

GAHC020004472022



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

Case No. : WA/27/2022

THE STATE OF NAGALAND AND 5 ORS
REPRESENTED BY THE CHIEF SECRETARY,
NAGALAND, KOHIMA

2: THE COMMISSIONER AND SECRETARY
PERSONNEL AND ADMINISTRATIVE REFORMS DEPARTMENT
NAGALAND KOHIMA

3: THE FINANCE COMMISSIONER
NAGALAND KOHIMA

4: THE PRINCIPAL SECRETARY
URBAN DEVELOPMENT DEPARTMENT
NAGALAND KOHIMA

5: THE DIRECTOR
URBAN DEVELOPMENT
NAGALAND KOHIMA

6: THE EXECUTIVE ENGINEER
URBAN DEVELOPMENT
NAGALAND KOHIMA

VERSUS

SHRI. ALEMBA
W/C CHOWKIDAR(RETIRED),
OFFICE OF THE EXECUTIVE ENGINEER,
URBAN DEVELOPMENT, KOHIMA, NAGALAND,
S/O LT. MERENKABA, WAROMONG VILLAGE,
MOKOKCHUNG DISTRICT.

Advocate for the Petitioner : GOVT ADV NL

Advocate for the Respondent : I. IMTI LONGCHAR

**BEFORE
HON'BLE MR. JUSTICE SUMAN SHYAM
HON'BLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Date : 08-06-2023

(Suman Shyam, J)

Heard Ms. V. Suokhrie, learned Addl. Advocate General, Nagaland appearing for the appellants. We have also heard Mr. I. Imti Longchar, learned counsel appearing for the sole respondent.

2. This *intra-court* appeal, preferred by the State of Nagaland and others, is directed against the judgment and order dated 23-11-2021 passed by the learned Single Judge in W.P.(C) No. 213/2019 preferred by the respondent as writ petitioner thereby allowing the writ petition. The case of the respondent/ writ petitioner, in a nutshell, is that he was appointed as a Work-Charged employee in the scale of pay of Rs. 375-590 in the office of the Town Planning Works Division, Nagaland, Kohima (subsequently renamed as Executive Engineer, Urban Development, Kohima, Nagaland) and was assigned the duty of Chowkidar. He continued to serve until his retirement on attaining the age of superannuation w.e.f. 30-11-2018. The respondent/ writ petitioner had served for 26 years 10 months and 28 days until his retirement, without any break but his service was not regularised, as a result of which, after his retirement, the respondent did not receive any pension. As such, the respondent had submitted a representation dated 20-

05-2019 before the Principal Secretary, Urban Development Department, Kohima, Nagaland with a prayer for regularization of his service in the post of Chowkidar in the office of Executive Engineer, Urban Development , Kohima and also for payment of pensionary benefits. By the order dated 17-10-2019 issued by the Deputy Secretary to the Government of Nagaland, Urban Development, the representation submitted by the respondent was rejected on the ground that the said prayer cannot be considered as he had been released from service w.e.f. 30-11-2018. Aggrieved by the order dated 17-10-2019, the respondent had approached this Court by filing W.P. (C) No. 213/2019 which was allowed by the learned Single Judge with the following direction:

"The above being the principle applied in nature of such employment by the Apex Court there can be no different view to express. The petitioner herein has put 26 years 10 months and 28 days of service and was superannuated on attaining 60 years of age. This court is of the view that the petitioner has established his rights to pensionary benefits.

The state respondents specially respondent No. 4 shall take steps to regularise the service of the petitioner a day before his superannuation to allow pensionary benefits to the petitioner. The exercise should be completed within two months of the passing of this order.

Writ Petition is allowed and disposed accordingly."

Aggrieved by the judgment and order dated 23-11-2021, the State of Nagaland has preferred the instant appeal.

3. Ms. V. Suokhrie, learned Addl. Advocate General, Nagaland has argued that the respondent cannot claim regularisation as a matter of right, more so, after he has retired on attaining the age of superannuation. The learned Addl. Advocate General, Nagaland further submits that there is no

dispute about the fact that the respondent was appointed as Work-Charged employee and he continued to serve as a Chowkidar till the date of his retirement. She further submits that the Government of Nagaland had earlier introduced a scheme for regularisation of service of Work-Charged employees vide office memorandum No. AR-3/GEN-67/2001(Pt.) dated 22-09-2004 for regularisation of service of Work-Charged employees. Regularisation of Work-Charged employee under the said scheme could be considered on the basis of seniority-cum-merit. However, since there were two other (Work-Charge) Chowkidars senior to the respondent, his case could not be considered under the OM dated 22-09-2004. Ms. Suokhrie has also invited the attention of this Court to the decision of the Supreme Court rendered in the case of ***State of Nagaland & Ors. Vs. Nishevi Achumi*** to submit that the respondent in this case was similarly situated as the writ petitioner in that case whose case was also not considered for regularisation since his turn had not come and he was much below in the seniority list. Notwithstanding the same, the learned Single Judge had issued a similar direction to regularise the service of the respondent therein, which was upheld by the Division Bench. However, on an appeal preferred by the State, the Supreme Court has set aside the judgment. According to Ms. Suokhrie the case of the State of Nagaland in the present appeal is covered under the judgment of the Apex Court rendered in the case of ***Nishevi Achumi (Supra)*** and therefore, this writ appeal deserves to be allowed by this Court.

4. Responding to the above submits Mr. Longchar, learned counsel for

the sole respondent has argued that the respondent, having continuously served for more than 26 years, cannot be denied the benefit of regularisation in service as well as pensionary benefits. By relying on the Central Civil Service (Pension) Rules, 1972 (in short Rules of 1972) as well as the Government of India's orders and notifications issued there-under from time to time annexed as Annexure-R1 to the cross objection filed by the respondent, Mr. Longchar has argued that in case of an employee who had rendered long years of service without being confirmed in any post, the condition of holding pensionable post in substantive capacity can be dispensed with under the Rules of 1972. Mr. Longchar has submitted that since the State of Nagaland has adopted the Rules of 1972, hence, the aforesaid Central Government circulars would be binding on the Government and to that extent, the learned Single Judge is correct in holding that the respondent has succeeded in establishing his right. By relying on the decisions of the Supreme Court of India rendered in the case of ***Prem Singh Vs State of UP*** reported in ***(2019) 10 SCC 516, State of Gujarat & Ors. Vs Tulsibhai Dhanjibhai Patel*** rendered in ***Special Leave to Appeal (C) No. 1109/2022*** as well as in the case of ***State of Manipur & Ors. Vs KSH Ibobal Singh*** reported in ***1997 (II) GLT 209***, Mr. Longchar has argued that law is well settled that if an employee has rendered more than 10 years of continuous service, he would be entitled to regularization in service and also for payment of pension. Therefore, there is no infirmity in the judgment and order passed by the learned Single Judge.

5. The facts of this case, as noted above, are more or less admitted.

There is no dispute about the fact that the respondent was appointed as Work-Charged employee and was posted as Chowkidar under the Town Planning Works Division. He retired from service on attaining the age of superannuation, i.e. 60 years, on 30-11-2018, after rendering 26 years 10 months and 28 days of service. However, the service of the respondent was not regularised till the date of his superannuation. Eventually, his representation submitted on 14-12-2018 praying for regularisation as well as for payment of pensionary benefits also came to be rejected by the order dated 17-10-2019 which order was put to challenge in W.P.(C) No. 213/2019.

6. We find from the record that the Government of Nagaland was aware of the fact that there were large number of Work-Charged employees in various departments, many of whom were serving continuously for a number of years and had also submitted representation before the Government for regularisation of their services. In some departments, the service of Work-Charged employees had been regularised. However, there was no transparent and rational policy laying down the criteria for regularisation of services of Work-Charged employees. Therefore, on examining the issue and after obtaining the recommendation of Committee specially set up for the purpose, the Government had issued OM dated 22-09-2004 notifying the scheme for regularisation of the services of the Work-Charged employee with the following criteria:

"(i) Each Department having Work-Charged employees should maintain a list of work-charged employees in various categories in order of their length of service."

(ii) Regularization 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 retirement.

(iv) Work charged employees will have the right to be considered first for regularization against 50% of all the future vacancies of similar nature in the Department for which they possess the requisite qualification. Such regularization will consider 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.

(v) In case no work charge employees is found suitable for regularization in term of the above clause(iv) the Department will obtain clearances of P&AR Department before making any fresh appointment against the quota reserved for work-charged employees explaining the circumstances for not being able to fill up the vacancy through regularization of work charged employees.

(vi) No age bar would apply in case for regularization if the Work-Charged employee is below the superannuation age.

(vii) Regularization Work-Charged employees will be entitled to count in full their continuous work charged service towards pension benefits.

(viii) Those Departments which have not approached the Nagaland work Charged and casual Employees Commission should do so immediately to get the optimum strength of workCharged employees fixed for their Department. They should take all possible measure including pursuing VRS option vigorously to bring down the all possible measure including pursuing VRS option vigorously to bring down the strength of work-Charged employees to the level recommended by the Commission.

(ix) Adequate provision for payment of work charge employees should be made in the budget and regular monthly payment of work charged wages ensured.

(x) All new Work-Charged appointments should be banned. Any person accepting work-charged service in the Government would be doing so at his/her own risk. Any new work charged appointment should be treated as illegal and strict action against the appointment authority. In case of any unforeseen situation requiring new work charge appointment, specific approval of the Cabinet must be taken."

7. It further appears from the materials on record that subsequently, the Government of Nagaland had introduced another scheme for regularisation and absorption of Work-Charged and Casual Employees and for revision of

their pay/ wages by issuing OM No. AR-3/GEN-201-209 dated 17-03-2015.

The OM dated 17-03-2015 was apparently issued, in compliance of the judgment and order of this High Court. However, the notification does not indicate as to which order of this Court had been complied. Be that as it may, what is relevant to be noted herein is that the OM dated 17-03-2015 had put in place another scheme for regularisation in service of Work-Charged/Casual employees. The relevant criteria for regularization, as laid down in the OM dated 17-03-2015, is being reproduced here-in-below for ready reference:-

"1. Regularization in service:

(i) All existing work-charged and casual employees of various Departments who are enjoying scale pay and who have completed 30 (thirty) years or more continuous service as on 01.01.2015 will be regularized by conversion of their posts into regular ones personal to them and subject to fulfillment of conditions as indicated below:

(a) The incumbent concerned and his/her service rendered as work-charged/casual employee have been duly verified and found genuine by the District Level Verification Committee constituted by the Government

(b) Availability of service records including appointment order, date of initial appointment, proof of length of service/age etc.

(c) Their suitability for continuation in service to be recommended by the Heads of Department concerned.

(d) The post occupied by them on regularization shall automatically stand abolished as and when they vacate the post on retirement, resignation, death etc. The strength of work-charged and casual employees under various Departments shall stand reduced by equal number concurrently with the regularization of such employees. No fresh appointment shall be made against these posts.

(e) On regularization in service, the pay of the incumbent shall be fixed at the minimum of the corresponding Pay Band and Grade Pay as admissible under Rule 10 of Nagaland Service ROP Rules, 2010.

(f) The past service rendered as work-charged/casual employees shall be counted towards length of service for the purpose of Nagaland Retirement from Public Employment Act, 2009 and as qualifying service for the purpose of pension.

(g) This scheme shall, however, not be applicable to the part time Casual employees, Village Guards, Home Guards, ICDS workers, other

CSS paid employees whose services are guided by specific terms and conditions laid down by the Government and some other categories of contingency employee like personal peons, part time sweepers/chowkidars/seasonal workers etc.

(h) The period of service rendered as work-charged/casual employees shall not be counted for the purpose of MACP.

(ii) In respect of those work-charged and casual employees. In scale pay and who have completed or will complete 30 (thirty) years of continuous service after 01.01.2015, their cases for regularization will be taken up subsequently in two batches as on 1st July and 1st January every year. The procedures and terms and conditions will be the same as laid down in this O.M.

(iii) The existing scheme for regularization of work-charged employees against normal vacancy is being modified and the quota for work-charged employees stand enhanced from 50% to 67% for the next 5 (five) years effective from 01.01.2015. This existing scheme will also be applicable for the casual employees appointed on full time basis."

8. On a careful reading of the above schemes introduced by the Government of Nagaland, we find that there is a marked difference in the criteria of regularization in the scheme as notified by the OM dated 22-09-2004 with that introduced by the subsequent OM dated 17-03-2015. The scheme of regularisation introduced in the year 2004 contemplate a process of regularisation to be carried out against 50% earmarked vacancies, based on the criteria of seniority-cum-merit whereas, under the scheme of regularisation introduced vide OM dated 17-03-2015, only those who have completed 30 years or more of continuous service as on 01-01-2015 would be entitled to be regularised. Although there is no indication in the notification as to whether the scheme introduced in the year 2015 supersedes the earlier scheme of regularization yet, by necessary implication it can be presumed that the scheme of 2015 has replaced the previous scheme and is holding the field. Be that as it may, it is not in dispute that

the respondent/ writ petitioner did not fulfill the criteria for regularisation under either of the schemes inasmuch as, it is not in dispute that till the time of retirement of the respondent, there were two other senior Work-Charged employees in the department who were yet to be regularised. That apart, the petitioner evidently did not have 30 years of continuous service as on 01-01-2015 and therefore, did not meet the eligibility norms under the scheme. It is in such factual backdrop that this Court has been called upon to consider as to whether, the direction issued by the learned Single Judge is sustainable in the eyes of law.

9. As has been mentioned hereinabove, the Apex Court has set aside a similar direction issued by the learned Single Judge of this Court for regularisation of service of a deceased employee in the case of ***State of Nagaland Vs. Nishevi Achumi (Civil Appeal No. 4223/2022)*** reported in ***2022 SCC OnLine SC 818***. In that case, it was contended that the husband of the petitioner had died-in-harness on 28-08-2005 while serving as Work-Charge/ Jugali for a continuous period of 12 years prior to his death and therefore, he ought to have been regularised in service and pensionary benefits ought to have been paid to his widow, i.e. the writ petitioner therein. The learned Single Judge had allowed the writ appeal with a direction upon the appellants to regularise the services of the deceased employee one day prior to the date of his demise so that the family members of the deceased employee would be entitled to the pensionary benefits. The appeal preferred by the State before the Division Bench was dismissed. Aggrieved thereby, the State of Nagaland had approached the

Supreme Court by filing SLP which was allowed by setting aside the judgment and order of the Division Bench. In the said decision it was observed that the deceased employee did not claim for regularisation during his lifetime and at the time of his death the employee was not entitled to regularisation as he was much below in the list of Work-Charged employees whose services were yet, to be regularised. Therefore, it was held that although the turn of the deceased employee for regularisation had not come, the High Court had committed an error in issuing a direction to the State to regularise his service.

10. A question of similar nature came up for consideration before the Hon'ble Supreme Court in the case of ***Director, Doordarshan, Prashar Bharati Corporation of India & Anr. Versus Smt. Magi H Desai*** reported in ***2023 SCC OnLine SC 336***. In that case, the employee, who was originally engaged on contract/ casual basis and whose services were extended from time to time, had moved the Central Administrative Tribunal (CAT), Ahmadabad Bench with a prayer to pay her the regular salary and allowances as have been paid to other regular General Assistant/ Clerks. Her prayer was allowed by the learned Tribunal. Thereafter, pursuant to a decision of the Principal Bench of the CAT, New Delhi issuing a direction to the authorities to regularise Casual Employees by framing a scheme, the service of the aforesaid employee also came to be regularise as Lower Division Clerk and she was given the regular pay scale w.e.f. the date of her regularisation. Dissatisfied with the above, the employee had once again approached the CAT with a prayer for consideration of her past services,

which prayer was rejected by the learned Tribunal. The decision of the Tribunal was assailed before the High Court which had permitted the employee to submit a representation before the department. Accordingly, the employee had submitted a representation which was also rejected by the department by turning down her prayer for considering the casual/ contractual services rendered by her prior to regularisation for calculating the pensionary/ service benefits. The original application filed by the employee assailing the said decision before the Tribunal was dismissed by holding that the services rendered by the employee as contractual/ casual employee cannot be treated and/ or considered as temporary service and therefore, the same cannot be counted for the purpose of retireal benefits. The judgment of the learned Tribunal was assailed by the employee before the High Court. The Division Bench had observed that the service in temporary capacity will include temporary servant such as casual or even contractual workers. Therefore, the writ appeal preferred by the employee was allowed by placing reliance upon Rule 13 of the Rules of 1972. Allowing the SLP filed by the department, the Apex Court while setting aside the judgment of the Division Bench of the High Court, has made the following observations in paragraphs 14 and 15, which are reproduced herein-below for ready reference:

"14. Rule 13 of the 1972 Rules provides for commencement of qualifying service. As per Rule 13, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. It further provides that such officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post. Therefore, the

services rendered on a substantive 4 post or services rendered as officiating or temporary service shall be treated as qualifying service. Service rendered as casual/contractual cannot be said to be officiating or temporary service. Even the services rendered as temporary service can be considered as qualifying service provided that the officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post. Service rendered as casual/contractual cannot be said to be service rendered on a substantive appointment.

15. Under the circumstances and on a fair reading and interpretation of Rule 13 of the 1972 Rules, the High Court has committed a very serious error in observing that the services in temporary capacity will include the classes of temporary service such as casual or even contractual. The High Court has materially erred in observing that the contractual service would be qualified as service in a temporary capacity. The question is not whether the services rendered by a contractual employee would be qualified as service in a temporary capacity. The question is, whether, in fact, such contractual employee rendered the services as temporary or not."

11. The ratio laid down in the case of ***Smt. Magi H Desai (Supra)*** as well as ***Nishivi 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 services 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. That 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 had 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 met the requirement of the scheme and had approached this Court seeking regularisation prior to his retirement. At this stage, consideration of the prayer made by the respondent may call 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 in exercise of power under Article 226 of the Constitution cannot direct the State Government 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 creation and/ or sanction of posts are also the sole prerogative of the Government and the High Court in exercise of powers under Article 226 of the Constitution cannot issue mandamus to that effect.

13. Law is firmly settled that right to receive pension is strictly governed by the provisions of the relevant rules, which in the present case is the Rules of 1972. The question of payment of pension would arise if the employee is substantially appointed against a sanctioned post.

14. The terms of appointment and conditions of service of Work-Charged and casual employees in the State of Nagaland is governed by the Nagaland Work-Charge and Casual Employees Regulation Act, 2001 (in short Act of

2001). Section 2(d) of the Act of 2001 defines "Work-Charged employee" which means an employee engaged without sanctioned post under Work-Charge establishment. As per section 6 of the Act, Work-Charged employees will be entitled to be paid wages as may be prescribed by the State Government on consideration of recommendation made by the Commissioner. However, in case of Work-Charged employees who were paid scale of pay at the commencement of the Act, their pay would not be less than the last pay as may be determined at the time of prescribing the fixed wages. From the above, it is apparent that the Act of 2001 seeks to protect the last drawn wages/ pay scale of Work-Charged employees.

15. There can be no doubt about the fact that with the enactment of the Act of 2001 the conditions of service of Work-Charged employees in the different works establishment in the Government of Nagaland would be governed by the provision of the said Act. The Act of 2001 neither confers any right to seek regularization in service nor does it extend pensionary benefit to the Work-Charged employees. Unless a Work-Charged employee/ casual employee is regularized against a vacant sanctioned posts and fulfills the requirement of minimum qualifying service as a regular employee, the question of payment of pension would not arise in the eyes of law. In the present case, even if the ex-post facto regularization is given to the petitioner, even then, he would fall short of the minimum qualifying service under the Rules so as to be entitle him to receive pension.

16. As has been observed hereinabove, the claim of the respondent for receiving pension does not come within the scope and ambit of the Act of

2001. Although Mr. Longchar has placed heavy reliance on the provisions of Rules of 1972 so as to contend that the respondent is entitled to receive pension, the fact remains that as per Rule 2(b) of the Rules of 1972, persons in casual and daily rated employment have been excluded from the purview of Rules of 1972. As such, the respondent clearly does not come within the ambit of the Act of the Rules of 1972 for making out a case for payment of pension. The OM issued by the Central Government bearing NO. 38/10/82-Pen. Unit dated 24-12-1983, relied upon by the learned counsel for the respondent would also not be applicable in this case. That apart, the approach of learned Single Judge in the present case also appears to have been clearly disapproved by the Supreme Court in the judgment in ***Nishivi Achumi (Supra)*** rendered in more or less identical fact situation. Therefore, the direction issued by the learned Single Judge, in our opinion, is untenable in law on such count alone.

17. Before parting with the record, we deem it appropriate to note herein that the decision relied upon by the learned counsel for the respondent have been considered. In the case of ***Prem Singh (Supra)*** the Hon'ble Supreme Court had interpreted Rule 3(8) of the U.P. Retirement Benefit Rules, 1961 and Regulation 370 of the CCS Regulation so as to hold that the employees who had rendered continuous service for more than 30/40 years would be treated to be regular employees. In the case of ***Talsibhai Dhanjibhai Patel (Supra)***, taking note of the continuous service rendered by the employee for more than 30 years, direction for payment of pension was made. However, the said decision appear to have been rendered in the facts

and circumstances of those cases. Insofar as the decision in the case of ***KSH. Ibobal Singh (Supra)***, the contractual employee in that case continued to serve uninterruptedly beyond the contract period, until attaining the age of superannuation. By interpreting the relevant rules as well as the contract agreement, the Division Bench had held that the character of the contract agreement automatically changed in that case and therefore, the employee had to be treated under the normal Government service rules entitling him to pensionary benefits. After going through the aforesaid decision, we are of the view that, the decision rendered in the case of ***KSH. Ibobal Singh (Supra)*** was in the peculiar facts and circumstances of that case, and therefore, the ratio laid down in the said decision would not have any bearing in the facts of the present case.

For the reasons stated hereinabove, we are of the unhesitant opinion that the impugned judgment and order passed by the learned Single Judge is unsustainable in the eye of law and the same is accordingly, set aside.

Writ appeal stands allowed.

The cross-objection filed by the respondent stands disposed of in terms of the observations made hereinabove.

Consequently, the writ petition stands dismissed.

Parties to bear their own cost.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

Comparing Assistant