**IN THE HIGH COURT OF CALCUTTA**

W.P. No. 18421 (W) of 2009

Decided On: 24.11.2011

Appellants: **Keya Saha**
**Vs.**
Respondent: **The State of West Bengal & Ors.**

**Hon'ble Judges/Coram:**
Hon'ble Justice Harish Tandon

**JUDGMENT**

**Harish Tandon, J.**

1. The petitioner has assailed the order of the Chairman passed vide memo No. 120/DPSC/Law dated 10th July, 2009 whereby and whereunder, she has been prevented to join the school as she is not a permanent teacher.

2. At the very outset it is pertinent to record that in spite of an order passed in this writ petition permitting the respondents to file affidavit in opposition, no such affidavit in opposition is filed. However, the learned Advocates appearing for the District Primary School Council, Malda and the state submit that there is no dispute with regard to the facts and the point which is raised in this writ petition are a pure question of law. In view of the above submission, this court proceeded with the hearing of the instant writ petition in absence of any affidavits on behalf of the respondents.

3. Brief facts which are necessary for the present purposes are that the petitioner was appointed as Assistant Teacher of Bhandari Para Primary School, District- Malda on compassionate ground. She joined the said school on 01.02.2006 on the strength of the letter of appointment issued by the competent authority. At that relevant time, she was pursuing her graduation and applied for leave without pay for the period from 10.05.2006 to 02.06.2006. After the examination is over she joined duty on and from 03.06.2006. After the gap of nearly four months, she further sought for the leave for pursuing the coaching for admission to MBA course between the period from 31.10.2006 to 10.10.2007. However, she joined her duty on 17.09.2007. The petitioner got admission in MBA course and further applied for leave from 24.09.2007 to 01.08.2008 but she resumed duty on 09.07.2008. She again applied for the leave for the period from 14.7.2008 to 14.04.2009 for completion of her MBA course and thereafter again resumed duty on 02.04.2009.

4. The Chairman of the District Primary School Council, Malda issued a showcause vide memo No. 550 dated 19.05.2009 as to why her service could not be terminated. It has been categorically stated in the said showcause notice dated 19.05.2009 that she was absent unauthorizedly without the leave and permission of the competent authority. It is further stated that she is not a permanent teacher as her service was not confirmed.

5. In reply to the said showcause, the petitioner took the stand that she all along applied for leave without pay to the competent authority and joined her duties before expiration of the period of leave. By the impugned memo dated 10thJuly,2009 the Chairman, District Primary School Council, Malda refused her prayer to allow her to join the school as she is not a permanent teacher and have been found unauthorisedly absent from duty.

6. Mr. Ekramul Bari, the learned Advocate appearing for the petitioner submits that the respondent authorities cannot refuse the permission sought by the petitioner to join and continue his services in the said school without taking recourse to the statutory rules. He further submits that the stand taken by the respondent authorities that the petitioner is not a permanent teacher, is illegal and arbitrary. Lastly he submits that the statutory rules provides the procedure for termination of the service of a primary teacher and any action in contravention to the said statutory rules are liable to be quashed and set aside.

7. Mr. P S Deb Barman, the learned Advocate appearing for the District Primary School Council, Malda submits that the services of the petitioner was not confirmed and as such the authorities have rightly refused to grant permission to join and continue in service. He strenuously argues that if a teacher who is not completed two years of continuous service, she cannot be treated as permanent teacher in terms of the definition assigned in Rule 3 (f) of West Bengal Primary Education ( leave of teachers of primary schools) Rules 1999. Lastly, he submits that mere claim of her leave does not mean that the made is granted unless the sanctioning authority expressly grants such leave.

8. Mr. Kamalesh Bhattacharya, the learned Advocate appearing for the state submits that the petitioner was never granted leave by the sanctioned authority and the service of the petitioner was also not confirmed and as such she cannot acquire the status of a permanent teacher.

9. Having considered the respective submissions, it is undisputed that the petitioner was appointed as Assistant Teacher in Bhandari Para Primary School on compassionate ground and she joined the school on 01.02.2006. It is also undisputed that she applied for sanction of the leave without pay on each occasion within the reasonable period of time. From the annexure of the writ petition it appears that those applications seeking leave without pay was forwarded to the Sub Inspector of School who is the sanctioning authority. There is no document produced wherefrom it could be seen that the sanctioning authority granted the leave as sought for. On each occasion the petitioner resumed the duties till the issuance of the showcause notice dated 19.05.2009.

10. The West Bengal Primary Education Act, 1973 does not define the meaning of the word 'permanent teacher' whereas the 'teacher' has been defined in Section 2 (xxia) to mean a person who hold a teaching post in a primary school or in a primary teacher training institute on a regular and whole time basis and is paid wholly from the funds under the control of the State Government in Education Department.

11. Section 56 A of the said act provides that the Primary School Council may award any punishment including the punishment of dismissal or removal from service of a teacher only on recommendation of the disciplinary authority. It would be profitable to court Section 56 A of the said act which reads thus:

Subject to the prescribed conditions, a Primary School Council may award any punishment, including the punishment of dismissal or removal from service, on a teacher, or a member of the another teaching staff, if any, of a primary school under the control of that primary school council:

Provide that no punishment, other than censure, shall be awarded except on the recommendation of the discipline committee.

12. In exercise of the power conferred under Section 106 of the West Bengal Primary Education Act, 1973 the State Government framed inter alia rules relating to the recruitment and the service conduct of the teaching and nonteaching staff of the Primary Schools by repealing the Recruitment Rules of 1991. The state framed the West Bengal Primary School Teachers' Recruitment Rules 2001 which is relevant for instant case which came into effect on and from 15.01.2002 (hereinafter referred to as Recruitment Rule) Rule 2 (o) of said Recruitment Rules defines the meaning of the word 'teacher' in the following:

"teacher means a person who holds a teaching post in a primary school or in a Junior Basic School on a regular and whole time basis, and is paid either wholly or in part from the funds under the control of the State Government in the Education Department;"

13. The procedure for recruitment of the teacher is provided under Rule 8 to 11 of the said recruitment rules. However, special provision is provided by insertion of Rule 14 of the Recruitment Rules for appointment on compassionate ground. Admittedly, the petitioner is appointed by invocation of Rule 14 of the Recruitment Rules. It would be evident from the perusal of Rule 14 of the said Recruitment Rules that after reasonable satisfaction as to the financial hardship of the deceased teacher the member of the family as defined therein may be appointed on compassionate ground. The methodology which is provided therein is that an application shall be made in writing by the family of the deceased teacher within the prescribed period, whereupon the council shall arrive at its satisfaction that the family of the deceased teacher is an extreme financial hardship and shall forward the said application for its approval to the Director of the School Education, West Bengal or its authorized officer. If the approval is granted by the said authority the appointment letter shall be issued by the District Primary School Council under the signature of the Chairman specifying the date within which the said teacher has to join his duty, otherwise such appointment shall be cancelled without further communications to the said teacher.

14. Rule 23 of the said Recruitment Rules postulates that the service of the teacher may be confirmed by the concerned District Primary School Council after the completion of two years from service from the date of joining in the primary school. Rule 23 of the Recruitment Rules reads thus:

(1) Subject to the provisions of sub-rule (2), Sub-rule (3) sub-rule (4) and sub-rule (5), A teacher may be confirmed by the concerned Council against a sanctioned post with effect from the date following the date of completion of two years of service from the date of joining in a primary school.

(2) On expiry of the said period of two years and within a period of three months therefrom the Council shall, by a letter ask the Sub-Inspector of schools of the concerned circle to furnish a report on the continuous and satisfactory services of the teacher during the said period of two years.

(3) the report shall be furnished by the Sub-Inspector of schools within a period of three months from the date of issue of such letter or within such extended period, not exceeding three months as the Council may determine, and the Sub-Inspector of Schools shall be informed, by a letter, of such extension.

(4) Before confirmation of the teacher, the report shall be considered by the council and if satisfied, shall issue an order of confirmation of the teacher.

(5) the teacher shall be confirmed with effect from the date following the date of completion of two years of service.

(2) If

(a) no report is furnished by the Sub-Inspector of schools within the period or extended period mentioned in sub-rule (3), or

(b) the report of the Sub-Inspector of schools is not considered by the Council within a period of three months from the date of receipt of the letter, as the case may be, the teacher shall be deemed to have been confirmed with effect from the date following the date of completion of two years of service.

15. On bare look to the said provision, the appointment of the teacher may be confirmed against the sanctioned post with effect from the date following the date of completion of two years of service from the date of joining in primary school. The council within three months from the date of expiration of two years shall ask the Sub Inspector of School of the concerned circle to furnish the report on the continuous and satisfactory service of the teacher and on submission of the report within three months from the date of the issue of the letter by the council, the council shall issue an order of confirmation of the teacher upon being satisfied upon the said report. It is further provided that if the report is not furnished by the Sub Inspector of School within the prescribed period or extended period or if the report of the Sub Inspector is not considered by the council within three months from the date of the receipt thereof, the teacher shall be deemed to have been confirmed with effect from the date following the date of completion of two years of service.

16. West Bengal Primary Education, (leave of teachers of primary schools) Rules 1999 (herein after referred to as "leave rules") was promulgated in exercise of Section 106 of the West Bengal Primary Education Act, 1973. In the Leave Rules Definition has been assigned to " permanent teacher", "teacher" and "temporary teacher". The teacher has been given the same meaning as in the West Bengal Primary Education Act, 1973. The permanent teacher is one who has completed two years of continuous and satisfactory service in the post of his appointment and confirmed by the appointing authority or the officer duly authorized in this behalf. Whereas the temporary teacher means a teacher who is not permanent. Sanctioning Authority to grants casual leave means the concerned Sub Inspector of School in the District but for sanctioning the other kinds of leave, the council is the authority subject to the recommendation of the District Inspector of School (Primary Education) and/or officer authorized in this behalf who should not be below the rank of Sub Inspector of Schools under Rule 7 of the said Leave Rules. It is specifically provided in the leave rules that the leave cannot be claimed as a right and the sanctioning authority may grant or refuse or revoking the leave if the exigencies so demand.

17. The West Bengal Primary Education (Conduct of Service of Teachers of Primary Schools) Rules 2001 framed in exercise of power conferred under Section 106 of the West Bengal Primary Education Act, 1973 contains the procedure for his removal and/or dismissal from service as well as other penalties as envisaged therein.

18. A conjoint reading of the aforesaid provisions envisages that the appointment of the teacher to a post shall have to be confirmed after two years of completion of his continuous and uninterrupted service. Duties are cast upon the council to ask the Sub Inspector of School to submit the report relating to the performance and services of the petitioner. The period within which the same as to be exercised is provided in the Recruitment Rules, if the same is not adhere within the prescribed period, such confirmation is deemed to have been made to the said teacher. The Service Conduct Rule does not make any differentiation between a permanent teacher, teacher and a temporary teacher but is applicable to a teacher who is holding a teaching post in a Primary School on the basis of the appointment in prescribed manner. It is nobodies case that the said appointment is not made in a prescribed manner but what is sought to be contended by the authorities is that the petitioner does not acquire the status of the permanent teacher as defined under the leave rules. The order for termination and removal of service can only be passed under the Service Conduct Rules and not otherwise. There is no power conferred upon the authorities to restrain the teacher from joining his duties except by resorting to the provisions contained under Service Conduct Rules. It may be relevant for the purpose of sanctioning the leave under the leave rules whether the teacher is a permanent or not, but the same does not germane while imposing the penalties under the Service Conduct Rules without taking recourse to the provisions contained therein. Thus the purported order by which the concerned authority has restrained the petitioner from joining his service or continuing in service is not sustainable.

19. The impugned order dated 10th July, 2009 is hereby quashed and set aside.

20. The writ petition is thus disposed of.

21. There shall have no order as to costs.

22. Urgent photostat certified copy of the judgment, if applied for, be given to the parties on priority basis.