

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

Writ Appeal No.45 of 2014

Appellant: The State of Assam represented by the Commissioner and Secretary to the Government of Assam, Finance Department, Dispur, Guwahati-6.

Respondents:

1. Sri Upen Das,
son of late Madan Das and **836 others**.

BEFORE
HON'BLE THE CHIEF JUSTICE MR. AJIT SINGH
HON'BLE MR. JUSTICE MANOJIT BHUYAN

For the Appellant : Mr. D Saikia, learned Senior Additional Advocate General, Assam, assisted by Mr. B Gogoi, Mr. P Nayak and Ms. A Das, learned counsel

For the Respondents : Mr.KK Mahanta, learned senior counsel, assisted by Mr. R Islam, learned counsel, Mr. D Mazumdar, learned senior counsel, assisted by Ms.M Barman, Mr. BU Laskar, Ms.N Saikia, Ms.C Borgohain, Mr.IH Saikia, Mr. SSS Rahman, Mr. DK Sarmah, Ms.A Talukdar, Mr. H Borah, Ms. B Gogoi, learned counsel

Date of hearing & Judgment : 8.6.2017

JUDGMENT AND ORDER

(Ajit Singh, C.J.)

This writ appeal is directed against the common order dated 20.12.2013 passed by a learned Single Judge of this High Court, whereby he has disposed of a bunch of writ petitions and one Review Petition with certain directions. These writ petitions are – WP(C) No.8216 of 2004; WP(C) No.1271 of 2006; WP(C) No.4759 of 2007; WP(C) Nos.3902 of 2008; WP(C) Nos.5118, 3658, 3086, all of 2010; WP(C) Nos.582, 6301, 3284, 5160, 2149, 6125, 6227, 1738, 6346, 6633, 4422, 6522, 5251, 2540, 3847, 5952, all of 2011; WP(C) Nos. 4180, 1053, 6269,

1801, 480, 518, 489, 5256, 512, 29, 174, 6128, 3574, 2733, 661, 13, 912, 1012, 6399, 1880, 1766, 1116, 627, 3119, 2984, 2548, 4955, all of 2012; WP(C) Nos.1801, 1843, 1791, 816, 1697, 2315, 574, 1111, 1863, 2170, 278, 277, 1402, 1428, all of 2013 and Review Petition No.57/2009.

2. The core issue, which calls for our consideration, is whether in the fact situation of the case, the respondents, who are Muster Roll workers, Work Charged workers and Casual workers, are entitled for regularization of their services with consequential benefits such as pension etc.

3. In several engineering and works related Departments of the State, a muster roll of workers is maintained in addition to the employees working in the regular cadre and such workers are known as Muster Roll Workers. Likewise, there is another category of workers, whose tenure of service with pay and allowances are charged to a particular ongoing work and they are commonly known as Work Charged employees. Apart from these two categories, several departments of the State also employ a large number of Casual Workers including Fixed Pay and Daily Rated Workers.

4. On 23.9.1983, a Cabinet decision was taken by the State Government to regularize the services of all Muster Roll Workers, who have completed 15 years of service or more as Class III employees. Thereafter, the Chief Secretary of the State vide communication dated 15.3.1984 also informed the General Secretary of the Public Works Department Employees Union that Muster Roll workers of the Public Works Department and other Engineering Departments, who have completed 15 years of continuous service, will be regularized with effect from 1.8.1984. By the same communication, the Union was further informed that Work Charged workers of the Engineering Departments, who have completed 5 years of continuous service, shall be brought under the regular establishment. However, no Scheme was prepared providing the procedure to implement the Cabinet decision.

5. And after about 9 years, the Chief Secretary, vide communication dated 20.4.1995, apprised all the concerned authorities that despite Cabinet decision,

the services of the Muster Roll and Work Charged workers were not being regularized. He also directed all the Departments to take necessary action in consultation with the Finance Department for early regularization of the services of Muster Roll and Work Charged workers, who were engaged prior to 1.4.1993. This communication was followed by an Office Memorandum dated 11.10.1995 issuing strict instructions to all concerned not to engage any further Muster Roll/Work Charged workers after 1.4.1993. On 13.10.1995, another clarification was issued to the effect that Office Memorandum dated 20.4.1995 was to operate provided the Muster Roll/Work Charged workers were not discharged or terminated on or before 20.4.1995.

6. It is relevant to mention here that in various writ petitions filed by Muster Roll/Work Charged workers, this Court has even directed the State Government to regularize such category of workers in terms of above mentioned Office Memorandum dated 20.4.1995.

7. But, later, on the issue regarding regularization of employees working in Grade III posts in the Transport Department, one case of *Jitendra Kalita vs. State of Assam* was referred to Full Bench of this Court which held that Office Memorandum dated 20.4.1995 did not reflect a valid policy decision of the State on regularization of Muster Roll/Work Charged workers. The Full Bench although did not disturb those already regularized on the strength of Office Memorandum dated 20.4.1995, it made clear that there would be no further regularization in terms of the Office Memorandum. The Full Bench decision is dated 17.5.2006 and reported in *2006(2) GLT 654* and we shall hereinafter refer it as "Jitendra Kalita Case".

8. Interestingly, on 14.11.2005, during the course of hearing of Jitendra Kalita's case, the Chief Secretary filed an affidavit stating therein that on 22.7.2005, the State Government had taken another Cabinet decision to regularize the services of Muster Roll/Work Charged workers, who were engaged prior to 1.4.1993 and the Full Bench did not express any opinion on the Cabinet decision dated 22.7.2005. Also, following the Cabinet decision, the State

Government created large number of posts and is reported to have regularized as many as 30,000 (thirty thousand) Muster Roll/Work Charged workers.

9. Also in WP(C) No.2186/2007 and WP(C) No.2384/2007, a Single Judge Bench, vide order dated 21.5.2008, allowed the relief of pension and family pension in favour of Muster Roll/Work Charged workers, who were engaged prior to 1.4.1993 and had retired. However, another Single Judge Bench, in Review Petition No.124/2012, vide order dated 14.3.2013, relying upon the decision of the Supreme Court in *Secretary, State of Karnataka vs. Umadevi (3), (2006) 4 SCC 1*, held that relief of pension and family pension is impermissible to such workers.

10. In yet another group of cases, the lead case being WP(C) No.1271/2006 (*Ramani Deka vs. State of Assam*), wherein this court was considering the issue of regularization of services of the Muster Roll/Work Charged workers engaged prior to 1.4.1993, a statement was made by the State Government on 6.9.2010 that a policy to regularize the services of such workers within 3(three) months is under active consideration. And the Court, on the same date, directed the Government to implement its policy.

11. In one Suo Motu case, being WP(C) (Taken Up) No.24/2007, a Division Bench of this court was considering the conditions of Prisons in the State, including engagement of adequate staff and other related issues and vide order dated 30.7.2010 it directed the State Government to frame policy for regularization of Casual Workers in terms of the Full Bench decision in the case of *Jitendra Kalita*. But, on 1.11.2010, when the Additional Advocate General informed the Court about the statement made in the case of *Ramani Deka* (supra) regarding consideration of policy to regularize the services of Muster Roll/Work Charged workers within three months, the Division Bench observed that no further steps need be taken pursuant to direction issued on 30.7.2010.

12. On 14.12.2011 also when the case of *Ramani Deka* was taken up, a statement was made on behalf of the Finance Department that the matter of regularization was under active consideration in co-ordination with the

Departments of Health, PWD, Directorate of Zoology and Mining, Water Resource etc. and the benefit of the deliberation was likely to be positive in favour of the petitioners therein.

13. However, notwithstanding the above statement made before the Court, the State Government filed MC No.597/2012 in WP(C) (Taken Up) No.24/2007 seeking leave to implement its policy of regularization and the Division Bench, having regard to the decision of the Supreme Court in *Umadevi* case, vide order dated 27.3.2012, declined to grant the leave. Immediately, thereafter, the Finance Department, Government of Assam, issued Office Memorandum dated 16.6.2012 stating therein that there shall be no further regularization of services of Muster Roll/Work Charged or similarly placed workers, even if such workers were engaged prior to 1.4.1993. The Office Memorandum dated 16.6.2012 also stated that there would be no more regularization by creating supernumerary posts for one day in respect of those Muster Roll/Work Charged workers, who were engaged prior to 1.4.1993, but have died or had attained the age of superannuation.

14. The respondents claim themselves to be Muster Roll/Work Charged workers engaged prior to 1.4.1993. Their grievance is that for some reason or the other, their cases were not considered by the State Government for regularization in the light of its Cabinet decision dated 22.7.2005. Feeling aggrieved, they, therefore, filed writ petitions for directing the State Government to regularize their services. Some of the respondents, who were engaged prior to 1.4.1993 and have retired, prayed that they be paid pension or family pension by creating supernumerary posts to the incumbents and regularizing their services for one day. The respondents also challenged the validity of Office Memorandum dated 16.6.2012. Surprisingly, none of the respondents challenged the above mentioned order dated 27.3.2012 of the Division Bench passed in MC No.597/2012 declining leave to implement the policy of regularisation.

15. The learned Single Judge having regard to the undertaking given by the State Government before the Court and the exception carved out in paragraph 53 of the *Umadevi* case to regularize those employees who have worked for

more than 10 years as a one-time measure which was also later explained by the Supreme Court in *State of Karnataka vs. M.L.Kesari, (2010) 9 SCC 247* has directed the appellant State Government to consider regularization of the services of respondents in terms of Cabinet decision taken on 22.7.2005 by framing an appropriate policy/scheme. The learned Single Judge has also observed that there was no bar for creating supernumerary post and regularization for one day of the Muster Roll, Work Charged and similar category of employees engaged prior to 1.4.1993 after attaining the age of superannuation or in case of death for the purposes of grant of pensionary benefits. The learned Single Judge has even quashed the Office Memorandum dated 16.6.2012 issued by the appellant pursuant to order dated 27.3.2012 passed by the Division Bench in MC No.597/2012.

16. It is in this background, we shall examine whether the respondents who are working as Muster Roll/Work Charged employees prior to 1.4.1993 can be considered for regularization in the light of exception carved out in paragraph 53 of the decision in *Umadevi* case. For ready reference, paragraph 53 is reproduced as under:-

“One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in 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 onetime measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of 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. We also clarify that regularisation, if any already made, but not sub-judice, need not be reopened based on this judgment, but there should be no further by passing of the constitutional

requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.”

17. Also the term “one-time measure” as explained by the Supreme Court in paragraphs 9,10 and 11 in M.L.Kesari case read as under:-

“9.The term “one-time measure” has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi(3), each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad-hoc employees who have been working for more than ten years without the intervention of Courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularise their services.

10.At the end of six months from the date of decision in Umadevi(3), cases of several daily-wage/ad-hoc/casual employees were still pending before Courts. Consequently, several departments and instrumentalities did not commence the one time regularization process. On the other hand, some government departments or instrumentalities undertook the onetime exercise excluding several employees from consideration either on the ground that their cases were pending in Courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of para 53 of the decision in Umadevi(3), will not lose their right to be considered for regularisation, merely because the one-time exercise was completed without considering their cases, or because the six-month period mentioned in para 53 of Umadevi(3), has expired. The one-time exercise should consider all daily-wage/ad-hoc/casual employees who had put in 10 years of continuous service as on 10-04-2006 without availing the protection of any interim orders of Courts or tribunals. If any employer had held the one-time exercise in terms of para 53 of Umadevi(3), but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi(3), the employer concerned should consider their cases also, as a continuation of the onetime exercise. The one-time exercise will be concluded only when all the employees who are entitled to be considered in terms of para 53 of Umadevi(3), are so considered.”

11. The object behind the said direction in para 53 of Umadevi(3), is twofold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of Courts or tribunals, before the date of decision in Umadevi(3) was rendered, are considered for regularisation in view of their long service. Second is to ensure that the departments/ instrumentalities do not perpetuate the practice of employing persons on daily wage/ad-

hoc/casual basis for long periods and then periodically regularise them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10-04-2006 [the date of decision in *Umadevi*(3)] without the protection of any interim order of any Court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularization. The fact that the employer has not undertaken such exercise of regularization within six months of the decision in *Umadevi*(3), or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the above directions in *Umadevi*(3) as a one-time measure”.

18. The Supreme Court in *Umadevi* case, but for exception carved out in paragraph 53 of the decision, has issued a Mandamus that henceforth, no regularization shall be made bypassing the constitutional requirement or making permanent, those not duly appointed as per the Constitutional scheme. And, after 10.4.2006, on which date, judgment of *Umadevi* was delivered, the State Government has not regularized the services of any Muster Roll/Work Charged worker or an employee of similar category whose appointment was either illegal or was not made on duly sanctioned vacant post. Also what is explained by the Supreme Court in the case of *M.L.Kesari* is that if, for some reason, the employees, who were entitled to the benefit of paragraph 53 of the decision in *Umadevi* were not considered, they will not lose their right to be considered for regularization merely because the one-time exercise was completed without considering their cases or because the six months period mentioned therein has expired. In paragraph 53 of the decision in *Umadevi*, it is held in unequivocal terms that only irregular appointments (not illegal appointments) of duly qualified persons in duly sanctioned vacant posts, who have worked for 10 years or more in duly sanctioned posts without cover of orders of the courts or of tribunals be considered for regularization as one-time measure within six months. According to the State Government, not one respondent was either appointed on a sanctioned vacant post or is working against a sanctioned vacant post. And, it is for these reasons, the State Government, despite having framed a policy to regularize the Muster Roll, Work Charged employees working prior to

1.4.1993, sought leave of this Court to implement the same in MC No.597/2012, which was rightly declined by the Division Bench, vide order dated 27.3.2012. The learned Single Judge overlooked the fact that respondents were not appointed on duly sanctioned vacant posts and are also not working on duly sanctioned posts, while directing the State Government to consider their cases for regularization. The impugned order passed by the learned Single Judge is, therefore, not in tune with the decision of the Supreme Court in *Umadevi case* and hence, cannot be sustained. After *Umadevi case*, the State Government also cannot create posts to regularize the services of Muster Roll/Work Charged employees as none of them are working against sanctioned posts. And for filling up the sanctioned vacant posts or newly created posts, the State will have to adopt a normal procedure of recruitment by giving opportunity to all qualified and eligible persons to participate in the recruitment process.

19. It is true that the State Government took a Cabinet decision on 22.7.2005 to regularize the services of Muster Roll/Work Charged workers who were engaged prior to 1.4.1993 and pursuant to which, the State Government regularized the services of large number of such workers after creating posts. The respondents, therefore, also claim for the same benefit of Cabinet decision by invoking the theory of legitimate expectation and taking a plea that they cannot be subjected to discrimination with those similarly placed workers, whose services have been regularized. Even this issue submission has been answered in *Umadevi case* against the respondents. Its relevant paragraph 47 reads as under:-

“47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. 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 a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot

constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.”

20. In the above quoted paragraph 47 of the decision in *Umadevi* case, the Supreme Court has clearly 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 a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. 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 a proper procedure for selection. According to the Supreme Court, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. The Supreme Court has also held that the State cannot constitutionally make a promise to such employees for making their services permanent. And, as mentioned above, after *Umadevi* case, the State Government has not regularized any similarly situated workers notwithstanding the Cabinet decision and the statements made before the Court regarding regularization of their services. We, therefore, reject the respondents’ plea of legitimate expectation and discrimination.

21. Lastly, the respondents have cited decisions of the Supreme Court in *Nihal Singh vs. State of Punjab*, (2013) 14 SCC 65, *Malathi Das vs. Suresh*, (2014) 13 SCC 249 and *Yashwant Arjun More vs. State of Maharashtra*, (2014) 13 SCC 264 to convince us that even after *Umadevi* case, the Supreme Court has directed for regularization even by creating posts although the employees were not working on sanctioned posts. But these decisions are on different facts and the Supreme Court itself has held that the ratio *decidendi* of *Umadevi* case was not applicable to them. In the case of *Nihal Singh vs. State of Punjab* (supra), Special Police Officers were appointed under Section 17 of the Police Act to meet the law and order problem. The appointments of Special Police Officers were made in accordance with the statutory procedure contemplated under the Act, but their services were not being regularized on the ground that there were no sanctioned

posts. The Supreme Court held that since the initial appointments of such Special Police Officers was made legally under a statute, it cannot be categorized as irregular much less illegal appointment and therefore the principles laid down in *Umadevi* case were not applicable. It is in this fact situation the Supreme Court directed the State Government to absorb the Special Police Officers by creating necessary posts. Besides this, in *Nihal Singh* the Supreme Court was not dealing with the issue of regularization of Muster Roll/Work Charged employees like the respondents. In *Malathi Das vs. Suresh* (supra) the Supreme Court in a Contempt Petition merely directed the authorities to comply with the order of the High Court to regularize the employees. The High Court order for regularization was admittedly passed and affirmed by the Supreme Court much prior to the decision of *Umadevi*. The decision of *Umadevi* was thus clearly not applicable in the case of *Malathi Das*. In *Yashwant Arjun More vs. State of Maharashtra* (supra) also non salaried copyists were working in the Revenue and Forest Department of the Government of Maharashtra continuously for 10 or more years and they could not apply for regularization because neither the required examination was held by the Department nor the Staff Selection Board was constituted. The State Government therefore to overcome its lapse decided to absorb such non-salaried copyists on available vacant posts subject to their making applications and holding required educational qualifications. The Supreme Court took note of the fact that non-salaried copyists were victims of the lapse of State Government and held that the ratio of judgment in *Umadevi* cannot be invoked for denying them the benefit of decision of the State Government to absorb them through a selection process. In the case at hand, there is no provision of holding examination of the respondents by any Selection Board for the purposes of their regularization and hence, the State Government cannot be blamed for any lapse. Hence, the decisions cited by the respondents do not help them.

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 vs. 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.

23. For these reasons, we are of the view that in the fact situation of the case, Muster Roll workers, Work Charged workers and Casual workers are not entitled for regularization of their services with consequential benefits, such as, pension etc. We, accordingly, subject to our direction in paragraph 22 of the judgment, allow the appeal and set aside the impugned judgment and order dated 20.12.2013 passed by the learned Single Judge.

JUDGE

CHIEF JUSTICE

Skd