

GAHC010023052012



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

Case No. : WP(C) 3266/2012

1:DIPALI KALITA
D/O DINANATH KALITA VILL- MAHRUL- JURIA P.O. PATHERI, DIST.
NAGAON, ASSAM.

VERSUS

1:STATE OF ASSAM and ORS.
REP. BY THE COMMISSIONER and SECRETARY TO THE GOVT. OF ASSAM,
REVENUE REGU DEPTT. GUWAHATI-6.

2:THE DEPUTY SECRETARY TO THE GOVT. OF ASSAM
REVENUE REGISTRATION DEPARTMENT
DISPUR
GUWAHATI-6.

3:THE INSPECTOR GENERAL OF REGISTRATION
RUPNAGAR
GUWAHATI-32.

4:THE DISTRICT REGISTRAR
NAGAON
ASSAM.

5:THE SUB-REGISTRAR
SUB-REGISTRY OFFICE
HOJAI
DIST. NAGAON
ASSAM

Advocate for the Petitioner : MR.F ISLAM

Advocate for the Respondent : SC, REVENUE

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

JUDGMENT

Date : 30-04-2019

Heard Mr. A. Sherif, the learned advocate for the petitioner. Also heard Mr. J. Handique, learned advocate, who is the standing counsel for the Finance Department of the State, appearing for all the respondents.

2) By this writ petition filed under Article 226 of the Constitution of India, amongst others, the petitioner is seeking a direction to the authorities to absorb the petitioner in the post of Lower Division Assistant (L.D.A.) or in the alternative to regularize her service as Extra Writer, and for other reliefs as prayed for in this writ petition. The case projected in this writ petition is that vide order under Memo No. IGR/EW-1/94/78 dated 26.02.1997, the Inspector General of Registration, Assam had granted approval for engagement of the petitioner as daily wage basis Extra Writer at Hojai Sub- Registrar Office for a period of 3 months from the date of her joining. Thereafter, the petitioner had joined her service on 01.03.1997 and that her engagement was extended from time to time by various orders passed by the competent authority. Having served for three years continuously, the petitioner had submitted several representations to the authorities for regularisation of her service as was done for similarly situated persons pursuant to order dated 27.08.1992 passed by this Court in Review Petition No. 31/1992 (*Shri Bishaya Chandra Hujuri Vs. State of Assam & Ors.*), arising out of Civil Rule No. 1393/1989. Thereafter, the Inspector General of Registration, Assam vide letter dated 13.01.2004, had submitted a proposal before the Commissioner & Secretary to the Government of Assam, Revenue (Registration) Department for regularising the service of the petitioner, working as a daily wage basis Extra Writer in the vacant post of Extra-Writer at Sub- Registry Office, Dhing due to conversion of one Shri Akhil Bora from Extra-Writer to L.D.A. However, the Sub- Registrar, Hojai Sub- Registry by a verbal order directed the petitioner not to attend her duty from 15.08.2008 without any written notice and without assigning any reason. It is further projected that the daily wages from 01.03.1997 to July, 2007 were paid to the petitioner.

3) The learned advocate for the petitioner has referred to various orders by which service of several other Extra Writers were regularised by the State Government. The learned advocate for the petitioner has heavily relied on the order dated 27.08.1992 passed by this Court in Review Petition No. 31/1992, thereby modifying the judgment dated 07.11.1991 in Civil Rule No. 1393/1989 to assert the right flowing to the petitioner through the same. It is submitted that by the said order, this Court had directed the State Government that the Extra Writers who had put in three years of satisfactory continuous service in that capacity but could not be absorbed in the posts of L.D.A. for want of vacancies in the cadre of L.D.A. should be absorbed on regular basis as Extra Writers with regular pay scale and thereafter they should be absorbed as L.D.A. against future vacancies in that cadre. Thus, it is submitted that the said order of this Court must be ordered to be complied with in letter and spirit in respect of the petitioner herein. It is submitted that many persons who were similarly situated like the petitioner had got the benefit of the directions contained in order dated 27.08.1992 passed by this Court in Review Petition No. 31/1992, but the name of the petitioner was left out and/or dropped out for reasons best known to the authorities and, as such, it is submitted that the petitioner was entitled to reliefs as prayed for. It is further submitted that the authorities had stopped paying the daily wages of the petitioner, but because of intervention of this Court vide order dated 31.03.2014, an enquiry was made and the petitioner, who was found to be working from August, 2007 to 14.08.2008 had received her wages till the said period. It is further submitted that recognizing the right of the petitioner, this Court by order dated 24.09.2012, in MC 2486/12 arising in this writ petition had observed that in case the petitioner succeeds in the writ petition, she will have to be provided the relief prayed for in the writ petition and directed the authorities to bear the said aspect in mind while filling up the post of Extra Writer. It is further submitted that as directed in the case of *State of Karnataka Vs. Umadevi (3), (2006) 4 SCC 1*, the State Government has not yet mooted any scheme for regularisation of Extra- Writer. It is, thus, submitted that suitable directions be issued in terms of the prayer made in the writ petition.

4) The learned Standing Counsel for the Revenue Department has referred to the affidavit- in- opposition filed by the respondent No.3 and he has submitted that in the

year 2000, a proposal for regularisation of daily wage basis Extra Writers engaged in the State was submitted by the Inspector General of Registration, Assam to the Govt. of Assam, Revenue (Registration) Department, vide letter dated 18.02.2000, but by then the petitioner had not completed three years of continuous service. It is submitted that the specific stand of the State respondents in para-8(ii) of the Affidavit- in- opposition of respondent No.3 is that thereafter vide letter No. REGN.64/98/73 dated 15.03.2003, the Government of Assam, Revenue (Registration) Department had directed the Inspector General of Registration, Assam to take necessary steps for regularisation of 11 numbers of non- regular Extra Writers named therein after observing all formalities, which had the approval of the State Empowered Committee, but the name of the petitioner did not figure in the said list.

5) It is further submitted that a fresh recruitment process was undertaken in the year 2008 for filling up 45 numbers of vacancies of Extra Writers then existing in various Sub- Registry in the State. After written test and interview, the select list in order of merit was published after due approval and appointment letters were issued to elected candidates on 25.07.2008. The petitioner, who had participated in the selection process, was not successful, as such, she along with 7 other unsuccessful candidates had approached this Court by filing W.P.(C) No. 3371/2008. However, the petitioner had withdrawn her name as the petitioner No.1 in the said writ petition and, as such, the petitioner is precluded from claiming regularisation after being unsuccessful in the selection process. It is submitted that the petitioner had suppressed the material fact of having approached this Court earlier on the same subject, and moreover, the petitioner did not controvert the said disclosure made by the respondent No.3.

6) Having heard the learned advocates for both sides, the materials on record have been examined. It is deemed appropriate to quote below the relevant portion of the order dated 27.08.1992 passed by the Division Bench of this Court in Review Petition No. 31/1992 (*Shri Bishoya Chandra Hujuri*):-

“Upon hearing the learned Counsel for the petitioner and the learned Govt. Advocate we dispose of the Review Application by modifying our order in para 4 of the judgment dated 7-11-91 passed in Civil Rule No. 1393 as follows:-

We direct the Government that the Extra Writers, namely, the members of the petitioner's association, who have put in 3 years satisfactory continuous service in that capacity but cannot be absorbed in the posts of L.D.A. for want of vacancies in the cadre of L.D.A. should be absorbed on regular basis as Extra Writers with regular pay scale and thereafter they should be absorbed as L.D.A. against future vacancies in that cadre.

The respondents shall give effect to the judgment within a period of two months from today."

7) In the present case in hand, there is nothing on record to show that the authorities had undertaken the exercise of any selection process of soliciting and/or inviting applications from all eligible persons for appointment to the post of Extra Writer. There is no material to show that there was public advertisement for the recruitment process and that more than one candidate had participated in such process. Therefore, this Court is not convinced to accept that the appointment of the petitioner in the post of Extra Writer on daily wage basis was in accordance with law. Therefore, one question which falls for consideration is whether merely by dint of rendering long service the petitioner can be said to be entitled to a direction from this Court for regularisation of her service?

8) This issue was extensively dealt with by this Court in the case of *Kamrup District Siksha Sarathi (I) Association & Anr. Vs. State of Assam, 2017 (6) GLJ (FB) 365: 2017 (5) GLT 188: 2017 (5) NEJ 232: (2018) 2 GLR 696*. Upon examining many case law on the point, the observations of the Full Bench of this Court is reproduced herein below:-

“24. *Having noticed the above, we may now briefly examine the Constitution Bench decision in Umadevi (supra). In Umadevi (supra), Supreme Court was concerned with non-adherence to the constitutional scheme of employment by the Government and its instrumentalities, more particularly, in the lower rungs of the service, thereby resorting to illegal appointments without following the proper appointment procedure. Not only such illegal appointments were made, but such appointments were allowed to be continued year after year, thereby depriving persons qualified for such*

jobs from applying and denying them due opportunity to compete for the posts. Supreme Court was also concerned with the role of the Constitutional Courts issuing occasional directions and writs of mandamus for regularizing the appointment of such persons. While strongly deprecating such practice, Supreme Court held that the executive or for that matter the Court in appropriate cases would have only the right to regularize an appointment made after following the due procedure, even though a non-fundamental element of that recruitment process or procedure had not been followed. It was clarified that such right would not extend to directing regularisation of an appointment made in clear violation of the constitutional scheme and the statutory rules made in that behalf. Supreme Court clarified that merely because a temporary employee or a casual wage worker has continued for a time beyond the terms of his appointment, he would not be entitled to be absorbed in regular service or made permanent merely on the strength of such continuance if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. Sounding a note of caution, Supreme Court observed that High Courts acting under Article 226 of the Constitution should not ordinarily issue directions for absorption, regularisation or permanent continuance, unless the recruitment itself was made in a regular manner and in terms of the constitutional scheme. Supreme Court further held that when a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the nature of his appointment. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following the proper procedure.

25. *After declaring so, Supreme Court made one exception. The exception that was carved out was in respect of irregular appointments and not illegal appointments of duly qualified persons in duly sanctioned vacant posts where the employee concerned had continued to work for 10 years or*

more, but without the intervention of the Courts or of the Tribunals. Question of regularisation of the services of such employees may have to be considered on merit in the light of the principles settled by the Supreme Court in the cases of State of Mysore v. S.V. Narayanappa, AIR 1967 SC 1071; R.N. Nanjundappa v. T. Thimmiah, (1972) 1 SCC 409 and B.N. Nagarajan v. State of Karnataka, (1979) 4 SCC 507.

26. *Having regard to the above, Supreme Court directed the Union of India, State Governments and their instrumentalities to take steps to regularize as a onetime measure the services of such irregularly appointed employees who have worked for 10 years or more in duly sanctioned posts but not under the cover of orders of the Courts or Tribunals. The process was directed to be set in motion within six months of the judgment.*

27. *This onetime measure provided by the Supreme Court in Umadevi (supra) was explained in detail by the Supreme Court in the later judgment in ML Kesari (supra), which may not be necessary to be gone into in this proceeding.*

28. *Suffice it to say, the issue before the Supreme Court in Umadevi (supra) was illegal appointments made by the State in the lower rungs of the services without following the due process of recruitment and continuing such illegal appointments for varying periods of time. While deprecating such practice, Supreme Court made it abundantly clear that there is no question of regularisation of such illegal appointments, be it on contractual basis or on temporary basis or as daily rated workers and also clarified that the Constitutional Courts would not be empowered to direct regularisation of such illegal appointments because such illegal appointments were made in violation of Article 14 of the Constitution as well as in violation of the constitutional scheme of recruitment to public service and a Constitutional Court is not expected to perpetuate such an illegality by issuing directions for regularisation.*

29. *Therefore, strictly speaking Umadevi (supra) covers cases where the appointments were not made following the due recruitment process. But*

would Umadevi (supra) create a bar in respect of regularisation of the services of persons who were appointed by following the procedure prescribed? Would Umadevi (supra) apply in a case where a particular manner of recruitment is prescribed where all eligible candidates could apply and their candidatures considered whereafter, the selection was made which was followed by the appointments, be it temporary, casual, part-time or contractual?”

9) In the aforesaid case of Kamrup District Siksha Sarathi (supra), the finding of this Court was that the selection process of Siksha Sarathi was initiated pursuant to communication from Assam Sarba Siksha Abhiyan Mission and pursuant to public advertisement, applications were submitted and the petitioners therein were selected and, as such, the said appointments were not illegal. Accordingly, under said factual circumstances, the directions issued by this Court in the case of *State of Assam v. Sri Upen Das*, (2017) 4 GLR 493: 2017 (4) GLJ 234: (2017) 5 NEJ 553: (2017) 4 GLR 493 was extended in respect of Siksha Sarathis. The operative part of the directions contained in the judgment and order passed in the case of Upen Das (supra) is as follows:-

“22. *It is, however, heartening to learn that the State Government has agreed not to terminate the Muster Roll, Work Charged and similarly placed employees working since last more than 10 years (not in sanctioned post) till their normal retirement, except on disciplinary ground or on ground of criminal offences. The State Government has also agreed to enlist such employees in Health and Accidental and Death Insurance Scheme, which will be prepared in consultation with the State Cabinet. We appreciate this positive stand of the State Government taken as welfare measures for the betterment and security of the employees, in question. We, accordingly, direct the State Government to implement the measures without further delay. Besides this, we, in the light of decision of the Supreme Court in State of Punjab v. Jagjit Singh, (2017) 1 SCC 148, also direct the State Government to pay minimum of the pay scale to Muster Roll workers, Work Charged workers and similarly placed employees working since last more than 10*

years (not in sanctioned post) with effect from 1.8.2017."

10) Following the above quoted ratio, in paragraph 44 of the case of *Kamrup District Siksha Sarathi (supra)*, this Court had held that – "... Having regard to the grievance expressed by the petitioners and the discussions made above, we are of the view that it would meet the ends of justice if similar benefit as granted to the muster roll, work charged and similarly placed employees working since last more than 10 years (not in sanctioned posts) is extended to the Siksha Sarathis. Accordingly, we direct the State to consider framing a scheme for the Siksha Sarathis on the above lines, which decision shall be taken within a period of 6 weeks from today."

11) It would also be relevant to refer to the case of *State of Karnataka Vs. M.L. Kesari*, (2010) 9 SCC 247. The relevant paragraphs 6 and 7 thereof are quoted below:-

6. This Court in *Umadevi (3)* [(2006) 4 SCC 1] further held that a temporary, contractual, casual or a daily-wage employee does not have a legal right to be made permanent unless he had been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution. This Court, however, made one exception to the above position and the same is extracted below

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *State of Mysore Vs. S.V. Narayanappa*, (AIR 1967 SC 1071), *R.N. Nanjundappa Vs. T. Thimmiah*, [(1972) 1 SCC 409 and *B.N. Nagarajan Vs. State of Karnataka*, [(1979) 4 SCC 507] and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above-referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their

instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date."

7. *It is evident from the above that there is an exception to the general principles against 'regularization' enunciated in Umadevi (3) (supra), if the following conditions are fulfilled:*

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

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

12) Thus, it is seen that the case of the order dated 27.08.1992 passed by this Court in Review Petition No. 31/1992 (Shri Bishaya Chandra Hujuri & Anr. Vs. State of Assam), is impliedly overruled by the decision of the Supreme Court of India, rendered in the case of *Umadevi (3) (supra)*, as explained in the case of *M.L. Kesari (supra)*, which was relied upon by this Court in the case of *Kamrup District Siksha Sarathi (supra)* and as the entry of the petitioner into service as Extra- Writer was not by following due process of law

and the said recruitment was not made against sanctioned post, the laid down in the case of *Bishaya Chandra Hujuri (supra)* would not apply in this case, as this Court has already expressed herein before that it is not convinced to accept that the appointment of the petitioner in the post of Extra Writer on daily wage basis was in accordance with law, in the considered opinion of this Court, merely by dint of long service rendered as daily wage basis Extra Writer, the petitioner would not be entitled to any relief in this writ petition.

13) The petitioner had not approached this Court with clean hands as she had suppressed material facts relating to withdrawal of her name in previously instituted W.P.(C) No. 3371/2008. In the opinion of this Court, the petitioner is precluded from claiming regularisation after being unsuccessful in the selection process undertaken in the year 2008 and after withdrawing her name as one of the petitioners in previously instituted W.P.(C) No. 3371/2008. The relief claimed in this writ petition is hit by the principles of *constructive res judicata*.

14) In view of the discussions above, this writ petition stands dismissed. There shall be no order as to cost.

15) However, before parting with the records, it is hoped that as and when fresh recruitment process for filling up Extra Writer and/or Lower Division Assistant under the establishment of Inspector General of Registration, Assam is initiated, the State Government may consider the long service rendered by the petitioner and grant relaxations, so as to enable the petitioner and all other similarly situated persons to participate in such recruitment process.

JUDGE

Comparing Assistant