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HIGH COURT OF ORISSA : CUTTACK.

WPC (OA) No. 1791 of 2017

(in the matter of an application under
Articles 226 & 227 of the Constitution of India, 1950)

SRI DEBENDRANATH SAHOO
SON OF LATE NARAYAN SAHOO

...

Petitioner

Mr. Prasanta Kumar Mishra,
Advocate for the petitioner

-versus-

STATE OF ODISHA & OTHERS

...

Opposite Parties

Mr. Lalatendu Samantaray,
Additional Government Advocate

Date of Hearing: 30.08.2022

::

Date of Judgment : 02.09.2022

CORAM:

MR. JUSTICE MURAHARI SRI RAMAN

JUDGMENT

This matter is taken up by virtual/physical mode.

“The State to secure a social order for the promotion of the welfare of the people.—

The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status,

P.T.O.

facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.”

— Article 38, the Constitution of India, 1950

2. The petitioner-WATCHMAN UNDER THE WORK CHARGED ESTABLISHMENT, as applicant before the Odisha Administrative Tribunal in O.A. No.1791 of 2017 filed under Section 19 of the Administrative Tribunal Act, 1985, which is later renumbered as WPC (OA) No.1791 of 2017 being transferred to this Court, at the verge of retirement in the year 2017, came up with grievance that his representation to bring his service over to regular establishment was not paid due attention, as a consequence, he would be deprived of service benefit including pensionary benefits. Therefore, the petitioner has sought for the following reliefs:

“The Hon’ble Tribunal may be pleased to declare that the action of the respondents in not regularizing the service of the applicant in regular establishment despite of vacancies is illegal and arbitrary;

The Hon’ble Tribunal may be pleased to direct the respondent to absorb the service of the applicant in regular establishment prior to date of his superannuation and extend all benefits including pensionary benefits as due admissible to him within a time to be stipulated;

Pass any other relief(s) the Hon’ble Tribunal deems fit and proper for the interest of justice.”

3. The fact as set forth by the petitioner reveals that having qualification of Class IX and being qualified as “welder” from Industrial Training Institute, he was initially engaged as Nominal

Muster Roll (NMR) employee under the Executive Engineer, Minor Irrigation Division, Khurda on 01.12.1983. Since his service along with many others was not regularized, the Employees Union approached the Government. Instead of bringing the petitioner over to regular establishment, he was brought over to work charged establishment at the age of about 53 years having rendered around 33 years of service *vide* Office Order bearing No.1451/CMIC/Bhubaneswar, dated 23rd April, 2010 (Annexure-2) which runs as follows:

*“In pursuance of Lr. No.5330, dated 19.04.2010 of Chief Engineer, Minor Irrigation, Orissa, Bhubaneswar Sri Debendranath Sahoo, NMR is hereby brought over as a watchman under work charged establishment in the scale of pay Rs.4440-7440 (pay band-1S) with Grade Pay Rs.1,500.00 and other allowances sanctioned by the Government of Odisha from time to time and posted as such under Junior Engineer, M.I. Mech. Section, Bhubaneswar under Asst. Executive Engineer, S&M (MI) Sub-Division, Bhubaneswar under MI Division, Khurda as is where is basis until further order from his date of joining as a watchman. ***”*

- 3.1. It is claimed by the petitioner that as he complied with the terms and conditions envisaged in the Government of Odisha in Finance Department Resolution dated 15th May, 1997 (Annexure-1) his service is liable to be regularized. The petitioner laid stress on said Resolution which runs as follows:

*“No.WFI-24/97-22764/F
Government of Orissa
Finance Department

*Resolution
Bhubaneswar, dated, the 15th May, 1997*

Sub.: Scheme for absorption of NMR/DLR/Job Contract Workers under Regular Establishment.

It has been brought to the notice of Finance Department by the different Departments of Government that directives from Hon'ble Supreme Court, High Court and Orissa Administrative Tribunal have been received for preparation of a scheme to absorb the above categories of workers under regular establishment.

As per the above directions, Government have been pleased to formulate the following norms and conditions for the NMR/DLR/Job Contract Workers:

- 1. Separate Gradation/Seniority list shall be prepared by the Appointing Authority for each category of workers determining the length of engagement of a particular person. The workers should have worked under the administrative control of the Department concerned directly for a minimum period of 10 years. The engagement of 240 days in a year shall be construed as a complete year of engagement for this purpose.*
- 2. The workers should have been engaged prior to 12.04.1993 i.e. prior to promulgation of ban on engagement of NMR/DLR/Job Contract Workers etc. vide Finance Department Circular No. WF-II-180/92-17815/F., dated 12.04.1993.*
- 3. They should have the minimum educational/technical qualification prescribed for the post against which they would be absorbed.*
- 4. They should be within the age limit prescribed for 1st appointment to Government service after deduction of the number of years they have worked under the Department concerned.*

Provided that the age limit can be further relaxed with the approval of Appointing Authority.

5. *Absorption against the post for which regular recruitment rules have been framed will be made in relaxation of the relevant provisions by the competent authority.*
6. *Vacancies reserved for SC/ST/OBC/Women candidate/Physically Handicapped etc. will be filled up according to reservation rules issued by Government from time to time.*
7. *Absorption in Class-III & IV posts against the vacant posts shall be made keeping in view the austerity measures issued in Finance Department OM No.50791/F., dated 10.12.1996 read with OM No.4986 dated 07.02.1997.*
8. *While filling up the regular vacant posts preference shall be given to work charged employees first. Where no suitable work charged employees are available to man the post preference shall be given in the following order i.e. NMR, DLR, Job Contract Workers and others.*
9. *On absorption in a regular establishment the worker shall draw the minimum of the time scale attached to the post and other allowances as admissible under rules from time to time.*
10. *The date of regularization shall be reckoned as the 1st appointment to the service for pension and other service benefits.*
11. *The authority competent who shall issue the order of regularization shall certify that the person(s) who are being regularized in this order were engaged as _____ prior to 12.04.1993 i.e. prior to promulgation of ban issued by Finance Department and this has been agreed to by the Financial Advisor of the Department.*
12. *This order shall supersede all the orders/resolutions/notifications etc. issued by various Departments of Government for regularization of*

NMR/DLR/Job Contract and other such category of workers. Copy of all regularization order issued in this connection shall be forwarded simultaneously to the Administrative Department concerned and Finance Department.

Order: Ordered that this should be published in the next Issue of Orissa Gazette for general information.”

*By order of the Governor
P.K. Mishra
Principal Secretary to Government”*

3.2. It is highlighted by learned counsel for the petitioner that the petitioner was under impression that before his retirement from service *i.e.*, 30.11.2017, he would be brought to regular establishment so as to be entitled for pension. But the authority has paid deaf ears which compelled him to file this case on 01.11.2017. Though the learned Odisha Administrative Tribunal *vide* Order dated 02.11.2017 issued notice to the opposite parties and passed interim order to the effect that “pendency of the Original Application is not a bar for consideration of the grievance of the applicant”, the opposite parties have not been kind enough to consider the same knowing fully well that the petitioner would get retired from service on attaining the age of superannuation on 30.11.2017.

4. *Per contra*, Mr. Lalatendu Samantaray, Additional Government Advocate vehemently argued that as per policy decision taken in the Government, the petitioner was brought over to work charged establishment by virtue of Notification No.7323-FE-IV-(NMR)-30/08/WR, dated 28.02.2009 issued in consideration of the

instructions contained in the Work Charged Employees (Appointment and Conditions of Service) Instructions, 1974 and in absence of vacant posts, the service of the petitioner was not entitled for being regularized in terms of Finance Department Resolution No.WFI-24/97-22764/F., dated, the 15th May, 1997. He further argued that though the Chief Engineer, Minor Irrigation, Odisha, Bhubaneswar *vide* Letter No.17125-OE.WM.05/2016/MI, dated 19th December, 2016 (Annexure-4) suggested 110 numbers of work charged employees belonging to Group-D category for being brought over to regular (wages) establishment, the Government upon consideration of such suggestion decided to bring over 65 numbers of work charged employees to regular (wages) establishment against vacant posts *vide* Government of Odisha in Department of Water Resources Letter No.7798/WR, dated 29th March, 2017 in File No.FE-IV-WC-03/2017 (Annexure-5). It is also submitted that the petitioner being retired since 30th November, 2017, no relief as prayed for can be granted to him.

5. It is relevant to extract the following paragraph from the counter filed on behalf of the opposite parties:

“That in reply to paragraph 6.2 of the Original Application, it is humbly submitted that, the applicant was initially engaged as NMR worker under the Executive Engineer, Minor Irrigation Division, Khordha on 01.12.1983. As per the policy decision of the Government in Department of Water Resources, Odisha, Bhubaneswar he has already been brought over to work charged establishment vide Notification No.7323 dated 28.02.2009 (Annexure-A). The applicant has joined in work charged establishment as watchman (work charged) on 01.05.2010 F.N.

vide Office Order No.1451 dated 23.04.2010 (Annexure-2 of O.A.) of the Superintending Engineer, Central Minor Irrigation Circle, Bhubaneswar and retired as such on attaining the age of superannuation i.e. on 30.11.2017 (AN) as per Office Order No.3583 dated 09.10.2017 (Annexure-7 of O.A.).”

5.1. In the instant case, undisputed fact remains that the petitioner has worked uninterruptedly since 01.12.1983 till 28.02.2009 (joined on 01.05.2010) when he was brought over to work charged establishment and continued as such till his retirement on 30.11.2017. Thus, total period of service he has rendered is around 33 years.

6. Learned counsel for the Petitioner referring to coordinate Bench Judgment dated 17.12.2021 rendered in the case of *Sadananda Seta Vrs. State of Odisha & others*, WPC(OAC) No.865 of 2018, reported at 2021 SCC OnLine Ori 2111 submitted that in identical factual matrix, this Court allowed the relief(s) akin to that are claimed in the present case.

6.1. This Court recorded the following fact and conclusion in *Sadananda Seta (supra)*:

“3. The factual matrix, in brief, is that the Petitioner had joined as ‘Khalalsi’ on 1st March, 1989 under the provision of Rehabilitation Assistance Scheme (in short ‘R.A.S.’) under work charged establishment instead of regular establishment. In course of his employment, the Petitioner had submitted several representations to the authorities to bring him over to the regular establishment but the grievance of the Petitioner remained unheard by the authorities till the date of his retirement on 30th June, 2016. The Petitioner has, therefore, stated that it is due to the sheer negligence and laches on the part of the authorities he was not given appointment in regular establishment.

Since at the time of retirement, the service of the Petitioner was not regularized, he has been denied pensionary and other retiral benefits by his employer, which is illegal, arbitrary and discriminatory.

9. *The counter affidavit filed on behalf of the Opposite Parties states that DOWR Resolution dated 7th September, 1995 wherein it has been stipulated that employees completing ten years in work charged establishment are eligible to be brought over to the regular establishment. ...*

14. *The Petitioner's case is that although he was appointed as R.A.S. on 1st March, 1989 i.e. much prior to the cut off date fixed by the Hon'ble Supreme Court of India i.e. 13th April, 1993, the Petitioner should have been brought over to the regular establishment before his retirement from service. The State Government counter does not reveal as to whether any scheme pursuant to the Hon'ble Supreme Court of India's direction was ever prepared or not and if such a scheme was prepared whether the list was prepared on the basis of seniority of the work charged employees. In the absence of any such information, this Court is constrained to accept the fact that the State Government has not acted in a manner as directed by the Hon'ble Supreme Court of India concerning the work charged employees. Moreover, the Petitioner was exploited by a model employer like the State for several decades as a work charged employee without giving him the service benefits of the regular establishment.*
15. *Moreover, even accepting the argument for Opposite Parties that the DOWR resolution dated 7th September, 1995 provides that on completion of ten years of service in work charged establishment, the work charged is eligible to be brought over to regular establishment. In the present case, the Petitioner joined as 'Khalalsi' on 1st March, 1989. It is not known as to what prevented the authorities to bring the Petitioner to regular establishment for such a*

long time as such the same has caused injustice to the Petitioner in the present case.

16. *Since the Petitioner has retired from service on attaining age of superannuation, the question of his regularization against the regular post does not arise for consideration in the present writ petition. It is a case of pensionary benefits payable to the Petitioner i.e. required to be considered in the present writ petition. Since the benefits have been granted to other similarly placed work charged employees by notionally considering them as regular establishment employee and as such the pensionary benefits have been given to them, the same benefit needs to be extended to the Petitioner for services rendered by him under the State Government for several decades continuously that too on payment of a paltry amount every month. The whole objective of the pension scheme is to support an employee and his family after retirement which is in recognition of his relentless service to the Govt. and such benefits are provided under the Rules on humanitarian considerations.”*

7. In identical case where the NMR employees were brought to the work charged establishment, this Court in the Judgment dated 07.04.2022 delivered in the matters of *Ramesh Chandra Biswal & Others Vrs. State of Odisha & Others*, WPC (OAC) No. 1067 of 2018 analysed the applicability of the Finance Department Resolution dated 15.05.1997 and held:

“13. *Having examined the aforesaid resolution, this Court finds that nowhere it mandates that the NMR/DLR/Job Contract workers are to be first brought over to the work-charged establishment before regularization of their services. Such being the position, it is not understood nor adequately clarified by the opposite parties as to on what basis the petitioners were brought over to the work-charged establishment in the year 2009, which is after the judgment passed in Umadevi [State of Karnataka and others Vrs. Umadevi and others, AIR 2006 SC 1806], even though they had put in nearly three decades of uninterrupted service*

and were, therefore, otherwise eligible to be considered for absorption in the regular establishment as per the ratio of Umadevi and even as per the resolution dated 15.05.1997. Reference has been made to the Resolution No.21828 dated 07.09.1995 of the Government in Water Resources Department, enclosed as Annexure-C to the counter, which provides for regularization of services of NMR and work-charged employees but then, after coming into force of the FD resolution dated 15.05.1997, the same stood automatically superseded. Therefore, reliance placed on the said resolution to justify the action of the authorities in bringing over the petitioners to the work-charged establishment in the year 2009 is entirely fallacious and untenable.

14. *The Opposite Parties have also referred to the Instructions 1974 to contend that the petitioners having accepted and acquiesced to being brought over to the work-charged establishment without any challenge to their service conditions as provided in the said instruction, cannot now seek a relief de hors the provisions in Instructions 1974. This is a fallacious argument inasmuch as when the Constitution Bench of the highest Court of the land has placed a definite obligation on the Government (in Umadevi) to act in a particular manner in respect of such category of employees and it has not done so, how can it turn around to question the so-called conduct of the employees by raising the plea of acceptance and acquiescence? To reiterate, the Apex Court in Umadevi as explained in M.L. Keshari [State of Karnataka Vrs. M.L. Kesari & Ors., AIR 2010 SC 2587], mandated that every department of the Government should undertake a one-time exercise of verification of such employees to consider if they are eligible to be regularized, and if so, to regularize them. This being the law of the land has to be followed in letter and spirit by all concerned. The concerned department in the instant case has however, acted as per its own decision overlooking the mandate of the Apex Court to simply bring the petitioners (and similarly placed other employees) to the work-charged establishment instead of undertaking the*

exercise as mandated in Umadevi. The stand of the opposite parties is therefore, untenable.

This Court is also unable to agree with the other contention raised by the opposite parties that the petitioners being governed by the Instructions 1974 cannot seek any relief dehors such instructions. This is for the reason that undoubtedly Instructions 1974 are applicable to all work-charged employees but the same does not speak of regularization of such employees, but lays down their various service conditions. As already stated, even apart from Umadevi, the FD Resolution dated 15.05.1997 holds the field in the matter of regularization of not only NMF/DLR/Job Contract employees but also the work-charged employees. Significantly, the opposite parties have themselves stated so in their counter affidavit under paragraph-9, the relevant portion of which is extracted herein below:

*“9. ****

Moreover, it is humbly submitted that the Finance Department in a subsequent resolution dated 15.5.1997 on the scheme for absorption of NMR/DLR/Job Contract Workers under Regular establishment vide Annexure-B have in supersession to all the orders/resolution/notification etc. issued by various department of Government for regularization of such category of workers issued norms and conditions for absorption in regular establishment. The Para-8 of the said resolution clearly states that while filling the regular vacant posts preference shall be given to work charged employees first. Where no suitable work charged employees are available to man the post, preference shall be given in the following order, i.e., NMR/DLR/Job Contract Workers. Thus, there is existing scheme for absorption in regular establishment as Finance Department Resolution dated 15.5.1997 vide Annexure-B which supersedes all previous resolutions including Finance Department Resolution

dated 22.1.1965 dated 6.3.1990 issued in the subject matter of absorption.

****''*

However, the provisions of the Resolution were never applied in case of the petitioners.

15. *It is also seen that the claim of regularization of the petitioners is sought to be repelled by the opposite parties by contending that they have made a backdoor entry into Government service without being sponsored by the employment exchange or undergoing any recruitment procedure. In this context, it is significant to refer to the averments made under paragraph-6.10 of the writ petition to the effect that the petitioners were duly appointed against existing vacant posts in the regular establishment. Such averment has not been controverted in any manner in the counter affidavit. Even assuming for a moment that the petitioners were not validly engaged, the question is, how could they be retained for such an inordinately long period of time and secondly, how could a gradation list of such employees be prepared and finalized and thirdly, how could they be taken over to the work-charged establishment? Of course, this court is conscious of the proposition that mere continuance for a long period per se does not confer any right on the person concerned to claim regular appointment de hors the Constitutional requirement, but then the observations of the Constitution Bench in Umadevi under paragraph-53 thereof as referred to hereinbefore, cannot also be overlooked. The long and short of the issue at hand is, the petitioners claim to have fulfilled the criteria laid down in Umadevi and therefore, should at least have been considered for regularization of their services within six months of the passing of judgment in Umadevi.*

16. *From the facts narrated hereinbefore, it is apparent that the petitioners, despite having put in merely three decades of continuous service to the State have been left in the lurch. Some of them have also retired in the meantime. The fact that the petitioners have continued for so long proves that there was work for them. If such be the case then, taking*

work from them for such a long period of time, but depriving them from the wages and other benefits payable/being paid to their counter-parts in the regular establishment is nothing but exploitation of the labour force by the Government, which is not expected from it, as it is supposed to be a model employer. The direction of the Constitution Bench in Umadevi, as amplified in M.L. Kesari is clear and unambiguous and places an obligation on the Government to regularize as one-time measure, all eligible casual employees who fulfill the criteria laid down therein within a period of six months. Alas, sixteen long years have passed since the date of judgment in Umadevi and yet there are no materials to suggest that the case of the petitioners was considered in pursuance of the ratio of Umadevi. It would therefore, be in the fitness of things to remit the matter to the opposite parties to first take a decision with regard to regularization of the services of the petitioners with due regard to all relevant factors like availability of posts, seniority etc.”

8. In *Meera Piri Vrs. State of Orissa and Ors.*, 104 (2007) CLT 445 = 2007 (II) OLR 533 = 2007 SCC OnLine Ori 166 this Court laid down as follows in the case of NMR employees who have worked for considerable length of time:

“12. Law is well settled that main concern of the Court in the above situation is to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Article 14 and 16 of the Constitution of India. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. Since the State is a model employer it is for this reason equal pay must be given for equal work which is indeed one of the directive principles of the Constitution. The person should not be kept in temporary or ad hoc status for long time. Where a temporary or ad hoc appointment is continued for long the Court presumes that there is need and warrant for a regular

post and accordingly directs regularization. If an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularization provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to reservation policy of the State. The normal rule of course is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an ad hoc and temporary appointment to be made.

13. *The question of regularization in any service including any Government service arises in two contingencies.*

Firstly, if on any available clear vacancies which are of a long duration, appointments are made on ad hoc basis or daily wage basis by a competent authority and are continued from time to time and if it is found that the incumbent concerned have continued to be employed for a long period of time with or without any artificial break and their services are otherwise required by the institution which employs them, a time may come in service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularize them so that the employee concerned can give their best by being assured security of tenure. But this would require one pre-condition that the initial entry of such employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry.

The second type of situation in which the question of regularization may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaws in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. The Petitioner's case comes under first category."

- 8.1. In the case at hand, the opposite parties have not disputed nor set forth in the counter denying the fact of vacancy position at the

initial entry of the petitioner in the service or on the date of completion of requisite number of years in terms of Resolution in vogue at the relevant point of time. It is manifest from the counter that for around 33 years the model employer-State has utilized the service of the petitioner as watchman.

9. In a case where an employee has served for 32 years in the work charged establishment, this Court *vide Judgment dated 26.04.2022* in the case of *Biswanath Gouda Vrs. State of Odisha & Others, WPC(OA) No.2359 of 2013*, observed the following with regard to entitlements regarding service benefits:

“8. Reading the above this Court finds, one must have completed five years of continuous service and there was likelihood of continuance of him in future and the post where the Petitioner is placed must be a sanctioned and permanent in nature and in such contingency, if considered suitable, one should be absorbed in the corresponding post created in regular establishment. The Opposite Parties though took the plea that the Petitioner has served in different projects, therefore, there is no application of above condition, this Court, however, finds, it is the State Government who had engaged the Petitioner though in a different establishment, but in particular scale of pay. The State utilized the services of the Petitioner for long 32 years that too continuously for more than three decades. Petitioner had no choice but to continue under the Public Establishment. Not only this establishment, but even considering the length of services of the Petitioner imparted, position of Law even after tempted to bring him to regular establishment. It is too late for the State-Opposite Parties to claim that since the Petitioner was engaged allthrough in work-charged establishment, he is not entitled to pension otherwise. This Court here again also finds, at some point of time considering the claim of the Petitioner, name of the Petitioner name was already empaneled and

recommended to be brought into the regular establishment and as has also been communicated to the Petitioner vide Annexure-12 on 25.06.2010 i.e. the date the Petitioner was still in service. The entire gamut clearly establishes that there is exploitation of services of the Petitioner by none else than the State-Establishment. This person having continuously served for 32 years, was entitled to several promotions and while continuing as such, he was to entitled to different scale of pay. It is unfair and unbecoming on the part of the State to see that it's employees after providing so much of service even more than three decades of his career, does not get any protection to survive for the rest part of his life and there is clear obstruction by the State to see its employee after putting up so much of service at least to have a decent retired life. At a time when there is a class of people at State level so also Central level are entitled to pension even if they have not served one elected term. This Court is of view that the State has not performed its duty as a model employer.

9. *Now coming to decide; upon superannuation whether the Petitioner maintains a claim for being considered for pension, this Court here finds, the O.A. decided by the Tribunal bearing No.622 of 1999 in the case of Chaitanya Gouda & Ors. Vs. State of Orissa & Others, clearly involves a superannuated person like that of the Petitioner. The Tribunal deciding the above O.A. vide Annexure-13 has given the following direction in paragraph no.5 therein:*

“5. I accordingly direct that the applicants shall be absorbed in any establishment posts from the time they completed five years continuous service till the date when they retired from service for the purpose of pension and other pensionary benefits. After such absorption, their pension and other pensionary benefits shall be computed on the basis of the notional fixation of pay in the regular establishment by adding annual increments which fell due and also taking into account various revisions of pay scales that were introduced. The process shall be completed within three months from the date of receipt of a copy

of this order. Accordingly, the Original Application is allowed.”

10. *In a further development this Court finds, for the order of the Tribunal hereinabove being challenged before the High Court in O.J.C. No.12087 of 1999, this Court by its Judgment dated 1.05.2001 had ultimately passed the following in confirmation with the order of the Tribunal :*

“2. Having heard learned counsel, we find no ground to interfere with the impugned order in view of the fact that the matter in dispute already stands concluded by two decisions of this Court in State of Orissa & others Vrs. Jhuma Parida & ors. (O.J.C. No.1162 of 1999, decided on 10.05.2000) and State of Orissa and others Vrs. Sudarsan Sahu and another (O.J.C. No.11028 of 1999 decided on 25.11.1999) in which similar challenge to the order of the Tribunal was made.

Admittedly opp. Parties 1 to 5 rendered their valuable services and considering this and in the light of the decision of the Apex Court in SLP No.11929-930 of 1998 the impugned direction was issued. Hence, we are of the view that no illegality has been committed by the Tribunal in its order.

Accordingly, the writ application is dismissed.”

11. *This matter again visited the Hon’ble apex Court and the Hon’ble apex Court in disposal of the SLP(C)/2003 CC 3196/2003 has come to dismiss the SLP observing as follows:*

“It appears that some officers of the State have formed the habit of not filing the petition for special leave within a reasonable time. There is a delay of 578 days in filing the present petition for which no justifiable reason is mentioned in the application for condonation of delay. Hence this petition is dismissed on the ground of delay with Rs.5,000/- as costs to be paid to the Supreme Court Legal Services Committee.”

12. *This Court here finds, there has been compliance of the order of the Tribunal in O.A. No.622 of 1999 after final disposal of the matter in Hon'ble apex Court and further there has also been compliance of similar nature of relief involving similar issues disposed of by the Tribunal in O.A. No.425 of 2011. This Court again finds, there has been again disposal of number of writ petitions by this Court involving similar issue such as W.P.(C) No.19550 of 2011 and in one such writ petition while a Division Bench of this Court taking note of similar development through several writ petitions and also taking note of development through disposal of Civil Appeal No.10690 of 2017, finally directed the State to comply the direction in favour of the Petitioner within specific period. It is shocking to observe that even after the State's endeavor in Hon'ble apex Court in similar matters, the State does not realize the legal state of affairs in such matters and compelling the persons to avail till a command is given by the competent Court."*
10. This Court in *Anadi Sunai Vrs. State of Odisha, WPC (OA) No.302 of 2010* vide Order dated 18th February, 2022 observed as follows:
- "5. *It is contended that one Narusu Pradhan, a similar circumstanced person like the petitioner had filed O.A. No. 1189 (C) of 2006 praying for retrial benefits. The Tribunal allowed the retiral pensionary benefits in his favour vide order dated 11.06.2009, which was challenged by the State before this Court in W.P.(C) No. 5377 of 2010. This Court dismissed the writ petition on 19.12.2011 and confirmed the order passed by the Tribunal. Thereafter against the order passed by this Court, the State has preferred SLP in Civil Appeal No. 22498 of 2012, the same was also dismissed on 07.01.2013.*
6. *In that view of the matter, the relief claimed by the petitioner is fully covered by the judgment of the Tribunal passed in the case of Narusu Pradhan, which has been confirmed by this Court as well as the apex Court. Thus the petitioner, having stood in similar footing, is entitled to get*

the benefits which have been extended to Narusu Pradhan and all the differential benefits and consequential benefits, as due and admissible to him, shall be granted to him in accordance with law within a period of four months from the date of communication of this order.”

- 11.** At paragraph 6.10 of the writ petition (Original Application before the Odisha Administrative Tribunal), it has been stated by the petitioner that the petitioner is required to be granted same relief as that has been granted in the case of *Chandra Nandi Vrs. State of Odisha & Others, 2014 (I) OLR 734 = 2014 SCC OnLine Ori 738 = 118 (2014) CLT 282*. On the contrary, in reply to such contention by way of the counter filed on behalf of the opposite parties it has been submitted as follows:

“That in reply to paragraph 6.10 of the OA, it is humbly submitted that the decision of the Hon’ble High Court of Orissa passed in Sri Chandra Nandi Vrs. State of Odisha and Others, (2014 (I) OLR 734) is not applicable to the instant case as the direction of the Hon’ble Court were with reference to a particular case.”

- 11.1.** Therefore, there arose need for ascertaining current position.
- 11.2.** Holding that the petitioner-watchman is treated to have been regularized in service at least one day prior to his superannuation notionally, this Court in the case of *Chandra Nandi Vrs. State of Odisha & Others, 2014 (I) OLR 734 = 2014 SCC OnLine Ori 738 = 118 (2014) CLT 282*, directed for calculation of entitlements including pension and arrear pension. Said matter being carried to the Hon’ble Supreme Court of India, in the case of *State of Odisha Vrs. Chandra Nandi, (2019) 4 SCC 357*, the Order of this Court reported in *2014 (I) OLR 734 = 2014 SCC OnLine Ori 738 = 118 (2014) CLT 282* has been set aside on the following ground:

“11. The order [Chandra Nandi Vrs. State of Orissa, 2014 SCC OnLine Ori 738 = 118 (2014) CLT 282] impugned in this appeal suffers from the aforesaid error, because the High Court while passing the impugned order [Chandra Nandi Vrs. State of Orissa, 2014 SCC OnLine Ori 738 = 118 (2014) CLT 282] had only issued the writ of mandamus by giving direction to the State to give some reliefs to the writ petitioner (respondent) without recording any reason.

12. We are, therefore, of the view that such order is not legally sustainable and hence deserves to be set aside.”

11.3. This Court upon rehearing the matter on remand by the Hon’ble Supreme Court vide (2019) 4 SCC 357 made the following Order on 03.02.2021:

“7. The said writ application was disposed of on 06.05.2004.

In paragraph-4 of the said order, it has been observed as follows:

“In respect of work charged establishment the Government of Orissa vide Finance Department Office Memorandum No.5483/F dated 6th March, 1990 decided that consequent upon absorption of work charged employees in the corresponding post created in regular establishment, the period of service rendered by him in work charged establishment, shall count towards pensionary benefits under the Orissa Pension Rules, 1977 subject to the condition that the employees so absorbed should have served continuously for a minimum period of five years in the work charged establishment. This decision was not followed by the subordinate authorities. Thus, the fate of the work charged employees who rendered a quite good years of service remained in dark. ***”

Accordingly the said writ application was allowed and direction was given to absorb the petitioner in any establishment post from the time he completed five years continuous service till the date he retired from service and thereafter his pension and other pensionary benefits shall

be granted on the basis of notional fixation of pay in regular establishment as has been granted to the applicants in O.A. No. 622 of 1999 and other cases as reflected in the said order of this Court. The order passed by this Court, was confirmed by the Apex Court in Civil Appeal No. 5575 of 2007 dated 22.07.2015.

8. *Such was the issue in case of one Narusu Pradhan, a work charged employee, wherein after the order passed by the Hon'ble Apex Court in S.L.P No. 22498 of 2012, the authorities passed an office order on 08.05.2013 by creating supernumerary post, regularized his service for the purpose of sanctioning pension.*
9. *This Court had also occasion to deal with this issue again in W.P.(C) No. 1534 of 2008, i.e. in the case of State of Orissa and others Vrs. Jyostna Rani Patnaik and others, wherein direction of the Tribunal to regularize the service of the applicant's husband by way of creating a supernumerary post, if necessary from the time he had completed 5 years of service as work-charged employee by bringing him over to regular establishment was challenged before this Court by the State authorities. The said case was disposed of vide judgment dated 19.12.2016, affirming the view expressed by the Tribunal.*

13. *It was also brought to the notice of this Court about the order dated 02.04.2018 passed in OJC No. 12017 of 2000, wherein it has been observed/ directed as follow:*

Having heard learned counsel for the parties and on perusal of the record, more particularly the order impugned herein, it appears that the Government in Finance Department vide resolution dated 22.01.1965 decided for absorption of such employees to regular establishment after completion of five years in the Work Charged Establishment. Subsequently vide memorandum dated 06.03.1990, Finance Department has also extended the pensionary benefit to work charged employees. Learned Tribunal in O.A. No. 2389 of 1997 vide order dated

23.02.1999 has already disposed of a case of similar nature. Even learned Tribunal has gone on to adjudicate one dispute in O.A. No. 1819 of 1996 regarding extension of pensionary benefit to such work charged employees, who have already retired. The plea of Additional Government Advocate to the effect that the opposite party could not have been brought over to regular establishment, as there was no vacancy, is not sustainable in law, as it has already been held in a catena of decisions that even if there is no clear vacancy, a work charged employee can be brought over to regular establishment for at least one day by creating a supernumerary post to make him entitled for pensionary benefit.

In view of the above, we modify the order of learned Tribunal to the extent that the opposite party shall be brought over to the regular establishment for at least one day by creating a supernumerary post, if necessary and accordingly, he shall be extended with the pensionary benefit as would be admissible to him. The entire exercise shall be completed within a period of two months hence.

- 14. It was also contended that relying on such decision, may other writ petitions, such as OJC No. 12017 of 2000 (decided on 16.04.2019), W.P.(C) No. 12017 of 2000 (decided on 16.04.2019) have also been disposed of.*
- 15. While dealing with the matter, this Court deprecates the action of the state-opposite parties. The state-opposite parties have not fair enough to comply the directions given by the Hon'ble Apex as indicated above and has only dragging such employees into multiple litigations. The State-authorities are also misleading this Court as well the Hon'ble Apex Court on each and every occasions in case of such types of work-charged employees, inspite of law settled in this regard and as well as specific circulars/resolutions/orders have been passed by the State Authorities in terms of the direction of this Court."*

11.4. The said matter was carried to the Hon'ble Supreme Court of India again in SLP(C) No. 21180 of 2021 [State of Odisha & Ors.

Vrs. Chandra Nandi] by the State of Odisha, which came to be disposed of on 06.05.2022 with the following order:

- “1 In the facts and circumstances of the present case, we are not inclined to entertain the Special Leave Petition under Article 136 of the Constitution.*
- 2 The Special Leave Petition is accordingly dismissed.*
- 3 However, the question of law is kept open to be resolved in an appropriate case.*
- 4 Pending application, if any, stands disposed of.”*

11.5. It is said in *Khoday Distilleries Limited Vrs. Sri Mahadeshwara Sahakara Sakkare Karkhane Limited*, (2019) 4 SCC 376, as follows:

“26. From a cumulative reading of the various judgments, we sum up the legal position as under:

26.1. The conclusions rendered by the three Judge Bench of this Court in Kunhayammed [Kunhayammed Vrs. State of Kerala, (2000) 6 SCC 359] and summed up in paragraph 44 are affirmed and reiterated.

26.2. We reiterate the conclusions relevant for these cases as under:

‘(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly,

the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

- (vi) *Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.*
- (vii) *On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC. '***'*

11.6. It may also be relevant to have regard to the following principle enunciated by the Hon'ble Andhra Pradesh High Court at Hyderabad in the case of Koduru Venka Reddy Vrs. The Land Acquisition Officer & Revenue Divisional Officer, Kavali, 1983 SCC OnLine AP 232 = (1994) 1 ALT 227 (DB) = (1988) 63 Comp Cas 376 = (1987) 67 STC 424 = (1988) 170 ITR 15 = (1988) 72 FJR 166 with regard to binding effect of judgment of High Court:

“3. *We are of the view that when a judgment of the High Court is the subject-matter of an appeal and the said judgment is suspended, the only effect of such suspension is that that judgment cannot be executed or implemented. But so long as the Full Bench judgment stands, the dicta laid down therein is binding on all Courts including Single Judges and Division Benches of this Court. The dicta laid down therein cannot be ignored unless the Court after hearing a particular case doubts the correctness of the dicta and thinks it appropriate that it should be reconsidered. ****”

11.7. Applicability of parity and consistency in approach has been considered by the Hon’ble Supreme Court of India in *Radhasoami Satsang Vrs. CIT*, (1992) 1 SCC 659. After referring to said case, said Hon’ble Court in *Bharat Sanchar Nigam Limited Vrs. Union of India*, (2006) 3 SCC 1 = 2006 SCC OnLine SC 258 laid down as follows:

“20. *The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why the courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate Bench*

which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction.”

11.8. Looking at the present matter in the above perspective, it can be safely said that this Court has been consistently taking view that long years of service rendered by lowly paid employees like NMRs and DLRs are required to be considered sympathetically for regularization and they are entitled to pensionary and other retiral benefits. The State has been accepting the view expressed by this Court on earlier occasion in respect of many NMR employees. On the same principle it is required to accept the present matter in order to maintain consistency.

12. This Court feels it apt to refer to the case of *Amarkant Rai Vrs. State of Bihar*, (2015) 8 SCC 265. In this case the appellant therein was temporarily appointed in Class IV post of night guard by Principal of College who was not competent authority to make such appointment. The appellant served on said post for 29 years on daily wage basis. The appointment of appellant was done out of necessity and concern for college, and duly intimated to the University in 1988. No issue was raised by the University pertaining to appointment of appellant as *ultra vires* the Bihar State Universities Act, 1976. Under such premises, it was held that the appointment of appellant cannot be termed as illegal but was only irregular. It has further been observed in the said reported case as follows:

“12. Applying the ratio of Umadevi’s case, this Court in Nihal Singh & Ors. Vrs. State of Punjab & Ors., (2013) 14 SCC

65 directed the absorption of the Special Police Officers in the services of the State of Punjab holding as under:

‘35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.’

13. In our view, the exception carved out in para 53 of Umadevi is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bear any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularization viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularized w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 03.1.2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits be paid from 01.01.2010.
14. Considering the facts and circumstances of the case that the appellant has served the University for more than 29 years on the post of night guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularize the services of the appellant retrospectively with effect from 03.01.2002 (the date on which he joined the post as per the direction of the Registrar).”

12.1. The present case apparently turns on better footing inasmuch as the facts and circumstances discussed above does not reveal nor can it be said that the appointment of Sri Debendranath Sahoo was irregular much less illegal. Pertinent feature in the present case akin to that obtained in the case of *Amarkant Rai (supra)* is that there is no material placed on record regarding the details whether any other watchman was appointed against the sanctioned post, in the facts and circumstances of the case. In the case at hand the authority has utilized the service of Sri Debendranath Sahoo for around 33 years since 1983.

13. In the case of *State of Odisha Vrs. Jugal Kishore Sahoo*, OJC No. 12017 of 2000, disposed of on 16.04.2019, this Court has been pleased to confirm the Order passed by the Odisha Administrative Tribunal by observing thus:

“2. By way of this writ petition, the petitioners Department have challenged the judgment/order dated 11.05.2000, passed by the Orissa Administrative Tribunal, Bhubaneswar, in O.A. No.2217 of 1999 under Annexure-1, directing the opposite party No.2 therein to sanction the pension and all pensionary benefits to which the applicant opposite party No.1 is entitled to in terms of the resolution of the Government within three month from the date of receipt of order.

3. We have perused the impugned order in detail.

4. Considering the submissions made and keeping in view the fact that the issue involved in the present case is squarely covered by the order dated 02.04.2018, passed by this Court in OJC No.8149 of 2000, wherein the work charged employee, similarly situated to the present applicant-opposite party No.1 in this case, was directed to be brought over to the regular establishment for at least one day by

creating a supernumerary post, if necessary and accordingly, he should be extended with the pensionary benefit as would be admissible to him, the applicant-opposite party No.1 shall be extended the pensionary benefit as would be admissible to him as per the law settled by this Court on the date on which he attained superannuation. For ready reference, the said order dated 02.04.2018 is reproduced hereunder:

'This writ petition has been filed on behalf of the State Government and its functionaries challenging the legality, validity and correctness of O.J.C. No. 12017 of 2000 order dated 14.10.1999 passed by the Orissa Administrative Tribunal, Principal Bench, Bhubaneswar in O.A. NO.1920 of 1999. Fact in nut shell giving rise to filing of the present writ petition is that though the opposite party was initially appointed on 01.02.1964 in the Work Charged Establishment under Water Resources Department and continued as such till his retirement on 31.03.1997, his services was not brought over to regular establishment. It was his case before learned Tribunal that pursuant to resolution of the Finance Department dated 22.01.1965, after completion of five years from the date of entry in the Work charged establishment he should have been regularized in service. Due to inaction of the authorities, he has been deprived of his pensionary benefits. Learned Additional Government Advocate for the petitioners-State submits that though Government in Finance Department vide resolution dated 22.01.1965 decided for absorption of such employees to regular establishment after completion of five years in the Work Charged Establishment, it has no application to the case of the opposite party as the job in which the opposite party was engaged was not permanent in nature. Moreover, the opposite party being a work charged employee is governed under Work Charged Employee (Appointment and Conditions of Service) Instruction, 1974, which only provides gratuity to such employees. Having heard learned counsel for the parties and on perusal of record, more particularly the order impugned herein, it appears that the Government in Finance Department vide resolution dated 22.01.1965 decided for absorption of such

employees to regular establishment after completion of five years in the Work Charged Establishment. Subsequently, vide memorandum dated 06.03.1990, Finance Department has also extended the pensionary benefit to work charged employees. Learned Tribunal in O.A. No. 2389 of 1997 vide order dated 23.02.1999 has already disposed of a case of similar nature. Even learned Tribunal has gone on to adjudicate one dispute in O.A. No. 1819 of 1996 regarding extension of pensionary benefit to such work charged employees, who have already retired. The plea of Additional Government Advocate to the effect that the opposite party could not have been brought over to regular establishment, as there was no vacancy, is not sustainable in law, as it has already been held in a catena of decisions that even if there is no clear vacancy, a work charged employee can be brought over to regular establishment for at least one day by creating a supernumerary post to make him entitled for pensionary benefit. In view of the above, we modify the order of learned Tribunal to the extent that opposite party shall be brought over to the regular establishment for at least one day by creating a supernumerary post, if necessary and accordingly, he shall be extended with the pensionary benefit as would be admissible to him. The entire exercise shall be completed within a period of two months hence. With the aforesaid modification in the impugned order, the writ petition is disposed of."

5. *In view of the above, we dispose of this writ petition in terms of the order quoted above. Accordingly, the same is allowed to the aforesaid extent only.*
6. *The arrears dues of the applicant will be cleared within a period of four months from today and if it is not done so, the applicant-opposite party No.1 will be entitled to interest @ 9% per annum."*

14. In the case of *State of Odisha Vrs. Chaitantya Gouda*, 2001 SCC OnLine Ori 131 = (2002) 94 FLR 318, this Court came to observe as follows in the case of work charged employee who were not extended the benefit of pensionary benefit:

- “1. *Opp. parties 1, 2 and 5 are working as work-charged employees from the year 1969, 1964 and 1963 respectively, whereas opp. parties 3 and 4 retired as work-charged employees after having worked from 1962 and 1965 respectively in the establishment in question. No pensionary benefits having been extended, they approached the Orissa Administrative Tribunal, Bhubaneswar by way of Original Application No. 622 of 1999 for a direction to the Respondents to grant them retirement and other benefits by declaring them to be regular employees.*
2. *By following decision in a batch of cases, the Tribunal allowed the Original Application in the following terms:*

‘I accordingly direct that the applicants shall be absorbed in any establishment posts from the time they completed five years continuous service till the date when they retired from service. After such absorption, their pension and other pensionary benefits shall be computed on the basis of the notional fixation of pay in the regular establishment by adding annual increments which fell due and also taking into account various revisions of pay scales that were introduced. The process shall be completed within three months from the date of receipt of a copy of this order. Accordingly the Original Application is allowed.’
3. *Aggrieved therewith the State has preferred this writ petition.*
4. *Having heard learned counsel, we find no ground to interfere with the impugned order in view of the fact that the matter in dispute already stand concluded by two decisions of this Court in State of Orissa Vrs. Juma Parida (O.J.C. No. 1162 of 1999, decided on 10.05.2000) and State of Orissa Vrs. Sudarsan Sahu (O.J.C. No. 11028 of 1999 decided on 25.11.1999) in which similar challenge to the order of the Tribunal was made.*
5. *Admittedly opp. parties 1 to 5 rendered their valuable services and considering this and in the light of the decision of the Apex Court in SLP No. 11929-930 of 1998 the impugned direction was issued.*

6. *Hence we are of the view that no illegality has been committed by the Tribunal in its order.*

7. *Accordingly, the writ application is dismissed.*

8. *Application Dismissed.”*

15. In view of the aforesaid discussion on fact as well as in law, the writ petition is disposed of with a direction to the opposite parties to consider the case of the petitioner in the light of consistent view taken by different Courts in respect of similarly circumstanced employees and, if he is found eligible, steps be taken to extend all the benefits and consequential benefits, as due and admissible to him in accordance with law.

16. The above exercise shall be taken up and concluded within a period of three months from the date of the receipt of copy of this Judgment or on production of certified copy thereof by the petitioner, whichever is earlier. Parties are to bear their own costs.

(M.S. RAMAN)
JUDGE

Laxmikant

High Court of Orissa, Cuttack
September 02, 2022