

GAHC020005862021



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

Case No. : WP(C)/305/2021

SHRI. PAOLAM
S/O SHRI ZUTSAPA,
W/C KHALASI (SUPERANNUATED),
BEARING CODE NO.PHK.0684,
UNDER SUB DIVISIONAL OFFICER, PHED,
MELURI SUB DIVISION,
PHEK, NAGALAND

VERSUS

THE STATE OF NAGALAND AND 4 ORS THROUGH THE CHIEF
SECRETARY TO THE GOVERNMENT OF NAGALAND, NAGALAND,
KOHIMA

2:THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF
NAGALAND PHED NAGALAND KOHIMA

3:THE CHIEF ENGINEER, PHED NAGALAND KOHIMA

4:THE EXECUTIVE ENGINEER PHED PHEK DIVISION PHEK
NAGALAND

5:THE ACCOUNTANT GENERAL NAGALAND KOHIMA

Advocate for the Petitioner : Mr. Sentianger,
Mr. Chuba Imchen,
Ms. Vesutolu Therie

Advocate for the State respondents : Ms. Lucy Nsu, Sr. Govt. Adv.

Advocate for the respondent No.5 : Ms. K. Lily Swu

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

JUDGMENT & ODER (CAV)

Date : 27-06-2023

Heard Ms. V. Therie, learned counsel for the petitioner, Ms. Lucy Nsu, learned Government Advocate for the State respondents and Ms. K. Lily Swu, learned counsel for the respondent No.5.

2. The present writ petition has been filed for issuance of writ in the nature of certiorari and/or mandamus and/or any direction or order to regularize the service of the petitioner against the lowest scale pay permissible for Grade-IV employees in the PHE Department, Government of Nagaland, for grant of pensionary benefits to the petitioner.

3. The facts of the case in brief is that vide order dated 23/05/1984, the petitioner was appointed as work-charge Khalasi in the scale pay of Rs. 300/- (fixed) p.m. under the establishment of the SDO(PHE), Phek, Nagaland.

4. That thereafter by the order dated 24/05/2019, issued by the Sub-Divisional Officer, PHED, Meluri Sub-Division, Phek, Nagaland, the petitioner was released from service on superannuation on completion of 35(thirty five) years of service. The petitioner was receiving a fixed pay of Rs. 3450/- on the date of his retirement.

5. That pursuant to the petitioner's retirement from service, the counsel for the petitioner filed the RTI application dated 10/02/2021 before the PIO, Office of the Chief Engineer, PHED, Nagaland, Kohima, seeking information on the list of the employees who were appointed on work-charged basis by the department and subsequently granted scale of pay, clearly indicating the date of appointment and the date of award of the scale pay. By another letter dated 10/02/2021, the counsel for the petitioner again sought information on the list of the work-charged employees who were regularized by the department clearly indicating their date of appointment and date of regularization.

6. That the information sought in the RTI application was furnished by the

department by the letter dated Nil March, 2021 conveying that 380 work-charged employees who were appointed on fixed pay were subsequently grant scale of pay and the service of 195 work-charged employees were subsequently regularized.

7. That on 28/07/2021, the petitioner submitted a representation to the Chief Engineer, Public Health Engineering Department, Nagaland, Kohima, for regularization of his service for pension and pensionary benefits, however the same did not evoked any response.

8. Ms. V. Therie, learned counsel for the petitioner, by referring to the information furnished by the department under the RTI Act submits that persons who were similarly appointed as the petitioner as well as those junior to the petitioner have been granted scale of pay as well as regularized in service. However, the petitioner has been indifferently treated and discriminated. The learned counsel also submits that the petitioner has served the department for 35 years but he was made to retire from service without availing the benefits of the O.M dated 17/03/2015 which is the scheme for Regularization and Absorption of Work-Charged and Casual Employees and Revision of Pay/Wages. The learned counsel for the petitioner has also submitted that similarly situated persons have been regularized in service under the scheme and has been extended pensionary benefits, however the petitioner has been denied of such benefits and discriminated. In support of her submissions, the learned counsel for the petitioner has relied in the case of the *State of Gujarat & Ors. -versus- Talsibhai Dhanjibhai Patel*, rendered in Special Leave to Appeal (C) No. 1109/2022 on 18/02/2022 and in the case of the *State of Manipur & Ors. -versus- KSH. Ibobal Singh*, reported in 1997 (II) GLT 209.

9. Ms. Lucy, the learned Sr. Government Advocate for the State respondents on the other hand submits that the petitioner was appointed as fixed pay W/C Khalasi without following any due process of law and against non sanctioned post and therefore no right accrues to the petitioner to be regularized in service despite having served the department for 35 years before superannuating from service. In support of her submission, the learned Government Advocate has referred to the case of *Secretary, State of Karnataka & Others -versus- Umadevi (3) & Others*, reported in (2006) 4 SCC

1. On the question of extending scale pay to the fixed pay work-charged employees, the learned Government Advocate submits that consequent to the order dated 21/11/2018 passed by this Hon'ble Court in W.P.(C) No. 228(K)/2018 (Shri. Phuhton K. & 46 Others -versus- The State) directing the State respondents to consider the prayer of the petitioners for payment of scale pay within a period of 3 months, the Government after examining the matter wrote the letter No. PHE-1/Estt/81/2018(Pt) dated 23/07/2020 to the Chief Engineer, Sanitation and WSSO, PHED, Nagaland, Kohima, conveying the administrative approval for up-gradation of fixed pay to scale pay of 31 employees who have completed 30 years or more service as on 01/07/2020. By the said letter dated 23/07/2020, it was also conveyed that the fixed pay employees who had retired on or before 01/01/2020 shall not have the right to claim the scale pay. Ms. Lucy accordingly submits that in the light of the administrative approval conveyed by the letter dated 23/07/2020 all the work-charged employees who were on fixed pay and has completed 30 years or more of service as on 01/07/2020 were given scale pay. However, the benefit of the letter could not be extended to the petitioner as the petitioner has retired from service w.e.f 30/06/2019. The learned Government Advocate further submits that in regard to the work-charged employees who were regularized in service, their regularization was done as per the O.M dated 17/05/2015 which provided that all existing work-charged and casual employees who are enjoying scale pay and who have completed 30 years of continuous service as on 01/01/2015 are eligible for regularization in service. The petitioner, it is submitted, was a work-charged employee on a fixed pay till his retirement from service and therefore, his case for regularization was not covered by the O.M dated 17/03/2015. Lastly, the learned Government Advocate has submitted that the petitioner has during his 35 years of service never made any representation claiming scale pay nor has ever brought his grievances to the notice of the department and it was only after the petitioner was released from service on superannuation on 30/06/2019 that he submitted the representation dated 28/07/2021 seeking regularization of his service for enabling him to claim pensionary benefits. The learned Government Advocate accordingly submits that there is un-explained delay in filing the present writ petition.

10. In the affidavit-in-reply to the affidavit filed by the State respondents, the petitioner while reiterating the averments made in the writ petition has stated that the 195 work-charged employees who were regularized from time to time are all junior to the petitioner and the 380 fixed work-charged employees who were awarded the scale of pay was by adopting pick and choose method. Furthermore, the letter dated 23/07/2020 containing the administrative approval of the Government stating that the fixed pay employee who has retired on or before 01/01/2020 shall not have the right to claim scale of pay is arbitrary and amounts to unreasonable classification. In regard to the issue of limitation raised by the learned Government Advocate, the petitioner has relied in the order dated 01/01/2022 passed by the Hon'ble Supreme Court in In Re..Cognizance for Extension of Limitation 2022 Live Law (SC) 31 in which the limitation period from 15/03/2020 till 28/02/2022 has been condoned on account of Covid-19 pandemic. The learned counsel for the petitioner has also submitted that there is no period of limitation prescribed for filing a writ petition under Article 226 of the Constitution of India and ordinarily the writ petition should be filed within a reasonable time. Lastly, it is stated that the State being a model employer, the mere absence of specific rules/guidelines to award scale of pay to work-charged employees cannot be a license to act arbitrarily or discriminately against similarly situated employees.

11. Ms. K. Lily Swu, learned counsel for the respondent No.5 by relying on the affidavit filed by the said respondent submits that the issue raised in the present petition is between the petitioner and the State respondents. The office of the Accountant General therefore has no role in regularizing the service of the petitioner and sanctioning of pension benefits. It is only on the receipt of the pension documents from the pension sanctioning authority to the office of the respondent No. 5, that the respondent No.5, can process the pension payment to the petitioner.

12. Heard the learned counsel for the parties and perused the pleadings. There is no dispute that the petitioner has served the department for 35(thirty five) years as a fixed pay work-charged employee prior to his retirement from service. The question which however arises for consideration of this Court in the present writ petition is

whether the petitioner has a right in law to be considered for regularization in service after retirement for the purpose of availing pensionary benefits.

13. 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.

14. That the Government of Nagaland on due consideration of the report of Work-Charged and Casual Employees Commission and in compliance with the judgment & order of the Hon'ble High Court has framed the scheme for regularization and absorption of work-charged and casual employees and for the revision of their pay and wages by issuing the O.M No. AR-3/GEN-201/2009, dated 17/03/2015. The relevant criteria for regularization as stipulated in the O.M dated 17/03/2015 is reproduced below;

"1. Regularisation 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 has 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 the 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 post.

(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 the Nagaland Services ROP Rules, 2010.

(f) The past service rendered as work-charged/casual employee 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 service are guided by specific terms and conditions laid down by the Government and some other categories of contingency employee like personal peon, 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, there case 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 employee stands enhanced from 50% to 67% for the next 5(five) years effective from 01/01/2015. The existing scheme will also be applicable for the casual employees appointed on full time basis.”

15. There is no dispute that the petitioner had served the department as a work-charged Khalasi for 35(thirty five) years before retiring from service. However, during all his years of service, the petitioner was on a fixed pay. The petitioner therefore, did not fulfill the eligibility criteria to be regularized in service as per the scheme formulated by O.M dated 17/03/2015 which inter-alia provided that all existing work-charged and casual employees of various department 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 post into regular ones personal to them subject to fulfillment of conditions stipulated in Sl. 1(i) (a) to (h). It is also an admitted fact that the petitioner all throughout his 35(thirty five) years of service had never submitted any representation to the authorities for payment of scale pay so as to make the petitioner eligible for regularization and absorption in service in terms of the scheme brought out by the O.M dated 17/03/2015. It was only after more than two years of the petitioner's retirement from service that the petitioner submitted the representation dated 28/07/2021 for regularization of his service for drawing pension and pensionary benefits. It is therefore apparent that the petitioner had slept over his right in claiming the scale pay during all his years in service.

16. 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."

17. 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."

18. 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.”

19. 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.

20. 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 his 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 allowing the petitioner to avail the pensionary benefits.

21. 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 in the case of *KSH. Ibobal Singh* (supra) where the Hon'ble Division Bench has inter-alia held that if the contract appointment continues uninterruptedly till the age of superannuation, the character of the appointment automatically changes and the employee has to be treated under normal Government service rules entitling them to pensionary benefits. The facts of the present case is different from those cases relied upon by the petitioner. The present case deals with the issue as to whether the petitioner who is a work-charged employee fulfills the criteria to be regularized in service as per the scheme formulated by the Government

for regularization and absorption of work-charged and casual employees, which is not so, in the cases relied by the petitioner. The cases relied by the petitioner, therefore in the considered opinion of this Court, is not relevant for deciding the present case.

22. On the issue raised by the petitioner that similarly situated employees and even those junior to the petitioner has been granted the scale pay and regularized in service under the scheme formulated in the O.M dated 17/03/2015, it is seen that, the petitioner, in the present case, has not impleaded any of those person who has been regularized in service under the scheme. It will, therefore, not be proper for this Court to examine the case of those persons 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.)”

23. Furthermore, the petitioner, referring to the letter dated 27/03/2020 (Annexure-A to the Government affidavit) has contended that the Government’s action of limiting the benefit of up-gradation of fixed pay to scale pay only to the work-charged employee who retired from service after 01/01/2020 is arbitrary and discriminatory. The letter dated 23/07/2020 contains the Government approval stipulating that “*The fixed pay employees who have retired on or before 01/01/2020 shall not have the right to claim scale of pay*”. This letter was written only after the petitioner retired from service on 30/06/2019. The petitioner, therefore, cannot derive any benefit for regularizing his service by agitating against the letter dated 23/07/2020 in the present petition. Even otherwise, the petitioner while contending that the administrative approval contained in the letter dated 23/07/2020 is arbitrary and discriminatory, has not taken any steps to impugn the letter dated 23/07/2020, therefore, in the absence of any challenge to the said letter, the administrative approval of the Government as contained in the letter dated 23/07/2020 continues to regulate the payment of scale pay to the fixed pay work-charged employees. In the case of **Krishnadevi Malchand Kamathia & Others** -versus- **Bombay Environmental Action Group and Others**, reported in **(2011) 3 SCC 363**, the Hon’ble Supreme Court has held that;

“16. It is a settled legal proposition that even if an order is void, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void. In State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil², Tayabbhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd.³, M. Meenakshi v. Metadin Agarwal⁴ and Sneh Gupta

v. Devi Sarup⁵, this Court held that whether an order is valid or void, cannot be determined by the parties. For setting aside such an order, even if void, the party has to approach the appropriate forum.

17. In State of Punjab v. Gurdev Singh⁶, this Court held that a party aggrieved by the invalidity of an order has to approach the court for relief of declaration that the order against him is inoperative and therefore, not binding upon him. While deciding the said case, this Court placed reliance upon the judgment in Smith v. East Ellore RDC⁷, wherein Lord Radcliffe observed : (AC pp.769-70)

".....An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity [on] its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

18. In Sultan Sadik v. Sanjay Raj Subba⁸, this Court took a similar view observing that once an order is declared non-est by the Court only then the judgment of nullity would operate erga omnes i.e. for and against everyone concerned. Such a declaration is permissible if the court comes to the conclusion that the author of the order lacks inherent jurisdiction/competence and therefore, it comes to the conclusion that the order suffers from patent and latent invalidity.

19. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the

ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person."

24. In the light of the discussions made above, this Court is firmly 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.

25. 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 does not fulfill the conditions to be regularized 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 delve into the petitioner's claim for pension and pensionary benefits.

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

JUDGE

Comparing Assistant