

(2013) 12 GAU CK 0018

In the Gauhati High Court

Case No : R.P. No. 57 of 2009, W.P. (C) Nos. 8216 of 2004, 1375 of 2005, 1271 of 2006, 3902 of 2008, 3658, 5118, 3086 of 2010, 6519, 3284, 2149, 6125, 1738, 6633, 4422, 5251, 3847, 5952, 582, 6301, 5160, 6227, 6346, 6522, 2540 of 2011, 1053, 29, 6218, 2733, 13, 188

Pradip Chakraborty and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 20-12-2013

Acts Referred:

Citation : (2014) 1 GLT 617

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Judgement

Ujjal Bhuyan, J.—All these writ petitions raising identical issues of fact and law, being inter-related, were heard together and are being disposed of by this common order. The core issue involved in this batch of writ petitions is the claim of work charge employees, muster roll workers and similar category of employees engaged prior to 01.04.1993 for regularisation of their service under the Government of Assam. Related grievance, which can also be said to be an offshoot of the core issue, is the claim of such categories of employees and workers or their family members for pension or family pension as the case may be, after attaining the age of superannuation or in the case of death, by creating supernumerary post personal to the incumbent and regularising his service for one day. The grievance has crystallized in the form of challenge to the Office Memorandum (OM) dated 16.06.2012 issued by the Finance (EC-II) Department, Government of Assam, which has ruled out any further regularisation on both counts.

Back Ground Facts.

2. The present batch of writ petitions have their genesis in the earlier rounds of litigation which culminated in a Full Bench judgment of this Court in the case of Jitendra Kalita Vs. State of Assam and Others, . State of Assam is being

confronted by the problem of a large number of work charge employees, muster roll workers and similar category of employees seeking regularisation which has assumed endemic proportion despite what was thought to be the conclusive intervention of this Court through the Full Bench in Jitendra Kalita. Of course, this problem is not confined or peculiar to the State of Assam only. It has a pan Indian complexion and had assumed alarming proportion so much so that a Constitution Bench of the Hon"ble Supreme Court had to step in. It is the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, . Yet the problem refuses to fade away and continues to confront the Court. This has resulted in the present round of litigation which is sought to be answered through the instant judgment.

3. The Full Bench in Jitendra Kalita had very lucidly and elaborately set out the facts. Therefore, for better appreciation, the facts as narrated in Jitendra Kalita are liberally quoted and referred to in the instant judgment. Relevant portion of Jitendra Kalita dealing with the genesis of the problem and the attempts made by the State for resolution of the problem, reads as under:--

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In the 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. Such workers are known as Muster Roll Workers. Also, in such engineering and works related departments of the State there is another category of workers whose tenure of service and pay and allowances are charged to a particular on going work. Such employees are commonly known as work charged employees. Though muster roll and work charged establishments are normally to be found in the works related departments, which are basically the engineering departments of the State, the practice of engaging such workers has virtually come to be followed in all departments of the State. In addition to the above two categories, each department of the State employs a large number of casual workers including fixed pay and daily rated workers. The extent of such employment in the State of Assam, which is outside the mainstream of employment, it must be noticed, is considerable.

3. In the year 1983, and to be precise, on 23.09.1983, a Cabinet decision was taken to the effect that all muster roll labourers working in all departments of the State, who have completed 15 years of service or more may be regularized as Grade IV employees. What happened thereafter and how the decision of the Cabinet was implemented, if at all, is not very clear save and except that in a communication dated 15.03.1984 issued by the Chief Secretary of the State, the General Secretary of the PWD Employees Union was informed that muster roll workers of the Public Works Department and other engineering departments, who have completed 15 years of continuous service were to be regularized with effect from 01.08.1984. By the said communication, the workers Union was further informed that work charged employees of engineering departments, who have completed 5 years continuous service, were to be brought under the

regular establishment. Admittedly and evidently, no scheme was prepared or detailed principles were laid down as to how the Cabinet decision dated 23.09.1983 was to be executed and implemented consistent with the rights under Article 14 and 16 of the Constitution of such persons who came within the purview of the aforesaid Cabinet decision dated 23.09.1983. The position remained unchanged until the Chief Secretary to the Government of Assam addressed a communication bearing No. ABP 176/91/Pt. 1/188 dated 20.04.1995 to all the Commissioners and Secretaries of the Government of Assam. By the aforesaid communication dated 20.04.1995 the Chief Secretary informed all concerned that in spite of the decision of the State Government to regularize the service of work charged and muster roll employees, no action for regularization of such employees have been taken. Accordingly, the Chief Secretary informed all the departments to take necessary action, in consultation with the Finance Department, for early regularization of the services of work charge and muster roll employees who were engaged prior to 1.4.1993. The aforesaid communication dated 20.04.1995 was followed by an Office Memorandum (OM) dated 11.10.1995 issuing strict instructions to all concerned not to engage any further muster roll/work charged employees after 01.04.1993 and further a clarification was issued on 13.10.1995 to the effect that the OM dated 20.04.1995 was to operate provided the muster roll/work charged employees were not discharged or terminated on or before 20.04.1995.

4. Based on the above OM dated 20.04.1995 a number of writ petitions came to be filed by such category of employees before this Court seeking regularisation of service in view of their engagement prior to 01.04.1993 and citing long years of service, the lead case being Civil Rule No. 4411/1995. While directing regularisation of service of those engaged upto 01.04.1993, it was held by the Court that those engaged after 01.04.1993 did not have any legally enforceable right. Writ appeal filed by the post 01.04.1993 work charge and muster roll employees was dismissed.

5. In the meanwhile, in respect of Transport Department where a selection was held for filling up a number of posts in Grade-III, two sets of conflicting orders came to be passed by this Court, one directing regularisation of adhoc/casual employees working in grade-III posts who were appointed prior to 01.04.1993, and the second set where the Court directed appointment of the selected candidates by adhering to the merit list. The conflicting decisions led the matter to be referred to the Full Bench in Jitendra Kalita.

6. The details and conclusions in Jitendra Kalita will be adverted to a little later in this judgment. At this stage, suffice it to say that the Full Bench held that the OM dated 20.04.1995 did not reflect a valid policy decision of the State for regularisation of muster roll/work charge employees. While those already regularised on the strength of the OM dated 20.04.1995 were not disturbed considering the human factor involved, it was however made clear that there would be no further regularisation in terms of the OM dated 20.04.1995.

7. Significantly and more importantly for the present round of litigation, it may be noted that in the proceedings of Jitendra Kalita, the Chief Secretary to the Government of Assam had filed an affidavit on 14.11.2005 informing the Court that on 22.07.2005 the State Cabinet had taken a decision to regularise the services of work charge/muster roll workers engaged prior to 01.04.1993 and that pursuant to the aforesaid Cabinet decision, an order had been issued by the competent authority of the State with the concurrence of the Finance Department for creation of over 30,000 posts against which such regularisations were proposed to be affected.

8. The Full Bench in Jitendra Kalita did not express any opinion with regard to the validity of the Cabinet decision dated 22.07.2005 or its implementation and execution.

9. From the documents placed on record, including the communication dated 22.8.2005 of the Finance (EC-II) Department, Government of Assam and the OM dated 31.07.2010 of the Pension and Public Grievances Department, Government of Assam, it appears that the State Government had created 5892 numbers of work charge grade posts and 25069 numbers of grade IV posts personal to the incumbents for the purpose of regularisation of services of 5892 numbers of work charge employees and 25069 numbers of muster roll workers. Thereafter, services of about 30,000 work charge employees and muster roll workers were regularised.

10. It was then that subsequent writ petitions came to be filed and the present round of litigation commenced. To keep the matter within reasonable proportion and to ensure that it does not become unwieldy, specific details and facts of the individual cases are not being narrated. However, to sum up the projection of the grievances, it may be pointed out that in some of the cases, petitioners claim to be engaged as work charge employees or muster roll workers prior to 01.04.1993. They seek regularisation of service on the strength of their long and continuous engagement, some for more than 25 years. In some of the writ petitions, regularisation is sought for on the strength of the Cabinet decision dated 22.07.2005. Grievance raised is that while services of similarly situated persons have been regularised following the above Cabinet decision, their services have not been regularised. Again, grievance of some of the petitioners is that because of clerical error in the spelling of their names in the list of eligible employees short listed for regularisation, objections were raised and consequently, their services were not regularised or due to inadvertence and oversight, their names were dropped from such list. There is yet another group of cases where the grievance is that State has created two categories of muster roll/work charge/casual employees i.e. into fixed pay and non-fixed pay categories. While services of the non-fixed pay category have been regularised, regularisation of those petitioners have been denied on the ground that they are fixed pay employees, though both the groups render similar nature of work. They had approached this Court earlier and this Court had directed consideration of

their cases, after holding such classification as illegal. Yet their services have not been regularised.

11. Parallel to the above proceedings, a related group of petitions came to be filed before this Court. In this group of cases, the grievance expressed was that notwithstanding rendering long years of service by the concerned incumbent either as work charge employee or as muster roll worker, having been engaged prior to 01.04.1993, pension or family pension as the case may be, were not forthcoming after attaining the age of superannuation or in case of death, inspite of repeated demands made before the authority. Stand of the Finance Department and the concerned administrative departments had been that in view of the decision in Jitendra Kalita, no regularisation of service for one day by creating supernumerary post personal to the incumbent to enable payment of pension was possible. A Single Bench of this Court vide a common order dated 21.05.2008 passed in WP (C) Nos. 2186 and 2384 of 2007 when confronted with the above problem clarified that Jitendra Kalita did not prohibit grant of pensionary benefit to the incumbent or his family members after death or after crossing of retirement age by creating supernumerary post for a single day. Respondents were therefore directed to proceed with the matter in accordance with law so as to enable the petitioners to receive their pensionary dues. This position was consistently followed thereafter by this Court, the details of which may not be necessary to be spelt out save and except that the number of such cases would be sufficiently large, till an abrupt departure was made by another Single Bench of this Court vide order dated 14.03.2013 passed in Review Petition No. 124/2012 whereby it was held that such regularisation of service by creating supernumerary post for one day would not be permissible in view of Uma Devi as it was reasoned that if regularisation during the service period was not permissible, it would be equally impermissible to regularise such service after the service period is over or after the death of the individual concerned.

12. Coming back to the mainstream of facts, this Court was considering a group of cases, the lead case being WP(C) No. 1271/2006 (Ramani Deka & Ors. v. State of Assam & Ors.), seeking regularisation of service on the ground that the petitioners were engaged as work charge, muster roll and other similar category of workers/employees prior to 01.04.1993. The claim was based on the Cabinet decision dated 22.07.2005. Grievance expressed was that they were left out of regularisation though they fulfilled the relevant criteria for such regularisation while services of similarly situated persons were regularised. On 06.09.2010, it was submitted by the State before the Court that as per information collated from 29 departments, around 3720 numbers of work charge, muster roll and similar other workers were working who were engaged prior to 01.04.1993. The Court was further informed that the State Government would come out with a policy for regularisation of the services of such workers after due examination within a period of 3 months. This Court by order dated 06.09.2010 directed that in view of the clear stand taken by the State, consequential action should be taken and completed within the specified time period.

13. In WP(C) (Taken up) No. 24/2007, where this Court was considering the conditions of prisons in the State, including engagement of adequate staff and other related issues, a Division Bench of this Court passed an order on 30.07.2010 directing that in terms of the Full Bench decision in Jitendra Kalita, the State Government should frame a policy for regularisation of casual workers. Learned Additional Advocate General, Assam appearing for the State submitted that the policy would be framed within 8 weeks. On 01.11.2010, learned Additional Advocate General submitted before the Court that an undertaking had already been given in Ramani Deka that a policy would be framed within 3 months. In view of the undertaking given by the State, the Division Bench observed that no further steps need be taken with regard to the direction issued on 30.07.2010.

14. When Ramani Deka was taken up on 14.12.2011, it was submitted before the Court on behalf of the Finance Department that the matter was under active consideration in coordination with the Departments of Health, PWD, Directorate of Zoology and Mining, Water Resources etc. and the benefit of the deliberation was likely to be positive, in favour of the petitioners.

15. Most surprisingly, suddenly and notwithstanding the above undertakings given before the Court, a miscellaneous application was filed by the State in the said WP(C) (Taken up) No. 24/2007 seeking leave of the Court to permit the State to implement its policy of regularisation. The said application was registered as MC No. 597/2012. A Division Bench of this Court by order dated 27.03.2012 declined to grant the prayer.

16. Following the same, the Finance (EC-II) Department, Government of Assam issued the impugned OM dated 16.06.2012 whereby it was decided that no more regularisation of services of work charge, muster roll or similarly placed workers can be undertaken by the State Government even if such workers were engaged prior to 01.04.1993 and have rendered continuous service without break. It was also decided that there would be no more regularisation by creating supernumerary post for one day in respect of those work charge or muster roll workers who were engaged prior to 01.04.1993 but has died or has attained the age of superannuation after rendering continuous services uninterruptedly. Another decision taken was that all concerned departments/Government Offices should strictly adhere to the earlier Finance Department OM dated 05.11.1999 regarding stopping the engagement of work charge, muster roll, casual employees etc.

PLEADINGS

17. All the writ petitions have been structured on the plank of the petitioners being engaged as muster roll, work charge, casual, daily rated etc. employees prior to 1.4.1993 and being in continuous and uninterrupted service for long periods of time. As already noticed above, in some of the writ petitions, regularisation has been sought for on the strength of the Cabinet decision dated

22.07.2005. Pleaded case is that while the services of similarly situated work charge and muster roll employees have been regularised following the Cabinet decision dated 22.07.2005, services of the petitioners have not been regularised. In some of the cases, it has been contended by the petitioners of those cases that because of clerical error in the spelling of their names in the list of eligible employees short listed for regularisation, objections were raised because of which, their services were not regularised. It has also been contended that due to sheer oversight or inadvertence, they were left out of regularization. In a few cases, it has been pleaded by the petitioners of those cases that the State has created two categories of muster roll/work charge/casual employees i.e. those who are paid fixed pay and those who are not paid fixed pay. It is contended that both the categories of employees render similar type of work but while the services of the non-fixed pay category employees have been regularised, regularisation of service of those petitioners have been denied on the ground that they are fixed pay employees. When they had approached this Court earlier, this Court after holding such classification as illegal, had directed consideration of their cases. Yet their services have not been regularised. It is also contended that the blanket ban on payment of pension to those work charge employees and muster roll workers who were engaged prior to 01.04.1993 but has died or has attained the age of superannuation after rendering continuous and uninterrupted service by creating supernumerary post for one day is wholly unjustified, arbitrary and unreasonable. The said decision is contrary to the legislative intent which manifests through the proviso to Rule 31 of the Assam Services (Pension) Rules, 1969. It is also violative of the constitutional philosophy as expressed through the directive principles of State policy under the Constitution of India.

18. Respective departments have filed counter affidavits inmost of the cases. Though factual aspects are different and therefore have invited varying responses in so far as contentions based on facts are concerned, the common thread running through the affidavits is that regularisation is no more possible in view of Uma Devi and Jitendra Kalita. Regarding payment of pension or family pension to work charge employees and muster roll workers who were engaged prior to 01.04.1993 but has died or has attained the age of superannuation after rendering continuous service uninterruptedly by creating supernumerary post for one day, it is contended that when regularisation of service is not permissible during the period of engagement as work charge employee or muster roll worker, such regularisation would also be impermissible after death or after attaining the age of superannuation had the incumbent been in regular service to enable receipt of pension. However, the stand of the Government has now become crystallized in the form of the OM dated 16.06.2012.

SUBMISSIONS

19. Heard Mr. K.K. Mahanta and Mr. A.B. Choudhury, learned Senior Counsel, Mr. R.C. Saikia, Mr. G. Uzir, Mr. A.M. Bujarbarua, Mr. J. Ahmed, Dr. B. Ahmed, Mr. D.K. Sarma and Mr. I.H. Saikia, learned Counsel appearing for the petitioners.

Also heard Mr. D. Saikia, learned Additional Advocate General, Assam, Mr. B. Goswami, learned Standing Counsel, Water Resources Department, Mr. B. Choudhury, Ms. A. Verma, Mr. B. Gogoi and Ms. R. Deka, learned Counsel for the respondents.

20. Learned Counsel for the parties have made elaborate and extensive arguments. Without going into the details and specifics of the arguments of each of the counsel, an attempt is being made to summarize and highlight the substance of the arguments advanced by both sides.

21. Learned Counsel for the petitioners have argued that Cabinet decision was taken by the State on 22.07.2005 to regularise work charge employees, muster roll workers and similar category of employees who were engaged prior to 01.04.1993 and are in service continuously and uninterruptedly. Pursuant thereto, various departments including the Water Resources Department finalized such category of employees and accordingly their services were regularised. Either through inadvertence or oversight or because of clerical mistake, petitioners were excluded from regularisation though they fulfilled the required criteria. When the mistakes were detected, corrective steps were taken for inclusion of the names of the petitioners for regularisation. While the process was on, the impugned OM dated 16.06.2012 was issued putting a complete embargo on regularisation. It is contended that the impugned OM dated 16.06.2012 is wholly arbitrary and discriminatory, being in violation of Article 14 of the Constitution of India. It was issued on a complete mis-reading of the Division Bench order dated 27.03.2012 and the decisions in Uma Devi and Jitendra Kalita. When there was already a Cabinet decision on 22.07.2005 and when an undertaking was given by the State before the Court to frame a policy to effect regularisation as per Cabinet decision, there was no need to seek permission from the Court. The Division Bench did not prohibit the State from framing policy to give effect to the Cabinet decision. The order of the Division Bench has to be read and understood in that context. Learned Counsel for the petitioners would contend that the motive of the State is clearly suspect as it has misused the order of the Division Bench to resile from the undertaking-given to the Court, Decision in Uma Devi would not be applicable in the present batch of cases as the claim for regularisation is based on a Cabinet decision which was not the case in Uma Devi. The issue in Uma Devi was illegal appointments and the power of the Court to issue directions for regularisation of such appointments. Moreover, the present batch of cases is also based on the plea of discrimination as similarly situated persons have been regularised while the petitioners have been left out. Thus, the impugned OM dated 16.06.2012 is liable to be appropriately interfered with.

22. It is also contended that claim of the petitioners for regularisation relates to the Cabinet decision dated 22.07.2005 following which about 30,000 muster roll and work charge employees have been regularised. These are all prior to 10.04.2006 when the judgment in Uma Devi was delivered. Therefore, in any

case, Uma Devi would not be applicable to the case of the petitioners.

23. This Court in Jitendra Kalita had considered Uma Devi but did not express any opinion as to the legality and validity of the Cabinet decision dated 22.07.2005 as there was no challenge to the same. Even now, there is no challenge or assailment to the above Cabinet decision. Moreover, Uma Devi itself carved out an exception to the bar of regularisation by exempting those who had rendered uninterrupted service for 10 years against sanctioned posts as a one time measure. This position has been explained by the Apex Court itself in the later case of State of Karnataka and Others Vs. M.L. Kesari and Others, .

24. It has also been contended that Uma Devi does not apply to muster roll workers and does not bar or rule out framing of a scheme for regularisation of muster roll or work charge employees. State of Tripura has framed such a scheme, which has been placed on record.

25. Further contention is that neither Uma Devi nor Jitendra Kalita bar one day regularisation of such category of employees by creating supernumerary post personal to the incumbent after crossing of the age of retirement or in case of death for the purpose of pension. Otherwise, it would be a case of exploitation of labour by the State and would run counter to the constitutional philosophy of the country.

26. While Mr. Uzir, learned Counsel for the petitioners made submissions as to what is a sanctioned post with reference to Assam Services (Revision of Pay) Rules, 2010, Dr. Ahmed has painstakingly taken the Court to a number of OMs and the Assam PWD manual to lay emphasis on the nature of work charge and muster roll engagement. Mr. K.K. Mahanta has argued that the Hon"ble Supreme Court has been permitting the State to frame scheme for regularisation of long serving casual workers and in this connection has referred to a number of post Uma Devi judgments including the case of Union of India (UOI) and Others Vs. Vartak Labour Union, . Mr. Bujarbarua additionally contends that this Court while accepting the undertaking given by the State to take effective steps to implement the Cabinet decision dated 22.07.2005 was fully conscious of Uma Devi and being convinced that the present batch of cases are not covered by Uma Devi, had directed the State to act on the undertaking so given. He submits that having regard to the under lying constitutional philosophy guiding the Indian republic, the course of action adopted by the State would not be permissible as it would amount to exploitation of labour. Mr. A.B. Choudhury, learned Senior Counsel has based his argument on the plank of discrimination and violation of article 14 of the Constitution of India.

27. Vehemently opposing the submissions of learned Counsel for the petitioners, Mr. D. Saikia, learned Additional Advocate General, Assam, appearing on behalf of the State submits that the writ petitioners did not enter into service through any selection process. They were engaged as muster roll/work charge/casual employee in a random manner. They were not engaged or appointed against any

sanctioned post as is understood in service jurisprudence. Therefore, they are not entitled to regularisation of their service. Long continuance as muster roll workers/work charge employees would not confer on them any enforceable right of regularisation. As the appointments of the petitioners were made without any selection process and against nonexistent posts, their appointments/engagements are illegal and therefore they cannot claim regularisation. Further contention of Mr. Saikia is that regularisation cannot be a mode of appointment and therefore no direction should be issued by the Court for regularisation. Mr. Saikia fully supports the OM dated 16.06.2012 and contends that even one day regularisation by creating supernumerary post after retirement or death for the purpose of grant of pension or family pension as the case may be to muster roll workers or work charge employees engaged prior to 01.04.1993 would also not be permissible in view of the law laid down in Uma Devi. However, in the course of his argument, Mr. Saikia, learned Additional Advocate General submitted that considering the exception carved out by Uma Devi and explained in ML Kesari, Government will frame a policy for regularisation of the services of those employees rendering service for 10 years or more against sanctioned posts as on 10.04.2006 as a one time measure. To carry out this exercise, he submits that about 6 months time would be required. In support of his submissions, learned Additional Advocate General has placed reliance on the following decisions:--

Ashwani Kumar and Others Vs. State of Bihar and Others, .

Secretary, State of Karnataka and Others Vs. Umadevi and Others, .

State of Karnataka and Others Vs. M.L. Kesari and Others,

Jitendra Kalita Vs. State of Assam and Others, .

Chandigarh Administration and another Vs. Jagjit Singh and another,

WP (C) No. 1237/2008: Abdul Kadir v. Central Assam Electricity Distribution Company Limited.

Review Petition No. 123/2012: State of Assam v. Sheila Paswan

QUESTIONS FOR CONSIDERATION/DETERMINATION

28. (A) Whether on the facts and in the circumstances of the case, petitioners are entitled to a consideration for regularisation of service on the strength of the Cabinet decision dated 22.07.2005 or whether the decision in Uma Devi completely rules out such consideration?

(B) Whether, creation of supernumerary post personal to the incumbent after attaining the age of retirement or after the death of the incumbent muster roll/work charge employee engaged prior to 01.04.1993 and regularisation for one day against such supernumerary post would also be barred in view of Uma Devi and Jitendra Kalita?

(C) Whether on the facts and in the circumstances of the case, issuance of the

OM dated 16.06.2012 altogether ruling out regularisation on the above two counts would be justified?

DISCUSSION AND ANALYSIS

A. Whether on the facts and in the circumstances of the case, petitioners are entitled to a consideration for regularisation of service on the strength of the Cabinet decision dated 22.07.2005 or whether the decision in Uma Devi completely rules out such consideration?

29. The manner in which muster roll workers and work charge employees are engaged in the State has been dealt with in the opening part of the judgment itself. It can be seen therefrom that muster roll workers and work charge employees are outside the regular stream of employment. Such engagement is permissible under the Assam Financial Rules, 1939 as updated from time to time and the PWD code framed thereunder, though such engagement or appointment is not intended for an indefinite period. However, the same perhaps cannot be said about casual employment. Therefore, to say and contend that all muster roll workers, work charge employees, casual employees etc. were appointed without any selection and against non-existent posts would be an over-simplification of facts. By their very nature, muster roll workers or work charge employees are never engaged against sanctioned posts.

30. Be that as it may, this now leads us to Uma Devi. Though learned Counsel for the parties had placed a number of pre Uma Devi judgments, deliberation on those judgments may not be necessary in view of the authoritative pronouncement of the Constitution Bench in Uma Devi. Issue for consideration in Uma Devi was as to whether illegal or irregular appointments against regular vacancies in posts should be allowed to continue year after year and thereafter to regularise such appointments bypassing the constitutional scheme of public employment. In other words, the question for consideration was as to whether there should be a premium on such appointments only because such appointees have continued in service for some duration of time while keeping out eligible and qualified persons and depriving them of the opportunity to compete for such posts. The Hon''ble Supreme Court held that the Courts should not ordinarily issue directions for absorption, regularisation or permanent continuance of temporary or ad hoc employees unless the recruitment itself was made regularly and in terms of the constitutional scheme which envisages appointment following a selection procedure as laid down by the relevant recruitment rules. Such principle has also been extended to those employees engaged and working on daily wage basis. The Hon''ble Supreme Court has made it clear that there is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis to claim absorption in service. Any deviation made from the constitutional scheme would amount to defeating the concept of equal opportunity for all and prevent regular selection or recruitment. The Hon''ble Supreme Court while clarifying that regularisations already made need not be reopened, however held that there should be no further regularisation of

those not duly appointed as per the constitutional scheme. Judgment in Uma Devi was delivered on 10.04.2006. Though the Apex Court held that a temporary employee or a casual worker by virtue of his long continuance in his employment, would have no legal right to claim absorption if the appointment was not made by following a due process of selection as per the relevant rules, an exception has been carved out in respect of those employees who have worked for more than 10 years against duly sanctioned posts without the intervention of the Court or tribunal and having the requisite qualification. Accordingly, the Central Government, the State Governments and their instrumentalities were directed to take steps to regularise the service of such appointees as a one time measure. Paragraph 53 of Uma Devi deals with the above aspect of the matter, which reads 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 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. 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.

31. The above direction issued in Uma Devi was considered and explained later by the Apex Court in M.L. Kesari with particular reference to the term "one-time measure". The Apex Court explained that there is an exception to the general principle against regularisation enunciated in Uma Devi if the employee concerned had worked for 10 years or more against a duly sanctioned post without the benefit or protection of any interim order of any Court or tribunal and that the appointment should not have been illegal, even if irregular. In other words, the employee concerned should possess the prescribed qualification and should be working against sanctioned post. The term "one-time measure" has been explained by the Apex Court in the following manner:--

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 one time 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 onetime measure.

32. Thus following the decision in Uma Devi, each department or instrumentality of the State is required to 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 10 years without the intervention of Courts or tribunals and subject them to a process of verification as to whether they are working against vacant posts and possess the requisite qualification. This exercise is required to be continued till all the employees who are entitled to be considered in terms of para-53 of Uma Devi are so considered. A Single Bench of this Court in Abdul Kadir has directed the Assam Power Distribution Company Ltd. (APDCL), an instrumentality of the State, to initiate the onetime exercise and to complete the same within 6 months.

33. Coming back to Uma Devi, in a later decision in the case of U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others, , a two judge bench of the Apex Court sought to distinguish the decision in Uma Devi by holding that the decision in Uma Devi cannot be applied to a case where regularisation has been sought for in pursuance of article 14 of the Constitution. Reliance was placed on Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, .

34. However, this approach of the two judge bench did not find favour with a subsequent three judge bench of the Apex Court in the case of Official Liquidator Vs. Dayanand and Others, . It was held that the judgment in Uma Devi is binding on all the Courts including the Apex Court till the same is overruled by a larger bench. View has been taken that the observations made in Pooran Ch. Pandey's case were not called for as those were beyond the issue which fell for consideration of the Court. It was clarified that the comments and observations made in Pooran Ch. Pandey should be read as obiter without having any binding character.

35. Thus, the law as it stands today is clear. Post 10.04.2006 i.e. the day on which judgment in Uma Devi was delivered, no direction or order can be issued by the Courts for regularisation of muster roll, work charge and similar category of employees barring the exception carved out in paragraph 53 of Uma Devi itself as explained in M.L. Kesari.

36. However, the peculiarity of the present batch of cases is that before the judgment in Uma Devi was delivered, a Cabinet decision was already taken in the State of Assam on 22.07.2005 to regularise the services of work charge/muster roll workers engaged prior to 01.04.1993. Pursuant to such Cabinet decision, services of about 30,000 work charge employees and muster roll workers were regularised by creating equivalent number of grade IV posts personal to the incumbents. This fact was brought to the notice of the Full Bench in Jitendra Kalita by the Chief Secretary by filing an affidavit. In another affidavit filed by the Additional Chief Secretary it was stated that the posts proposed to be created were only apart of the attempted solution as the number of work charge/muster roll employees were far more in number.

37. Grievance raised in the present batch of cases is that though the petitioners are covered by the Cabinet decision dated 22.7.2005 and services of similarly placed employees like them were regularised pursuant to such Cabinet decision, because of oversight or inadvertence or clerical mistake, they were left out of regularisation. In the proceedings of WP(C) No. 1271/2006 (Ramani Deka & Ors v. State of Assam & Ors.), as already noticed, on 06.09.2010 the Chief Secretary had informed the Court through the Additional Advocate General that as per information received from 29 departments, there were around 3720 numbers of work charge, muster roll and similar other workers engaged prior to 01.04.1993, who were left out of regularisation.

38. Question which arises for consideration is what would be the fate of those workers/employees who were engaged prior to 01.04.1993 but for some inexplicable reasons remained outside the net of regularisation following the Cabinet decision dated 22.07.2005. Had the exercise to regularise the work charge, muster roll and similar category of employees engaged prior to 01.04.1993 been carried out in a full and complete manner, the situation would have been completely different as no occasion would have arisen for the petitioners to ventilate such grievance and following Uma Devi, their regularisation would not have been disturbed. Should they suffer for the lapse on the part of the State? It is this issue which has engaged the attention of the Court and the Court is grappling to find an answer to this issue.

39. In Jitendra Kalita, the Full Bench was primarily concerned with the legality and validity of the OM dated 20.04.1995 issued by the Chief Secretary of the State informing all the departments to take necessary action in consultation with the Finance Department for early regularisation of the services of work charge and muster roll workers who were engaged prior to 01.04.1993. After due consideration and after taking note of Uma Devi, the Full Bench held that the OM dated 20.04.1995 did not reflect a valid policy decision of the State. It was found that there was no Cabinet decision or policy decision of the State preceding the OM dated 20.04.1995 which was found to be issued at the level of the Chief Secretary. However, without disturbing the regularisations already effected on the strength of the OM dated 20.04.1995, the Full Bench clarified that there would be no further regularisation on the basis of the said OM.

40. Corning to the Cabinet decision dated 22.07.2005, the Full Bench expressed no opinion as to its validity or its implementation and execution as no challenge was made to the said Cabinet decision. As a matter of fact, the said Cabinet decision dated 22.07.2005 has remained unchallenged till date.

41. In Jitendra Kalita, the Full Bench while examining as to what is meant by the expression "policy decision", also exhaustively dealt with the exercise of executive power of the State under our constitutional scheme. After referring to the relevant articles of the Constitution and the decisions of the Supreme Court, it was held that it is the satisfaction of the Ministers individually or collectively as the Cabinet on which basis the executive power of the State is exercised in the

name of the Governor and it is the satisfaction of such Ministers or the Cabinet as the case may be, that is the satisfaction of the Governor under the Constitution. Policy decisions therefore have to be taken by the individual Ministers if the subject matter is otherwise within their domain or by the State Cabinet. The Cabinet enjoying majority support in the legislature exercises the executive functions of the State. As the Ministers constituting the Cabinet act on the principle of collective responsibility, important questions of policy are formulated by them collectively through the Cabinet. The need and the power to make appointments of various categories of employees is necessarily an executive function of the State. It has been held by various decisions of the Apex Court that creation, continuance and abolition of posts is a matter of Government policy and is decided by the Government in the interest of administration and general public. Having regard to the above and considering the enormity of the problem, the Full Bench therefore observed that any solution to the problem of the magnitude to which it has been allowed to develop can be attempted by the State only in terms of a policy decision taken as a one time measure.

42. In the proceedings of Ramani Deka, this Court had asked the learned State Counsel to obtain necessary instructions and to inform the Court as to whether the State Government was contemplating to frame a policy for regularisation of the cases of fortuitous, casual, muster roll, work charge and fixed pay employees of the State. The State was also asked to inform the Court about the approximate number of such fortuitous employees engaged in the State of Assam. On 6.9.2010, the Chief Secretary of the State informed the Court through the learned Additional Advocate General that there were around 3720 numbers of work charge, muster roll and similar categories of employees in employment who were engaged prior to 01.04.1993. The Court was further informed that the State would come out with a policy for regularisation of the services of such workers after due examination within a period of 3 months. In view of the categorical stand taken by the Chief Secretary, this Court by order dated 06.09.2010 observed that it was obligatory on the part of the Chief Secretary to ensure that what was undertaken before the Court be completed within the specific time and accordingly directed that consequential action be completed within the specified period of 3 months. The undertaking given by the State and the direction issued by the Court on the basis of such undertaking were clearly in tune with the observations of the Full Bench in Jitendra Kalita that any solution to the problem can only be attempted by the State in terms of a policy decision taken as a one time measure.

43. As already noticed in the earlier part of this judgment, in the proceedings of the taken up matter i.e. WP(C) (Taken up) No. 24/2007, a Division Bench of this Court by order dated 30.07.2010 directed the State Government to frame a policy for regularisation of casual workers in terms of the Full Bench decision in Jitendra Kalita. Learned Additional Advocate General, Assam appearing for the State assured the Court that a policy would be framed within 8 weeks. When the matter was taken up again on 01.11.2010, the learned Additional Advocate

General informed the Court that in so far the direction regarding framing of policy for regularisation of casual workers in terms of Jitendra Kalita was concerned, an undertaking had already been given by the State in Ramani Deka that a policy would be framed within 3 months. In view of the undertaking given by the State in Ramani Deka, the Division Bench observed that no further steps need to be taken with regard to the direction issued on 30.07.2010.

44. It is seen that the Chief Secretary had filed an affidavit in the above taken up case on 10.12.2010 stating that there are about 5085 (approx) numbers of work charge/muster roll/contingent/casual workers who were engaged prior to 01.04.1993 and are working continuously in different departments. It was further stated that the State Government is committed to take a decision to regularise the services of the above categories of employees as per undertaking given to the Court on 06.09.2010.

45. Viewed in the above perspective, this Court finds the move of the State Government to file a miscellaneous application seeking permission of the Court to formulate a draft policy for regularisation of the above categories of employees and for its implementation on the ground that the State was apprehensive of undertaking such an exercise in view of Uma Devi and Jitendra Kalita to be totally unwarranted and un-called for in the contextual facts of the case. Undertaking was given by the State, which was accepted by the Court on the basis of which direction was issued by the Court to implement such undertaking given, keeping in mind and being fully conscious of the parameters of law as laid down in Uma Devi and Jitendra Kalita. Considering the sequence of events, there was no necessity at all on the part of the State to seek leave of the Court to frame and implement a policy decision. The move itself was quite bizarre and virtually amounted to surrendering the executive authority of the State. Courts do not run the administration of the country that its permission is required to be taken to give effect to a Cabinet decision. The contention advanced that because of Uma Devi, permission of the Court was necessary borders on absurdity. Uma Devi does not prohibit framing of policy by the State; it only re-states the legal principle that the Court should not direct the State to frame policy for regularisation as it involves finances of the State. It is in this context that the Division Bench order dated 27.03.2012 has to be read and understood. A careful reading of the above order would show that the Division Bench only expressed the view that if in the understanding of the State it cannot regularise casual workers as per law laid down by the Hon"ble Supreme Court, how it could expect the Court to give direction to adopt such a policy. This does not mean or should not be understood to mean that the executive arm of the State has been denuded of its power to frame a policy based on a Cabinet decision. Beyond this, nothing more should be read into the order dated 27.03.2012.

46. In Vartak Labour Union, though the Apex Court set aside the direction of the High Court to regularise the services of the casual workers employed by the

Border Roads Organisation, however observed that as those workers were engaged in service consistently for the past thirty to forty years with short breaks in between, Union of India would considering enacting an appropriate regulation/scheme for absorption and regularisation of the services of such casual workers. As a matter of fact, State of Tripura has framed a scheme for regularisation of full time casual/contingent workers who have completed 10 years of service as on 31.03.2008. This is contained in the Memorandum dated 01.09.2008 issued by the Finance Department, Government of Tripura, which has been issued pursuant to a policy decision taken by the Government. The said memo has been placed on record by the petitioners in WP(C) No. 2315/2013.

47. Thus the decision of the Government based on the above Division Bench order dated 27.03.2012 as expressed in the impugned OM dated 16.06.2012 that there would be no more regularisation of the services of the work charge, muster roll of similarly placed workers engaged prior to 01.04.1993 and rendering continuous service without break, does not appear to be just, fair, reasonable and rational. When Cabinet decision has been taken based on which already about 30,000 people have been regularised; when undertaking was given to the Court on 06.09.2010 on the basis of which this Court directed implementation of the undertaking, when the State Government by filing affidavit gave a commitment before the Court to regularise the services of such employees as per undertaking given on 06.09.2010, it would not be justified at all to take such a decision, resiling from the earlier position. In the circumstances, filing of the miscellaneous application appears to be suspect. Beyond this, the Court would not like to make any further comment.

48. At this stage, it may be pointed out that two writ petitions came to be filed before this Court, being WP(C) No. 6224/2005 (Pulin Kumar Sharma & Ors. v. State of Assam & Ors.) and WP(C) No. 5876/2005 (Jamal Hussain & Ors. v. State of Assam & Ors.), questioning the rationale behind the classification of the muster roll, work charge and casual employees into fixed pay and non-fixed pay categories and conferring the benefit of regularisation on the non-fixed pay category following the Cabinet decision dated 22.07.2005. Both the writ petitions related to the Water Resources Department. A Single Bench of this Court by a common judgment and order dated 12.10.2010 held such classification to be unreasonable and unjustified and directed the State to confer the benefit of regularisation on the fixed pay category of employees as was granted to the non-fixed pay category of employees. The above judgment was rendered by the Court being fully conscious of Uma Devi and on the clear understanding that Uma Devi would not bar such regularisation.

49. Thus having regard to the discussions made above, the State should now take all follow up steps to give effect to the undertaking given and commitment made before the Court that services of muster roll, work charge and similar category of employees who were left out of regularisation following the Cabinet decision dated 22.07.2005 would be regularised and the direction of this Court

based thereon dated 06.09.2010. In addition to the above, the State and its instrumentalities are also required to carry out the one time exercise as per paragraph 53 of Uma Devi and explained in M.L. Kesari. Since both the above exercises would require factual verification, necessary modalities, which are fair and transparent, should be worked out. To meet any further grievances of such category of employees or of any person claiming to belong to such category and to eliminate further litigation in the matter, the State should constitute a grievance redressal committee with specific mandate to look into any grievance arising out of the aforesaid exercises. Question No. A is answered accordingly.

B. Whether, creation of supernumerary post personal to the incumbent after attaining the age of retirement or after the death of the incumbent muster roll/work charge employee engaged prior to 01.04.1993 and regularisation for one day against such supernumerary post would also be barred in view of Uma Devi and Jitendra Kalita?

50. The above question has arisen in view of the decision of the State expressed through the impugned OM dated 16.06.2012 that no more regularisation would be undertaken by creating supernumerary posts for one day in respect of those work charge and muster roll workers who were engaged prior to 01.04.1993 but has died or has attained the age of superannuation after rendering continuous service uninterruptedly. A reading of the OM dated 16.06.2012 would indicate that the said decision has been arrived at in view of the Division Bench order dated 27.03.2012 as well as the judgment of the Apex Court rendered in Uma Devi.

51. Uma Devi has been analysed and discussed above. A careful reading of Uma Devi does not show that it has expressed any opinion on grant of pension or pensionary benefits to work charge or muster roll workers who had rendered so many years of service that had they been in the main stream of employment, they would have attained the age of superannuation or in the case of death of such workers while in engagement. This was certainly not the issue before the Apex Court in Uma Devi. As already noticed above, in Uma Devi the Apex Court was primarily concerned with the power of the Court to issue writs, directions or orders to regularise the services of work charge, muster roll, ad-hoc, casual, temporary etc. class of employees. Therefore, it would not be correct and proper to draw any inference from Uma Devi to contend that no steps can be taken by the State or its instrumentalities to grant pension to such categories of employees. This is also the position in Jitendra Kalita where the core issue before the Full Bench was the legality and validity of the OM dated 20.04.1995.

52. When pension was denied to two such employees, two writ petitions came to be filed before this Court, being WP(C) No. 2186/2007 and WP(C) No. 2384/2007. A Single Bench of this Court vide order dated 21.05.2008 explained the position and held as under:--

The facts stated above make it amply clear that in the past the State had been

adopting the practice of creation of superannuity post for a single day i.e. last date prior to the retirement of an incumbent for the purpose of regularising his service against such post so as to vest in the concerned incumbent a right to receive pension. Such right to receive pension by the concerned incumbent flows from the various orders passed by this Court from time to time in several cases directing exercise of the power of relaxation under proviso to Rule 31 of the Pension Rules which would enable the State to take into account the period of service rendered as a muster roll or worked charged employee, as the case may be, for computation of the required period of qualifying service.

A reading of the order of the Full Bench in Jitendra Kalita (*supra*) would seem to indicate that the cases of the present kind were not in contemplation of the Full Bench and, therefore, were not included within the prohibition on further regularisations in terms of the Office Memorandum dated 20.04.1995, as contained in paragraph 28(2) of the order dated 17.05.2006 passed by the Full Bench. The issue before the Full Bench was with regard to the validity of the Office Memorandum dated 20.04.1995. The said Office Memorandum having been held not to be laying down a valid policy for regularisation, the Full Bench imposed a prohibition on further regularisations in terms of the said Office Memorandum without, however, disturbing the regularisations already made. On reading the full text of the judgment of the Full Bench, it cannot be said that while passing the order dated 17.05.2006 the Full Bench can be intended to have laid down the law that even regularisations after death or retirement for a single day against a superannuity post for the purpose of pensionary benefits was prohibited.

The above being the purport and effect of the Full Bench order dated 17.05.2006, as can be understood from reading the judgment in question, the stand taken by the Finance and the Public Works Department in their respective affidavits has to be clarified by the Court to be not in consonance with the spirit of the Full Bench order dated 17.05.2006. If that be so, the Court finds no impediment for application of the past practice of creation of superannuity posts only for the purpose of regularisation of the worked charged/muster roll employees who have either retired or have died in that status for the purpose of grant of pensionary benefits.

In the result, both the writ petitions shall stand disposed of in terms of the observations and clarifications as contained above with further liberty to the departments in question to proceed in the matter in accordance with what has been observed above so as to ensure that the petitioners in both the cases are paid such pensionary benefits to which they would be entitled in law.

53. This decision was thereafter consistently followed by this Court in a large number of cases till an abrupt departure was made by another Single Bench *vide* order dated 14.03.2013, which will be adverted to a little later in the judgment.

54. The preamble to the Constitution of India declares and resolves to constitute

India into a sovereign socialist secular democratic republic and assures to secure to all its citizens justice, liberty, equality and fraternity in all its facets. The preamble reflects the high purpose and noble objective of the Constitution makers. The preamble together with the directive principles of State policy expresses the constitutional philosophy of our republic. The directive principles of State policy starting from Article 36 to Article 51 of the Constitution are the guiding principles of governance. The objective of directive principles is to embody the concept of a welfare State. Directive principles have been held to supplement fundamental rights in achieving a welfare State. The Hon''ble Supreme Court" in *Air India Statutory Corporation, etc. Vs. United Labour Union and others* [overruled], in the context of examining the Contract Labour (Regulation and Abolition) Act, 1970 stated thus:--

15. The Founding Fathers of the Constitution, cognizant of the reality of life wisely engrafted the Fundamental Rights and Directive Principles in Chapters III and IV for a democratic way of life to every one in Bharat Republic. The State under Article 38 is enjoined to 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 and to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Article 39(a) provides that the State shall direct its policies towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood; clause (d) provides for equal pay for equal work for both men and women; clause (e) provides to secure the health and strength of workers. Article 41 provides that within the limits of its economic capacity and development, the State shall make effective provision to secure the right to work as fundamental with just and humane conditions of work by suitable legislation or economic organization or in any other way in which the worker shall be assured of living wages, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workmen. The poor, the workman and common man can secure and realise economic and social freedom only through the right to work and right to adequate means of livelihood, to just and humane conditions of work, to a living wage, a decent standard of life, education and leisure. To them, these are fundamental facets of life. Article 43-A, brought by the 42nd Constitution (Amendment) Act, 1976 enjoins upon the State to secure by suitable legislation or in any other "way, the participation of workers in the management of undertaking, establishments or other organisations engaged in any industry. Article 46 gives a positive mandate to promote economic and educational interests of the weaker sections of the people. Correspondingly, Article 51-A imposes fundamental duties on every citizen to develop scientific temper, humanism and to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement. To make these rights meaningful

to workmen and meaningful right to life a reality to workmen, shift of judicial orientation from private law principles to public law interpretation harmoniously fusing the interest of the individual entrepreneur and the paramount interest of the community is essential. Article 39-A furnishes beacon light that justice be done on the basis of equal opportunity and no one be denied justice by reason of economic or other disabilities. Courts are sentinel on the qui vive of the rights of the people, in particular the poor. The judicial function of a court, therefore, in interpreting the Constitution and the provisions of the Act, requires to build up continuity of socio-economic empowerment to the poor to sustain equality of opportunity and status and the law should constantly meet the needs and aspiration of the society in establishing the egalitarian social order. Therefore, the concepts engrafted in the statute require interpretation from that perspective, without doing violence to the language. Such an interpretation would elongate the spirit and purpose of the Constitution and make the aforesaid rights to the workmen a reality lest establishment of an egalitarian social order would be frustrated and constitutional goal defeated.

55. Keeping the above perspective in view, the issue of pension may now be looked into. It is settled law that pension is a valuable right and not a bounty which can be paid to the employee at the discretion of the Government. In D.S. Nakara and Others Vs. Union of India (UOI), the Hon"ble. Supreme Court pointed out that payment of pension in a welfare State is a facet of socio-economic justice. It was held that the antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer has been swept under the carpet by the decision of the Constitution Bench in Deokinandan Prasad Vs. The State of Bihar and Others, declaring that pension is a right and payment of it does not depend upon the discretion of the Government but governed by the rules. It was lucidly pointed out by the Apex Court that as the society had undergone transformation to a welfare society, obligation of the State to provide old age security has been recognized to avoid destitution in old age. Therefore, as can be seen from the above, the object of providing pension or pensionary benefit is to provide social security to the employee and his family after his retirement from service.

56. In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the State of Assam has framed the Assam Services (Pension) Rules, 1969. Rule 31 of the Pension Rules lays down three conditions to enable an employee to qualify for pension. These three conditions are -

- (i) the service must be under the Government;
- (ii) the employment must be substantive and permanent; and,
- (iii) the service must be paid by the Government.

As per the proviso to Rule 31, the Governor may declare any service or any individual case as qualifying for pension even if either or both conditions (i) and (ii) above are not fulfilled.

57. Government of Assam had framed a scheme in the year 1989 extending pension to regularised work charge employees. One Kabiram Rajbongshi filed a writ petition before this Court contending that he was engaged as a muster roll worker for about 26 years whereafter his service was regularized as Grade IV: When he retired from service, he had only about 6 years of regular service because of which he was not granted pension. A Single Bench of this Court after referring to Rule 31 and other provisions of the Pension Rules directed the authority to make necessary declaration as per the proviso to Rule 31 to enable the petitioner to receive pension. This decision reported in 1997 (1) GLT 589 (Kabiram Rajbongshi v. State of Assam & Ors.) has since been followed consistently by the Courts.

58. Thus the past practice or procedure followed by the State as indicated above is statutorily recognized through the proviso to Rule 31. A provision of a rule framed in exercise of power under the proviso of article 309 of the Constitution cannot be rendered otiose by an OM or by an administrative instruction as is sought to be done in the present case. Moreover, the past practice which has been referred to as one day regularisation by creating supernumerary post personal to the incumbent is not intended to validate the appointment or engagement of the incumbent by regularising it but only meant to ensure that the employee or his family gets some old age security in the form of pension or family pension as the case may be for the long years of service rendered, may be in the status of work charge or muster roll employee. This is certainly in tune with the constitutional philosophy of our country as discussed above.

59. This now brings us to the order of the Single Bench dated 14.03.2013 which was passed in Review Petition No. 124/2012.

60. In that case, the State had filed an application for review of the final order passed in the writ petition. In the final order, the writ Court, by following the order dated 21.05.2008 as noticed above, had directed the State to create supernumerary post to regularise the service of the petitioner's husband for one day to enable the petitioner to receive pensionary benefits. While recalling the final order, the review Court relied upon and referred to Uma Devi and M.L. Kesari and held that the individual concerned had not been appointed or had worked against any vacant sanctioned post. As such, his service could not be regularised. It was reasoned by the review Court that when it was not permissible to regularise the appointment of the person concerned during his life time, it would be equally impermissible to regularise his service after his death.

61. With great respect, I am unable to persuade myself to accept the above line of reasoning, making an abrupt u-turn from the long line of uniform judicial pronouncements of this Court as noticed above. As discussed earlier, neither in Uma Devi nor in Jitendra Kalita, the concept of one day regularisation by creating supernumerary post personal to the incumbent after attaining the age of superannuation or in case of death to enable payment of pension to the incumbent or his family members was the issue for consideration. This was

clarified in the order dated 21.05.2008 itself that there is no impediment to the application of the past practice of creation of supernumerary posts only for the purpose of regularisation for one day of the work charge/muster roll employees who have either retired or have died in that status to ensure that they receive pensionary benefits. Unfortunately, the review Court overlooked this aspect of the matter. As a matter of fact, there was no discussion on the order dated 21.05.2008. The provision of Rule 31 of the Pension Rules, particularly the proviso thereto which enables the State to relax the eligibility conditions to receive pension, escaped the notice of the review Court. So also the decision in Kabiram Rajbongshi and the long line of decisions of various Single Benches following the order dated 21.05.2008. In such circumstances, I am of the view that the one off decision of the review Court dated 14.03.2013 should be read as observations confined to the facts of that particular case only without any binding character and cannot be treated to have negated the earlier decisions, which in any case, being decisions of coordinate bench, the review Court could not have done.

62. This issue can also be looked at from another angle. Firstly, the State has allowed a muster roll or work charge employee to continue in that status for such a long period that had he been in the regular stream of employment, he would have attained the age of superannuation and then to deny him some old age security in the form of pension. Can such conduct on the part of the State be said to be just and fair? Will such a course of action be not opposed to our stated constitutional objective? The answer to the above two questions is obvious and apparent on the face of it

63. Thus, in the light of the discussions made above, the answer to question B would be in the negative and in favour of the petitioners.

C. Whether on the facts and in the circumstances of the case, issuance of the OM dated 16.06.2012 altogether ruling out regularisation on the above two counts would be justified?

64. Having regard to the above, no further deliberation on this question is considered necessary. Considering the facts and circumstances of the case, it is therefore held that issuance of the impugned OM dated 16.06.2012, particularly decisions A and B thereof, is not justified.

SUMMARY & CONCLUSIONS

65. In view of the discussions made above and conclusions reached, the summary of the same and the directions issued are reiterated as under:- (1) The Cabinet decision taken on 22.07.2005 to regularise the services of work charge, muster roll and such category of employees engaged prior to 1.4.1993 being prior in point of time, would not come under the bar of Uma Devi.

(2) Those work charge, muster roll and such category of employees engaged prior to 01.04.1993 but left out of regularisation pursuant to the Cabinet decision

taken on 22.07.2005 would thus be entitled to a consideration for such regularisation.

(3) Division Bench order dated 27.03.2012 cannot be read and understood to mean that the executive arm of the State has been denuded of its authority to frame a policy/scheme to give effect to the Cabinet decision dated 22.07.2005.

(4) The State should take immediate consequential steps to frame necessary policy/scheme to give effect to the undertaking given and commitment made before the Court to regularise the services of such category of left out employees pursuant to the Cabinet decision dated 22.07.2005 as a one time measure as per decision of the Full Bench in Jitendra Kalita and following the orders of the Court dated 30.07.2010 and 06.09.2010.

(5) The procedure or the modalities to be engrafted in such policy/scheme should be fair and transparent.

(6) The State and all its instrumentalities should also carry out and implement the one-time measure as per paragraph 53 of Uma Devi and explained in M.L. Kesari.

(7) Both the above exercises should be initiated within a period of 2 months from the date of receipt of a copy of this order.

(8) A grievance redressal committee should be constituted at the state level to consider all grievances relatable to the above 2 exercises.

(9) Neither Uma Devi nor Jitendra Kalita bar application of the past practice of creating supernumerary post and regularisation for one day of the work charge, muster roll and similar category of employees engaged prior to 01.04.1993 after attaining the age of superannuation or in case of death for the purpose of grant of pensionary benefits.

(10) Decisions (A) and (B) of the OM dated 16.06.2012 are accordingly set aside and quashed.

All the writ petitions are disposed of in the above terms. No cost.