

GAHC010120042012



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

Case No. : WP(C)/31/2012

SMTI NGAHLHAI LIMSONG
W/O LATE KAILAL LIMSONG R/O VILL- THINGVOM, P.O. KHEPRE P.S.
MAIBANG DIST. N.C. HILLS DIMA HASSAO, ASSAM.

VERSUS

THE STATE OF ASSAM AND ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
PUBLIC WORKS DEPARTMENT ROADS, DISPUR, GUWAHATI-6.

2:THE SECRETARY
FINANCE DEPARTMENT
GOVT. OF ASSAM
DISPUR
GUWAHATI-6.

3:THE ACCOUNTANT GENERAL A and E
ASSAM
MAIDANGAO
BELTOLA
GUWAHATI-29.

4:THE CHIEF ENGINEER
ROADS
PUBLIC WORKS DEPARTMENT
CHANDMARI
GUWAHATI-3.

5:THE EXECUTIVE ENGINEER
R and B
MAIBONG DIVISION
MAIBONG- 788831

Advocate for the Petitioner : MR.H TALUKDAR

**Advocate for the Respondent : Mr. D. Nath, learned Senior Government Advocate.
Ms. Tinlung, Advocate.**

**BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

JUDGMENT

Date : 18-04-2024

None appears for the petitioner on call. Heard Mr. D. Nath, learned Senior Government Advocate, appearing for the respondent Nos.1 & 4, Ms. Tinlung, learned counsel appearing on behalf of Mr. R.K. Talukdar, learned counsel for the Accountant General, Assam (respondent No.3).

2. The petitioner, by way of instituting the present petition has prayed for a direction upon the respondent authorities for regularization of the services of her husband Late Kailal Limsong, by creating a supernumerary post for one day and thereafter to finalize her family pension.

3. As projected in the Writ Petition, the petitioner's husband Late Kailal Limsong was engaged as a Muster Roll Labour, in the establishment of the respondent No.5 on 01.08.1981. While working in such capacity, the husband of the petitioner died in harness on 07.04.2005, after having rendered services for 24 Years 8 Months 6 Days.

4. The petitioner in the Writ Petition has further contended that her husband being engaged as a Muster Roll Worker w.e.f. 01.08.1981, was covered by the policy adopted by the Government of Assam for regularization of the services of Muster Roll Workers who were so engaged prior to 01.04.1993. However, it is contended that before the process as initiated for regularizing the services of husband of the petitioner could be taken to its logical conclusion, he died while

working as a Muster Roll Worker on 07.04.2005.

5. The petitioner in support of her claim has placed reliance amongst others, on the decision of this Court in the case of Ms. Anjali Thapa vs. State of Assam and others (WP(C) No.4107/2010), wherein this Court vide order dated 06.08.2010, under similar circumstances had disposed of the Writ Petition by requiring the respondent authorities to regularize the services of the petitioner's husband, for one day, by creating a supernumerary post and thereafter to take further action in terms of the provisions in force for enabling the petitioner to receive family pension and other pensionary benefits. The petitioner has contended that she being similarly situated like the petitioner in WP(C) No.4107/2010, she is also entitled to similar benefits.

6. Mr. D. Nath, learned Senior Government Advocate, Assam appearing for the respondents has contended that the order dated 06.08.2010, as passed by this Court in WP(C) No.4107/2010 was questioned by the State by way of instituting a Review Petition being Review Petition No.124/2012 (State of Assam vs. Ms. Anjali Thapa and others).

7. This Court vide order dated 14.03.2013, on consideration of the issues as raised in the Review Petition was pleased to allow the same by recalling the said order dated 06.08.2010. This Court had arrived at a conclusion that it was not permissible to regularize the appointment of the person concerned during his lifetime, it would be equally impermissible to regularize his services after the person concerned had died. This Court further held that the direction as issued vide the order dated 06.08.2010 in WP(C) No.4107/2010, for creation of the supernumerary post for the purpose of regularizing the services of the husband of the petitioner herein to be wholly illegal.

8. The relevant paragraphs of the order dated 14.03.2013, passed by this Court in Review Petition No.124/2012 (State of Assam vs. Ms. Anjali Thapa and others) is quoted here-in-below for ready reference:

“13. Before dealing with the above aspects of the case, it needs to be borne in mind that an illegality cannot be allowed to be perpetuated in the name of removing discrimination. The mere fact that an authority has passed a particular order in the case of another person, similarly situated, cannot be a ground for issuing a writ in favour of a petitioner on the plea of discrimination if the order, passed in favour of the other person, is found to be contrary to law or not warranted in the facts and circumstances of the case. Noticing that the High Courts, in exercise of their writ jurisdiction, have been passing orders to remove discrimination and thereby asking the authorities concerned to repeat the illegality, the Supreme Court has expressed its anxiety on such an approach and has laid down the position of law, in no uncertain words, in Chandigarh Administration and another Vs. Jagjit Singh and another, , 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 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 allowed 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 war-ranted 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 extraordinary 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 the 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 please 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 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 illegal, 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 word. (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. (Emphasis is added)

14. From the observations, made in Jagjit Singh (supra), it becomes more than abundantly clear that in the name of removing discrimination, no Court can issue a direction, which would amount to perpetuating of illegality. If, therefore, a person's service cannot be regularized even after his death for the purpose making pension and pensionary benefits available to his legal representatives, it would be impermissible for the Court to issue such a direction and, if such a direction has been issued, then, the direction needs to be recalled.

15. While considering the rival submissions, made before this Court, it needs to be noted that there can be no doubt that the engagement of the husband of the writ petitioner-opposite party No. 1, whose death had given rise to the writ petition, in question, was not made following any selection process. This apart, his engagement was, admittedly, not against any vacant sanctioned post. In fact, his engagement was against non-existent post. In such circumstances, regularization of his services, in the light of the decisions in Uma Devi (supra), M.L. Kesari (supra) and Jitendra Kalita (supra), is impermissible in law.

16. With regard to the above, it may be noted that while laying down that unless an appointment has been made by observing the constitutional guarantee, as embodied in Articles 14 and 16 requiring an appointment to be made after giving opportunity of participation in the selection process to all eligible candidates, the Constitution Bench, in Uma Devi (supra), make one exception, the exception being that when a person was, admittedly, qualified and was appointed against a sanctioned post and has continued for more than 10 years, in service, without any orders of the Court, then, the State shall undertake an exercise to regularize the service of such

a person. The relevant observations, appearing at para 53, in *Uma Devi (supra)*, read as under:

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa (supra)*, *R.N. Nanjundappa (supra)*, and *B.N. Nagarajan (supra)*, and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of Courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of Courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date.

(Emphasis is added)

17. Having considered the exception, which was carved out by the Constitution Bench, in *Uma Devi (supra)*, a two Judge Bench of the Supreme Court, in *M.L. Kesari (supra)*, speaking, through *R.V. Raveendran, J.*, laid down as under:

7. It is evident from the above that there is an exception to the general principles against 'regularization' enunciated in *Umadevi*, if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any Court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

8. *Umadevi* casts a duty upon the concerned Government or instrumentality, to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of Courts or tribunals, as a one-time measure. *Umadevi*, directed

that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10.4.2006).

9. The term 'one-time measure' has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi, each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of Courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularize their services.

(Emphasis is added)

18. From a minute reading of what have been observed above, it becomes clear that as a one time measure, the State was given by the Constitution Bench, in Uma Devi's case (supra), the opportunity to regularize the service of such a person, whose appointment was not illegal, but irregular in the sense that he was qualified to hold the post against which he was appointed and that the post was a sanctioned post. Unless, therefore, a person is found to have been appointed against a duly sanctioned vacant post, his appointment cannot, in the light of the decision in Uma Devi (supra), be directed to be regularized. This is more than abundantly clear from the observations, made, at para 7, in M.L. Kesari (supra), which I have already reproduced above, and para 11 thereof, which is reproduced herein-below:

11. The object behind the said direction in para 53 of Umadevi is two-fold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of Courts or tribunals, before the date of decision in Umadevi was rendered, are considered for regularization in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad-hoc/casual for long periods and then periodically regularize them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10.4.2006 (the date of decision in Umadevi) without the protection of any interim order of any Court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularization. The fact that the employer has not undertaken such exercise of regularization within six months of the decision in Umadevi or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the above directions in Umadevi as a one-time measure.

19. Situated thus, it becomes abundantly clear that when it was not permissible to regularize the appointment of the person concerned during his lifetime, it would be equally impermissible to regularize his service after the individual concerned has died.

20. The direction, therefore, given in the writ petition, for counting the period of service of the writ petitioner's husband, as Muster Roll worker, for the purpose of computation of pensionary

benefits by creating, if necessary, superannuary post, is wholly illegal inasmuch as the period of service, which the individual had put in, could not have been counted for the purpose of computation of pensionary benefits. In essence, the directions, given by this Court, in the writ petition, in question, requires regularization of the service of the individual concerned, which, as already discussed above, was impermissible and ought not to have been directed, when the individual concerned had not been appointed or worked against any vacant sanctioned post.

21. Because of what have been discussed and pointed out above, this review petition succeeds. The directions, given by the order, dated 06.08.2010, are hereby set aside and the same shall accordingly stand vacated.”.

9. Applying the reasons as contained in the said order dated 14.03.2013, to the facts of the present case, it is found that the petitioner in the present proceedings has also prayed for creation of a supernumerary post for one day for the purpose of regularizing the services of her late husband and thereafter for releasing to her the due family pension and other pensionary benefits. This Court having already held that such regularization of services to be not permissible, the petitioner herein is also not entitled to any relief in the matter.

10. Accordingly, the services of the husband of the petitioner who had expired while serving as a Muster Roll Worker on 07.04.2005, now cannot be directed to be regularized by creating a supernumerary post. The services of the husband of the petitioner herein being not permissible to be directed to be regularized, the petitioner herein would not be entitled to receive the family pension and/or any other pensionary benefits, for the services as rendered by her husband as a Muster Roll Worker in the establishment of the respondent No.5.

11. Accordingly, in view of the conclusion reached herein above by this Court, this Writ Petition is held to be devoid of any merit and the same stands dismissed. However, there would be no order as to cost.

JUDGE

Comparing Assistant