

GAHC010182132021



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

Case No. : WP(C)/5820/2021

JOY NARAYAN SARMA AND ANR
S/O- LT. BHABENDRA NATH SARMA, VILL- PATHSALA JYOTI NAGAR,
WARD NO. 1, P.O. PATHSALA, DIST.- BAJALI, ASSAM, PIN- 781325

2: HARI DAS
S/O- LT. DHARMESWAR DAS
VILL- METUAKUCHI
P.O. BARPETA
DIST.- BARPETA
ASSAM
PIN- 78130

VERSUS

THE STATE OF ASSAM AND 5 ORS
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM, PUBLIC
HEALTH ENGINEERING DEPTT., DISPUR, GHY-06

2:THE COMM. AND SECY.
FINANCE DEPTT.
DISPUR
GHY-06

3:THE SECRETARY
PUBLIC HEALTH ENGINEERING DEPTT.
DISPUR
GHY-6

4:THE CHIEF ENGINEER (PHE)
WATER
ASSAM
HENGRABARI
GHY-36

5:THE EXECUTIVE ENGINEER (PHE)
NALBARI DIVISION
NALBARI- 781334

6:THE EXECUTIVE ENGINEER (PHE)
BARPETA DIVISION
BARPETA- 78131

Advocate for the Petitioner : MRS. R DEVI

Advocate for the Respondent : SC, P H E

BEFORE

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the petitioners : Ms. R. Devi

Advocate for the respondents : Shri I. Borthakur, PHE
Shri R. Borpujari,
SC-Finance

Date of hearing : **23.07.2024**

Date of Judgment : **23.07.2024**

JUDGMENT & ORDER

Two petitioners have joined together in this writ petition filed under Article 226 of the Constitution of India with the following relief:

“In the premises aforesaid, your Lordships may be pleased to admit this petition, call for the Records and issue Rule upon the Respondents to show cause as to why a writ in the nature of certiorari shall not be issued quashing and setting aside the order issued on Feb/2021 by the Under Secretary to the Government of Assam, PHE Department rejecting the proposals of regularization of

the services of Muster Roll/ Work Charged/ Casual Workers with consequential benefits such as pension etc. and/or any order/ direction passed or is being passed by the authorities that have the effect of depriving the petitioners from regularization of their service and/or why a writ in the nature of Mandamus shall not be issued directing/ Commanding the respondents authority to regularize the petitioners services in the Public Health Engineering Department with retrospective effect when the similarly situated persons were regularized in the department with all service benefits with a further direction to the authorities to forbear from passing or giving effect to any order (s) prejudicial to the right of the petitioners for regularization of their services with all service benefits and after hearing the parties and perusing of the records, this Hon'ble Court may be pleased to make the Rule absolute and/or pass such order as your Lordships may deem fit and proper.'

2. The facts projected is that the petitioners were initially appointed as work charged employees in the Public Health Engineering Department (hereinafter PHE) in the year 1988. In the year 1990, they were deputed to the Assam Urban Water Supply and Sewerage Board wherein, it is claimed that their services were also upgraded. In the year 2011, the petitioners were reverted back to the parent Department of PHE. The petitioners had sought for regularization of their services. However, by the impugned decision taken in February, 2021 by the Department, their cases of regularization has been negated. It is this order which is the subject matter of challenge with a further prayer for a direction to regularize the services of the petitioners.

3. I have heard Ms. R. Devi, learned counsel for the petitioners. I have also

heard Shri I. Borthakur, learned counsel representing the PHE Department and Shri R. Borpujari, learned Standing Counsel representing the Finance Department.

4. Ms. Devi, the learned counsel for the petitioners has submitted that the petitioners have rendered long period of service from the year 1988 and this writ petition was instituted when the petitioners were still in service. Though the petitioners have retired in the meantime, in absence of an order of regularization they are not getting their post retirement benefits. By referring to the documents annexed to the writ petition, the learned counsel for the petitioners has submitted that when the petitioners were reverted back to the PHE Department vide an order dated 06.04.2011, such reversion was with their respective posts. The learned counsel has emphasized on the issue that the petitioners were upgraded in their services while they were deputed in the Assam Urban Water Supply and Sewerage Board. Attention of this Court has also been drawn to a communication dated 13.04.2011 of the Department wherein a proposal for regularization and retention was made. The learned counsel has also relied upon an order dated 23.03.2017 of this court passed in WP(C)/3476/2016 where there was a direction for consideration of regularization. The learned counsel accordingly submits that in the line of the aforesaid order dated 23.03.2017, a similar order be passed for regularization of the services of the petitioners.

5. *Per contra*, Shri Borthakur, learned counsel representing the PHE Department has submitted that the records which have been enclosed to the writ petition do not even suggest that the initial appointment of the petitioners were in a vacant sanctioned post which is one of the pre-conditions laid down by the Hon'ble Supreme Court in the case of **Secretary, State of Karnataka**

and Ors. Vs. Umadevi (3) and Ors. reported in **(2006) 4 SCC 1** and therefore, the question of regularization would not arise. By referring to the communication dated 27.09.2019 relied upon by the petitioners which pertains to three employees of the Department whose services were regularized, the learned counsel has submitted that the said order was passed in terms of an order of this Court of the year 2012 and was also a conditional order that the regularization was purely temporary and could be reverted without assigning any reasons. He submits that after the case of **State of Assam Vs. Upen Das** reported in **2017 4 GLR 493**, the scope of regularization has become absolutely minimal and unless an incumbent meets the requirement laid down by the Hon'ble Supreme Court in the case of **Umadevi (3)** (supra), such regularization cannot be directed.

6. Endorsing the submission made on behalf of the PHE Department, Shri Borpujari, learned Standing Counsel, Finance Department has submitted that a bare look at the initial order of appointment dated 29.03.1988 would show that the same was not against any sanctioned vacant post. He has also highlighted the aspect that the order was issued by the Executive Engineer and not by the Government. By referring to the reversion order dated 06.04.2011 and the chart appended thereto, the learned Standing Counsel has submitted that unlike other incumbents, so far as the petitioners are concerned, there was no information on creation of the post. He submits that it indicates that the petitioners were not appointed against any sanctioned vacant post and therefore, the question of regularization would not arise. The learned Standing Counsel has also submitted that the order dated 23.03.2017 relied upon by the petitioners passed in WP(C)/3476/2016 was not a Mandamus *per se* and was only an order of consideration. As regards the regularization order pertaining to some other

incumbents, the learned Standing Counsel has submitted that such regularization order cannot be held to be a binding precedent as the same was issued by the Executive Engineer and not by the competent authority. The said regularization order also does not indicate that there was any approval by the Government and in any case, there is expressed clause that the regularization order was temporary in nature and could be reverted at any time without assigning any reasons. By drawing the attention of this Court to the affidavit-in-opposition filed by the Finance Department on 09.12.2022, the learned Standing Counsel has submitted that after the authoritative pronouncement by the Hon'ble Division Bench in the case of **Upen Das** (supra), a direction for regularization cannot be issued. He has also referred to the impugned order of February, 2021 whereby in view of the law laid down in the case of **Upen Das** (supra) case, the proposal were returned which cannot be found fault with. The attention of this Court has also been drawn to an order dated 27.03.2012 passed by a Division Bench of this Court in Misc. Case/597/2012 whereby there is a categorical finding that no direction can be issued by the Court for regularization of service which is contrary to the law laid down by the Hon'ble Supreme Court. The learned Standing Counsel has also specifically referred to the observation made by the Hon'ble Division Bench in paragraph 23 of the **Upen Das** (supra), the same is extracted hereinbelow-

“23. For these reasons, we are of the view that in the fact situation of the case, Muster Roll workers, Work Charged workers and Casual workers are not entitled for regularization of their services with consequential benefits, such as, pension etc. We, accordingly, subject to our direction in paragraph 22 of the judgment, allow the appeal and set aside the impugned judgment and order dated

20.12.2013 passed by the learned Single Judge.”

7. The rival submissions have been duly considered and the materials placed before this Court have been carefully examined.

8. The issue of regularization has been one of the matters for consideration before the Court from time to time. At one instance, the State Government has taken a step to regularize muster roll worker and work charged employee, who were appointed prior to 01.04.1993. However, the issue was finally resolved by a Division Bench of this Court in the case of **Upen Das** (supra) wherein the plea of the State was accepted by the Court and it was held that only by the length of service rendered, an incumbent does not *per se* become entitled for regularization. The Hon'ble Division Bench, in the aforesaid case had taken into consideration the law holding the field as laid down by the Hon'ble Supreme Court in the various cases including the case of **Umadevi (3)** (supra). In the said case, the Hon'ble Supreme Court had made the following observations:

“53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan 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

regularise as a onetime 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. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

9. The Hon'ble Division Bench by following the law laid down had negated the aspect of a claim for regularization. It was only on concession made by the State that certain observations were made for payment of the minimum wages to such employees.

10. In the instant case, the petitioners have relied upon an order dated 27.09.2019 pertaining to certain employees of the Department. A bare look of the said order would reveal that the same was passed by the Executive Engineer and was a conditional one. It also appears that the order was passed pursuant to certain directions of this Court passed in WP(C)/6532/2011 vide an order dated 26.07.2012. Apart from the fact that such directions were issued prior to the decision in the case of **Upen Das** (supra) case, the consequential order is also a conditional one which cannot be a binding precedent.

11. This Court however makes it clear that while it would be the prerogative of the Department to adopt a policy for regularization which however is to be

strictly in accordance with law, a direction for regularization cannot be passed by this Court in view of the authoritative pronouncement by the Hon'ble Division Bench of this Court in the case of ***Upen Das*** (supra). This Court has also noticed that the petitioners do not fulfill the three requirements as laid down by the Hon'ble Supreme Court in the case of ***Umadevi (3)*** (supra). Admittedly, the initial induction of the petitioners in service was not against any vacant sanctioned post.

12. In view of the aforesaid facts and circumstances, this Court is of the considered opinion that no relief can be granted to the petitioners in this case. The writ petition is accordingly dismissed.

13. No order as to costs.

JUDGE

Comparing Assistant