

GAHC020004882023



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

Case No. : WP(C)/204/2023

MR. VIVITO
S/O SHIHOTO,
R/O HEZULHO VILLAGE,
DISTRICT NIULAND, NAGALAND

VERSUS

THE STATE OF NAGALAND AND 3 ORS
REPRESENTED BY THE COMMISSIONER SECRETARY/ SECRETARY,
DEPARTMENT OF WORKS AND HOUSING,
GOVERNMENT OF NAGALAND,
KOHIMA, NAGALAND

2:THE COMMISSIONER AND SECRETARY/SECRETARY

DEPARTMENT OF PERSONNEL AND ADMINISTRATIVE REFORMS

GOVERNMENT OF NAGALAND

KOHIMA
NAGALAND

3:THE ENGINEER-IN-CHIEF

PUBLIC WORKS DEPARTMENT (PWD)

GOVERNMENT OF NAGALAND

KOHIMA
NAGALAND

4:THE CHIEF ENGINEER

PUBLIC WORKS DEPARTMENT (R AND B)

GOVERNMENT OF NAGALAND

KOHIMA
NAGALAN

Advocate for the Petitioner : A. ZHIMOMI

Advocate for the Respondent : GOVT ADV NL

Linked Case : WP(C)/201/2023

MR. LUVUKHU
R/O HEZULHO VILLAGE

DISTRICT NIULAND
NAGALAND

VERSUS

THE STATE OF NAGALAND AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY/
SECRETARY

DEPARTMENT OF WORKS AND HOUSING

GOVERNMENT OF NAGALAND

KOHIMA
NAGALAND

2:THE COMMISSIONER AND SECRETARY/ SECRETARY

DEPARTMENT OF ADMINISTRATIVE REFORMS

GOVERNMENT OF NAGALAND

KOHIMA
NAGALAND

3:THE ENGINEER-IN-CHIEF

PUBLIC WORKS DEPARTMENT (PWD)

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NAGALAND
4:THE CHIEF ENGINEER

PUBLIC WORKS DEPARTMENT (R AND B)

GOVERNMENT OF NAGALAND

KOHIMA
NAGALAND

Advocate for : A. ZHIMOMI
Advocate for : GOVT ADV NL appearing for THE 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)

Heard Mr. A. Zhimomi, the learned counsel appearing on behalf of the petitioners and Mr. K. N. Balagopal, the learned Advocate General, Nagaland assisted by Ms. V. Soukhrie, the learned Additional Advocate General, Nagaland appearing on behalf of the respondents.

2. In both the writ petitions, the petitioners have challenged Clauses (ii), (iii) and (iv) of the Office Memorandum dated 22.09.2024 as well as Clauses 1 (i), 1(ii), 1(iii), 2 & 3 of the Office Memorandum dated 17.03.2015. In addition to that, the petitioners have also sought for grant

of minimum scale of pay allowed to a labour appointed on regular basis to the petitioners with effect from the date of their initial appointment along with arrears and also a direction upon the respondents to regularize the services of the petitioners. For dealing with the issues involved in the instant writ petitions, this Court finds it relevant to take note of the brief facts in both the writ petitions.

WP(C) No.201/2023

3. The petitioner herein claims that in the year 1994, a person namely Niraj was appointed as a work-charged labour under the Establishment of the SDO, PWD, Road-II Sub-Division, Dimapur. As the said person failed to report, the petitioner was appointed in his place. However, there was no formal order issued to that effect. Be that as it may, vide an order 02.06.2014, a formal order was issued wherein the petitioner was shown as appointed as a work-charged labour and in the remarks column, it was shown that the petitioner has been serving for the past 20 years and receiving a salary of fixed amount of Rs.5,205/- per month. The petitioner claims that he has rendered 20 years of continuous service as a work-charged labour, and as such, he ought to have been considered in terms with the Office Memorandum dated 22.09.2004. It is the further case of the petitioner that as on the date of filing the writ petition, he had completed 29 years of service. The petitioner herein has assailed the Office Memorandums dated 22.09.2004 as well as 17.03.2015 on the ground that they are unconstitutional as both the Office Memorandums stipulate certain conditions for regularization of the services of the work-charged employees.

4. In the said writ petition, an affidavit has been filed by the respondent Nos.1, 2, 3 & 4 that the petitioner has only served for 9 years and not 29 years as alleged in the instant writ petition. It has also been mentioned that the Office Memorandums dated 22.09.2004 as well as 17.03.2015 are schemes made by the State of Nagaland for regularization of its employees. These schemes have been providing benefits to various work-charged as well as casual employees. Laying down prescribed service conditions and criteria for service regularizations are within the exclusive domain of the State Government subject to restrictions envisages in the Constitution. It was also stated that the schemes of 2004 as well as 2015 cannot be challenged on the ground that the petitioner did not fulfill the criteria laid down therein. It has also been mentioned that the petitioner is at Sl. No.96 of the seniority list prepared of work-charged labour under the Executive Engineer, PWD (R&B), Dimapur Division as on February 2024 and his case would only be considered as per Clause (iv) of the Office Memorandum dated 22.09.2004.

WP(C) No.204/2023

5. The petitioner herein claims that one Tunulal was appointed as a work-charged labour under the Establishment of the SDO, PWD, Road-II Sub-Division, Dimapur in the year 2003. As the person failed to report for duty, the petitioner was appointed in his place. However, there was no formal order issued. After 12 years, vide an order dated 02.06.2014, a formal order was issued whereby the petitioner was shown as appointed as work-charged labour and in the remarks column, it was stated that the petitioner was serving for the past 12 years and he was currently receiving

salary amount of Rs.5,205/- per month. It is the case of the petitioner that the petitioner has rendered 20 years of service and he had represented before the respondent authorities for his regularization, but the same had not found favour with the respondent authorities for which the instant writ petition has been filed. In the similar manner like the petitioner in WP(C) No.201/2023, the petitioner has also assailed the Office Memorandum dated 22.09.2004 as well as the Office Memorandum dated 17.03.2015. The respondents have filed their affidavit-in-opposition which is similar in content to the affidavit-in-opposition filed in WP(C) No.201/2023, and as such, for the sake of brevity, the same is not being repeated. However, it is the categorical stand taken by the respondents that the petitioner has only rendered 9 years of service and not 20 years as alleged. It has also been mentioned that the petitioner is at Sl. No.97 of the seniority list prepared of work-charged labour under the Executive Engineer, PWD (R&B), Dimapur Division as on February, 2024 and his case would only be considered as per Clause (iv) of the Office Memorandum dated 22.09.2004.

6. In the backdrop of the above facts, this Court has heard Mr. A. Zhimomi, 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 for regularization.

7. 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.

8. 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.

9. 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.

10. In the backdrop of the above, it is relevant to take note of that the Government of Nagaland had formulated 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.

11. 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.

12. Taking into account that the petitioners herein challenged the clauses of both the Office Memorandums, 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.

13. 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 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.

14. 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 would 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 fulfilling 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. The said Sub-clause therefore protects the interest of the work-charged employees who are awaiting their turn for being considered for regularization.

15. 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 of the said Office Memorandums, 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.

16. In the present writ petitions, it would be seen that the petitioners have challenged both the Office Memorandums dated 22.09.2004 as well as 17.03.2015 on the ground that the State cannot lay down the various conditions. In the opinion of this Court, the said challenge is completely misconceived in as much as the respondent State who has the power to frame a scheme for regularization would also be within its power to frame the various conditions upon which these schemes for regularization would operate. Merely because of the petitioners having rendered service, there is no vested right upon the petitioners to seek regularization. It is no longer res-integra that regularization is not a source of recruitment. It is based on the policy of the Government to bring the various kinds of temporary, work-charged, casual etc. employees with the fold of the service of the Government who on account of genuine and administrative exigencies were appointed. This aspect of the matter is well settled by the judgment of the Supreme Court in the case of **Umadevi (3)** (supra) as well as various other judgments. In this regard, this Court finds it relevant to refer to the judgment of the Supreme Court in the case of **State of Jammu & Kashmir and Others vs. District Bar Association,**

Bandipora, reported **in (2017) 3 SCC 410**. Paragraph No.26 of the said judgment is reproduced herein below:

“26. The principles will have to be formulated bearing in mind the position set out in the above judgments. Regularisation is not a source of recruitment nor is it intended to confer permanency upon appointments which have been made without following the due process envisaged by Articles 14 and 16 of the Constitution. Essentially a scheme for regularisation, in order to be held to be legally valid, must be one which is aimed at validating certain irregular appointments which may have come to be made in genuine and legitimate administrative exigencies. In all such cases it may be left open to courts to lift the veil to enquire whether the scheme is aimed at achieving the above objective and is a genuine attempt at validating irregular appointments. The State and its instrumentalities cannot be permitted to use this window to validate illegal appointments. The second rider which must necessarily be placed is that the principle as formulated above is not meant to create or invest in a temporary or ad hoc employee the right to seek a writ commanding the State to frame a scheme for regularisation. Otherwise, this would simply reinvigorate a class of claims which has been shut out permanently by Umadevi (3). Ultimately, it would have to be left to the State and its instrumentalities to consider whether the circumstances warrant such a scheme being formulated. The formulation of such a scheme cannot be accorded the status of an enforceable right. It would perhaps be prudent to leave it to a claimant to establish whether he or she falls within the exceptions carved out in para 53 and falls within the ambit of a scheme that may be formulated by the State. Subject to the riders referred to above, a scheme of regularisation could fall within the permissible limits of Umadevi (3) and be upheld.”

17. Under such circumstances, the challenge made to the Office Memorandums dated 22.09.2004 as well as 17.03.2015 on the ground that the various conditions have been laid down on the basis of which regularization would be given effect, in the opinion of this Court, cannot be said to be unconstitutional unless a case of violation of the fundamental or Constitutional rights can be shown which the petitioners completely failed to do so.

18. This Court further takes note of that the petitioners in both the writ petitions have only completed 9 years of service. They would definitely be entitled to be considered in terms with the Office Memorandum dated

22.09.2004 and more particularly Clause (iv) which stipulates that it is to be done as per seniority-cum-merit and fulfilling the requisite qualifications. It is also seen that both the petitioners are at St. No. 96 and Sl. No.97 respectively in the seniority list so prepared, and as such, the petitioners herein can only be considered as and when their turn comes.

19. Under such circumstances, this Court cannot issue directions for granting the petitioners an out of turn consideration by the respondent authorities as the same would be going against the mandate of Clause (iv) of the Office Memorandum dated 22.09.2004. It is however observed that the petitioners would only be entitled to regularization strictly in terms of the Office Memorandum dated 22.09.2004.

20. It is also seen from the stand taken by the petitioners in both the writ petitions that they claim that they are entitled to the minimum of the scale of pay as provided to the regular employees performing similar works. It is pertinent to take note of that such a direction as sought for cannot be granted as the petitioners herein cannot be equated with the regular employees in as much as the manner of entering into the service of the petitioners are not the same as that of the regular employees. In addition to that, such a direction if passed would amount to interfering into the domain reserved exclusively upon the Executive. In this regards, this Court finds it relevant to refer to the judgment of the Supreme Court in the case of ***State of Bihar vs. Bihar Secondary Teachers Struggle Committee, Munger & Others***, reported in ***(2019) 18 SCC 301*** wherein the Supreme Court laid down the limitations or qualifications to

the applicability of the doctrine of 'equal pay for equal work'. Amongst the various limitations, it was observed that if the person had not gone through the process of recruitment, it may itself, in certain cases, make a difference. In addition to that, it was observed that granting pay scale is purely an executive function and the Court should not interfere as it would amount to having a cascading effect creating all kinds of problems for the Government and Authorities. Paragraph No.96 along with the sub-paragraphs are quoted herein below:-

“96. Analysis of the decisions referred to above shows that this Court has accepted the following limitations or qualifications to the applicability of the doctrine of “equal pay for equal work”:

96.1. The doctrine of “equal pay for equal work” is not an abstract doctrine.

96.2. The principle of “equal pay for equal work” has no mechanical application in every case.

96.3. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference.

96.4. The application of the principle of “equal pay for equal work” requires consideration of various dimensions of a given job.

96.5. Thus, normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere.

96.6. Granting pay scales is a purely executive function and hence the court should not interfere with the same. It may have a cascading effect creating all kinds of problems for the Government and authorities.

96.7. Equation of posts and salary is a complex matter which should be left to an expert body.

96.8. Granting of pay parity by the court may result in a cascading effect and reaction which can have adverse consequences.

96.9. Before entertaining and accepting the claim based on the principle of equal pay for equal work, the Court must consider the factors like the source and mode of recruitment/appointment.

96.10. In a given case, mode of selection may be considered as one of the factors which may make a difference.”

21. In view of the above, this Court is of the opinion that the petitioners in both the writ petitions have failed to make out a case for granting scale

of pay to them as granted to the regular employees.

22. In view of the above observations and directions, this Court finds no merit in the writ petitions, and accordingly, the same stand dismissed. No costs.

JUDGE

Comparing Assistant