

(2000) 09 CAL CK 0005

Calcutta High Court

Case No: Writ Petition No. 19559 (W) of 1999

Sudhansu Sekhar Baidya

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Sept. 15, 2000**Citation:** (2001) 1 ILR (Cal) 11**Hon'ble Judges:** M.H.S. Ansari, J**Bench:** Single Bench**Advocate:** Bimal Chakraborty, for the Appellant;**Final Decision:** Dismissed

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### Judgement

M.H.S. Ansari, J.

The case of the Petitioner is that he was appointed as a class IV staff in Manmathapur High School. The service of the Petitioner was approved on and from September 25, 1993, by the District Inspector of Schools (S.E.) In the order of approval, the D.I.S. (S.E.) has stated that the appointment will continue for six months or till the joining of Mr. Shaktipada Roy Chowdhury again. The said Shaktipada Roy Chowdhury again. The said Shaktipada Roy Chowdhury; incumbent in the post of class IV staff took leave for indefinite period and there after on September 17, 1994, he made an application for voluntary retirement. The said letter of resignation it appears was accepted by the authorities. Consequent thereto, by a resolution dated April 29, 1994, the Managing Committee extended the service of the Petitioner in the place of the said Mr. Roy Chowdhury and also made a request to the D.I. of Schools (S.E.), South, 24-Parganas, for approval of the appointment of the Petitioner in the said post of class IV staff.

2. Alleging non-compliance with statutory obligations on the part of the State authorities for with-holding the approval and absorbing the Petitioner filed a writ petition being C.O. No. 8929(W) of 1995. In the said writ application, an interim order dated September 26, 1995, was passed by Justice Shyamal Kumar Sen (As His Lordship then was) directing the District Inspector of Schools (S.E.) to find out if the

Petitioner was still working in the school since it was contended that although the Petitioner rendered service in the said school but he was not receiving salary from August 22, 1994, and in the event, the D.I. of Schools (S.E.) was of the view that the Petitioner is still working, then the District Inspector of Schools (S.E.) was directed to take steps for releasing of the salary due and payable to the Petitioner.

3. In terms of the said order, D.I.S. (S.E.) inspected the school and having found the Petitioner working, released the salary under Memo. No. G.A./20 dated January 9, 1996, and vide a Memo No. G.A./T/268 dated May 28, 1996, in the sum or Rs. 30,000.00.

4. Thereafter, D.K. Basu, J. by an order dated October 3, 1997, in C.A.N. No. 1739 of 1997, inter alia, directed the D.I.S. (S.E.) to release the salary of the Petitioner upto September, 1997. The Petitioner, it is stated, was paid the salary upto September, 1997.

5. Once again an application being C.A.N. No. 5051 of 1999 was filed for appropriate orders for releasing the salary of the Petitioner since October, 1997. However, by an order dated November 18, 1999, Justice Amitava Lala was pleased to dismiss the said application being C.A.N, No. 5051 of 1999, and liberty was given to the Petitioner to file fresh writ application for his absorption.

6. The instant writ application has been filed for issue of a writ of mandamus commanding the Respondents to give approval to the Petitioner as permanent class IV staff in Manmathapur High School.

7. Learned Counsel for the Petitioner Mr. Bimal Chakraborty relying upon the judgment in Rabindra Nath Ghosh v. State of West Bengal 1997 (2) C.L.J. 389 contended that as the Petitioner is working against permanent vacancy having been duly appointed in accordance with the recruitment procedure, the Petitioner is entitled to regularisation of his service in the said post and for payment of arrears of the salary including current salary to be paid to the Petitioner.

8. From the narration of facts as above and more particularly, the averments contained in para. "7" of the writ application, it will be seen that the Petitioner was appointed in the leave vacancy of Shaktipada Roy Chowdhury, a class IV staff of the said school on September 25 1993. The Petitioner's appointment in the said leave vacancy was approved by the D.I.S. (S.E.) (Annex-"B") for the said duration of six months or until the return of the said Shaktipada Roy Chowdhury.

9. The question for consideration in the instant writ application is whether consequent upon the substantive post holder Shaktipada Roy Chowdhury having taken voluntary retirement/resigned from the post in question, the Petitioner is entitled to be absorbed in the said post.

10. The arguments advanced by Mr. Bimal Chakraborty, learned Counsel for the Petitioner, are to the effect that the Petitioner has been appointed in a permanent

post and as such, the Petitioner is entitled to get approval as matter of course according to the Rule 28(7) of the Management Rules.

11. The appointment of the Petitioner was in a leave vacancy. It was for a fixed term that is until the return of the incumbent in the said post. The distinction between a temporary appointment in a permanent post and an appointment of a temporary nature have to be borne in mind. Service Law jurisprudence recognises such distinction.

12. Under Rule 3(d) of the Recruitment Rules, provision has been made for appointment in temporary Vacancies. The said Rule 3(d) reads as under:

For appointment in temporary vacancies of more than three months but less than one year advertisement shall be made in State level daily newspapers with complete address of the School and other relevant particulars.

13. Rules 28(1)(i) and (ii) also make the distinction between the appointment of employees on permanent basis against permanent vacancies dealt with in Clause (i) and appointment of employees on temporary basis against permanent or temporary vacancies dealt with in Clause (ii).

14. Rule 28(7) of the Management Rules upon which much reliance has been placed by Mr. Chowdhury learned Counsel for the Petitioner, the same reads as under:

(7) In all cases of appointment, both 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 confirmation normally falls, due. In the case of an appointment on temporary basis against a permanent post the teacher or the employees 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.

15. Under the said rule in the case of permanent appointment, the employee is to be confirmed on the expiry of the period of probation. In the case of appointment of temporary basis against a permanent post, the employee so appointed shall be confirmed on completion of two years continuous satisfactory service in the institution.

16. The appointment of the Petitioner was in a temporary vacancy and not on temporary basis against a permanent posts. The Petitioner was appointed in the leave vacancy initially for a term of six months or till the return of the substantive post holder whichever is earlier. The contention of the Petitioner, therefore, that in

terms of Rule 28(7), the service of the Petitioner is entitled to be confirmed is misplaced. The said Rule 28(7) will have no application to the Petitioner's case.

17. The judgment in *Rabindra Nath Ghosh v. State of West Bengal* (Supra) was with respect to the claim of the Petitioner in that case who was working against a regular vacancy. The Court in that case issued, directions for according approval from the date when the Petitioner in that case was working against the permanent vacancy. The said case is thus distinguishable on the facts of the case on hand. It is only consequent upon the retirement of the substantive post holder Shaktipada Roy Chowdhury that the vacancy in the post of Class IV staff can be said to have arisen. The said post is now required to be filled up in accordance with the Recruitment Rules as applicable and not by absorption.

18. It is well settled that a person cannot be appointed substantively to a post ever which an employee has an existing lien. See: [State of Haryana and Others Vs. Rajindra Sareen](#) . An appointment to officiate in a permanent post is usually made when the incumbent substantively holding that post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. Such an officiating appointment comes to an end on the return of the incumbent substantively holding the post from leave or on a substantive appointment being made to that permanent post.

19. In the instant case, the Petitioner was appointed in the leave vacancy of Shaktipada Roy Chowdhury substantive post holder. The order of appointment as also the approval by the D.I.S. (S.E.), annex. "B", clearly specified that the appointment was for duration of six months or until the return of the said Shaktipada Roy Chowdhury.

20. The Petitioner, in the light of the above can have no legal right to the said post after the same has fallen vacant and which requires to be filled up in accordance with the Recruitment Rules.

21. Accordingly, the writ petition is dismissed, however, without any order as to costs.

22. Let urgent xerox copy of this order be furnished to the Petitioner expeditiously, if applied for.