs.
29. Urgent photostat certified copy of this judgment be given to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)