

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13542 of 2019

1. The Bihar State Electricity Employees Association a registered Trade Union Having its Office at Bakarganj, East Gandhi Maidan, P.O. Bankipur, P.S. Pirbahore, District- Patna- 800004 through the General Secretary Namely Sanjeev Kumar Sharma Son of late Sri Raghunandan Sharma, Resident of Village- Rajgangapur, P.O. and P.S. Sultanganj, District- Bhagalpur.
2. Kaushik Kumar, Son of late Ranjeet Singh, Resident of Bakarganj, P.O. Bankipur, P.S. Bakarganj, District- Patna- 800004
3. Amit Kumar, Son of Umesh Prasad Sinha, Resident of Bakarganj, Krishna Gopal Market Near Leather World, P.O. and P.S. Bankipur, District- Patna- 800004
4. M.D. Shahbaz Alam, Son of Md. Ali Anshari, Resident of Mohalla- Dildarganj, P.O. and P.S. Laheriya Sarai, District- Darbhanga- 846001

... .. Petitioner/s

Versus

1. The Bihar State Power Holding Company Ltd. through the Managing Director , Ist Floor, Jawahar Lal Marg, Patna- 800001
2. The Chairman-Cum- Managing Director, Bihar State Power Holding Company Ltd. Ist Floor Jawahar Lal Marg, Patna- 80001
3. The Bihar State Power Transmission Company Ltd. through Managing Director, Ist Floor, Jawarhar Lal Marg, Patna- 800001
4. The Managing Director, Bihar State Power Transmission Company Ltd. Ist Floor Jawahar Lal Marg, Patna- 80001
5. The Bihar State Power General Company Ltd. through the Managing Director, Ist Floor Jawahar Lal Marg, Patna- 800001
6. The Managing Director, Bihar State Power Generation Company Ltd. Ist Floor Jawahar Lal Marg, Patna- 80001
7. The North Bihar Power Distribution Company Ltd. through the Managing Director, Ist Floor, Jawahar Lal Marg, Patna- 800001
8. The Managing Director North Bihar Power Distribution Company Ltd., Ist Floor, Jawahar Lal Marg, Patna- 800001
9. The South Bihar Power Distribution Company Ltd. through the Managing Director, Ist Floor, Jawahar lal Marg, Patna- 800001
10. The Managing Director, South Bihar Power Distribution Company Ltd. Ist Floor, Jawahar Lal Marg, Patna- 800001
11. The General Manager, Human Resources, Bihar State Power Transmission Company Ltd. Ist Floor, Jawahar Lal Marg, Patna- 80001

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Kumar Kaushik, Advocate
For the Respondent/s	:	Mr. Vinay Kirti Singh, Sr. Advocate



CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
CAV JUDGMENT

Date : 07-08-2019

1. Heard the learned counsel for the parties.

2. The petitioners had earlier approached this Court vide C.W.J.C. No. 5532 of 2019 for a direction to the respondents to count the services rendered by them prior to their regularization for the purposes of grant of financial progression like A.C.P. and M.A.C.P. This Court *vide* order dated 09.04.2019 had directed the General Manager (Human Resources), Bihar State Power Holding Company Limited to dispose off the representations preferred by the petitioners and pass a reasoned order in accordance with law, within a period of six weeks from the date of production of a copy of that order.

3. Pursuant to the aforesaid direction, an order has been passed by the General Manager, Human Resources, Bihar State Power Holding Company on 29.04.2019, rejecting the claim of the petitioners on the sole ground that the petitioners at the time of their



regularization had given an undertaking that they are willing to be appointed on the terms and conditions specified by the company and that they shall not be entitled to claim any benefit for the period of service spent on contract basis if they are appointed in the time-scale of pay of regular post. The other ground which has weighed with the management of the company in rejecting the claim of the petitioners is that the advisory of the Finance Department is not being followed and the earlier rule of not counting such services under contract for the aforesaid periods is still prevalent.

4. The aforesaid order has been questioned by the petitioners on the ground that it is contrary to the decision of the State Government contained in letter dated 27.05.2013 which extends the benefits of M.A.C.P. by counting the past services of *ad hoc* employees and that the decision is in fact an unreasoned distinction between *ad hoc* and contractual employees, which is neither permissible nor desirable. The decision has also been



dubbed as illegal, arbitrary and violative of Article 14 of the Constitution of India, as being highly unconscionable.

5. To recount the facts, it is stated that the petitioner no. 1 is the registered association of which other petitioners are members. The erstwhile Bihar State Electricity Board had appointed various employees on various posts on contractual basis who, like the petitioners, continued to work uninterruptedly till 2015. In the year 2012, all the assets and liabilities of the Bihar State Electricity Board were transferred to respondent / Bihar State Power Holding Company Limited, which was established as an undertaking of the State Government. The company thereafter introduced a scheme of regularizing the services of the employees who were appointed on contract basis but only after participating in a selection process conducted in accordance with law. The petitioners were thus appointed on various posts in regular pay-scale.



6. It is worth mentioning that the erstwhile Bihar State Electricity Board had adopted the M.A.C.P. Scheme of 2010 *vide* Memo No. 135 dated 20.08.2010. The company also introduced such benefits to its employees by taking a decision in the year 2018, whereby the benefit was extendable to the employees on completion of their 8, 16 and 24 years of service. The aforesaid scheme was introduced w.e.f. 01.10.2018. In the meantime, the Government also took a decision, pursuant to the orders of this Court, to count the services rendered as *ad hoc* employee for the purposes of counting the period for applicability of the provision of M.A.C.P.

7. With such decision in the Government and the benefit being accorded to the employees of Rajendra Agriculture University, the petitioners also preferred a representation on 03.04.2018 before the Chairman-cum-Managing Director, Bihar State Power Holding Company Limited for granting them the benefit of services rendered on contractual basis for the purposes of giving the benefit



of A.C.P. under the 2010 Rules. When no decision was taken, the petitioners approached this Court, as referred to above, and obtained an order directing the General Manager, Bihar State Power Holding Company to decide the representation preferred by them.

8. On such representation, the order dated 29.04.2019 has been passed which has been impugned in the present petition.

9. Mr. Kumar Kaushik, learned Advocate for the petitioners has submitted that the order is patently illegal as any affidavit given by the petitioners at the time of regularization cannot be taken into account for avoiding giving benefit of the period of service spent on contract basis as it would be violative of Section 23 of the Indian Contract Act, 1872.

10. It has been urged that there cannot be any estoppel against the rules. What has really been harped upon and argued is that at the time of their induction in the company, they had little choice of raising any



grievance and the position was that either they accepted the induction on the terms and conditions put to them or they would have been asked to go back to their respective homes. The company had the bargaining power to its advantage and the petitioners, for the fear of being rendered jobless, accepted such unconscionable terms without a demur.

11. It was also brought to the notice of this Court that the claim of the petitioners has been rejected on a completely unconscionable ground that the earlier rule of the Finance Department of not giving the benefit of the contractual services for the M.A.C.P. was still operative and functional. Such adherence to an earlier advisory of the Finance Department is contrary to the decision of the State Government by which the M.A.C.P. Rule was amended and the past services of the employees which was rendered as *ad hoc* employees was also held to be liable to be counted for providing the benefits under the Scheme.



12. The additional argument advanced on behalf of the petitioners is that the status of a contractual employee is by no means inferior to an *ad hoc* employee and it would be absolutely an unconscionable proposition not to accord the benefits of past services rendered as contractual employee for the purposes of grant of benefits of M.A.C.P.

13. As early as in the year 1986, the Supreme Court in ***Central Inland Water Transport Corporation Limited & Anr. Versus Brojo Nath Ganguly & Anr. [(1986) 3 SCC 156]*** had an occasion to deal with a question whether a government company as defined under Section 617 of the Companies Act, 1956 is "the State" within the meaning of Article 12 of the Constitution and whether an unconscionable term in a contract of employment is void under Section 23 of the Indian Contract Act, 1872, as being opposed to public policy and, when such a term is contained in a contract of employment entered into with a government company is also void as infringing Article 14



of the Constitution in case a government company is “the State” under Article 12 of the Constitution?

14. The Supreme Court after referring to several decisions in ***Sukhdev Singh Versus Bhagatram Sardar Singh Raghuvanshi [(1975) 1 SCC 421]***; ***Ramana Dayaram Shetty Versus International Airport Authority of India [(1979) 3 SC 489]***; ***Ajay Hasia Versus Khalid Mujib Sehravardi [(1981) 1 SCC 722]***; and ***U. P. Warehousing Corporation Versus Vinay Narayan Vajpayee [(1980) 3 SCC 459]***, came to the conclusion that if there is an instrumentality or agency of the State which has assumed the garb of a government company as defined in Section 617 of the Companies Act, it does not follow that it thereby ceases to be an instrumentality or agency of the State. For the purposes of Article 12, it was held, one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State.

15. The second question, namely, the sustainability of an unconscionable term in a contract of employment with a company with the trappings of the



State, was also decided in favour of not giving credence to such term of contract which was opposed to public policy or was unconscionable or entered into by an employee who did not have any bargaining power.

16. The Supreme Court in the ***Central Inland Water Transport Corporation Limited (supra)*** was in a dilemma as to under which head would an unconscionable bargain fall. If the term in a contract was because of undue influence, it would be voidable, but if it was opposed to the public policy, it would be void.

17. The Supreme Court took care to analyze the meaning of the word "unconscionable" and settled for the meaning as provided in the Shorter Oxford English Dictionary, 3rd Edition, Volume II, Page 2288 as "showing no regard for conscience; irreconcilable with what is right or reasonable".

18. It was discerned by the Supreme Court that notwithstanding the adherence to "*Pacta Sunt Servanda*" (contracts are to be kept), the idea of unconscionable



bargain because of economic duress between the parties being unsustainable, gained ground. The logic behind the aforesaid paradigm shift was the theory of distributive justice which was derived from the principle of distributive fairness and justice in the possession of wealth and property.

19. The Supreme Court in the aforesaid case has instructively penned down the following paragraphs:

88. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognized, at least in certain areas of the law of contracts, that there can be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, section 138(2) of the German Civil Code



provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages . . . which are obviously disproportionate to the performance given in return." The position according to the French law is very much the same.

89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of



this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It



will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and



unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances.

90. It is not as if our civil courts have no power under the existing law. Under section 31(1) of the Specific Relief Act, 1963 (Act No. 47 of 1963), any person against whom an instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the court may in its discretion, so adjudge it and order it to be delivered up and cancelled.

91. Is a contract of the type mentioned above to be adjudged voidable or void? If it was induced by undue influence, then under section 19A of the Indian Contract Act, it would be voidable. It is, however, rarely that contracts of the types to which the principle formulated by us above applies are induced by undue influence as defined by section 16(1) of the Indian Contract Act, even though at times they are between parties one of whom holds a



real or apparent authority over the other. In the vast majority of cases, however, such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power. Such contracts will not fall within the four corners of the definition of "undue influence" given in section 16(1). Further, the majority of such contracts are in a standard or prescribed form or consist of a set of rules. They are not contracts between individuals containing terms meant for those individuals alone, Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to the public interest. To say that such a contract is only voidable would be to compel each person with whom the party with superior bargaining power had



contracted to go to court to have the contract adjudged voidable. This would only result in multiplicity of litigation which no court should encourage and would also not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void. While the law of contracts in England is mostly judge-made, the law of contracts in India is enacted in a statute, namely, the Indian Contract Act, 1872. In order that such a contract should be void, it must fall under one of the relevant sections of the Indian Contract Act. The only relevant provision in the Indian Contract Act which can apply is section 23 when it states that "The consideration or object of an agreement is lawful, unless . . . the court regards it as . . . Opposed to public policy."

92. The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy" or "contrary to public policy" are incapable of precise definition. Public policy, however, is not



the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought - "the narrow view" school and "the broad view" school. According to the former, courts can not create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of



the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Driefontein Consolidated Mines Limited : "Public policy is always an unsafe and treacherous ground for legal decision." That was in the year 1902. Seventy-eight years earlier, Burros, J., in Richardson v. Mellish, described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in Enderby Town Football Club Ltd. v. Football Association Ltd. "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles." Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law", Volume III, page 55, has said :



In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles



underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of A. Schroeder Music Publishing Co. Ltd. v. Macaulay, however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In Kedar Nath Motani and others v. Prahlad Rai and others, reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):

The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff



cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Willistone and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by restoring to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail.

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are



***opposed to public policy and require to
be adjudged void.***

20. In ***Dhirendra Chamoli & Anr. Versus State of U.P. [(1986) 1 SCC 637]***, the Supreme Court allowed the case of such writ petitioners, who had approached the Court for being paid in the same manner as any other Class-IV employees and directed to accord to such petitioners who were concededly performing the same duties as Class-IV employees, the same salary and conditions of service as were being received by Class-IV employees in other organization.

21. The thread of reasoning was again the equality clause of Article 14 of the Constitution of India.

22. In ***Oswal Agro Furane Limited & Ors. Versus Oswal Agro Furane Workers Union and Ors. [(2005) 3 SCC 224]***, the Supreme Court has held that regard has to be given to the maxim "*ex turpi causa non oritur actio*" and if any agreement which opposes the public policy, has to be held void and to no effect.



23. Similarly, in ***State of Punjab & Anr. Versus Dharam Pal [(2017) 9 SCC 395]***, the Supreme Court has held that the Government or its agency in its capacity as a model employer cannot be permitted to make a distinction between its employees and seek to vindicate the same on the basis of terms of an agreement between the government and the employee if it is unconscionable. Any commitment / agreement not to ask for any rightful claim cannot be used to the disadvantage of an employee by the Government as it would be opposed to the public policy and the conception of unconscionability of contract.

24. In the case in hand, the petitioners had no option but to accept the employment with the terms and conditions which were thrust upon them. If the services rendered as an *ad hoc* employee is counted by the Government for computing the necessary period for A.C.P. / M.A.C.P., there is no reason why the period of service on contract without any break of the petitioners would not be counted by the company for giving them the benefits of



A.C.P. / M.A.C.P. only on the ground of such undertaking having been taken from them at the time of their induction / regularization in service. There can be nothing more unconscionable than this. While saying so, this Court has also taken note of the facts that the petitioners were appointed, though on contract but through a process of selection and that there was no break in the service before their induction in the Company and their regularization. There is no rationale behind subjecting them to a different treatment than other employees. This Court cannot put its imprimatur on the decision of the company not to afford the petitioners the benefit of the services rendered in the past on contract for the purpose of computing countable period for grant of A.C.P. and M.A.C.P. on the ground of such waiver of the right at the time of regularization. In the opinion of this Court, the petitioners are entitled for the counting of the services rendered by them earlier during their contractual appointment.

25. The impugned order, therefore, is set aside.



26. The matter is remitted to the Chairman-cum- Managing Director, Bihar State Power Holding Company Limited (Respondent No. 2) for writing out a fresh order in accordance with law regarding the according of the benefit of counting past services rendered by the petitioners during the contractual period for the purposes of granting them the benefit of A.C.P. / M.A.C.P.

27. With the aforesaid observation / direction, this petition stands allowed.

(Ashutosh Kumar, J)

skm/-

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CAV DATE	
Uploading Date	07.08.2019
Transmission Date	

