

(2023) 08 SHI CK 0148
In the High Court Of Himachal Pradesh
Case No : Civil Writ Petition No. 963 Of 2023

Rakesh Kumar Sharma And Ors

APPELLANT

Vs

State Of Himachal Pradesh And Ors

RESPONDENT

Date of Decision : 28-08-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 32

Citation : (2023) 08 SHI CK 0148

Hon'ble Judges : Satyen Vaidya, J

Bench : Single Bench

Advocate : Onkar Jairath, Shubham Sood, Pushpender Jaswal, Gautam Sood, Rahul Thakur, Priyanka Chauhan, Vishwa Bhushan, Narender Guleria

Final Decision : Disposed Of

Judgement

Satyen Vaidya, J

1. Petitioners are Junior Engineers (Electrical) in the Department of Public Works, Government of H.P. By way of instant petition, petitioners have raised a grievance against the placement of private respondents above them in the seniority list of the Junior Engineer (Electrical).

2. Earlier also petitioners had approached this Court by way of CWP No. 606 of 2023, which was disposed of on 22.02.2023, by directing respondent No.2 therein to decide the objections of the petitioners against tentative seniority list in accordance with law. The objections of the petitioners have been decided by respondent No. 2, vide office order dated 27.02.2023. In this background, petitioners have prayed for following reliefs:-

i) That this Hon'ble Court may be pleased to issue the writ in the nature of certiorari or any other appropriate writ order or direction quashing and setting aside the impugned seniority lists Annexure P-5 (Colly) to the extent, whereby, the petitioners have been assigned the wrong seniority and have been shown junior to the private respondents being patently illegal and arbitrary besides the

same being in violation to the settled law of the land.

ii) That this Hon'ble Court may be pleased to issue the writ in the nature of certiorari or any other appropriate writ order or direction quashing and setting aside the impugned order dated 28.02.2023 (Annexure P-8) being patently illegal and arbitrary besides the same being in violation to the settled law of the land.

iii) That this Hon'ble Court may be pleased to issue the writ in the nature of mandamus or any other appropriate writ order or direction, directing the respondents to re- draw the seniority and assign the petitioners seniority after taking into consideration the entire length of service rendered by them from the date of their initial date of appointment i.e. on contract basis and they be assigned the seniority at Serial No's over and above the private respondents in the seniority list of Junior Engineer (Electrical) in view of the settled law of the land as has been narrated herein above in the preceding paras of the writ petition.

iv) That this Hon'ble Court may be pleased to issue the writ in the nature of mandamus or any other appropriate writ order or direction directing the respondents to consider petitioners for promotion to the post of Assistant Engineer (Electrical) from due date i.e. when they have completed requisite numbers of years' qualifying service as Junior Engineer (Electrical) from the date of their initial appointment i.e. on contract basis as per the recruitment and promotion rules in view of the settled law of the land.

3. The service conditions of Junior Engineer (Electrical) in the Department of Public works are governed by Himachal Pradesh Public Works Department, Junior Engineer (Electrical), Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2020 (for short 'the Rules'). As per rules, 75% of the posts are to be filled by way of direct recruitment and 25% by promotion from amongst Junior Technician (Electrical), Draftsman/Surveyor, Work Inspectors, Technician Grade-II and Technician Grade - I, possessing requisite qualification and length of service.

4. Out of the quota for direct recruitment, 45% posts are to be filled by direct recruitment on regular or on contract basis as the case may be and remaining 30% posts are filled by batch-wise basis on regular or contract basis at departmental level from amongst the candidate(s) who possess regular full time Degree/Diploma in Electrical Engineering or Electrical and Electronics Engineering from an Institution/University duly recognized by the Central or State Government.

5. Petitioners No. 1 and 2 were appointed as Junior Engineers (Electrical) on 28.08.2010 on contract basis as direct recruits. Petitioners No. 3 and 4 were appointed on 21.04.2012 and 06.11.2013 on batchwise and direct basis respectively. The services of petitioners No. 1 and 2 were regularized w.e.f. 13.05.2016, whereas the services of petitioners No. 3 and 4 were regularized w.e.f. 31.03.2017.

6. The private respondents are the Junior Engineers (Electrical) having been promoted from feeder categories. Their dates of promotion are between the dates of initial appointments of petitioners on contract basis and the dates of their regularization as detailed above.

7. The next promotional post for the post of Junior Engineer (Electrical) is Assistant Engineer (Electrical), which is governed by Himachal Pradesh Public Works Department, Assistant Engineer (Electrical), Class-I (Non-Gazetted), Recruitment and Promotion Rules, 2010. The post of Assistant Engineer (Electrical) in the Department of Public Works, is to be filled in the ratio of 75% by promotion and 25% by direct recruitment. For the 75% quota by promotion, 50% of the posts are to be filled by promotion from amongst Junior Engineers (Electrical) having seven years regular or regular combined with continuous ad-hoc service in the grade, 10% of the posts are to be filled by promotion from Junior Engineer (Electrical), who acquired AMIE or equivalent qualification during service having three years regular or regular combined with continuous ad-hoc service in the grade, 10% of the posts are to be filled from Junior Engineers (Electrical), who possess degree in Electrical Engineering or its equivalent at the time of appointment as Junior Engineer (Electrical) having three years regular or regular combined with continuous ad-hoc service rendered in the grade and remaining 5% of the posts are to be filled by promotion from Junior Engineers (Electrical), who possess two years certificate course in the trade of Electrician or its equivalent from a recognized ITI or from an Institute duly recognized by the Central or State Government having fifteen years or regular combined with continuous ad-hoc service rendered, if any, in the grade, failing which by promotion from amongst the category of Junior Engineers (Electrical) having seven years regular or regular combined with continuous ad-hoc service in the grade.

8. Petitioners fall in the first category of feeder grade i.e. Junior Engineers (Electrical) having seven years service. They were appointed in the years 2010, 2012 and 2013. As per petitioners, by taking into account their entire service from the date of initial appointments on contract basis they have completed requisite number of years. It is further the case of the petitioners that their entire contract service is liable to be considered for the purposes of seniority as their initial appointment on contract basis was in terms of the rules and they were selected after their participation in the selection process undertaken by official respondents in terms of the Rules. On such basis, petitioners claim themselves to be senior to private respondents and also entitled to be considered for promotion to the next promotional post of Assistant Engineer (Electrical) before them.

9. The official respondents have taken a stand that the tenure of contract service of the petitioners cannot be considered for the purpose of seniority as their substantive appointment to the post of Assistant Engineers (Electrical) was from the dates of their respective regularization. As per official respondents, prior to

regularization of petitioners, they were not born in the cadre of Assistant Engineer (Electrical). It is also submitted that the private respondents were promoted as Junior Engineers (Electrical) before regularization of petitioners on the said post, therefore, the private respondents have rightly been placed above the petitioners in the seniority list.

10. The claim of the petitioners is also sought to be defeated on the ground of delay and laches. It is submitted that the seniority list of Junior Engineers (Electrical) as it stood on 29.02.2016 was circulated on 02.03.2017. Thereafter, provisional seniority list of Junior Engineer (Electrical) was circulated on 15.07.2020 and was finalized on 23.09.2020. Though, in the seniority list dated 23.09.2020, petitioners were placed below private respondents, they had not raised any objection. The official respondents have further disclosed that the seniority list dated 23.09.2020 was subsequently kept in abeyance as certain short-comings were noticed and the same was again circulated on 09.03.2021 and was finalized on 17.02.2022. In this seniority list also, private respondents were above the petitioners and still the petitioners had not challenged the same. The department now circulated the tentative list dated 21.01.2023 as it stood on 31.12.2022, which has been challenged by the petitioners.

11. The stand of the private respondents is also identical to one taken by official respondents. It is submitted that initial appointments of petitioners were on contract basis. The services of contract employees as per Rules were governed by Rule 15A. The service conditions of the contract employees were differently placed than the regularly appointed Junior Engineers (Electrical) and thus, the petitioners cannot claim the seniority from initial date. Further, the regularization of the petitioners was not under the rules but under a policy formulated by the State. The regularization of petitioners was specifically notified to be from prospective dates and petitioners after having accepted the regularization as offered to them, cannot turn around to claim regularization or seniority from back date.

12. I have heard learned counsel for the parties and have also gone through the record of the case carefully.

13. Petitioners by way of averments made in para-7 of the petition have specifically submitted that various posts of Junior Engineers (Electrical) were lying vacant in the department of Public Works and for such reason the process of filling up the posts of Junior Engineers (Electrical) was undertaken.

Petitioners were fully eligible for being appointed to the post of Junior Engineers (Electrical), therefore, they participated in the selection process and were selected and appointed as Junior Engineers (Electrical) after their selection in accordance with law. Noticeably, the contention so raised on behalf of the petitioners has not been denied by the respondents. In reply to para-7 of the petition, official respondents have stated that the contents of said para are matter of record with further submission that the petitioners were appointed

purely on contract basis and their service condition were governed by the contract. Response of private respondents to para-7 is also the same. They have not offered any submission to the contents of mpara-7, on the ground that it was a matter of record.

14. Thus on facts, it is established that the initial appointment of petitioners, though on contract basis, was in pursuance of due selection process in terms of prevalent rules. It is also not the case of the respondents that the initial appointment of petitioners was not against the then existing vacancies.

15. It is no more res - integra that the initial appointment, though not on regular basis, if had been made after holding selection process in terms of Rules shall be counted towards seniority.

16. The law on the issue has been articulated by the Constitutional Bench of Hon'ble Supreme Court in Direct Recruit Class-II Engineering Officers' Association Vs. State of Maharashtra and others (1990) 2 SCC 175 as under:-

"13. When the cases were taken up for hearing before us, it was faintly suggested that the principle laid down in Patwardhan's case was unsound and fit to be over-ruled, but no attempt was made to substantiate the plea. We were taken through the judgment by the learned counsel for the parties more than once and we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter se seniority has to conform to the principles of equality spelt out by articles 14 and 16. If an appointment is made by way of stop-gap arrangement, without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two un-equals as equal which would violate the equality clause. But if the appointment is made after considering the claims of all eligible candidates and the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for purpose of seniority. Same will be the position if the initial appointment itself is made in accordance with the rules applicable to substantive appointments as in the present case. To hold otherwise will be discriminatory and arbitrary. This principle has been followed in innumerable cases and has been further elaborated by this Court in several judgments including those in Baleshwar Dass v. State of U.P. and others, [1981] 1 SCR 449, and Delhi Water Supply and Sewage Disposal Committee and others v. R.K. Kashyap and others, [1989] Supp. 1 SCC 194, with

which we are in agreement. In *Narender Chadha and others v. Union of India and others*, [1986] 1 SCR 211, the officers were promoted although without following the procedure prescribed under the rules, but they continuously worked for long periods of nearly 15- 20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of Articles 14 and 16. There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service.

47. 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.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed

continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by Engineers as well as Engineers under the the permanent Deputy the officiating Deputy State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinized for finding out any possible error. It is not in the interest of Service to unsettle a settled position.

With respect to Writ Petition No. 1327 of 1982, we further hold:

(K) That a dispute raised by an application under article 32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final."

17. Recently, Hon'ble Division Bench of this Court, vide judgment dated 03.08.2023, passed in CWP No. 2004 of 2017 along with CWP No. 629 of 2018, has held as under:-

"15. The above judgments of the Hon'ble Supreme Court make it amply clear that if the initial appointment is made after considering the claims of all eligible candidates and the appointees continued on the post uninterruptedly till the regularization of the service in accordance with the Rules made for regular substantive appointments, there is no reason to exclude the officiating service for the purpose of seniority and same will be the position if the initial appointment itself is made in accordance with the Rules applicable to substantive appointments.

16. Coming to the facts of the present case, the initial appointment of the original applicants admittedly was made in accordance with the Rules applicable to substantive appointment to the post in issue and through the Recruitment Agency prescribed in the Recruitment Rules. The only thing was that rather than offering appointment to the original applicants on regular basis, they were offered appointment on contract basis and their services were subsequently regularized, as has already been mentioned hereinabove.

17. Thus, in the backdrop of the factual scenario of the present case, learned Tribunal rightly held the original applicants to be entitled for seniority from the date of their initial appointment on contract basis, followed by regularization, as their initial appointment was made by following the Rules in vogue for making substantive appointment against the post and the process of recruitment was undertaken by the Subordinate Selection Board in which the claims of all eligible candidates were considered."

18. The abovesaid view has been taken by Hon'ble Division Bench after placing

reliance upon the judgments passed by Hon'ble Supreme Court in Direct Recruit's case supra (1990) 2 SCC 715, Aghore Nath Dey (1993) 3 SCC 371 and also the judgment of Hon'ble Division Bench of this Court in Narender Singh Naik, LPA No. 271 of 2011 and affirmed by Hon'ble Supreme Court in Special Leave to Appeal (C) No(s). 34038 of 2012.

19. Thus, the legal position is well settled. The initial appointment, even though made on temporary or ad-hoc basis, if had been made in terms of prevalent recruitment rules and after holding the due process of selection, the service rendered thereafter continuously till regularisation is liable for consideration for the purposes of seniority.

20. The private respondents have made an attempt to persuade this Court to take a different view in the matter on the premise that the contract service of the petitioners was governed under specific contracts entered by them with the state Government and their regularisation also not being the part of the recruitment rules but result of policy of the Government that too having prospective operation, cannot be treated as regular service and counted towards seniority. The contention so raised, in my considered view, deserves rejection for the reason that contract was one of the modes of appointment prescribed under the Rules. The appointments were to be made against existing sanctioned posts. That being so, petitioners cannot be faulted and their case cannot form an exception to the dictum of law as noticed above.

21. The private respondents then placed reliance on judgments passed by Hon'ble Supreme Court in Rashi Mani Mishra Vs. State of Uttar Pradesh, 2021 SCC Online SC 509 and Malook Singh and others Vs.State of Punjab and others, 2021 SCC Online SC 876,to support their case, but once again without success. In Rashi Mani supra the observation by Hon'ble Supreme Court to the effect that services rendered by ad-hoc employees prior to regularisation cannot be counted for the purposes of seniority were in the special context of the Uttar Pradesh Regularization of ad-hoc Appointment Rules, in which the substantive appointment did not include the ad-hoc appointment. In Malook Singh supra also the above noted enunciation cannot be said to have been altered or diluted.

22. Lastly, as regards the objection as to delay and latches, the same also deserve to be rejected for the reason that in the seniority list of Junior Engineer (Electrical) as it stood on 29.02.2016 and circulated on 02.03.2017, the names of petitioners did not appear as dates of regularization of their services were subsequent thereto. Thereafter, it is the case of the respondents that though the seniority list was finalized and circulated on 23.09.2020, but the same was kept in abeyance, on account of certain short comings. It was again circulated on 09.03.2021 and was finalized on 17.02.2022. The petitioners had approached this Court by way of CWP No. 606 of 2023, which clearly reflected their intent to challenge the seniority of private respondents above them and the earlier petition of the petitioners cannot be said to have been filed after unreasonable or inordinate delay after the finalization of the seniority list by the officials

respondents on 17.02.2022.

23. In view of above discussion, the petition is allowed. The seniority list of Junior Engineer (Electrical) in the Department of Public Works, Government of H.P. as it stood on 31.12.2022, showing the placement of private respondents above the petitioners, is quashed and set aside. It is held that the entire period of service of the petitioners from the initial date of their appointments on contract basis as Junior Engineers (Electrical) is liable to be considered for the purposes of seniority. Respondents No. 1 to 3 are directed to reframe the seniority list of the Junior Engineers (Electrical) in accordance with what has been held in this judgment and to make further promotion to the post of Assistant Engineer (Electrical) strictly in accordance with law, on the basis of such reframed seniority list of Junior Engineers (Electrical).

24. The petition stands disposed of in the aforesaid terms, so also the pending application(s), if any.