

20.08.2024
Item No.05
Court No.652
Avijit Mitra

WPA 3468 of 2007
with
IA No.CAN 1 of 2018 (Old No.CAN 5741 of 2018)

In re: An application under Article 226 of the Constitution of India;

And

Mohsin Gaiur
- Versus -
State of West Bengal & ors.

Mr. Ekramul Bari,
Sk. Intiaz Uddin

...for the petitioner

Mr. Supriya Chattopadhyay,
Mr. Jayanta Samanta,
Mr. Suman Dey,
Mr. Supriya Majumder

...for the State

Affidavit-of-service filed by the petitioner be taken on record.

Throwing a challenge to the legality of the order issued by the Director of School Education, West Bengal vide memo dated 2.2.2007/6.2.2007 in deference to the order passed in WP 14338 (W) of 1994, the present writ petition has been instituted.

To grasp the issue involved in this writ petition, it is crucial to note the key facts that led to its presentation.

A selection process was initiated by the Managing Committee of Surjapur High School (hereafter referred to as 'the school') for the post of

Assistant Teacher in the Language and Literature group to fill an additional vacancy. The petitioner participated in the process, secured first place in a three-man panel. However, according to the appointment letter dated 21.03.1990, issued by the Secretary of the school, the petitioner was appointed to the post on a temporary basis for a period of two years.

The petitioner's appointment to the post was approved by the District Inspector of Schools (SE), West Dinajpur, *vide* his memo dated July 16, 1990, on a temporary basis from March 22, 1990, to March 21, 1992. Subsequently, an order dated March 3, 1992, issued by the District Inspector of Schools extended the petitioner's service for an additional year, effective from March 22, 1992, to March 21, 1993. However, the petitioner continued in the post beyond March 21, 1993.

Later, in a communication *vide* Memo dated July 28, 1994 addressed to the District Inspector of Schools, the Director of School Education noted that the petitioner was appointed to a leave vacancy for two years effective from March 21, 1990, in place of Feroz Alam Sahid (referred to as 'Feroz'), who was subsequently appointed as Headmaster of the School. The petitioner was permitted to continue in the position vacated by Feroz and his service was

extended for another year, from March 22, 1992, to March 21, 1993. However, the communication concluded by instructing the District Inspector of Schools not to approve the petitioner's service beyond March 21, 1993, as the vacancy needed to be filled according to the existing recruitment rules.

The memorandum dated July 28, 1994, was challenged by the petitioner in W.P. 14388 (W) of 1994. A coordinate Bench of this Court, by passing an interim order dated 1.9.1994 in the writ petition, permitted the petitioner to serve the school without prejudice to the rights and contentions of the parties, despite the order dated July 28, 1994. The petitioner was allowed to draw a salary with the condition that they provide a written undertaking to the D.I. of Schools, agreeing to refund the entire salary if the writ petition was unsuccessful. Additionally, the respondents were restrained from taking any steps to fill the post.

However, the writ petition, W.P. no. 14388 (W) of 1994 was disposed of by an order dated 19.03.2022. By this order, the memo. dated July 28, 1994 was set aside, with a consequential order to decide on the petitioner's service after affording an opportunity of hearing to him.

Pursuant to the order dated March 19, 2022, the Director of School Education addressed the issue

after hearing the representatives of both the petitioner and the Secretary of the School. An order dated 02.02.2007/06.02.2007 was issued, concluding that since Feroz had availed of study leave for his higher studies, a vacancy was created. The petitioner was appointed to this leave vacancy for two years. After completing his studies, Feroz rejoined the school and was absorbed into the post of Headmaster. The petitioner's service was extended for an additional year. However, the petitioner was appointed to a short-term vacancy, and the selection process was initiated for a leave vacancy, not for a regular post. Consequently, the petitioner's claim for regularization was denied. The Director of Schools was directed to stop the payment of the petitioner's salary and recover the entire amount paid, while the school authorities were instructed to fill the post in accordance with the existing recruitment rules.

Aggrieved by that order dated 2.2.2007/6.2.2007, the present writ petition has been preferred.

Mr. Bari, learned advocate representing the petitioner, refers to the memorandums dated March 20, 1990, and June 19, 1990, issued by the D.I. of Schools and contends that after conducting a selection process in accordance with the extant recruitment rules, the petitioner was appointed to an additional

post duly sanctioned by the D.I. of Schools as per the memorandum dated April 15, 1988, and that this appointment was properly approved. He argues that there is no basis for the memorandum dated July 28, 1994, issued by the Director of School Education. Mr. Bari also draws attention to the order dated March 19, 2022, passed in W.P. No. 14388 (W) of 1994, where a coordinate Bench of this Court observed that when an additional post has been sanctioned, the issue of a leave vacancy should not arise.

Placing reliance on two unreported decisions, one rendered by a Hon'ble Division Bench in an appeal, being M.A. No. 173 of 1997 and the other by a coordinate Bench of this Court in W.P. No. 19013 (W) of 1999, he contends that in analogous situations, directions were given to regularize the services.

Mr. Bari submits that the petitioner, having rendered 28 years of service, superannuated on May 31, 2018. Consequently, the petitioner has filed an application, CAN 5741 of 2018, seeking a direction upon the respondents to release his terminal benefits. With consent of the parties, the application is taken up for hearing together with the writ petition.

In response to my query, Mr. Bari submits that no amount has ever been deducted from the petitioner's salary towards provident fund.

Mr. Dey, learned advocate, appears on behalf of the State Respondents, along with Mr. Samanta, learned advocate. Mr. Dey vehemently opposes the contentions raised by Mr. Bari. Referring to a copy of the memorandum No. 897 dated April 15, 1988, issued by the D.I. of Schools, he argues that permission was granted to the school to appoint a duly qualified assistant teacher in the Language and Literature group for only two years, in accordance with the recruitment rules outlined in the notification dated August 31, 1987. Drawing my attention to the panel, the letter of appointment, and the approval of appointment, he asserts that the petitioner was appointed on a temporary basis for two years. Although the petitioner's service was extended for an additional year, Feroz rejoined the school and was appointed as Headmaster. Mr. Dey argues that the school authority illegally allowed the petitioner to continue in the post. He submits that the Director of Schools, by issuing a reasoned order, rejected the petitioner's claim for regularization, and therefore, there is no scope to interfere with the same. The copy of the memorandum dated April 15, 1988, as produced by Mr. De, is taken on record.

Thus, the epicenter of the dispute centers on the question of whether the petitioner was appointed to a

leave vacancy or to a permanent vacancy in the school.

The memorandum No. 897 dated April 15, 1988, indicates that permission was granted to the school to initiate the selection process according to the procedure outlined in the notification dated August 31, 1987, to fill the post on a temporary basis for two years or until the Headmaster became qualified, whichever occurred earlier. The memorandum dated April 15, 1988 had found its reference in the panel, letter of appointment, and approval of appointment. The letter of appointment explicitly states that the petitioner was appointed *"on a temporary basis for two years from the date of joining, as per D.I.'s memorandum No. 897 dated April 15, 1988."* Similarly, panel, letter of appointment and the order approving the petitioner's service also clarified that the petitioner was appointed to an additional post sanctioned under T.O. No. 897 dated April 25, 1988, from March 22, 1990, to March 21, 1992. Thus, it appears that the phrases "additional post sanctioned vide this office No. 897 dated April 15, 1988" in the panel and also in the letter of approval have contributed to the confusion and/or the dispute.

In the order under scrutiny in this writ petition, the Director of School Education specifically noted that Feroz rejoined the school and was subsequently

absorbed into the post of Headmaster. The school authority then allowed the petitioner to continue in the position that had become vacant due to Feroz's appointment as Headmaster. Additionally, by virtue of an interim order of this Court, the petitioner continued in the post.

In the present case, the selection process was conducted and concluded according to the extant recruitment rules for a specific purpose: to fill the vacancy which was created since Feroz, an approved teacher took study leave for higher studies, and the petitioner was appointed for a defined period. Needless to observe that an illegal appointment cannot be directed to be regularized. Where something that is irregular for want of compliance with one of the elements in the process of selection which does not go to root of the process can be regularized.

In the given case, legal validity can be granted to the school authority's decision to allow the petitioner to continue in the post beyond March 21, 1993. A temporary employee, who is aware of the terms and consequences of their appointment, cannot claim a vested right to regularization. This proposition is fortified by the decision, reported at (2006) 4 SCC 1 (Secretary of Karnataka v. Uma Devi), where the Hon'ble Supreme Court clarified that the decisions running counter to the proposition of law expounded

in this case, or directions contrary to what has been held, will not be considered precedents.

It is axiomatic that the mere continuation of service by a temporary employee under an interim order of a Court does not confer any right to be absorbed into permanent service (see, the judgment delivered in case of State of Rajasthan v. Daya Lal, reported in AIR 2011 SC 1193). Therefore, Mr. Bari's reliance on the two unreported decisions is misplaced. As noticed previously, no amount has ever been deducted from the petitioner's salary towards provident fund.

Therefore, for these reasons mentioned above, it would not be equitable to direct the respondents to regularize the petitioner's service in the post, and to direct payment of terminal benefits.

The next question is whether it would be prudent to direct the respondents to recover the salaries paid to the petitioner. Admittedly, the petitioner received the salary after rendering his service. No application to vacate the interim order dated September 1, 1994, was filed, nor was an appeal made against the final order dated March 19, 2022, passed in W.P. No. 14388 (W) of 1994 by either the School authority or the State Respondents. The petitioner was superannuated on May 31, 2018. Therefore, at this stage, it would be harsh to direct the

petitioner to repay the entire salary drawn beyond March 21, 1993. Accordingly, I direct the respondents not to take any steps to recover any amount from the petitioner in any manner whatsoever.

With the above observation and direction, the present writ petition and its connected application are disposed of.

There shall, however, be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties.

(Partha Sarathi Chatterjee, J.)