

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:
THE HON'BLE JUSTICE HARISH TANDON
And
THE HON'BLE JUSTICE PRASENJIT BISWAS

**MAT 1810 OF 2024
CAN 1 OF 2024**

MOHSIN GAIUR
Vs.
THE STATE OF WEST BENGAL & ORS.

FOR THE APPELALNT : **MR. EKRAMUL BARI, ADVOCATE**
MR. S.M. ALI, ADVOCATE
MR. SK. IMTIAZUDDIN, ADVOCATE

FOR THE STATE : **MR. TAPAN KUMAR MUKHERJEE, LD. AGP**
MR. PINAKI DHOLE, ADVOCATE
MR. SOMNATH NASKAR, ADVOCATE
MR. JAYANTA SAMANTA, ADVOCATE

HEARD ON : FEBRUARY 27, 2025.

JUDGMENT ON : FEBRUARY 27, 2025

THE COURT:

1. It is a usual practice at the behest of the State Counsel to divert the issue to a destination which suits them, instead of addressing the core issue involved in the proceeding. Several legislations are placed without considering whether those have any manner of application in relation to the facts involved in the proceeding with intent to avoid the legitimate right or the legal right fructified in favour of the litigant.
2. Be that as it may, the appellant is subject to several round of litigation before this Court, even after being appointed as an Assistant Teacher upon undergoing the rigor of the recruitment process envisaged in the statutory Rules framed in this regard. To be more precise, the appellant was appointed as an Assistant Teacher in Surjapur High School, Police Station Surjapur, District Uttar Dinajpur in language and literature group on temporary basis for two years from the date of

joining vide Memo No. 897 dated 15.04.1988 with clear stipulation that he would join the post on/or before 31.03.1990. Subsequent to the joining, Memo No. 1539 dated 16.07.1990 was issued by the District Inspector of Schools (Secondary Education) of the then West Dinajpur now Uttar Dinajpur, granting approval to such appointment for the purpose of salaries as admissible under the Rules which clearly indicates that the petitioner is appointed to an additional post sanctioned under Memo No. 897 dated 15.04.1988 and the approval was given temporarily for two years commencing from 22.03.1990 and ending with 21.03.1992. Interestingly, another Memo No. 630/1(2) dated 03.03.1992 was issued by the District Inspector of Schools (SE), Uttar Dinajpur signifying that the appointment of the appellant to the post of Assistant Teacher under the language and literature group is made in normal vacancy and, therefore, such appointment is approved on a salary as admissible under Rules from 22.03.1990 to 21.03.1992 on usual terms and conditions. The second Memo, on a bare look, initially conveys an intention of the authority to extend the period of such appointment but on a meticulous reading thereof, it appears that the authority was conscious that the said appointment is under the normal vacancy meaning thereby that there was a vacant sanctioned post over which such appointment is made.

3. There has been a paradigm shift from the stand taken by the authority in causing a Memo No. 2383-OA_4G-3/90 dated 08.07.1994 to the extent that the petitioner was for the first time made aware that his appointment to the post of Assistant Teacher is not against the sanctioned vacant post or normal vacancy but in leave vacancy for two years as the Assistant Teacher who went for a study leave after an approval is granted and, thereafter, appointed as a Headmaster in the School. The said Memo dated 08.07.1994 was challenged by the petitioner in WP 14388 (W) of 1994 and an interim order was passed on 01.09.1994 to the following effect:

“The petitioner may serve the School in question without prejudice to the rights and contentions of the parties despite the order dated 28.07.1994 as contained in annexure ‘F’ to the writ-application.

During the pendency of the writ-application, however, no steps should be taken for filling up the post”

4. Ultimately, the said writ-petition came to be disposed of on 19.03.2002 and the said Memo dated 08.07.1994 was quashed and set aside with a liberty to the Director of School Education, if so consider appropriate, to initiate such proceeding against the petitioner as may be open to him in law and in compliance with the principles of natural justice. It was categorically observed that until such proceedings are taken, the service of the petitioner cannot be interfered with and shall accordingly continue, it is so directed.
5. Pursuant to leave having granted, the proceeding was initiated which culminated into an order dated 02.02.2007 which was forwarded on 06.02.2007. The Director of School Education reiterated and restated the stand that the appointment of the appellant was actually on a leave vacancy in terms of the Memo No. 897 dated 15.04.1988. It is further disclosed that after completion of the higher studies by the then Teacher who went on leave, he was absorbed by the School as Headmaster by the Managing Committee. Interestingly, it is recorded that despite the said Teacher having appointed as Headmaster, the service of the appellant was further approved for one year in the said resultant vacancy.
6. The said decision of the Director of School Education is challenged by the appellant in WP 3468 (W) of 2007 and the operation of the said order was stayed until further order and the *status quo* was directed to be maintained with regard to the service of the petitioner, obviously, in relation to the salary and other benefits attached to the said post.
7. Ultimately, the said writ-petition is finally disposed of on 20.08.2024 by the Single Bench solely on the basis of the judgment of the Constitution Bench of the Supreme Court rendered in case of Secretary, ***State of Karnataka & Ors. Vs. Umadevi (3) & Ors.*** reported in ***(2006) 4 SCC 1***. However, the Single Bench was conscious that the petitioner has rendered services for a continuous period of more than a decade and directed the authority not to recover the salary nor any other amount which is paid in relation thereto.
8. The petitioner has challenged the said order in the instant appeal reiterating the stand that he was not appointed in a leave vacancy but against the additional sanctioned post, may be for a duration of two

years which was extended for a further period of one year upon undergoing the regular process of recruitment framed by the Government to fill up the sanctioned vacant post.

9. Mr. Bari, learned Counsel appearing for the appellant, submits that the stand of the leave vacancy was disclosed for the first time on 08.07.1994 which was quashed and set aside by this Court and, therefore, it would not be proper on the part of the administrative authority to take a contrary view in this regard. Since there appears to be a vacuum as the State who argued the matter before the Single Bench, did not file any affidavit-in-opposition despite several directions passed in this regard but produced the records or the relevant documents, which was taken note of by the Single Bench.
10. We could have remitted the matter after affording an opportunity to the State to file an affidavit but considering the plight of the litigant who is ventilating his grievance since 1994 yet could not achieve the desired result, we invited the attention of the learned Additional Government Pleader to produce the relevant documents so that the matter can be brought to its logical end.
11. Mr. Mukherjee, learned AGP, hands over the Memo No. 897 dated 15.04.1988 issued by the District Inspector of Schools (SE) sanctioning the permission for appointment of one duly qualified Assistant Teacher in language and literature group on temporary basis for two years on condition that one post of Assistant Teacher should remain vacant. It is further indicated that the appointment procedure should be made as per DSE, West Bengal No. 1828 (17) GA dated 31.07.1987 and roster of vacancy since 15.08.1976 should be maintained. The appointment letter issued to the appellant on 21.03.1990 revealed the process of selection having undertaken and the appointment is made strictly in terms of the said Memo dated 15.04.1988.
12. The question thus arise whether the post which was sanctioned by the District Inspector of Schools on 15.04.1988 was for leave vacancy or an additional post created for the purpose of combating the deficiency which the School faces because of the less number of teachers, which is not in commensurate with the pupil-teacher ratio. If such being the perception, one striking feature is manifest from the said Memo dated

15.04.1988 when the approval was subject to one post of Assistant Teacher to remain vacant.

13. It is trite to say that if there are sanctioned vacant posts in the said group, the question of keeping one post vacant does not appear to be reasonable nor would achieve the object and the purpose for which the additional post was duly sanctioned. We can very well appreciate that the Government sanctioned the post of a particular category in the Schools on the subject-wise basis and the intention can be gathered that keeping one post of Assistant Teacher vacant without identifying the subject category, may appears to be of some relevance as the Government does not want to disturb the total sanctioned strength of the teachers.
14. There appears to be a fallacy in this regard, if we look at the Memo dated 15.04.1988 where the sanction was given for a period of two years which obviously ends in the month of April 1990. Had it been a case of the Government that the post on which the appellant was appointed is on the basis of a leave vacancy, the reference to the said Memo appears to be erroneous. The Memo dated 16.07.1990 issued by the District Inspector of Schools clearly stipules the additional post sanctioned under the said GO dated 15.04.1988 without any clarificatory words that it is meant to fill up the leave vacancy. The moment the Government appointed the Teacher on the said additional post, it is not open to the Government to resile from the said stand and treat such appointment under a leave vacancy. Even this Court in an earlier round of litigation quashed and set aside the Memo dated 08.07.1994, wherein the Government took the stand for the first time that the appointment of the petitioner was on a leave vacancy and, therefore, it is not open to the authority to take a stand which does not appear from the record nor an intention, be it remotely or otherwise, can be gathered therefrom. Furthermore, the Teacher who went on leave for higher studies, was granted such permission from the year 1990 and, therefore, the sanction of the additional post way back in the year 1988, cannot be said to be restricted to a leave vacancy in language and literature group as the Government cannot foresee that somebody would pursue the higher courses in future, more

particularly, the teacher of such category of subject or a group. Even an appointment was shown to be temporary but the appellant was initially allowed an extension of one year, obviously, on taking into account his satisfactory services to the children of the School, more particularly, that the Assistant Teacher of the said School who went for higher studies, later on joined the post of a Headmaster and, therefore, keeping the said post vacant.

15. Mr. Mukherjee, tried to impress this Court that the ratio of the judgment rendered in ***Umadevi (3) (supra)*** and the judgment of the Apex Court in ***State of Karnataka & Ors. Vs. M.L. Kesari & Ors.***, reported in ***(2010) 9 SCC 247***, stands in the way of the Government to grant approval to the appointment of the petitioner. The reliance is placed upon paragraph 53 of the judgment rendered in *Umadevi (3) (supra)* wherein the Constitution Bench of the Supreme Court held:

“53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointment) as explained in S.V.Narayanappa [1967 (1) SCR 128], R.N. Nanjundappa [1972 (1) SCC 409] and B.N. Nagarajan [1979 (4) SCC 507] and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the Courts or of Tribunals. The question of regularization of service of such employees may have to be considered on merits in the light principles settled by this Court in the cases above-referred to and in the light of this judgment. In that context, the Union of India, the State Governments and there instrumentalities should take steps to regularized as a one-time measure the services of such irregularly appointed who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the Courts of Tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily-wagers are being now employed. The process must be set in motion within six months from this date.....”

16. The observation of the Constitution Bench decision in the above-noted report is to be read in the context of the facts involved therein. Though it is held that any appointment made does not deserve to be regularized after a passage of time but a distinction must be drawn in between an appointment which can be termed to be illegal with the appointment which can be termed as irregular. It is held that the duly qualified person appointed in a duly sanctioned post upon following

the procedure of recruitment, not in *stricto sensu*, having rendered services for a continuous period of 10 years or more, cannot be thrown out by a stroke of pen and, therefore, is entitled to have such services duly regularized and the respective States were directed to take out a onetime exercise in this regard.

17. In ***M.L. Kesari (supra)*** the case of a daily wage-earner appointed by a Zilla Panchayat, whose services were utilized for more than 15 years without an intervention of any Court came up for consideration. The Bench took note of the observation of the Constitution Bench in ***Umadevi (3) (supra)*** and clarified that the onetime measure has to be understood in its proper perspective and should not be taken as a barrier in the following:

“The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (See Basu’s Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That Article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedure which specify the necessary qualifications, the mode of appointment etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognized that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the Constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution

which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed.”

18. There is no quarrel to the proposition as laid down in the above-noted decision but the ratio has to be culled out from the context it is used and should not be applied in an abstract manner. The distinction is made in the Constitution Bench's decision between an appointment, which can be termed to be irregular with an appointment which is patently illegal. It is held that the appointment which is illegal, does not confer any right into a person to get such services regularized but if the appointments are coming within the ambit of a irregular appointment, the conditions enshrined in the said Constitution Bench decision, if fulfilled, creates a right of regularization of their services as onetime measure to be undertaken by the respective States. Apropos to the aforesaid nuances of law, let us see whether those principles laid down therein, has any manner of application in the instant case.
19. It is nobody's case that the appointment of the appellant was made without following the recruitment Rules rather the converse appear to be true for the simple reason that the appointment was duly approved by the District Inspector of Schools (SE) of the respective districts, obviously after considering all aspect including the procedure for an appointment in conformity with the statutory Rules. It is too late to contend that the appointment was not followed by the procedures. We do not find any separate procedures promulgated by the State in relation to an appointment on leave vacancy and the appointment on a regular vacant sanctioned post. The procedure being one and the same, the point which involves in the instant appeal is whether such appointment was under a leave vacancy or on an additional post duly sanctioned by the Government. Though the post was sanctioned for two years but even after the expiration of the period it was allowed to continue which implies that the Government sanctions such post and was considered to be a validly sanctioned post at the time when the appointment was made to the appellant. It is inconceivable and improbable that the Government will approve the appointment to a post which is non-existent.

20. The moment the post is there and in absence of any stipulation in the appointment letter, that it is against the leave vacancy, it is not open to the Government to change the stand at a later point of time. The letter of appointment clearly stipulates that such appointment is on the additional post duly sanctioned by a Memo dated 15.04.1988 but for a period of two years which was admittedly extended for another year. Even the stand of the Government does not appear to be correct as the person who applied for study leave, after completion thereof, did not revert back to the said post but was appointed as Headmaster of the said School.
21. Such being the position, the Government cannot prevaricate its stand from the stage of the appointment to a stage of an approval and, therefore, we find that the decision of the appropriate authority that the appointment was purely on a leave vacancy, is not sustainable nor appears to be in consonance with the documents produced before us.
22. The order of the Single Bench is hereby set aside. Consequently, the order of the Director of School Education is also set aside.
23. The appointment of the petitioner should be regularized by giving a post-facto sanction and/or approval within a period of four weeks from date.
24. With these observations, the appeal being **MAT 1810 of 2024** and the connected application being **CAN 1 of 2024** accordingly **disposed of**.

(HARISH TANDON, J.)

(PRASENJIT BISWAS, J)

