

GAHC020004312019



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

Case No. : WP(C) 169/2019

1:YIZANO
PEON (REGULAR),
OFFICE OF THE EXTRA ASSISTANT COMMISSIONER, AQHUNAGA.

VERSUS

1:THE STATE OF NAGALAND AND 8 ORS.
THROUGH THE CHIEF SECRETARY TO THE GOVT. OF NAGALAND, KOHIMA

2:THE COMMISSIONER AND SECRETARY
TO THE GOVERNMENT OF NAGALAND
PERSONNEL AND ADMINISTRATIVE REFORMS DEPARTMENT
NAGALAND
KOHIMA.

3:THE PRINCIPAL SECRETARY
HOME DEPARTMENT
NAGALAND
KOHIMA.

4:THE FINANCE COMMISSIONER
NAGALAND
KOHIMA.

5:THE COMMISSIONER
NAGALAND
KOHIMA.

6:THE DEPUTY COMMISSIONER

DIMAPUR
NAGALAND.

7:THE ADDITIONAL DEPUTY COMMISSIONER
NIULAND
NAGALAND.

8:THE EXTRA ASSISTANT COMMISSIONER
AQHUNAGA
NAGALAND.

9:THE ACCOUNTANT GENERAL
KOHIMA
NAGALAND

Advocate for the Petitioner : I. IMTI LONGCHAR

Advocate for the Respondent : GOVT ADV NL

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

JUDGMENT & ORDER (CAV)

Date : 14-02-2023

Heard Ms. R. Atsula Kips, learned counsel for the petitioner and Ms. S. Mere, learned Addl. Sr. Govt. Advocate for the State respondents. Also heard Mr. N. Mozhui, learned Standing counsel for the respondent No.9.

2. The present writ petition has been filed for payment of regular scale pay and consequential benefits retrospectively w.e.f. 04/07/2011 upto 15/08/2019.

3. The facts of the case in brief are as follows;

i) That by the order dated 06/04/1990 issued by the Office of the Additional Deputy Commissioner, Niuland, Nagaland, the petitioner was appointed as Typist (Contingency) in the fixed pay of Rs. 450/- p.m. w.e.f. 01/04/1990. The appointment was purely on temporary basis terminable at any

time.

ii) Thereafter by the order dated 10/01/2011, issued by the Additional Deputy Commissioner, Niuland, Nagaland, the petitioner, on the recommendation of the Recruitment Board was regularized and appointed as Office Peon in the Office of the Extra Assistant Commissioner, Aghunaqa, in the scale pay of Rs. 4750/- with Grade Pay of Rs. 1300/- p.m. with immediate effect. The appointment was made against the newly created post at Aghunaqa EAC, Hqrs. vide Government Notification No. GAB-4/TSG/103/2008(B) dated 07/10/2010.

iii) That however the Additional Deputy Commissioner, Niuland, issued the order dated 04/07/2011 cancelling the order dated 10/01/2011 by which the service of the petitioner as Peon was regularized. The order dated 04/07/2011 was stated to have been issued in compliance to the letter dated 17/06/2011 written by the Commissioner, Nagaland. The petitioner was however allowed to continue as Contingency Typist in the Office of the Addl. Deputy Commissioner, Niuland on a fixed pay of Rs. 2500/- p.m. as drawn earlier. Thereafter, by the order dated 01/08/2011 issued by the Addl. Deputy Commissioner, Niuland, one Shri. Vikavi Katty was appointed to the post of Peon earlier held by the petitioner.

iv) The petitioner accordingly filed the W.P.(C) No. 153(K)/2013 inter-alia impugning the order dated 04/07/2011 by which the regularization of the petitioner as Office Peon was cancelled and the impugned order dated 01/08/2011 appointing Shri. Vikavi Katty as the Peon in the Office of the Extra Assistant Commissioner, Aghunaqa.

v) The writ petition was disposed by the judgment & order dated 08/12/2015 directing the State respondents to consider the matter in accordance with the guidelines incorporated in the O.M dated 17/03/2011 which provided for recruitment of staffs to the newly created post under the District Administration. The District Recruitment Board constituted in terms of the O.M dated 17/03/2011 was also directed to reconsider the case of appointment of Peon in the Office of the EAC Aghunaqa within a period of 3(three) months from the date of receipt of the certified true copy of the order

and in doing so, the case of the petitioner was also directed to be considered and till such time it was ordered that the appointment of the respondent No.7 as the Office Peon was not be disturbed.

vi) The petitioner thereafter filed the Civil Review Petition No. 1(K)/2016 for review of the judgment & order dated 08/12/2015 on the ground that when W.P.(C) No. 153(K)/2013 was filed the petitioner was not aware of the existence of the notification dated 17/04/1979, issued by the Department of Personnel & Administrative Reforms (Administrative Reforms Branch) by which the selection committee for each districts and each sub-divisions were reconstituted for direct recruitment to all Class-III & IV posts except technical post and it was in the absence of the said notification dated 17/04/1979 that the Court in the writ petition had considered the O.M dated 17/03/2011 and passed the judgment & order dated 08/12/2015. The petitioner accordingly took the ground that the P&AR department being the nodal department the O.M dated 17/03/2011 issued by the Office of the Commissioner, Nagaland could not have overruled the notification dated 17/04/1979 and if the said notification had been considered while deciding W.P.(C) No. 153(K)/2013 the outcome of the case in the said writ petition would have been different. The Hon'ble Court on consideration of the entirety of the matter however dismissed the review petition.

vii) That being aggrieved by the judgment & order dated 08/12/2015 passed in W.P.(C) No. 153(K)/2013 and the judgment & order dated 29/04/2016 passed in Civil Review Petition No. 1(K)/2016, the present petitioner preferred the W.A No. 21(K)/2017 which was disposed by the judgment & order dated 25/08/2019. The findings of the Hon'ble Division Bench which is reflected in paragraph-13, 14 & 15 is reproduced below;

“13. The facts stated above thus shows that the State Government has accepted the constitution of the Recruitment Board vide Notification dated 09.12.2010 in respect of regularization of one Hukato, who was a D.B (Contingency), but was regularized to the newly created post of D.B Grade-II. However, the State Government has not accepted the Meeting Minutes of the Recruitment Board in respect of regularization of the appellant's service, while at the same time accepting the appointment of the

respondent No. 7 as Peon on the basis of the selection made by the same Recruitment Board. The letter dated 17.01.2011, issued by the EAC, Aghunaqa to the Addl. Deputy Commissioner shows that besides all the 3 regularized employees, including the appellant, 3 other persons, who had been directly recruited on the basis of the Meeting Minutes of the Recruitment Board constituted on 09.12.2010 had given their joining reports. Thus, we find that the Government has accepted the decision of the Recruitment Board constituted on 09.12.2010 in respect of its Meeting Minutes dated 17.12.2010, in respect of regularization of one Mr. Hukato, while not accepting the regularization of the appellant and another person. The action of the State respondents is discriminatory and in violation of Article 14 of the Constitution. Accordingly, in view of the above, we hold that the Recruitment Board constituted on 09.12.2010 coupled with the letter dated 10.06.2010, issued by the Government of Nagaland, Personnel & Administrative Reforms Department (Administrative Reforms Branch), had been given the power to regularize the service of contingency employees.

Due to the reasons stated above, we are not in agreement with the findings of the learned Single Judge that the Recruitment Board, constituted by the respondent No. 4, vide Notification dated 09.12.2010, was constituted without any authority. We hold that the Recruitment Board constituted vide Notification dated 09.12.2010 was validly constituted.

14. As the selection process and regularization of the appellant's service was done by the said Recruitment Board prior to the coming into effect of the OM dated 17.03.2011, there is no question of applying the provisions of the OM dated 17.03.2011 in the selection process.

15. In view of the reasons stated above, the impugned judgment & order dated 08.12.2015, passed in WP(C) No. 153(K)/2013 is set aside. Consequently, the letter dated 17.06.2011 in so far as it affects the appellant and the order dated 04.07.2011, cancelling the regularization of the appellant's service is set aside. The impugned order dated 01.08.2011, appointing the respondent No. 7 as Peon is also set aside. The State respondents are directed to immediately reinstate the appellant back into service as a regular Peon in the Office of the EAC, Aghunaqa. Appeal is accordingly allowed."

viii) That subsequent to the judgment & order dated 28/05/2019 passed by the Hon'ble Division Bench in W.A No. 21(K)/2017, the Government of Nagaland, Office of the Deputy Commissioner, Dimapur, Nagaland, issued the order dated 16/08/2019 reinstating the petitioner as regular Peon in the Office

of the Extra Assistant Commissioner, Aghunaqa.

ix) That on the reinstatement of the petitioner as the regular peon, the present petition has been filed by the petitioner claiming the pay scale which was then paid to the petitioner in the regularized post of peon w.e.f. 04/07/2011 which is the date of the order cancelling the regularization of the service of the petitioner as the Office Peon till 15/08/2019 which is the date immediate prior to the order dated 16/08/2019 reinstating the petitioner in service as the regular peon.

4. Ms. R. Atsula Kips, the learned counsel for the petitioner submits that since by the judgment & order dated 28/05/2019 passed by the Hon'ble Division Bench in W.A No. 21(K)/2017, the Court had set aside the order dated 04/07/2011 cancelling the regularization of the service of the petitioner as Office Peon and the State respondents has issued the order dated 16/08/2019 reinstating the petitioner in service, the petitioner has a right to receive the regular pay scale with all other allowances and consequential benefits from 04/07/2011 till the date the petitioner was reinstated in regular service on 16/08/2019. In support of her submission, the learned counsel for the petitioner has relied in the case of **Deepali Gundu Surwase -versus- Kranti Junior Adhyapak Mahavidyalaya (D.ED.) & Others**, reported in **(2013) 10 SCC 324**, to substantiate that as the order dated 04/07/2011 passed by the respondents authorities cancelling the regularization of service of the petitioner as the Office Peon has been set aside as discriminatory and in violation of Article 14 of the Constitution, the petitioner is entitled to receive the regular scale pay which was paid to her as the Office Peon from 04/07/2011 till 15/08/2019 along with all other allowances and consequential benefits.

5. Ms. S. Mere, learned Government Advocate on the other hand submits that the petitioner is not entitled to receive any regular pay scale or service benefits with retrospective effect. The learned Government Advocate submits that neither in W.P.(C) No. 153(K)/2013 nor in the W.A No. 21(K)/2017, the petitioner has sought for any relief for payment of regular pay scale nor for any consequential benefits and it was only consequent to the judgment & order

dated 28/05/2019 passed by the Hon'ble Division Bench that the official respondents received the notice dated 11/06/2019 from the learned counsel representing the petitioner demanding the pay due from 04/07/2011. Ms. S. Mere however submits that in the judgment & order dated 28/05/2019 passed by the Hon'ble Division Bench there is no direction for payment of back wages/salary or for granting consequential benefits to the petitioner but only a clear direction to immediately reinstate the petitioner back into service as a regular peon in the Office of the EAC Aghunaqa which has been complied with by the State respondents. In support of her submission, the learned Government Advocate has relied in the case of the **State of Uttar Pradesh & Another** -versus- **Mahindra Nath Tiwari**, reported in **(2010) 2 SCC 252**, to buttress the point that since in the judgment & order dated 28/05/2019, the Court has only ordered the reinstatement of the petitioner in service, no pay scale or consequential benefits can be extended retrospectively.

6. Mr. N. Mozhui, learned Standing counsel for the respondent No. 9 submits that since the relief sought for in the petition is for a direction to the State respondents to pay regular pay scale along with consequential benefits and the respondent No.9 not being the authority to authorize such payment, the respondent No.9 has nothing much to submit in the case.

7. In the instant case, the only question which arises for the consideration of this Court is whether the petitioner is entitled to receive the regular pay scale with consequential benefits retrospectively from 04/07/2011 upto 15/08/2019.

8. The Hon'ble Division Bench by the judgment & order dated 28/05/2019 has held that the action of the State respondents cancelling the regularization of the service of the petitioner as Office Peon is discriminatory and in violation of the Article 14 of the Constitution thus setting aside the order cancelling the regularization of the petitioner's service and directing the State respondents to immediately reinstate the petitioner back into service as regular peon in the Office of the EAC Aghunaqa. Consequent thereto, the Government of Nagaland, Office of the Deputy Commissioner, Nagaland, has issued the order dated 16/08/2019 re-instating the petitioner as regular peon in the Office of the EAC

Aghunaqa. The order dated 16/08/2019 is therefore not an order newly appointing the petitioner in service but restoring the service of the petitioner to the original/former position as a regular peon. This itself reveals that the petitioner was illegally removed from the post of Peon by cancelling her regularization in service.

9. In the case of Deepali Gundu Surwase (supra), the Hon'ble Supreme Court while defining the word "*reinstatement*" has held as follows;

"21. The word "reinstatement" has not been defined in the Act and the Rules. As per Shorter Oxford English Dictionary, Vol.II, 3rd Edn., the word "reinstatement" means to reinstall or re-establish (a person or thing in a place, station, condition, etc.); to restore to its proper or original state; to reinstate afresh and the word "reinstatement" means the action of reinstating; re-establishment. As per Law Lexicon, 2nd Edn., the word "reinstatement" means to reinstall; to re-establish; to place again in a former state, condition or office; to restore to a state or position from which the object or person had been removed and the word "reinstatement" means establishing in former condition, position or authority (as) reinstatement of a deposed prince. As per Merriam-Webster Dictionary, the word "reinstatement" means to place again (as in possession or in a former position), to restore to a previous effective state. As per Black's Law Dictionary, 6th Edn., "reinstatement" means:

"To reinstall, to re-establish, to place again in a former state, condition, or office; to restore to a state or position from which the object or person had been removed."

22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on

the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

23. A somewhat similar issue was considered by a three Judge Bench in *Hindustan Tin Works (P) Ltd. v. Employees*⁷ in the context of termination of services of 56 employees by way of retrenchment due to alleged non-availability of the raw material necessary for utilization of full installed capacity by the petitioner. The dispute raised by the employees resulted in award of reinstatement with full back wages. This Court examined the issue at length and held: (SCC pp.85-86, paras 9 and 11)

“9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More

so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away there from. On top of it they were forced to litigation up to the Apex Court now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of an invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them.

11. In the very nature of things there cannot be a straitjacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party

objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular.” (emphasis supplied)

After enunciating the above noted principles, this Court took cognizance of the appellant's plea that the company is suffering loss and, therefore, the workmen should make some sacrifice and modified the award of full back wages by directing that the workmen shall be entitled to 75 % of the back wages.

24. Another three-Judge Bench considered the same issue in [Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court](#)⁸ and observed: (SCC p. 447, para 6)

6.... Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to

the employer if the relief is granted.” (emphasis supplied)

10. The law laid down by the Hon'ble Supreme Court makes it amply clear that full back wages for illegal termination of service would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. The Hon'ble Supreme Court has further held that there cannot be a strait-jacket formula for awarding relief of back wages and all relevant consideration will have to be taken by the Court while adjudicating the subject of back wages.

11. In the instant case, it is seen that the Hon'ble Division Bench has only directed the State respondents to immediately re-instate the petitioner back into service as a regular peon in the Office of the EAC Aghunaqa and no directions have been issued for payment of the pay scale retrospectively from 04/07/2011. In compliance to the order passed by the Hon'ble Division Bench, the Deputy Commissioner, Dimapur, Nagaland, with the prior approval of the Government has issued the order dated 16/08/2019 re-instating the petitioner as a regular peon in the Office of the EAC Aghunaqa. It is further seen that neither in W.P.(C) No. 153(K)/2013 nor in the W.A No. 21(K)/2017 relief has been claimed by the petitioner for payment of regular pay scale from 04/07/2011 onwards and it is only subsequent to the passing of the judgment & order dated 28/05/2019 in W.A No. 21(K)/2017 that the learned counsel representing the petitioner has served the notice dated 11/06/2019 to the State respondents to comply with the judgment & order and to pay all arrear salary from 04/07/2011. It is only thereafter that the present writ petition has been instituted.

12. It is therefore discernible that the petitioner herself has contributed in belatedly claiming the salary from a retrospective date which is the subject matter in the present petition. This Court is therefore not inclined to direct payment of regular pay scale to the petitioner with retrospective effect from 04/07/2011 upto 15/05/2019 as claimed by the petitioner.

13. However, considering that the petitioner was illegally removed from the

regular service of Peon and was deprived the pay scale attached to the post for about 8(eight) years prior to the filing of the present writ petition and taking into account the attending facts and circumstances of the case, this Court is of the view that the petitioner shall be entitled to receive the regular scale pay of Office Peon effective from 3(three) years immediately preceeding the filing of the present writ petition but minus the consolidated fixed pay already received by the petitioner as contingency Typist in the Office of the Addl. Deputy Commissioner, Niuland, during the said period. No other allowances, consequential benefits etc. is allowed.

14. The State respondents are directed to make the payment to the petitioner within a period of 90(ninety) days from the date of passing of the order failing which the amount ordered to be paid shall carry interest at the rate of 9% p.a. till final realisation.

15. Writ petition allowed to the extent indicated above. No cost.

Sd/-

JUDGE

Comparing Assistant