

GAHC020007032022



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

Case No. : WP(C)/275/2022

SHRI. DZESETUO RIO
AGED ABOUT 42 YEARS,
WORK CHARGED CARPENTER HELPER,
UNDER THE ESTABLISHMENT OF THE EXECUTIVE ENGINEER,
PWD(H) DIVISION, NAGALAND

VERSUS

THE STATE OF NAGALAND AND 2 ORS
THROUGH THE COMMISSIONER AND SECRETARY, WORKS AND
HOUSING DEPARTMENT, GOVERNMENT OF NAGALAND,
NAGALAND, KOHIMA

2:THE ENGINEER-IN-CHIEF

NPWD
NAGALAND
KOHIMA

3:THE CHIEF ENGINEER

PWD (HOUSING)

NAGALAND
KOHIM

Advocate for the Petitioner : MOA JAMIR

Advocate for the Respondent : GOVT ADV NL

Linked Case : WP(C)/105/2020

WATIMONGBA
S/O SHRI TEKACHANG

R/O TULI TOWN
MOKOKCHUNG
NAGALAND

(WORK CHARGED DRIVER
UNDER THE ESTABLISHMENT OF EXECUTIVE ENGINEER
NH-II
MOKOKCHUNG
NAGALAND)

VERSUS

STATE OF NAGALAND AND 3 ORS
THROUGH THE CHIEF SECRETARY

TO THE GOVERNMENT OF NAGALAND

NAGALAND
KOHIMA

2:THE COMMISSIONER AND SECRETARY
TO THE GOVERNMENT OF NAGALAND

WORKS AND HOUSING DEPARTMENT

NAGALAND
KOHIMA

3:THE ENGINEER-IN-CHIEF
NAGALAND PUBLIC WORKS DEPARTMENT
4:THE CHIEF ENGINEER
PUBLIC WORKS DEPARTMENT

(NATIONAL HIGHWAY)
NAGALAND
KOHIMA

Advocate for : MOA JAMIR

Advocate for : GOVT ADV NL appearing for STATE OF NAGALAND AND 3
ORS

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

Date of Hearing : 25.07.2024

Date of Judgment : 22.08.2024

JUDGMENT AND ORDER (CAV)

Both the two writ petitions relate to cases where the petitioners herein have sought for direction to regularize the services of the petitioners. The question is as to whether such direction can be passed by this Court taking into account the schemes of regularization of work-charged employees announced by the State of Nagaland and more particularly, the Office Memorandums dated 22.09.2004 and 17.03.2015. For deciding the said question, this Court finds it first to deal with the respective pleadings in both the writ petitions.

WP(C) No.105/2020

2. The petitioner herein was initially appointed as work-charged Driver vide an Office Order No.MKG/N.H/EI-6/949-50 dated 14.12.1998 in the pay of scale of Rs 900-25-1025-30-1445-35-1760 per month w.e.f. 01.11.1998. The services of the petitioner was extended from time to time without any break in service. At the time of filing the writ petition, the petitioner had 21 years 7 months of service and during the course of the hearing, it is stated that the petitioner still continues to render his services. At the time of taking up the instant matter for disposal, the petitioner has approximately 25 years of service. It is the case of the petitioner that the petitioner, being the senior most work-charged Driver in

the Division, he submitted a representation on 15.10.2019 praying for regularization. However, the same was not considered, and as such, the petitioner submitted another representation on 09.12.2019. Being aggrieved by the inaction on the part of the respondent authorities to consider the case for regularization, the petitioner has therefore approached this Court by filing the instant writ petition.

3. It is seen from the affidavit filed by the respondent authorities that there is no denial to the fact that the petitioner was duly appointed on the date stated in this writ petition. However, it is the specific case of the respondents in their affidavit that the petitioner's case is being taken up for consideration. But as he is at Sl. No.8 of the seniority list of the scale paid work-charge employees under the establishment of E.E PWD (NH), Division-I, Mokokchung, the petitioner's case would be considered as and when his turn comes. In that regard, the seniority list of the work-charged employees under the National Highway Division No.-II, Mokokchung has been enclosed to the said affidavit and from the seniority list it is seen that the petitioner is at Sl. No.8.

4. To the said affidavit-in-opposition so filed, the petitioner has filed an affidavit-in-reply stating inter-alia that the seniority list is not prepared in terms with the Office Memorandum dated 22.09.2004 in as much as, as per the said Office Memorandum, each Department should maintain a seniority list in various categories in order of their length of service, and as such, the question of maintaining the separate seniority list in the Department on Division-wise was contrary to the Office Memorandum. In addition to that, the petitioner had also stated that a perusal of Annexure-

7 to the writ petition would show that for the period from 2009 till 2019, 72 drivers were appointed directly without considering the ratio to be maintained in terms with the Office Memorandum dated 22.09.2004.

WP(C) No.275/2022

5. The case of a petitioner in the instant writ petition is that vide an Office Order No.DS/ESTT-5/98-99/539-45 dated 04.01.1999 issued by the Sub-Divisional Office, PWD (H) Sub-Division No.1, Dimapur, Nagaland, the petitioner was initially appointed as a work-charged labour on fixed pay w.e.f. 04.01.1999 under the Establishment of the Sub-Divisional PWD (H) Sub-Division No.1, Dimapur, Nagaland. Thereupon, vide an order dated 04.04.2006, the petitioner was promoted to the post of work-charged Carpenter Helper in the scale of pay of Rs.800-18-890-20-1050-25-1475 per month under the Establishment of the Sub-Divisional Officer, PWD (Housing) No.1, Dimapur, Nagaland. As on the date of filing of the instant writ petition in the year 2022, the petitioner had rendered 23 years of continuous service. However, it is the case of the petitioner that the respondent authorities have however not taken up the case of the petitioner for regularization. It is also seen that the petitioner had also submitted representation for regularization of his services on 29.09.2022 which was however not considered. It was also the case of the petitioner that in violation to the Office Memorandum dated 22.09.2004, the respondent authorities for the period from January 2016 to January 2022 had appointed 204 Grade-IV employees directly without considering the case of regularization of the work-charged employees. Being aggrieved by the action of the respondent authorities, the petitioner has therefore

approached this Court seeking a direction that the petitioner's services should be regularized in terms with the Office Memorandum dated 22.09.2004 as well as the Office Memorandum dated 17.03.2015.

6. In the instant writ petition, an affidavit-in-opposition has been filed wherein there is no denial to the aspect as regards the date of appointment of the petitioner as well as the number of years of continuous service rendered. However, it is mentioned that the petitioner's case has been taken up for consideration in terms with the Office Memorandum dated 22.09.2004 and he is at Sl. No.4 of the seniority list and there are still three employees who are senior to the petitioner and the petitioner's case would be duly considered as and when his turn comes. It has also been mentioned that out of the 30 vacancies of Carpenter Helper from 2015 to 2019, the Department had utilized 20 vacancies of the Carpenter for work-charged regularization and only 10 vacancies were utilized for fresh appointment, and as such, denied the allegation made of non-consideration of work-charged employees for regularization by the petitioner. No affidavit-in-reply however is filed.

7. In the backdrop of the above facts, this Court has heard Mr. Moa Jamir, the learned counsel appearing on behalf of the petitioners in both the writ petitions and Mr. K. N. Balgopal, the learned Advocate General assisted by Ms. V. Soukhrie, the learned Additional Advocate General, Nagaland and has given anxious consideration to their respective submissions. For deciding the entitlement of the petitioners in both the writ petitions, this Court finds it relevant to first deal with the powers conferred upon this Court to direct regularization vis-à-vis power to issue

direction when the State formulate policies of regularization.

8. It is relevant to take note of that in the case of ***State of Karnataka & Others vs. Umadevi (3) & Others***, reported in ***(2006) 4 SCC 1***, two issues primarily felt for consideration before the Constitution Bench of the Supreme Court:-

(i) The right of the employees seeking regularization on the strength of long and continuous work; and

(ii) The correctness of the directions issued by the High Courts for regularization of employees under Article 226 of the Constitution.

9. The Constitution Bench of the Supreme Court in the case of ***Umadevi (3)*** (supra) dealt firstly with the right claimed by the temporary employees to be regularized in service on the basis of long continuance, legitimate expectation, employment under the State and Directive Principles. In addition to that, the Constitution Bench also answered as to whether Courts would be justified in issuing directions for regularization based on such features such as equality and long spell of service. On both the counts, the Constitution Bench held against the temporary employees.

10. Be that as it may, the judgment in the case of ***Umadevi (3)*** (supra) is not an authority for the proposition that the Executive or the Legislature cannot frame a scheme for regularization or in other words, the said judgment rendered in ***Umadevi (3)*** (supra) did not denude the State or its instrumentalities from framing a scheme for regularization.

11. In the backdrop of the above, it is relevant to take note of that the

Government of Nagaland had formulated a scheme for regularization of services of work-charged employees which is the Office Memorandum dated 22.09.2004. Clauses (i) to (v) of the said Office Memorandum dated 22.09.2004 being relevant is reproduced hereinunder:-

(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 recruitment.

(iv) Work-charged employees will have the right to be considered first for regularization against 50% of all future vacancies of similar nature in the Department for which they possess the requisite qualification. Such regularization will be considered 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-charged employee is found suitable for regularization in terms of the above clause (iv), the Department will obtain clearance 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 employee.

12. It is also relevant to take note of that the Government of Nagaland had framed another scheme for regularization and absorption of work-charged and casual employees and revision of pay/wages. This is the

Office Memorandum dated 17.03.2015. Clause 1 (i), 1(ii) and 1 (iii) being relevant is reproduced herein under:-

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)

(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 stands 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.

13. Taking into account that the petitioners herein claim rights under both the Office Memorandums and the respondent State having taken a stand that the petitioners would not be entitled to in terms with the Office Memorandum dated 17.03.2015, this Court specifically sought the assistance of the learned Advocate General, State of Nagaland on the aspect as regards the situations under which the Office Memorandum dated 22.09.2004 as well as the Office Memorandum dated 17.03.2015

would be applicable.

14. At this stage, it would be relevant to take note of the submission of the learned Advocate general, Nagaland. The learned Advocate General submitted that the Office Memorandum dated 22.09.2004 would be applicable to all work-charged employees who possesses the requisite qualification and would be considered against 50% of all future vacancies in the Department. Such consideration shall be based on seniority-cum-merit or in other words, that the senior most work-charged employee in the relevant category would get regularized subject to his or her fitness for the vacant post. The learned Advocate General, however, submitted that in the case of the Office Memorandum dated 17.03.2015, it is not against future vacancies, but it shall be applicable to all work-charged and casual employees of various Departments who enjoys scale pay and who had completed 30 years or more continuous service as on 01.01.2015. He further submitted that such regularizations so made would be by conversion of their posts into regular ones personal to them and subject to fulfillment of the conditions as mentioned in Sub-Clauses (a) to (h) of Clause 1 (i). He further submitted that those employees who had not completed 30 years of continuous service as on 01.01.2015, but would complete after 01.01.2015, their cases for regularization would be taken up in the similar manner as stipulated in Clause 1 (i) in two batches, as on 1st of July and 1st of January every year. He further submitted that for a period of 5 years w.e.f. 01.01.2015, the quota for regularization vis-à-vis future vacancies which was 50% as per the Office Memorandum dated 22.09.2004 was enhanced to 67% as would be seen from Clause 1 (iii). He submitted that at present the regularization against future vacancies in

terms with the Office Memorandums for work-charged employees would be 50% w.e.f. 01.01.2021.

15. From the said submission made by the learned Advocate General, it is therefore clear that the Office Memorandums dated 22.09.2004 and 17.03.2015 operate in different fields though they relate to regularization of work-charged employees. The Office Memorandum dated 22.09.2004 does not mention as to how long the length of service is required for being considered for regularization as well as do not require that the work-charged employee needs to be in a scale of pay. The said Office Memorandum merely stipulates that the respondent authorities shall first consider regularization against 50% of all future vacancies of the work-charged employees provided they possess the requisite qualification. The criteria on the basis of which such regularization could be made is seniority-cum-merit or in other words, the senior most work-charged employee in the relevant category would be regularized subject to his or her fitness for the vacant post. Clause (v) of the Office Memorandum dated 22.09.2004 is very pertinent taking into account that the Department can make fresh appointment against the quota reserved for work-charged employees only subject to two conditions. First, there is no work-charged employee found suitable for regularization in terms with Clause (iv) of the Office Memorandum dated 22.09.2004 and secondly, the Department would have to obtain the clearance of P&AR Department before making any fresh appointment. This Clause (v) therefore protects the interest of the work-charged employees who are awaiting their turn for being considered for regularization.

16. On the other hand, it is also clear from the submission of the learned Advocate General as well as perusal of the Office Memorandum dated 17.03.2015 that to be considered for regularization in terms with the said Office Memorandum, the work-charged as well as the casual employees have to complete 30 years of service and paid remuneration in a pay scale. The question of future vacancies arising or not is not a relevant consideration is so far as the Office Memorandum dated 17.03.2015 is concerned in as much as those work-charged and casual employees who have completed 30 years of service and in a pay scale would be regularized by creation of a supernumery post strictly personal to the said employee and the said post would cease to exist upon the superannuation/termination of service of the employee. The employee however would be entitled to his pension and his pensionary benefits.

17. Now coming back to the facts of instant case, it would be seen that the petitioners in both the writ petitions do not come within the ambit of the Office Memorandum dated 17.03.2015 as they have rendered less than 30 years of service as on date. However, the petitioners herein would definitely be entitled to be considered in terms with the Office Memorandum dated 22.09.2004. It is seen from the affidavit so filed by the respondents in both the writ petitions that the petitioner in WP(C) No.105/2020 is at Sl. No.8 and the petitioner in WP(C) No.275/2022 is at Sl. No.4.

18. Under such circumstances, this Court directs the respondent authorities to consider the case of the petitioners in terms of Sub-Clause (iv) of the Office Memorandum dated 22.09.2004.

19. This Court further observes and directs that the Respondents shall not violate the quota of 50% of all future vacancies as stipulated in Clause (iii) of the Office memorandum dated 22.09.2024. In addition to that, the respondent authorities shall not make any fresh appointment in violation to Clauses (iv) and Clause (v) of the Office Memorandum dated 22.09.2004. It is further observed that the petitioners herein would be entitled for consideration in terms with the Office Memorandum dated 17.03.2015 only upon completion of 30 years of service.

20. In view of the above observation and direction, both the writ petitions stand disposed of.

JUDGE

Comparing Assistant