

GAHC020000862020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/39/2020

HANPHUBA YIMCHUNGER
S/O LT. MAHJIH YIMCHUNGER,
R/O KEOSSORE VILLAGE,
TUENSANG, NAGALAND

VERSUS

THE STATE OF NAGALAND AND 4 ORS
THROUGH THE CHIEF SECRETARY,
GOVT. OF NAGALAND, NAGALAND, KOHIMA

2:THE SECRETARY,
DEPT. OF PERSONNEL AND ADMINISTRATIVE REFORMS
NAGALAND KOHIMA

3:THE ENGINEER-IN-CHIEF
NPWD NAGALAND KOHIMA

4:THE CHIEF ENGINEER
PWD(R AND B) NAGALAND KOHIMA

5:THE EXECUTIVE ENGINEER
PWD TUENSANG CENTRAL DIVISION
TUENSANG NAGALAND

Advocate for the Petitioner : MOA JAMIR

Advocate for the Respondent : GOVT ADV NL

**BEFORE
HON'BLE MR. JUSTICE KAKHETO SEMA**

JUDGMENT & ODER (CAV)

Date : 18-07-2023

Heard Mr. Moa Jamir, learned counsel for the petitioner and Ms. Sepong Chang, learned Government Advocate for the State respondents.

2. The present petition has been filed seeking for a direction to retrospectively regularize the work-charged service of the petitioner as Sectional Assistant in the office of the Sub-Divisional Officer, PWD, Tuensang, under the establishment of the Executive Engineer, (R&B), Tuensang Central Division, Nagaland, to entitle the petitioner for receiving pensionary benefits.

3. The case in brief is that vide order dated 01/07/1978, the petitioner was appointed as work-charged (w/c) Chowkidar in the scale pay of Rs. 140-3-226-4-250/- P.M. Thereafter, by the order dated 14/05/1985 issued by the respondent No. 5 i.e. Executive Engineer, PWD Central Division Tuensang, the petitioner was appointed/promoted as W/C Mahurrur under the establishment of the SDO, PWD, Tuensang in the scale pay of Rs. 425-9-542-12-615-EB-14-670-15-730/- P.M. plus inner line compensatory allowance of 25% of basic pay subject to maximum of Rs. 400/- P.M. and all other allowances as are admissible from time to time with effect from the date of joining the post. Further, by the order dated 02/04/1986, issued by the respondent No. 5, the petitioner was reappointed as W/C Sectional Assistant under the establishment of the SDO, PWD Tuensang in the same scale pay of Rs. 425-9-542-12-615-EB-14-670-15-730/- P.M. plus other allowances as are admissible from time to time with effect from the date of joining the post. Thereafter again, by the order dated 28/07/1986, issued by the respondent No. 5, the petitioner was transferred and posted under SDO, PWD Tuensang on the Hilepong-Chessore Road.

4. That the petitioner after serving as W/C Sectional Assistant for more than 18 years submitted a representation to the respondent No.5 for regularization of his service. The respondent No.5 accordingly by the letter dated 21/05/2003 forwarded the application of the petitioner to the respondent No. 4 i.e. the Chief Engineer PWD (R&B), Nagaland, Kohima, stating therein that the petitioner has been serving as W/C Sectional Assistant for more than 18 years and therefore, to favourably consider his regularization in service. The petitioner's case for regularization in service was however not considered. Thereafter, again, after serving the department for about 34 years, the petitioner submitted another representation for regularization in service to the respondent No.5 who in turn by the letter dated 10/09/2012 forwarded the application to the respondent No.3, however, even the second representation for regularization did not evoke any response.

5. That by the order dated 02/07/2013, issued by the respondent No.5, the petitioner was released from service on superannuation on completion of 35 years of service with effect from 30/06/2013.

6. That subsequent to the retirement of the petitioner from service, the petitioner on 28/10/2019 submitted the joint representation to the respondent No. 3, 4 & 5 for regularization of service post-retirement for availing pensionary benefits, however, the same was also not considered. The petitioner has therefore filed the present writ petition.

7. Mr. Moa Jamir, learned counsel for the petitioner submits that since the petitioner has rendered 35 years of continuous service, the State being a model employer should have considered the case of the petitioner for regularization in service. The learned counsel also submits that the petitioner's regularization in service should have been considered under the scheme brought out in the O.M dated 22/09/2004 which was holding the field during the relevant point of time. It is further submitted that similarly situated employees were considered for regularization in service and therefore, non consideration of the case of the petitioner for regularization in service under the O.M dated 22/09/2004 is unfair and discriminatory. It is also submitted that the State has discriminated the petitioner by taking undue advantage of

the fact that the State and the petitioner were not on equal bargaining position insofar as the service of the petitioner was concerned. With regard to the delay in approaching the Court, it is submitted that it was due to illiteracy and poverty of the petitioner. In support of his submission, the learned counsel for the petitioner has relied in the case of the State of Gujarat & Others -versus- Talsibhai Dhanjibhai Patel, rendered by the Hon'ble Supreme Court in Special Leave to Appeal (C) No. 1109/2022 and in the case of the State of Nagaland & 2 Others -versus- Shri. Khruvotso, rendered in W.A No. 15(K)/2013, by the Hon'ble Division Bench of this Court by order dated 06/10/2015.

8. Ms. Sepong Chang, the learned Government Advocate for the State respondents by referring to the affidavit-in-opposition filed by the State submits that the O.M dated 22/09/2004 contains the policy and the scheme for regularization of work-charged employees and in terms of which it is the senior most eligible work-charged employee who is considered for regularization in the relevant category against clear sanctioned vacancy and not otherwise. The learned Government Advocate submits that there are thousands of work-charged employees in the department and out of which hundreds of work-charged employees similarly circumstanced as the petitioner were also released from service without having their service regularized due to non availability of vacancies in their respective category. It is further submitted that the State Government has not framed any policy for considering the ex-post facto regularization of work-charged employees in service and therefore, the relief sought for by the petitioner seeking regularization in service post-retirement cannot be considered by the Government. It is also submitted that the present writ petition has been filed only after a lapse of more than 6 years from the date of the retirement of the petitioner and no grounds/reasons has been stated explaining the delay, the present petition is therefore liable to be dismissed only on the grounds of delay and laches.

9. In the affidavit-in-reply, the petitioner, while admitting that, though under the scheme brought out in the O.M dated 22/09/2004, it is only the senior most work-charged employees who can be considered for regularization in service against regular vacancies, however submits that having utilized the service of the petitioner

continuously for 35 years, the State respondents should not be allowed to take a stand that the petitioner and similarly situated persons could not be considered for regularization in service due to non availability of regular vacancies. Furthermore, the petitioner while agreeing that there is no specific scheme or policy of the Government for consideration of ex-post facto regularization of service in the State, there are two Office Memorandum for regularization of work-charged and casual employees namely, the O.M dated 22/09/2004 and the O.M dated 17/03/2015 and therefore, it was incumbent upon the State respondents to have considered the case of the petitioner for regularization, while in service, under anyone of the said scheme. It is further the case of the petitioner that this Hon'ble Court in a catena of decision has directed the State respondents to regularize the service of the work-charged employees even after their retirement.

10. Heard the learned counsel for the parties and perused the pleadings. There is no dispute that the petitioner had served the department as work-charged employee on scale pay for 35(thirty five) years, prior to retirement from service. The issue which however requires the consideration of this Court is as to whether the petitioner has a right in law to be considered for regularization after his retirement from service so to entitle the petitioner to avail the pensionary benefits.

11. To regulate appointment and conditions of service of persons appointed as work-charged and casual employees in the State of Nagaland "*The Nagaland Work Charged and Casual Employees Regulation Act, 2001*" has been enacted. Section-2 d of the Act defines '*Work-charged employee*' to mean an employee engaged without sanctioned post under work-charged establishment. Section 12 of the Act, 2001 then provides for the '*scheme for absorption of service*' and stipulates that the State Government may draw up a scheme for absorption of service of work-charged employees into regular Government service.

12. The Government of Nagaland in the department of Personnel & Administrative Reforms (Administrative Reforms Branch), on the recommendation of the committee for regularization of work-charged employees in the State has issued the O.M No. AR-3/Gen-67/2001(Pt) dated 22/09/2004 containing the policy and scheme for

regularization of service of work-charged employees serving under the various department of the State Government. The relevant criteria for regularization as stipulated in the O.M dated 22/9/2004 inter-alia provides as follows;

“(i) Each department having work-charged employees shall maintain a list of work-charged employees in various categories in order of their length of service.

(ii) Regularisation of work-charged employees will be done against available regular vacancies.

(iii) 50% of all regular vacancies of similar nature arising in a year will be reserved for regularization of work-charged employees, and the remaining 50% will be filled up as per normal rules of recruitment.

(iv) Work-charged employees will have the right to be considered first for regularization against 50% of all future vacancies of similar nature in the department for which they possess the requisite qualification. Such regularization will be considered on the basis of seniority-cum-merit. This means that the senior most work-charged employee in the relevant category will be regularized subject to his/her fitness for the vacant post.

.....”

13. Thereafter, another scheme for regularization and absorption of work-charged and casual employees and Revision of Pay/Wages was formulated by the Government by issuing the O.M No. AR-3/GEN-201/2009 dated 17/03/2015.

14. It is the case of the petitioner that he was fit to be considered for regularization in service in terms of the O.M dated 22/09/2004 which was holding the field when the petitioner was in service. The O.M dated 22/09/2004 was introduced by the Government when the petitioner was in the work-charged service of the department and the said O.M continued to hold the field for regularization of work-charged employees even when the petitioner retired from service on 30/06/2013. The

subsequent O.M dated 17/03/2015 came into existence only after the petitioner retired from service and is therefore, in the considered opinion of this Court, not relevant for the present case. The petitioner however could not be regularized under the O.M dated 22/09/2004 while in service, since the petitioner failed to fulfill the criteria as stipulated in the scheme. A reading of Clause-(ii), (iii) & (iv) of the O.M dated 22/04/2009 reveals that regularization of work-charged employees can be done only against the 50% regular vacancies arising in a year which is reserved for work-charged employees and it is only the senior most work-charged employee in the relevant category who can be considered for regularization in service subject to his/her fitness for the vacant post. It is therefore clear that under the O.M dated 22/09/2004, putting in 35 years of service, by itself, is not the criteria for enabling a work-charged employee to be regularized in service but it must also be demonstrated that he/she is the senior most work-charged employee who is eligible and has a right to be considered for regularization to the regular vacant post reserved for the work-charged employee. In the present case, the petitioner has not been able to show that he is the senior most work-charged employee in the relevant category who has been denied regularization in service against the vacant post meant for work-charged employees. It is also not the case of the petitioner that the other work-charged employees, junior to the petitioner has been regularized in service ignoring the case of the petitioner. Moreover, the stand taken by the State respondents that there are thousands of work-charged employee in the department and due to which hundreds of work-charged employees similarly situated as that of the petitioner were released from service without having their service regularized due to non-availability of vacancies in the department, cannot be ignored nor lost sight of. Furthermore, though by the order dated 02/07/2013, the petitioner was retired from service w.e.f. 30/06/2013 on completion of 35 years of service, the petitioner has filed the present petition only on 05/03/2020 after a lapse of more than 6 years from the date of retirement and no reasons has been given explaining the delay except for making a bare statement that the petitioner could not approach the Court in time due to illiteracy and poverty. It is therefore apparent that the petitioner has not only failed to explain the delay but has been very casual in approaching the Court with the present petition.

15. In the case of the *State of Nagaland & Others -versus- Nishevi Achumi*, reported in 2022 SCC Online SC 818, the Hon'ble Supreme Court in a similar case quashed and set aside the order passed by the Hon'ble Division Bench confirming the judgment & order passed by the learned Single Judge directing the appellant State to regularize the service of the deceased husband of the respondent one day earlier to his death and thereafter, to pay the family pension to the respondent. The Hon'ble Supreme Court in the said *Nishevi Achumi* (supra) held as follows;

“7. Having heard learned counsel for the State and considering the submissions made on behalf of the State and having gone through the judgment and order passed by the learned Single Judge confirmed by the Division Bench, we are of the firm opinion that the High Court has committed a grave error in directing the appellant to regularize the services of the deceased employee one day prior to his death.

8. It is required to be noted that the deceased employee died in the year 2005. During his lifetime he never claimed any regularization. That the respondent herein - original writ petitioner - wife of the deceased employee claimed the regularization after a period of twelve years from the death of the deceased employee. At the time of the death of the deceased employee he was not entitled to regularization as he was much below in the list of the worked charge employees whose services were to be regularized. Under the Regularization Policy the services of the work charge employees were required to be regularized as per the seniority and as and when the vacancy arises. The services of the other work charge employees even who were senior to the deceased employees were regularized in the year 2009 i.e. after the death of the deceased employee. Despite the above, the High Court has directed the State to regularize the services of the deceased employee one day prior to his death, which otherwise his services were not required to be regularized as his turn had not come and he was much below in the seniority list.

9. Considering the aforesaid facts and circumstances, the impugned

judgment and order passed by the High Court is unsustainable and the same deserves to be quashed and set aside.

10. In view of the above and for the reason stated above present appeal is allowed. The impugned judgment and order passed by the Division Bench of the High Court as well as the learned Single Judge is hereby quashed and set aside. Consequently, the original writ petition filed by respondent - wife herein stands dismissed. However, in the facts and circumstances of the case there shall be no order as to costs."

16. In a similar case recently decided in W.A No. 27/2022 (*State of Nagaland & Others -versus- Shri. Alemba*), vide judgment & order dated 08/06/2023, the Hon'ble Division Bench of this Court relying in the case of Nishevi Achumi (*supra*) had allowed the appeal filed by the State by setting aside the order passed by the learned Single Judge directing the State to regularize the service of the respondent/petitioner a day before the superannuation to allow pensionary benefits to the respondent/petitioner. The Hon'ble Division Bench in the said case has held as follows;

"11. The ratio laid down in the case of Smti. Magi H Desai (supra) as well as Nishevi Achumi (supra), in our opinion, squarely covers the present case. It is no doubt correct that the respondent has rendered more than 26 years of service as a work-charged employee and therefore, as a model employer, the State was duty bound to come up with a policy decisions and/or schemes for regularization of service of such work-charged employees. However, as would be evident from the facts alluded, the Government of Nagaland did come up with not only one but as many as two such schemes. Unfortunately, the respondent did not meet the requirements of either of the schemes. This is the reason why his service was not regularized. Therefore, it cannot be said that the State has meted out a discriminatory treatment to the respondent by declining his request for regularization in service.

12. It is also to be noted herein that the respondent has never made a prayer for regularization of his service prior to his retirement. The representation was submitted only after he had retired from service and

that too only for the purpose of receiving pension. The matter could have been considered from a different angle had the respondent made the requirement of the scheme and had approached this Court seeking regularization prior to his retirement. At this stage, consideration of the prayer made by the respondent may called for creation of a supernumerary post for regularization of his service which would not be permissible in the fact of this case. In the case of UOI & Ors. -versus- Ilmo Devi & Anr., reported in 2021 SCC Online SC 899, the Hon'ble Supreme Court has held that the High Court cannot direct the State to sanction and create posts for regularization of part-time employees. Framing of any scheme is not the function of the Court but is the sole prerogative of the Government. Even creations and/or sanction of post are also the sole prerogative of the Government and the High Court in exercise of the powers under Article 226 of the Constitution cannot issue mandamus to that effect."

17. In the **Secretary, State of Karnataka & Others -versus- Umadevi (3) & Others**, reported in **(2006) 4 SCC 1**, the Hon'ble Supreme Court has held that the High Court acting under Article 226 of the Constitution should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. It was also clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. In paragraph-45 of the said judgment, it was also held as follows;

"45. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the

nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain--not at arm's length--since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for

public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in [Article 14](#) of the Constitution of India.”

18. Furthermore, in the case of **State of Manipur & Another -versus- KSH. Moirangninthou Singh & Others**, reported in **(2007) 10 SCC 544**, the Hon’ble Supreme Court while dealing with a case, where the learned Single Judge of the High Court, had directed the State Government to regularize the service of the writ petitioners and to grant them all service benefits including pensionary benefits as are payable to Government employees holding civil post, and upheld by the Division Bench, held that in view of the Constitution Bench judgment in *Secy. State of Karnataka v. Umadevi (3)*, no direction can be given for regularization of service and as the Court does not have any power to direct regularization, it follows that it has no power to direct grant of benefits payable to regular employees.

19. It is therefore clear that the High Court acting under Article 226 of the Constitution of India does not have the power to direct regularization and/or absorption in service unless the recruitment itself was made regularly and in terms of the constitutional scheme. In the present case, since the appointment of the petitioner as work-charged on fixed pay was not in accordance with the constitutional scheme, no direction can be issued to regularize the service of the petitioner with retrospective effect so as to enable the petitioner to claim pensionary benefits. To put it differently when the petitioner’s service could not be regularized during the lifetime of the petitioner’s work-charged service as he did not fulfill the conditions stipulated in the scheme for regularization, it would be equally impermissible to regularize the service of the petitioner after retirement only for entitling the petitioner to avail the pensionary benefits.

20. The petitioner has relied in *Talsibhai Dhanjibhai Patel (supra)* where the Hon’ble Supreme Court has upheld the decision of the High Court directing the State to pay pensionary benefits to the respondent who has retired after rendering more than 30 years of adhoc service and also in the case of *Shri. Khruvotso (supra)* where the Hon’ble Division Bench of this Court has inter-alia agreed with the view taken by the

learned Single Judge that after rendering 30 years of uninterrupted service, the State cannot denied pensionary benefits to the respondents. The facts of the present case is different from those relied upon by the petitioner. The present case deals with the issues as to whether the petitioner who is a work-charged employee fulfills the criteria to be regularized in service as per the policy and the scheme formulated by the Government for regularization of service of work-charged employees under the O.M dated 22/09/2004, which is not so, in the cases relied upon by the petitioner. Moreover, the Hon'ble Supreme Court in Nishevi Achumi (supra) has inter-alia held that under the regularization policy the service of the work-charged employees is required to be regularized as per the seniority and as and when vacancy arises and not otherwise. The cases therefore relied upon by the petitioner, in the considered opinion of this Court, is not relevant for deciding the present case.

21. Furthermore, on the issue raised by the petitioner that when similarly situated employees has been considered for regularization under the O.M dated 22/09/2004, non consideration of the petitioner's case for regularization is unfair and discriminatory. The petitioner in the present case has not impleaded nor brought on record any of those similarly circumstanced employees who has been regularized in service by giving effect to the O.M dated 22/09/2004, it will therefore not be proper for this Court to examine the case of those person not impleaded in the present petition vis-à-vis the petitioner. In this connection, it is relevant to cite the case of **Chandigarh Administration & Another -versus- Jagjit Singh & Another**, reported in **(1995) 1 SCC 745**, wherein the Hon'ble Supreme Court has held as follows;

“8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in

favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law--indeed, wherever it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law --- but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and a similar relief can be given to the petitioner if it is found that the petitioners' case is similar to the other persons' case. But then why examine another person's case in his absence rather than examining the case of the petitioner who is present before the court and seeking the relief. Is it not more appropriate and convenient to examine the entitlement of the petitioner before the court to the relief asked

for in the facts and circumstances of his case than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the case nor is his case. In our considered opinion, such a course---barring exceptional situations-- would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises.)”

22. In the light of the discussions made above, this Court is of the view that the petitioner has not been able to make out the case for enabling this Court to issue directions to the State respondents to retrospectively regularize the service of the petitioner post-retirement.

23. Furthermore, having held that this Court under Article 226 of the Constitution of India does not have the power to direct regularization and/or absorption in service, unless the recruitment itself was made regularly and in terms of the constitutional scheme and also having considered that the petitioner has failed to satisfy this Court that he is eligible to be considered for regularization in service as per the scheme formulated by the Government and therefore, cannot be regularized in service, this Court is of the view that it will be futile to discuss the petitioner's claim for pension and pensionary benefits.

24. There is no merit in the writ petition and the same is accordingly dismissed. No

cost.

JUDGE

Comparing Assistant