

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No 4063 of 2018

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1. Prashant Kumar, Son of Late Muni Lal Bind, Resident of Village- Bara, Police Station- Kinjar, District- Arwal.
 2. Alok Kumar, Son of Jaglal Prasad Choudhary, Resident of Village- Basantpur Patti, Police Station- Saraiya, District- Muzaffarpur.
 3. Surendra Chaudhary, Son of Sri Nathun Chaudhary, Resident of Shankarpur, Police Station- Haspura, District- Aurangabad.
 4. Wakil Singh, Son of Dharikshan Singh, Resident of Village- Harigaon, Police Station- Jagdishpur, District- Bhojpur at Arah.
 5. Brajesh Kumar, Son of Late Lal Bahadur Ram, Resident of Village- Gaura, Police Station- Mohaniya, District- Kaimur.
 6. Sandeep Kumar, Son of Dwarika Prasad, C/o Binod Kumar, Resident of Mohalla- Dhobi Tola, Police Station- Danapur, District- Patna.
 7. Ajay Kumar, Son of Ravindra Nath Gupta, Resident of Village- Chhajan Khariyar, Police Station- Kurrahn, District- Muzaffarpur.
 8. Md Rizwan Ahmad, Son of Md. Nizamuddin Ansari, Resident of Village- Kathara, Police Station- Sakatpur, District- Darbhanga.
 9. Vishal Kumar, Son of Dhupal Pandit, Resident of Village- Prasadi English, Police Station- Arwal, District- Arwal.
 10. Rohit Kumar, Son of Sri Sukhlal Choudhary, Resident of Mohalla- Dr. Ranjan Yadav Path, Police Station- Danapur, District- Patna.
 11. Mritunjay Kumar, son of Deogirish Prasad, Resident of Bodhgaya, Police Station- Bodhgaya, District- Gaya.
 12. Siyaram Kumar, Son of Sri Bishnudeo Pandit, Resident of Village- Bhawanipur Nayatola, Police Station- Rangra Chowk, District- Bhagalpur.
 13. Priya Darshan Keshava, Son of Late Ram Janam Prasad, Resident of 'Raghu Kunjam', Road No.- 3, Ashok Nagar, Police Station- Kankarbagh, District -Patna.
 14. Wazim Raza, Son of Md. Abbas, Resident of Deurwa, Police Station- Lauriya, District- West Champaran.
 15. Md Nurul Hoda, son of Md. Ismail, Resident of Mohalla- 3rd Sector, New Millat Colony, Police Station- Phulwarisharif, District- Patna.
 16. Devendra Ram, son of Late Dhongal Ram, Resident of Village- Baluaha, Police Station- Kalyanpur, District- Samastipur.
 17. Priti Kumari, Daughter of Sri Y.N. Mahto, Resident of Village- Deshri, Police Station- Bibhutipur, District- Samastipur.
 18. Lallu Prasad, son of Bhairaw Prasad Prasad Baitha, Resident of Village- Kasba Mehshi, Police Station- Mehshi, District- East Champaran.
 19. Shyamal Kishor, son of Dukhmochan Mandal, resident of Village- Bhan,



Police Station- Madhepura, District- Madhepura.

20. Gyan Prakash, son of Late Brahmadeo Mahto, Resident of Village-
Phulmalik, Police Station- Sahebpurkamal, District- Begusarai.

... .. Petitioner/s

Versus

1. The Chairman -Cum- Managing Director, Bihar State Power (Holding)
Company Limited, Patna
2. The Director (Administration), Bihar State Power (Holding) Company
Limited, Patna.
3. The General Manager (HR/Admin), Bihar State Power (Holding) Company
Limited, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr Bindhayachal Singh, Sr Advocate with

Mr Vipin Kumar Singh, Advocate

For the Respondent/s : M/s A K Ojha, A K Karna, Advocates

CORAM: HONOURABLE MR JUSTICE MADHURESH PRASAD

CAV JUDGMENT

Date : 21-07-2022

Heard learned senior counsel for the petitioners and the
learned counsel for the Bihar State Power (Holding) Company
Limited (for brevity, *the Company*).

2 An advertisement was issued in the year, 2006 for
engagement of contractual services against sanctioned posts in the
erstwhile Bihar State Electricity Board (for brevity, *the Board*).
The petitioners were applicants for the post of Assistant Electrical



Engineer (General). The recruitment was based on the marks obtained in the requisite academic qualifications. The petitioners emerged successful in that process which, it is not disputed, was observing the requirement of reservation and against sanctioned posts.

3 On 10.04.2007, an office order was issued whereby all these petitioners were engaged in the contractual services. Another fact, which is not in dispute, is that thereafter, Respondent-Board has made several regular recruitments against the post of Assistant Electrical Engineer (General).

4 The Board of Directors of the Company in its 37th Meeting dated 03.03.2015 decided to take the petitioners' services in the regular establishment and office order was issued on 31.03.2015. Pursuant to the said Resolution, the instant petitioners along with other candidates on regularization were taken on the post of Assistant Electrical Engineer (General). Clause (vii) of this officer order, reads as follows, and has been assailed by the petitioners by filing this writ petition:

“(vii) The seniority of the contractually engaged employees on appointment on regularization in regular pay scale shall be fixed below the employees appointed in regular pay scale and on consolidated pay before the date of this appointment. The inter-se-seniority among the contractually engaged employee will be fixed on the basis of the year of their engagement and



the points obtained in the merit list of the contractual employment.”

5 The writ petitioners claim that they are entitled to the recognition of their services rendered by them in the contractual establishment since their contractual recruitment was after due procedure, following the requirement of reservation and against sanctioned posts.

1. **6** The submission is that the Board's Service Regulations, 1976 (for brevity, *Regulations*) provides for recruitment on contract basis. Reliance has been placed on Regulations 82 and 84. The engagement on contractual basis was in terms of the Rule. The Rules also provide for merger of ex cadre post in a cadre post by determining the seniority of ex cadre employees, based on continuous officiation. The scheme of the Rule, as per the learned senior counsel, is that it provides for allowing continuous officiation and, therefore, impugned clause (vii) of the order of regularization would be opposed to public policy. The petitioners cannot be denied of their right for having the services rendered in the contractual establishment to be counted as continuous officiation in the Board for the purposes of seniority and all other purposes. The learned senior counsel has relied upon decisions of the Apex Court and this Court in the case of *Bihar State Electricity Employees Association & Others -Versus- Bihar State Power*



(Holding) Company Limited & Others, an unreported decision of a coordinate Bench of this Court rendered in *CWJC No 13542 of 2019* and in the case of *Secretary -cum- Chief Engineer, Chandigarh -Versus- Hari Om Sharma & Others* since reported in *AIR 1998 Supreme Court 2909* (Paragraph 8).

7 Learned counsel for the Company, on the other hand, has raised a preliminary objection regarding the application being filed belatedly. He submits that the petitioners have availed the benefit of regularization with open eyes along with Clause (vii) in the year, 2015. The issue of inter se seniority of regular appointees, appointed in the meantime, has attained finality. The petitioners now, at this belated stage, cannot be permitted to unsettle the settled issues of seniority and that too without impleading those who are likely to be affected.

8 Drawing the attention of this Court towards the office order whereby the petitioners have been taken into contractual establishment, it is submitted that the heading of the office order makes it clear that contractual engagement was in the exigency of service. The relevant clauses of the said office order, namely, Clauses (iv), (v), (vi) and (viii) leave no room for doubt that the nature of engagement, which was offered to the petitioners, was limited to its existence under the contract and did not entail any



consequential/further benefits. In fact, by way of an affidavit duly sworn, all the petitioners have stated in so many words that they would not be claiming any other facility being given to the regular appointees.

9 Petitioners were allowed opportunity to participate in the two recruitment processes which have been undertaken by the Board while the petitioners were working on contractual basis. The notice of advertisement for appointment in fact allowed them weightage for the services rendered as contractual employees, in the event they participated in the selection process. Company has adopted a fair attitude towards the contractual employees and given due opportunity to them to become members of the regular establishment, benefits of which opportunity the petitioners have not been able to avail.

10 Petitioners' selection in the contractual appointment was based only on their academic qualification. The recruitment under the general establishment was by way of open competition and assessment of inter se merit between the competing candidates. The regular appointee, thus, form a class distinct in terms of merit also. The petitioners cannot, therefore, claim parity with the regular appointees. Reliance is placed on the judgment of *Amarjeet Singh -Versus- Devi Ratan*, since reported in (2010) 1



Supreme Court Cases 417 to contend that the petitioners have not assailed the Resolution of the Board of Directors in its 37th Meeting dated 03.03.2015 which forms the basis of office order dated 31.03.2015 and, therefore, the relief claimed in the instant writ petition cannot be had.

11 It is also submitted that the reliance placed on decision of this Court in *CWJC No 13542 of 2019 (supra)* is misplaced for the simple reason that in the said case, this Court was considering the claim for recognition of past service for the limited purposes of Assured Career Progression and Modified Assured Career Progression wherein there was no third party rights involved. In the instant case, third party rights are involved. It is also pointed out that this Court in *CWJC No 13542 of 2019 (supra)* ultimately relegated the petitioners to the Board for finalizing the matter of granting the benefits. It is also submitted that the order is under challenge in LPA No 1554 of 2019.

12 In so far as the petitioners' submission with regard to Section 23 of the Indian Contract Act and the order being opposed to public policy, the submission is that the petitioners cannot claim the benefits of Section 23 of the Indian Contract Act. Having regard to nature of their services and the undertaking given. At the time of their initial engagement on contract basis, they were aware



that petitioners had no right to any parity with regular employees. Since there was no vested legal right for counting their contractual service at par with regular employees, plea that Clause (vii) of the order of regularization is violative of Section 23 of the Indian Contract Act or opposed to public policy, does not arise.

13 Upon hearing the parties, this Court would firstly deal with the submission of the petitioners' counsel based on Regulations 82 and 84, which have been relied upon by the petitioners' counsel. These two Regulations deal with determination of seniority of ex-cadre employees on the principle of continuous officiation in the grade equal to the grade of the merged post, and regarding seniority of absorbed employees considering equivalence of the post/s held before absorption in private electricity supply undertakings prior to nationalization, or their permanent absorption. The petitioners, prior to their regularization, have neither served on any ex cadre post, nor they were employees of private electric supply undertaking, which has been nationalized. The petitioners, therefore, neither fall under the scope of Regulation 82, nor under the scope of Regulation 84, which is evident from bare reading of these two Regulations. The claim for being granted recognition of service rendered by the



petitioners in contractual establishment prior to the regularization, based on these two Rules, therefore, is clearly unsustainable.

14 In so far as the petitioners' submission regarding Clause (vii) of the order of regularization being contrary to Section 23 of the Indian Contract Act and opposed to public policy is concerned, this Court would observe that the said submission is devoid of substance. The petitioners cannot claim a right in excess of the terms of contract under which they were working prior to their regularization. At the time of their engagement on contract basis, under Office Order No 1095 dated 10.04.2007, the petitioners were required to submit an affidavit in terms of Clause f of the Officer Order dated 10.04.2007, which reads as follows:

“f. An affidavit sworn in before first class magistrate that the engaged candidates will not claim any other facility admissible to a Government employee and on the basis of this engagement day will not claim for regular appointment/employment.”

15 The petitioners very entry in the contractual establishment was based on the terms of the service contract agreed upon by the petitioners that they would not be claiming any benefit admissible to Government employees on the basis of their contractual engagement. Contractual status of the petitioners was based on a legal and valid contract entered into between the petitioners and the Respondent-Board based on certain terms and



conditions to which the parties were ad idem, and they have availed the benefit of contractual service based thereon. The contractual engagement of the petitioners put the petitioners in a class distinct from regular employees right from the very inception. The petitioners, thus, cannot claim any parity with regular employees during this period. The petitioners under the terms of contract had no right to be considered as regular employees for any purpose whatsoever during their existence under the contract. In fact, the petitioners under the contract did not have any right to even claim regularization. The petitioners' regularization under Office Order dated 31.03.2015 is based on policy decision of the Board of Directors in its 37th meeting. The petitioners' right to regularization, for the first time, flows from this Resolution of the Board of Directors in its 37th meeting duly notified by Office Order No 352 dated 31.03.2015. Prior to issuance of this Office Order, the petitioners had no right to regularization, much less counting of their services in the contractual establishment for the purposes of seniority. The fact that petitioners' contractual engagement was after an advertisement and against posts in the Respondent-Board will not confer a better status on the petitioners than what has been



conferred by the terms of their contractual engagement based on the Office Order dated 10.04.2007, noted above.

16 In this connection, the petitioners have placed reliance on an unreported decision of a coordinate Bench of this Court in the case of *Bihar State Electricity Employees Association & Others (supra)*. On careful consideration of the said judgment, this Court finds that the claim in the said case was for counting services rendered in the contractual establishment for the purposes of eligibility for grant of benefits under Assured Career Progression (for brevity, *ACP*) and Modified Assured Career Progression (*MACP*). Clause (vii) of the Office Order dated 31.03.2015, which is impugned in the instant writ proceedings, is in respect of seniority of the petitioners inter se employees appointed in the regular pay scale and on consolidated pay; before the petitioners' appointment under the Office Order dated 31.03.2015. There is clear distinction between the counting of service for grant of ACP and MACP wherein there is no competing third party right/s, and counting of the service for determining inter-se seniority with those working in the regular establishment. This Court would, therefore, observe that decision in the case of *Bihar State Electricity Employees Association & Others (supra)* is factually distinguishable from the instant case. The said decision



does not have any bearing on claim in respect of inter se seniority. Petitioners' reliance on the said decision, in the opinion of this Court, is misplaced and untenable.

17 Another decision relied upon by the petitioners' counsel is decision of the Apex Court in the case of *Secretary -cum- Chief Engineer, Chandigarh (supra)*. Petitioners' counsel has laid emphasis on paragraph 8 of the said judgment. This Court has been taken through the judgment during the course of argument. It is apparent that in the case of *Secretary -cum- Chief Engineer, Chandigarh (supra)*, the respondents before the Apex Court were regular employee of the appellant. The Apex Court had also found that he was the only person amongst the non-diploma holders available for promotion to the post of Junior Engineer – I. However, he was placed on the higher post by way of a stop gap arrangement. The petitioner therein was, thus, found to be entitled to be considered for promotion. Considering these factors, the Apex Court held that the undertaking that petitioner would not claim any benefit pertaining to the higher post was opposed to public policy and unenforceable in view of Section 23 of the Indian Contract Act, 1872. In the instant case, the admitted position is that the petitioners were born in the service as a regular employee after 31.03.2015. For the period in between their



engagement on contractual basis under Office Order dated 10.04.2007 till 31.03.2015, their rights were legally determinable based on the terms of the contract forming the basis of their existence in the contractual establishment of the Board. The petitioners, thus, have no right to claim any benefit as a regular Government employee, much less inter se seniority by including the services rendered in the contractual establishment, to the prejudice of other employees in the regular establishment of the Board. If this Court were to allow such claim, the same would give rise to an illegal situation where settled inter se seniority of the employees, in the regular employment of the Respondent-Board during the period of petitioners' contractual services, would get unsettled.

18 At this juncture, this Court would also take notice of the fact that the prayer of the petitioners for inter se seniority, assailing terms and conditions of their regularization under Office Order dated 31.03.2015, are being challenged three years after the petitioners have availed the benefit of regularization under the said Office Order. The petitioners, having availed the benefit of regularization without any objection with open eyes, cannot be permitted to approbate and reprobate at the same time, which is clearly impermissible in law. The claim for inter se seniority, at



this belated stage, will surely affect third party rights arising out of the settled inter se seniority of the regular employees in the Board, prior to the petitioners' regularization.

19 Petitioners' counsel has also relied upon decision of the Apex Court in the case of *The Direct Recruit Class – II Engineering Officers' Association & Others -Versus- State of Maharashtra & Others*, reported in *AIR 1990 Supreme Court 1607*. Specific reliance has been placed on paragraph 13 and paragraph 44. The facts of that case are different and distinguishable from the instant case. The Apex Court was considering the prayer for continuous officiation by Government servants appointed following the Rules applicable for substantive appointment, and not contractual appointment, as in this case. It is in this context that the Apex has summed up the legal position in paragraph 44 to hold that

“44 To sum up, we hold that :

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.”



20 It is the specific case of the respondents that the petitioners' selection for engagement on contractual basis was based only upon marks obtained by the petitioners on their academic qualifications. Substantive appointment under the general establishment, on the other hand, was by way of open competition and assessment of inter se merit between the competing candidates. The petitioners' appointment, therefore, was not in accordance with the Rules prescribed for regular substantive appointments in service.

21 The Regulations, which have been relied upon by the petitioners, also maintains distinction between the contractual and substantive appointment. "Employees" have been defined under Regulation 2 (xviii) as follows:-

"Employee" means a person appointed to any post in the Board or any of the establishments, including Area Boards and Generation-cum-Transmission Organization whether borne on regular or work-charged establishments, but does not include casual or muster roll workers and staff appointed on daily-wage basis."

22 "Contract staff", on the other hand, have been defined under Rule 2 (xiv) as follows-

"Contract staff" means persons who, after having superannuated from the service of any previous employer, are re-employed in the Board for specific periods, not exceeding five years, and includes persons employed on the basis of a contract, whether formally signed or not, fixing their terms of employment, salary, compensation or honorarium and/or allowances."



23 The Regulation, therefore, maintains a clear distinction between the “contract staff” and “employee”. It is not in dispute that the petitioners have been appointed based on contract in accordance with the terms and conditions therein. “Employees”, on the other hand, as per Chapter I of the Regulations, are to be appointed in accordance with Rules/standards and as per procedure prescribed for substantive appointment.

24 Decision of the Apex Court in the case of *Direct Recruit Class – II Engineering Officers’ Association (supra)* is, therefore, distinguishable on facts, from the facts of the instant case and, in the opinion of this Court, inapplicable to the claim of the petitioners.

25 In view of the above discussions, the petitioners have not been able to make out any legally enforceable right for counting services rendered in the Respondent-Board as contractual employees, dehors the terms of their contract; to claim that the period as contractual employment be counted for the purposes of determination of inter se seniority with other employees substantively appointed in service, that also at a belated stage so as to have an adverse effect on third party rights.



26 This Court does not find any substance in the petitioners’ claim made in the writ petition.

27 Writ petition is dismissed.

(Madhuresh Prasad, J)

M.E.H./-

AFR/NAFR	AFR
CAV DATE	14.07.2022
Uploading Date	10.08.2022
Transmission Date	NA

