

**Sharda Devi Vs. the State of Bihar and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/123217](http://sooperkanoon.com/123217)

**Court :** Patna

**Decided On :** Dec-22-2006

**Judge :** Barin Ghosh, J.

**Acts :** Bihar Service Code - Rules 38, 48 and 83; [Constitution of India](#) - Article 311

**Appeal No. :** C.W.J.C. No. 5978 of 2002

**Appellant :** Sharda Devi

**Respondent :** The State of Bihar and ors.

**Advocate for Def. :** Ravi Ranjan, JC to SC 11

**Advocate for Pet/Ap. :** Purushottam Kr. Jha and Chakrapani, Advs.

**Prior history :** Barin Ghosh, J. 1. Rule 38 of the Bihar Service Code defines 'Permanent post' as a post carrying a definite rate of pay and sanctioned without time limit; whereas Rule 48 of the said Code defines 'Temporary post' as a post carrying a definite rate of pay and sanctioned for a limited time. That is the only difference in between a permanent post and a temporary post. As a holder of a permanent post is entitled to protection of Article 311 of the Constitution of India so is a holder of temporary

**Judgement :**

**Barin Ghosh, J.**

1. Rule 38 of the Bihar Service Code defines 'Permanent post' as a post carrying a definite rate of pay and sanctioned without time limit; whereas Rule 48 of the said Code defines 'Temporary post' as a post carrying a definite rate of pay and sanctioned for a limited time. That is the only difference in between a permanent post and a temporary post. As a holder of a permanent post is entitled to protection of Article 311 of the [Constitution of India](#) so is a holder of temporary post. In this connection, reference may be had to the judgments of the Hon'ble Supreme Court rendered in R.S.S. Sial v. State of Uttar Pradesh : (1974)ILLJ513SC and Ras Bihari v. Haryana Agricultural University : AIR 1987 SC1833 .

2. Whether the post is a temporary post or a permanent post, the same may carry either a fixed pay or pay at time scale. If the post carries fixed pay, the incumbent is entitled to fixed pay only and nothing more. If the post carries pay at a time scale, the holder thereof is entitled to annual increments. Rule 83 of the said Code makes it clear that an increment shall ordinarily be drawn as a matter of course unless it is withheld.

3. In the instant case, the petitioner was appointed as a temporary Woman Warder on 1st August, 1983 on compassionate ground for her husband died in harness. The post to which the petitioner was appointed carried pay at a time scale. She was, however, not accorded yearly increments. There was no decision of the appointing authority to withhold any of the increments of the petitioner.

4. The appointment letter as contained in Annexure-1 to the Writ Petition has not been denied in the counter affidavit. In the counter affidavit, an office order has been brought on record which suggests that the temporary appointment of the petitioner could be brought to an end at any point of time. That the temporary appointment of the petitioner could be brought to an end at any point of time was not mentioned in Annexure-1 to the Writ Petition. In those circumstances, no reliance can be placed on an additional clause incorporated in Annexure-A to the counter affidavit which did not see its light at any point of time until the counter affidavit was filed. In any event when the petitioner was appointed as a temporary employee, her services could only be brought to an end after complying with the

provisions contained in Article 311 of the Constitution. It does not appear that the services of the petitioner were brought to an end by initiating proceedings as directed by Article 311 of the [Constitution of India](#). It, however, appears that contrary to the provisions contained in Article 311 of the [Constitution of India](#), for some time, the petitioner was off-loaded and thereupon re-engaged. As aforesaid, this is not permissible. Off-loading of the petitioner in the manner, as has been done in the instant case, having no legal sanction, it must be deemed that the petitioner continued to serve since 1st August, 1983 uninterruptedly. There being no decision to withhold any increment of the petitioner in terms of Rule 83 of the said Code, it is declared that the petitioner was entitled to yearly increments right from the date of her appointment as a temporary employee, i.e., from 1st August, 1983.

5. It is surprising that after having had appointed the petitioner as a temporary employee, her employment was brought to an end ultimately in the year 1994 and, that too, without taking any step under Article 311 of the [Constitution of India](#) and subsequently she was purported to be engaged on daily wage basis. The action of bringing to an end the temporary appointment of the petitioner being contrary to the constitutional mandate, the same is declared to be illegal. It should, therefore, be deemed that the petitioner continued to remain a temporary employee and not a daily wager.

6. Furthermore, Annexure-1 to the Writ Petition clearly demonstrates that the petitioner was appointed on compassionate ground. According to the policy adopted by the State of Bihar, compassionate appointments can only be given when the appointee is a dependent of an employee of the State, who has died in harness. There is no other policy of the Government on the basis whereof any compassionate appointment can be given. The presumption, therefore, would be that inasmuch as an employee of the Government died in harness, the petitioner, being a dependent of such employee, obtained the subject appointment. The policy pertaining to giving of such employment makes it abundantly clear that compassionate appointment should only be given to sanctioned posts and accordingly question of giving appointment on ad hoc basis to the petitioner did never arise.

7. The policy of the Government also directs when and how a temporary employee of the Government would become permanent. It appears that on 30th January, 1996, the petitioner was made a permanent employee of the State with effect from 30th November, 1990.

8. In those circumstances, it is declared that the petitioner was a temporary employee of the State with effect from 1st August, 1983 until 29th November, 1990 and she served as such without any interruption and since 30th November, 1990 she became a permanent employee of the State. The petitioner has not been given increments to which she was otherwise entitled to for having been appointed in a post carrying pay on time scale from 1st August, 1983 until 30th November, 1990. Let those increments, to which the petitioner was entitled to be given to her and her pay and subsequent increments be revised accordingly. In as much as the petitioner was working since 1st August, 1983 as a temporary employee, and such temporary employment of the petitioner stood converted into permanent employment since 30th November, 1990, for all practical purposes including for the purpose of counting the period of service for retirement, it must be deemed that the petitioner started discharging her duties in the post in question on and from 1st August, 1983, and accordingly unless, it is provided in any Government circular that the period of temporary employment will not be counted for the purpose of according time bound promotion, the employment of the petitioner shall be counted from 1st August, 1983, but if the policy of the Government directs that such period should be excluded then the period of service of the petitioner should be counted from 30th November, 1990, and on the basis thereof, the petitioner's claim for time bound promotions shall be considered. Let such consideration be made within a period of two months from today.

9. It is made clear that unless the Government has consciously decided that the period of employment in temporary post will not be counted for time bound promotions, for the reasons already recorded above, the period of service rendered by the petitioner in the post of Woman Warder shall be counted from 1st August, 1983 for the purpose of granting her time bound promotions.

10. This disposes of the writ petition.

