

02.01.2025
(D/L-8)
Ct. No.4
(B.K.N.)

**W.P.S.T. 55 of 2023
With
CAN 2 of 2023**

**Kamrul Karim
Vs.
The State of West Bengal & Ors.**

Mr. Asim Hati,
Ms. Nandini Sharma,
Mr. Antariksha Karmakar,
Mr. Abdus Salam

...for the Petitioner

Mr. Tapan Kr. Mukherjee, Ld. A.G.P.,
Ms. Sangeeta Roy

...for the State

Mr. Sourav Mondal
...for the Respondent No. 6/
Principal Accountant General

1. Heard learned counsel for the petitioner and the learned counsel for the State.
2. It appears from the impugned order of the director that the petitioner herein was appointed in terms of an advertisement dated 5th November, 1999, as Medical Technologist (Electro Cardiogram), referred to as M.T.(ECG) at the project hospitals, under the State Health System Development Project – II, in South 24 Parganas under the Health and Family Welfare Department, Government of West Bengal. The appointment was on a contractual basis having a consolidated remuneration of Rs. 5025/- per month. The contract was for a one year period, and

contemplated annual renewal on the basis of performances.

3. It is not in dispute that the petitioner's contractual services were continuously renewed on the basis of his performance, year after year, till it was regularised by order dated 5th March, 2008, with effect from 17th May, 2007.
4. From the order of regularisation it is apparent that the post of Medical Technologist (ECG) was created under the Medical Technologist Cadre. Pursuant to an order No. HF/D/MS/697/W-64/06 dated 26th December, 2007, the petitioner's services were regularised on the said post, and he was directed to act until further orders at his place of posting.
5. The petitioner attained the age of superannuation on 31st December, 2015. He was expecting pensionary benefits which was denied to him because as per the department/government the petitioner did not have the requisite qualifying services for the purposes of grant of pensionary benefits, which according to them is short by one year, four months and fifteen days (1year 4 months and 15 days). According to them the DCRB Rules requires a minimum of ten years of service to qualify for grant of pensionary benefits. Taking into consideration the petitioner's services only with effect from 17th May, 2007 that is the date on

which the petitioner was regularized on the post, they found a deficiency in the qualifying service.

6. The petitioner on the other hand contended that he had discharge the duties of the very same post as a temporary employee on contractual basis for seven years six months twelve days prior to his regularisation. Only when his services were found to be worthy of regularisation he was regularised with effect from 17th May, 2007. He, therefore, relied upon Rule 17 of the DCRB Rules to contend that he was entitled to counting of the services rendered as a temporary employee. Rule 17 of the DCRB Rules reads as follows:

“17. Qualifying service – Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the office to which he is first appointed either substantively or in an officiating or temporary capacity.”

7. Relying on this provision the petitioner claimed that his qualifying service was to commence from the date he took charge of the office of M.T.(ECG) in a temporary capacity, that is with effect from 5th November, 1999.
8. The petitioner has further placed reliance on a memorandum issued by the State Government which is dated 22nd March, 1973. It is submitted that the memorandum has been issued as a measure for liberalising and simplifying the grant of

pension. The same contemplates that the whole time continuous services rendered in contingent/work charged establishment is to be allowed as service qualifying for pension; subject, however, to the condition that the services rendered under any establishment wherein contributory provident fund benefits were allowed will not count unless the government contribution including the interest accrued therein is refunded in full to the government. Abiding by this stipulation contained in the memorandum dated 22nd March, 1973 the petitioner claimed that he was entitled to counting of the past temporary services being seven years six months twelve days (7 years, 6 months and twelve days) for the purposes of qualifying service for grant of pension. If this period were to be added to his existing services of eight years, seven months and fifteen days (8 years 7 months and 15 days) post regularisation the petitioner would fulfil the requisite ten years qualifying service.

9. It is thus submitted that in view of the DRCB Rules, and the memorandum dated 22nd March, 1973 the petitioner is entitled to counting of his earlier temporary services on a contractual basis on the same post for the purposes of qualifying service and grant of pension as a consequence thereof.

10. The learned counsel for the petitioner has further submitted that the past service has been counted by the authorities themselves for the purposes of determining his *inter se* seniority with others, but the same is sought to be excluded when it comes to the issue of qualifying service. The authorities, therefore, have not only acted contrary to the DCRB Rule and memorandum dated 22nd March, 1973 but have also acted arbitrarily. Therefore, the State Administrative Tribunal should have directed the authorities to grant the pensionary benefits after including the period of temporary service (seven years six months twelve days).
11. The petitioner had placed reliance on the decision of a coordinate Bench of this Court in the case of ***Nemai Ch. Chatterjee and Others -Vs.- State of West Bengal and Others*** reported in **(2014) 3 CalHCN 608** wherein under similar circumstances this Court directed for counting of the past temporary services rendered by the employee therein for the purposes of grant of pensionary benefits. The Tribunal, however, ignoring the judgment in the case of ***Nemai Ch. Chatterjee and Others (supra)*** has relegated the petitioner to the authorities for considering such claim of the petitioner. The order in so far as it relegates the petitioner to the authorities is in abdication of the

duties cast upon the State Administrative Tribunal to adjudicate the issue with respect to the petitioner's condition of service.

12. Prior to the Tribunal's impugned order dated 22nd December, 2022 passed in O.A. 675 of 2019, the issue had already been considered by the State Authorities who had rejected the claim of the petitioner. The Tribunal has taken note of the legal position in view of the decision of this Court in the case of ***Nemai Ch. Chatterjee and Others (supra)***, supporting the petitioner's claim, however, having taken note of the settled legal position, the Tribunal has relegated the petitioner to the authorities once again which is nothing more than an exercise in futility and a clear abdication of the jurisdiction and duties cast upon the Administrative Tribunal.

13. The learned counsel for the State on the other hand submits that the petitioner has worked as a contractual employee. The period of contractual services (seven years six months twelve days) cannot be termed as "temporary services". Since Rule 17 of the DCRB Rules mentions counting of only "temporary services" for the purposes of qualifying service the petitioner cannot seek any benefit under Rule 17 of the DCRB Rules. By making such submission the learned counsel has attempted to draw a distinction between the facts

arising for consideration before the coordinate Bench in the case of ***Nemai Ch. Chatterjee and Others (supra)***, than with the facts and circumstances of the present case.

14. It is submitted that in the present case the petitioner was not a temporary employee prior to 17th May, 2007. It is only on this date that the petitioner's services were regularised and, therefore, the petitioner's prayer for counting of the services prior thereto are untenable under the Rules. The petitioner, therefore, is also not entitled to benefits in terms of the coordinate Bench decision in the case of ***Nemai Ch. Chatterjee and Others (supra)*** since the facts are essentially different.

15. We have considered the rival submissions and gone through the DCRB Rule, memorandum dated 22nd March, 1973 as well as decision of the coordinate Bench in the case of ***Nemai Ch. Chatterjee and Others (supra)***.

16. We find that the fact that the petitioner was appointed after an advertisement dated 5th November, 1999 on the post of M.T.(ECG) is not in dispute. It is also not in dispute that the contractual appointment was whole time and continuous till regularisation of the petitioner by an

order dated 5th March, 2008, with effect from 17th May, 2007.

17. Despite these admitted facts, the learned counsel for the State has submitted that the petitioner was in contractual service, and not holding a “temporary service” and, therefore, cannot be extended the benefit of the Rule 17 of the DCRB Rules.
18. The Court made a pointed query whether the temporary service/employee has been defined in the DCRB Rules or not. No such provision could be pointed out with reference to the DCRB Rules defining the term “temporary employee”.
19. We find that the petitioner was appointed on a contractual basis on very same post, on which he has subsequently been appointed on regular basis. The fact that the services were whole time and continuous is not in dispute. The Court is thus required to see whether the factum of petitioner’s earlier appointment on contractual basis would disentitle him to the benefits under the DCRB Rules read with the Memorandum dated 22nd March, 1973. Since we have already quoted above, the relevant extract of the DCRB Rules, we also consider it apposite to quote relevant extract of the memorandum dated 22nd March, 1973. Clause 1, 1(iii), and 1(iv) of this memorandum reads:

“Government had for some time past under consideration the question of taking certain measures for further liberalisation and simplification of the rules regulating the grant of pension. After careful consideration of the matter in all its aspects, the Governor has been pleased to decide that the following additional benefits in respect of pension will be given:-

.....

.....

(iii) Temporary Government servants rendering continuous service for ten years or more will be granted pension and gratuity as admissible to permanent Government servants under the normal rules.

(iv) Entire whole-time continuous service rendered in contingent/work charged establishment (except piece-rate or daily rated service) will be allowed as service qualifying for pension subject to the condition that the service rendered under any establishment wherein contributory provident fund benefits are allowed, will not count unless the Government contribution including interest accrued thereon is refunded in full to Government.”

20. In absence of any provision defining the expression

“temporary employee” the Court while considering whether a service is as a temporary employee or not is to be guided by the provision in the Rule 17 of the DCRB Rules, extracted above as well as the memorandum dated 22nd March, 1973, also quoted above. A harmonious reading of Rule 17 of the DCRB Rules and Clause 1(iii) and (iv) of the memorandum dated 22nd March, 1973 makes it more than obvious that the qualifying service is to commence from the date an employee takes charge of the office to which he is first appointed either substantively or in a officiating capacity or “temporary capacity”. The requisites of such temporary service under Rule 17 of the DCRB Rules are specified in the memorandum dated 22nd

March, 1973 wherein it is specified that the entire whole time continuous service rendered in contingent/work charged establishment will be allowed as service qualifying for pension, subject, however, to certain conditions specified therein. The expression temporary capacity used in Rule 17 of the DCRB Rules has further been elaborated in the memorandum dated 22nd March, 1973 to include services rendered in contingent/work charged establishment. The submission of the learned State counsel, therefore, that on account of the petitioner not being a “temporary employee” is without any substance a temporary employee. As per the harmonious reading of the Rule and the memorandum the expression “temporary employee” includes employees serving in contingent/work charged establishment subject, however, to the requirement that the services rendered are whole time and continuous. It is not in dispute that the petitioner’s services rendered on a contractual basis was entirely whole time and continuous till the date he was regularised. Thus being the facts we find that there is no basis to exclude the petitioner from the benefits contemplated under Rule 17 of the DCRB Rules read with the memorandum dated 22nd March, 1973.

21. In this connection we hasten to add that a coordinate Bench of this Court in the case of ***Nemai Ch. Chatterjee and Others (supra)*** has in paragraph 14 considered a similar submission by the State counsel appearing in the said proceedings, when it was submitted that the petitioner therein could not be considered as a temporary employee because the services rendered by the petitioner was not against a sanctioned post. Considering similar endeavour made in those proceedings the coordinate Bench in paragraph 14 has held as follows:

“14. It has been argued on behalf of the Government that unless the Petitioners were appointed temporarily on sanctioned posts, the question of paying pension to them does not arise. It has been urged further that there can be no temporary service of an employee in a post unless that post is sanctioned. This submission on behalf of the government is, in our opinion, untenable. An employee is appointed on a temporary basis depending on the exigencies of work. The Petitioners in this case, though appointed on a temporary basis as Seasonal Belders, were accorded a regular scale of pay and all allowances and benefits applicable. These Petitioners were employed continuously in the Irrigation Department of the Government of West Bengal. Some of them have rendered continuous service for more than thirty years. The DCRB Rules do not in any manner exclude the entitlement of temporary employees to pension, provided their temporary service is followed immediately, without a break, by permanent service. Therefore, it is not possible to accept the submission made on behalf of the Government. The argument that the Petitioners ought to have rendered service in sanctioned posts is also untenable as temporary employees are recruited depending upon the exigencies of work. It would be inequitable to exclude the period rendered by the Petitioners as temporary employees for the computation of qualifying service and consequently pension, when the Rules do not exclude this period. In fact, the Rules and the Memo dated 22.03.1973 issued by the Finance Department specifically include the period rendered by an employee as a temporary employee for the purpose of counting the qualifying service, except where the temporary service is rendered in an establishment

where Contributory Provident Fund benefits are paid. However, this exception does not become effective if the Government's contribution to the Fund and the interest thereon is refunded to the Government."

22. From the decision in the case of **Nemai Ch.**

Chatterjee and Others (supra), therefore, it is evident that a temporary employee is recruited depending upon the exigencies of work. In the instant case the exigency of work requiring the recruitment of petitioner was the fact that the government was desirous of carrying on the project hospitals under the State Health System Development Project – II. It was in this exigency of work that the petitioner was appointed on a contractual basis/temporary basis. This has further been acknowledged, appreciated and regularized with effect from 17th May, 2007 that is the date on which the post has become sanctioned and created. We, therefore, find no substance in the argument of the learned counsel for the State that the petitioner was not holding a temporary service or was not a temporary employee.

23. It is also not in dispute that the said period has been counted for the purposes of determining seniority of the petitioner. Having considered the rule position, the memorandum dated 22nd March, 1973 as well as the decision of the coordinate Bench we find that the Tribunal ought to have

directed the State Authorities to count the temporary services of the petitioner for seven years six months twelve days for the purposes of grant of pensionary benefits. The Tribunal, however, has abdicated its authority and jurisdiction by relegating the matter again to the very same authority who has already rejected it and whose order was subject matter before the Administrative Tribunal. Such order of the Tribunal dated 22nd December, 2022 is, therefore, set aside.

24. We also quash the decision of the director dated 27th June, 2019.

25. We direct the State Authorities to count the petitioner's temporary service of seven years six months twelve days as qualifying service for the purposes of grant of pension under the DCRB Rules and to extend the due and admissible pensionary benefits, in accordance with law.

26. It is expected that the entire exercise shall be completed by the Authorities within eight weeks from the date of receipt of this order.

27. Needless to say that the petitioner would be required to abide by the condition contained in Clause (iv) of the memorandum dated 22nd March, 1973 if he has received any benefit of contributory pension.

28. The writ petition stands allowed.

29. Application being CAN 2 of 2023 is also disposed of.

(Madhuresh Prasad, J.)

(Supratim Bhattacharya, J.)