
(2011) 10 AP CK 0011

In the Andhra Pradesh High Court

Case No : Writ Petition : 28932, 29081 of 2008, 958, 2473, 11667, 23380 of 2009, 5941, 6206, 11500, 19503, 23466, 26099, 23033, 28643 and 29418 of 2010

B. Gopalu, G. Ravinder, K. Nagendra and K. Naveen Kumar APPELLANT
and Others

Vs

A.P. Transco and Others RESPONDENT

Date of Decision : 18-10-2011

Acts Referred:

Andhra Pradesh State and Subordinate Service Regulations — Regulation 14(1)
Andhra Pradesh State and Subordinate Service Rules, 1996 — Rule 10, 14, 2, 23, 26
Andhra Pradesh State Electricity Board Service Regulations — Regulation 14, 14(1), 15, 15(1), 19
Constitution of India, 1950 — Article 14, 16
Electricity (Supply) Act, 1948 — Section 79

Citation : (2011) 10 AP CK 0011

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : K.R. Prabhakar, in WP No. 29418 of 2010, Sri. K. Venugopal Reddy, in WP NO. 23380 of 2009, Sri. K. Ramachandra for Sri K.S. Murthy, in WP NO. 28932 of 2008, Sri. S. Ravindranath, in WP NO. 11500 of 2010, Smt K. Udaya Sri, in WP NO. 19503 of 2010, WP NO. 23033 of 2010, Sri. K. Venugopal Reddy, in WP NO. 23466 of 2010, WP NO. 5941 of 2010, Sri. S. Ramachandra Rao, for Sri M. Surender Rao, in WP NO. 26099 of 2010, for Sri J.R. Manohar Rao, in WP NO. 28643 of 2010, for Sri B.V. Rama Rao, in WP NO. 29081 of 2008, Sri. M.V. Rama Rao, in WP NO. 958 of 2009, in WP NO. 11667 of 2009, Sri. S. Ramachandra Rao, for Sri M. Surender Rao, in WP NO. 6206 of 2010 and Sri. P. Narasimha Rao, in WP NO. 2473 of 2009, for the Appellant; P. Laxma Reddy, Counsel for the respondent No. 1 to 5, Sri V. Sudhakar Reddy, Counsel for the respondent No. 6 to 8 in WP No. 29418 of 2010, for the respondent No. 5 to 15 in WP : 28932 of 2008, GP for Energy, Counsel for the respondent No. 1, Sri V. Sudhakar Reddy, Counsel for the respondent No. 4 to 15, Sri. P.R. Balarami Reddy, SC for APSEB, Counsel for the respondent No. 2 and 3 in WP : 23380 of 2009, for the respondent No. 2 to 4 in WP : 28932 of 2008, for the respondent No. 1 in WP : 11500 of 2010, for the respondent No. 1 to 3 in WP:26099 of 2010, for the respondent No. 1 in WP : 958 of 2009, for the respondent No. 1 and 2 in WP : 29081 of 2008, for the respondent No. 1 to 3 in WP : 6206 of 2010, G.P for Energy, Counsel for Respondent No. 1, Smt. K. Udaya Sri, Counsel

for the respondent No. 16 to 18 in WP : 28932 of 2008, for the respondent No. 4 to 10 in WP : 11500 of 2010, Sri. K. Chindabaram, SC for APSEB, Counsel for the respondent No. 1 and 2 in WP : 19503 of 2010, G.P for Irrigation, Counsel for the respondent No. 1, Sri. P.R. Balarami Reddy, (SC for AP TRANSCO), Counsel for the respondent No. 2 and 3 in WP : 23466 of 2010, Sri. Vedula Venkata Ramana, for Sri. G. Vidya Sagar, Counsel for the respondent 6, 13, 17 to 19, Sri. N. Ravi Prasad, Counsel for the respondent No. 8, 12, 14, 15, 16, 21, 22, 26 and 30 in WP:26099 of 2010, Sri K. Chidambaram, SC for APSEB, Counsel for the Respondent No. 1 and 2 in WP : 23033 of 2010, Sri. P. Laxma Reddy, SC for APSEB, Counsel for the respondent No. 2 to 5, M/S. Bhardwaj Associates, Counsel for the respondent 31, 33, 36 and 37 in WP : 28643 of 2010, Ch. Jagannadha Rao, Counsel for the respondent No. 3 to 10, A.K.A. Venkata Ramana, Counsel for the respondent No. 5 to 19 in WP : 29081 of 2008, Party-in-Person Counsel for the respondent No. 5 in WP : 958 of 2009, GP for Energy, Counsel for the respondent No. 1, P.R. Balarami Reddy, (SC for AP TRANSCO), Counsel for the respondent No. 2 and 3, Sri. V. Sudhakar Reddy, Counsel for the respondent No. 4 to 12 in WP : 5941 of 2010, Sri. P.R. Balarami Reddy, Counsel for the respondent No. 1 and 2 in WP : 2473 of 2009, F.R. Balarami Reddy, SC for APSEB, Counsel for the respondent No. 1 and 2, Sri. Vedula Venkata Ramana, Senior Counsel for Sri. K.S. Murthy, Counsel for the respondent No. 3 and Smt. Udaya Sree, Counsel for the respondent No. 12 to 14, for the Respondent

Final Decision : Dismissed

Judgement

L. Narasimha Reddy

1. The activities of generation, transmission and distribution of electricity in the State of Andhra Pradesh was being carried out by the A.P. Electricity Board (for short "the Board"), constituted in accordance with the provisions of the Electricity (Supply) Act, 1948 (for short "the Act"). With a view to regulate the conditions of service of the employees, the Board issued regulations from time to time, in exercise of powers conferred upon it, under Clause (c) of Section 79 of the Act. The A.P. State Electricity Board Service Regulations (for short "the Regulations") Parts I and II, which are comparable to Fundamental Rules and State Subordinate Service Rules, respectively, relating to Government services, were issued through B.P.M.S.Nos.547 and 548, dated 21.08.1967, and they came into force with effect from 04.03.1970. Regulations - Part III, which deal with the classification and control of services in the Board were issued through B.P.M.S.No.89, dated 02.02.1970, and they came into force on 04.03.1970.

2. In the year 1998, the Legislatures of the State of Andhra Pradesh enacted the A.P. Power Reforms Project Act, 1998, through which the Board was divided into many entities through the process of incorporation of the companies and they were assigned the respective functions of generation, transmission and distribution of electricity. The Service Regulations framed by the Board were adopted through office orders issued in the year 1999, by the respective companies.

3. The post of Assistant Engineer (A.E) is in category III of Clause (2) of Annexure-I to Service Regulations - Part III. Initially, when the Rule was framed, the appointment to the posts of A.Es was through direct recruitment alone. In the year 1994, the Board amended the Annexure through B.P.M.S.No.354, dated 12.12.1994 by providing for appointment by transfer of Graduate Sub-Engineers against 10% of the vacancies. Clause (3) of the provision so introduced mandates that Sub-Engineers, who are appointed against 10% vacancies, by transfer, shall take the lowest rank, as on the date of appointment, below the junior most A.E, or trainee.

4. In the years 2003, 2004 and 2005, the respective distribution companies (for short "the respondents") issued notifications, inviting applications to select the candidates to the posts of A.Es., through direct recruitment. However, it was mentioned that the appointment shall be purely on contractual basis, for a limited period. Simultaneously, appointment by transfer from the category of Sub-Engineers was also taken up against 10% of vacancies for some years, and of higher percentage, for one year. Over the period, the appointment of A.Es on contractual basis was treated as the one, made under regular basis and their services were regularised. On a representation made by that category of Engineers, the benefit of contractual service rendered by them, was also treated as regular, holding good, for the purpose of reckoning their seniority.

5. In this regard, the Transmission Corporation, one of the respondents, issued T.O.O.No.231, dated 23.12.2008 directing that the service rendered by the A.Es on contract basis till their services were regularised, be treated as regular for the purpose of fixing seniority, without any financial and pensionary benefits. The same agency issued memo dated 23.09.2009, clarifying that the expression "Engineer/Assistant Engineer (Trainee)" occurring in clause (3) of Category III, of Class I of Annexure I of Regulation- Part III shall include "Assistant Engineer (Contract)" also, and thereby, brought the A.Es appointed on contractual basis, within the purview of the Regulations.

6. On account of the uncertainty as to the nature of appointment of A.Es through the process of direct recruitment, the Sub-Engineers, who are appointed by transfer as A.Es were treated as seniors in a provisional seniority list prepared on 22.01.2008. Representations were made by the association of A.Es, taking objection to such a course of action. A revised provisional seniority list was issued on 01.07.2008 placing the direct recruit A.Es for the years 2003, 2004 and 2005, above the A.Es, appointed by transfer in those years. That list was challenged in W.P.Nos.1264 and 2189 of 2009. The writ petitions were disposed of, directing that the final seniority list be prepared in accordance with the service regulations, and in particular, the amendment caused through B.P.M.S.No.354 dated 12.12.1994. Ultimately, a final seniority list was prepared on 30.09.2010, in which the A.Es, who were appointed on contractual basis, but were treated as having been directly recruited, were placed above the Sub-Engineers, appointed as A.Es by transfer, for the respective years.

7. This batch of writ petitions is filed by the Assistants Engineers, appointed by transfer. They challenge the orders issued by the Transmission Corporation, treating them as Juniors to the A.Es, appointed initially on contractual basis, and regularised thereafter; and the consequences that have flown from the said action.

8. The petitioners contend that the orders of appointment issued to the A.Es., appointed on contract basis are clear and specific to the effect that the engagement is for a limited period, that it does not confer any right for being regularised and that the procedure prescribed under the regulations was not followed. They submit that whatever may have been the justification for the TRANSCO or the Distribution Companies (for short "the Companies"), in treating the contractual services of such employees, as regular, and on a time scale of pay, there was absolutely no basis for them in treating the contractual service as holding good for seniority also. It is their further case that by the time the orders of regularization were issued in favour of contractual A.Es., the petitioners were appointed by transfer on regular basis, and in that view of the matter, they ought to have been treated as seniors to the said employees.

9. The companies, on the one hand, and the A.Es., initially appointed on contract basis, who are impleaded as respondents in various writ petitions, on the other hand, filed separate counter-affidavits. Their common case is that Regulations - Part III mandate that appointment to 90% of the posts of A.Es., must be through direct recruitment and a detailed procedure, such as holding of written test, conducting of interviews etc., is provided therefor. According to them, the prescribed procedure, in its entirety, was followed at the time of making appointments against the posts earmarked for direct recruitment for the years 2003, 2004, 2005 also, but on account of the specific directions issued by the Government, as a result of the reforms, the orders of appointment were issued, treating the employment on contractual basis. They submit that the service regulations provide for flexibility in the matter of appointment to various posts and for regularisation thereof, with the passage of time.

10. They submit that appointment of A.Es, by transfer, of qualified Sub-Engineers, cannot take place independently, and as per the relevant provisions, the persons so appointed have to take their seniority after the A.Es. appointed against vacancies, meant for direct recruitment. The respondents contend that the anomalies that have crept into the provisional seniority list, at one point of time have been corrected, and that the final seniority list accords with the service regulations and other provisions pertaining to seniority.

11. The arguments on behalf of the petitioners were advanced by Sri S. Ramchandara Rao, learned Senior Counsel, Sri M. Surender Rao, Sri J.R. Manohara Rao, Sri B.V. Rama Rao, Sri K. Srinivasa Murthy, learned counsel.

12. The gist of their argument is that the seniority of an employee in an organisation has to be reckoned from the date on which, he came to be

appointed on regular basis, and that in the instant case, for the concerned years of recruitment, Sub-Engineers were appointed by transfer as A.Es., earlier to the appointment of A.Es., against the vacancies earmarked for direct recruitment. Elaborating this, they submit that no direct recruitment in its strict sense has taken place and that the candidates were appointed on contractual basis. They submit that the mere fact that A.Es., who were engaged on contractual basis were treated as having been regularly appointed 2 or 3 years later, does not make them seniors, vis-a-vis the Sub-Engineers, appointed as A.Es., by transfer. Learned counsel submit that true purport of Annexure I of part III as amended through B.P.M.S.No.354 dated 12.12.1994, would be that the Sub-Engineers appointed as A.Es. by transfer must take their seniority immediately, after A.Es., whose services were regularised by that time, the former came to be appointed.

13. Learned counsel further submit that the service regulations part I, and part II, do not permit commencement of probation for any employee, before a date on which the appointment was made on regular basis. According to them, even where the contractual on non-regular service is treated as regular, under Regulation 3(d) of part I, it must be, for all purposes, and not selectively, for seniority alone. By making reference to various other provisions, learned counsel submit that there was no occasion for the respondents for invoking Regulation 26(a) of Part II, and that at any rate, the seniority of an employee cannot be counted from a date anterior to the one, on which the probation was commenced.

14. Placing reliance upon the judgments rendered by the Supreme Court and this Court, they submit that the service rendered by an employee on ad hoc or contractual basis cannot be reckoned for the purpose of determining the seniority. It is also stated that memo, dated 23.09.2009, through which the expression "Assistant Engineer (Contract)" was added to Annexure I part III amounts to amendment of the regulations and the same cannot be sustained in law. A further plea is raised to the effect that the amendment if at all, would operate prospectively and cannot affect the rights, that have accrued to the petitioners before the date on which, the memo was issued.

15. Arguments on behalf of the respondents were advanced by Sri Vedula Venkat Ramana, learned Senior Counsel, Sri G. Vidya Sagar, Sri P. Lakshma Reddy, learned Standing Counsel for the Transco and Companies; Sri K. Vasudeva Reddy, Sri C. Raghu and Sri M. Ravindranath Reddy, learned counsel.

16. Their case is that the appointment to the post of A.Es., used to be exclusively through direct recruitment from the beginning, and that it is only in the year 1994, that a small fraction of it was permitted to be filled through appointment of qualified Sub-Engineers, by transfer. They submit that the appointment of qualified Sub-Engineers at any given time, cannot take place independently, and that appointments through both the procedures must be done simultaneously. Learned counsel submit that the steps for filling posts of A.Es. through direct recruitment, were initiated in the years 2003, 2004 and 2005, strictly in accordance with the prescribed procedure, but at the instance of the State

Government, orders of appointment in favour of direct recruits were issued indicating that they are contractual, in nature. It is stated that the Regulations provide for appointment of different kinds and that even where such appointments are made in deviation from the Rules, power and discretion is conferred upon the authorities to treat the appointments as regular. Reference is made to various provisions of the Regulations - Parts I, II and III, and it is stated that notwithstanding the nature of orders of appointment, the candidates so selected are direct recruits, for all practical purposes.

17. Learned counsel submit that the probation of the writ petitioners was commenced only after the services of the contractual A.Es. were treated as regular and the former cannot claim seniority over the latter. It is also urged that Annexure I to Regulation Part III treats the recruitment at a given point of time, as a single exercise, and appointment through direct recruitment on the one hand, and by transfer, on the other hand, are different facets thereof, and that they cannot be treated as separate exercises, in the context of determination of seniority among the candidates so appointed. They too placed reliance upon certain decided cases and assert that no illegality has taken place in the entire process, and that the impugned proceedings do not suffer from any legal infirmity.

18. The core issue that arises for consideration in this batch of writ petitions is in relation to the seniority, between the A.Es., appointed against vacancies earmarked for direct recruitment, initially on contractual basis, on the one hand; and those, appointed from as A.Es the category of Sub-Engineers, by way of transfer; on the other hand. To resolve this, it becomes necessary to address the following questions, viz.,

a) Whether, the appointment to the posts of A.Es. at a given point of time, must take place simultaneously through direct recruitment as well as by appointment by transfer, or whether the process of appointment by transfer to such posts can take place independently, or in isolation;

b) whether it is permissible to make appointments on contractual basis against the vacancies earmarked for direct recruitment and if so, whether such appointments can be treated as regular, at a later point of time; and

c) whether it is permissible under the Regulations to treat the contractual service rendered by A.Es., as the one, on regular basis, for the purpose of seniority, vis-a-vis the A.Es., appointed by transfer from the category of Sub-Engineers.

19. The broad purport of the Regulations that govern the service conditions of the employees of the erstwhile A.P. State Electricity Board and the present Generation, Transmission Corporations and Distribution companies has already been indicated. The services in the company are broadly categorized into Engineering Service, Account service, Security Service and General Service. The subject-matter of these writ petitions pertains to the Engineering Service, which is dealt with under Annexure -1 to Part III of the Service Regulations. The post of

Assistant Engineers occurs in Category II of Class II of the Engineering Services. The method of appointment is as under:

Asst. Engineers

(i) Direct recruitment.

(ii) By transfer from Graduate Sub-Engineers with minimum of four years service in the category of Sub-Engineer or four years service in all in the category of Sub-Engineer, Asst. Supervisor, Sub-Overseer, Lineman, Tester etc., subject to the following conditions.

(1) Such recruitment, from among graduate Sub-Engineers shall be limited to 10% of the vacancies at the time of each recruitment.

(2) They are not entitled for any service weightage,

(3) They have to take the lowest rank as on the date of appointment below the junior most Asst. Engineer/Trainees as on that date.

20. Till the year 1994, the appointment to the post of Engineers was exclusively through direct recruitment. In that year, the provision was amended to the effect that the appointment by transfer from the category of Sub-Engineers, subject to their holding graduation degree in Engineering, can be made limited to 10% of the vacancies. Till the year 2002, the appointment through both the methods, was taking simultaneously, though in certain years, the percentage was varied in favour of the Sub-Engineers.

21. In the year 2003, the notification issued for direct recruitment to the post of A.Es., stipulated that the appointments shall be made on contractual basis. This is stated to be on the insistence by the State Government, in the light of the reforms, it has undertaken. Though the entire procedure stipulated for direct recruitment, viz, conducting written test and interviews was followed, appointments were made on contractual basis, stipulating that the contract would be in force for a period of one year, the emoluments will be on consolidated basis and that no right would accrue to a candidate to seek appointment on regular basis. The appointments by transfer against 10% vacancies, on the other hand, have taken place as usual. This pattern was continued in the next two years. In the year 2005, the percentage in favour Sub-Engineers has been increased substantially by relaxing the relevant provision. The contractual appointments came to be treated as regular after sometime.

22. According to the writ petitioners, no direct recruitment, as contemplated under the Regulations has taken place for the three years, referred to above, and in that view of the matter, their appointments by transfer need to be treated independently. If this is done, they would be entitled to take seniority immediately after the regularly appointed A.E., which obviously means the Engineer, who has been appointed in the year 2002.

23. It is not uncommon that the service rules of various organizations provide for

different methods of appointment/recruitment from different sources, to the same post. The allocation of percentages to the respective sources brings about a phenomenon, called in the ordinary parlance, as "quota". Each source is allocated a particular number of vacancies and candidates from one source cannot be recruited/appointed/promoted against the posts earmarked for the other source. The rules also stipulate as to the manner in which the seniority among the candidates appointed through different sources to the same category of posts must be determined. Generally, the candidates appointed by transfer or promotion are required to take their seniority, after the first candidate appointed through direct recruitment in a given year of recruitment. Here itself, it is necessary to take into account, the concept of rotation. This is adopted whenever it becomes necessary to ensure meticulous and perfect blend of the candidates appointed through different sources to the same post, particularly when the vacancies that occur at each point of time are relatively low and the chances for candidates from a particular source for selection are brighter, compared to those from other sources.

24. Take for instance, promotion to the post of Superintendent in an establishment is from the post of Senior Assistant, Accountants and Senior Stenographer is in the ratio of 5:3:2 as per the relevant rules. The administration may allocate the places in the roster for each category, lest any imbalance occurs. It may so arrange the posts in a unit of 10 vacancies in such a way that candidates from one source are not placed either at an extremely advantageous or extremely disadvantageous position. Through a catena of decisions, the Supreme Court held that the concept of rotation, on the one hand, and the one, of quota, on the other hand, do not coexist.

25. In the instant case, Clause (1) of the table extracted above, becomes relevant. It reads:

Such recruitment, from among graduate Sub-Engineers shall be limited to 10% of the vacancies at the time of each recruitment.

26. It is axiomatic that the number of posts, representing 10% available for graduate Sub-Engineers must be reckoned with reference to "the vacancies at the time of each recruitment". The phrase "each recruitment" naturally takes in its fold, all the vacancies that are available at a given point of time. It is difficult to assume that the appointment by transfer of the graduate engineers to the post of A.Es. can take place independent of the general recruitment. The petitioners are not able to cite any instance where appointment by transfer was made, without there being direct recruitment against 90% of vacancies. An extreme example or instance, can exist only when the appointing authority takes a conscious and specific decision to do away with the process of direct recruitment altogether for an year of recruitment and to proceed exclusively with the appointment by transfer of the Sub-Engineers.

27. It is not in dispute that the steps to fill the vacancies earmarked for direct

recruitment on the one hand, and those, meant for Sub-Engineers on the other hand, have been initiated, simultaneously in the years 2003, 2004 and 2005. It is a different matter that the candidates that were considered against the posts earmarked for direct recruitment were issued orders of contractual appointment. Whether one goes by the text of the relevant rule or the practice in vogue in relation to the appointments of this nature, the inescapable conclusion is that the expression "each recruitment" would take in its fold, the direct recruitment, as well as the appointment by transfer of a graduate Sub-Engineers.

28. The second question happens to be the most intricate. It is a matter of record that the candidates that were appointed against the vacancies earmarked for direct recruitment in the years 2003, 2004 and 2005 were issued orders of appointment, almost in the form of a contract. In fact, the respective notifications made that aspect clear. The petitioners contend that an appointment made on contract basis cannot be treated as an appointment made under the Regulations, much less can it be regularized in such a way, as to be detrimental to the interests of the candidates appointed from the other source. In this context, it becomes necessary, to take note of certain provisions of the Regulations.

29. Rule 2 of Part I of the Service Regulations reads:

Except where it is otherwise expressed or implied, these regulations with such amendments as may be effected by the Board from time to time shall apply to the monthly paid (on time-scale of pay) employees of the Government of Andhra Pradesh who have opted for service under the Board and to the monthly paid employees recruited on and after 01.04.1959. (proviso is omitted, since it is not necessary)

30. Rules 3 (a) and (b) permitted the Board to avail the services of Central and State Governments on deputation basis. Rules 3 (c) and (d) deal with the appointment on contractual basis. It reads:

(c) "The Board may also appoint any person or persons on contract on such terms as may be considered necessary and in such cases the conditions and classifications of the service of such persons shall, except in so far as they are not governed by the terms of contract, be regulated by the provisions of the regulations framed by the Board.

(d) The Board may absorb a person appointed on contract basis into the Board corresponding cadres in the Board's Service on a permanent basis. Such persons may, in the discretion of the Board, be given credit for the full period of their contract service or part thereof and thereupon such service shall be taken into account for all purposes, including seniority, probation, leave and pension.

31. Rule 2 of Part II of the Regulations reads:

Scope of the Service Regulations (Part-II) These regulations shall apply to all employees of the Board including those employed under contracts and on

deputation from Government who draw their pay once a month in a time scale of pay. All employees of the Board Services to whom these regulations apply, shall be bound by the regulation in force from time to time. The Board shall have authority to amend these regulations at any time and from time to time. (proviso is omitted, since it is not necessary)

32. The phrase "appointment to a service" is defined under Regulation 4(1). It reads:

Appointment to a service:- A person is said to be appointed to a service when in accordance with these regulations or in accordance with the regulations applicable at the time, as the case may be, he discharges for the first time the duties of a post borne on the cadre of such service or commences the probation, instruction or training prescribed for members thereof. Explanation: The appointment of a person holding a post borne on the cadre of one service to hold additional charge of a post borne on the cadre of another service or to discharge the current duties thereof does not amount to appointment to the latter service.

33. The expression "Member of a service" is defined under Regulation 4(12) as under:

Member of a service: Member of Service" means a person who has been appointed to that service and who has not retired or resigned, or who has not been removed or dismissed, or substantively transferred or reduced to another service, or who has not been discharges otherwise than for want of a vacancy. He may be a probationer, an approved probationer or a full member of that service.

34. Regulation 4(17) indicates as to what a direct recruitment would mean:

Recruited Direct: A candidate is said to be "Recruited Direct" to a Service, Class, Category or post if at the time of his first appointment thereto, he is not in the service of the Andhra Pradesh State Electricity Board or the Government of a State or the Government of India.

Provided that, for the purpose of this definition, a person shall be deemed to be not in the service of the Andhra Pradesh State Electricity Board, nor in the service of the Government of State or the Government of India.

35. The general method of recruitment, particularly where the said Regulations provide for admixture of direct recruitment and by transfer is dealt with under Rule 10 of Part II of the Service Regulations, as under:

Method of Recruitment: Where the normal method of recruitment to any service, class or category is neither solely by direct recruitment nor solely by transfer but is both by direct recruitment and by transfer.

a) the proportion or order in which the special regulations concerned may require vacancies to be filled by persons recruited direct and by those recruited by transfer shall be applicable only to substantive vacancies in the permanent

cadre;

b) A person shall be recruited direct only against a substantive vacancy in such permanent cadre, and only if the vacancy is one which should be filled by a direct recruit under the Special regulations referred to in clause (a); and

c) Recruitment to all other vacancies shall be made by transfer, (proviso is omitted, since it is not necessary)

36. Temporary appointments are dealt with under Rule 14 of Part II of the Service Regulations, as under:

Temporary appointments and promotions: The appointing authority may appoint or promote temporarily a person otherwise than in accordance with the provisions of these regulations in the following cases until a person is appointed in accordance with the regulations.

(a) (1) Where, it is necessary in the interest of the administration to fill up a vacancy immediately and there would be undue delay in making an appointment or promotion as the case may be in accordance with these regulations.

(2) Where it is necessary to fill a short vacancy in a post and the appointment or promotion, as the case may be, would involve excessive expenditure on traveling allowance or exceptional administrative inconvenience.

(b) Where general or special qualifications has been prescribed for holding a post in a category and no member of the lower category from which promotion is to be made to this category possesses the prescribed qualifications, a member of the lower category may be promoted temporarily to the higher category until a member qualified becomes available for promotion.

(c) A person appointed or promoted under clause 1(a) or (b) shall not be regarded as a probationer in such category or be entitled by reason of such appointment to any preferential claim to future appointment or promotion to such categories. The services of such a person shall be liable to be terminated or reverted to lower category, as the case may be, by the appointing authority at any time without notice and without any reason being assigned.

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Rule 23(d) deals with "the commencement of probation.

Temporary service counting for probation: A probationer in one service, who is appointed temporarily to another service under sub-regulation (a) and (c) of Regulation 14, shall be entitled to count towards his probation in the former service the period of duty performed by him in the latter service during which he would have held a post in the former service but for such temporary appointment.

37. Rule 26 deals with the method of determination of "Seniority" and it reads:

Seniority:

(a) The seniority of a person in a class of service, category or grade shall, unless he has been reduced to a lower rank as a punishment, be determined by the rank obtained by him in the list of approved candidates drawn up by the Board or other appointing authority as the case may be.

Provided that where no ranking has been fixed in respect of any person in a service, class, category or grade, the seniority of such candidate shall be determined by the date of his first appointment to such service, class, category or grade. If any portion of the service of such person does not count towards probation under regulations 14(c), (e), 19 and 38(b), his seniority shall be determined by the date of commencement of his service, which counts towards probation.

(Remaining part of the rule is omitted, since it is not necessary)

38. Regulation 7 of Part II mandates that in the event of there being any conflict between the provisions of that part, on the one hand, and those of Regulations in Part III, on the other hand, the latter would prevail.

39. From a perusal of these and the other relevant Rules, it becomes clear that though the Board prescribed procedure for appointment of persons to various categories of posts, it has reserved to itself, the right to deviate from the prescribed procedure, in case the situation warrants. The Regulations also provide for the transformation of one category of appointment with the other.

40. To begin with Rule 3(i)(c) of part I enables the Board to appoint any person on contract basis on such terms, as may be considered necessary. Whenever such appointment is made, the conditions and classifications are regulated by the provisions of the Regulations, to the extent they are not in conflict with the terms of contract. Clause (d) thereof, empowers the Board to absorb a person appointed on contract basis, into the corresponding cadre in the Boards service, on a permanent basis. The provisions also empower the Board to give credit or weightage to the period of contractual service in its entirety or in part.

41. The petitioners do not dispute existence of such power in the respective companies. It is a different matter that the benefit was extended only to the extent of seniority, though Regulation 3(d) mandates that, once the benefit is extended, it shall be for all purposes, including seniority, probation, leave and pension. If the benefit in its entirety is not extended, it should be the grievance of the persons, who are extended it, and not that of the petitioners.

42. The purport of the definitions of certain important expressions, such as appointment to service, approved candidate, member of service, extracted in the preceding paragraphs make it amply clear that appointment through a particular method or form is necessary for an individual to become a member of service or employee of the Board. Appointment to a service takes place, when a person is appointed in accordance with the Regulations, including Clause 3(c) Part I of the

Regulation, that provides for appointment on contractual basis also. A person so appointed becomes a member of service, whether he is a probationer or approved probationer or a full member of service.

43. The definition of the word "probationer" takes in its fold, any member of the service, when he has not completed his probation. Clause 3(d) of Part-I empowers the Board to absorb a person appointed on contract basis, into the service as a full member. Though the aim of the Regulations of Part-I, II and III is to ensure total objectivity in the matter of appointment of employees and to stipulate the conditions of service, the fact that deviation from them is warranted some-times, is recognized. The Board has reserved to itself, the liberty to deviate from the Regulations, in case the situation demands. Regulation 41 of Part-II reads as under:

Regulation 41: Relaxation of regulation by the Board: No regulation made in exercise of the powers conferred by sub-section (c) of Section 79 of the Electricity (Supply) Act, 1948 shall be construed to limit or abridge the power of the Board to deal with the case of any person serving under the Board in such manner as may appear to it to be just and equitable;

Provided that, where any such regulation is applicable to the case of any person or a class of persons, the cases shall not be dealt with in any manner less favorable to the person or class of persons than that provided by that regulation.

44. As a matter of fact, some of the petitioners are beneficiaries of the relaxation or deviation. The relevant provision mandates that 90% of the posts of A.Es shall be filled up by direct recruitment, and remaining 10%, by appointment by transfer of Sub-Engineers. In relaxation of that provision, the percentage of appointments to be made by transfer was enhanced substantially. In the name of a one-time relaxation, such deviations were resorted to, on several occasions. No amendment was carried to the provision, obviously taking shelter under Regulation 41.

45. In Secretary, State of Karnataka and Others Vs. Umadevi and Others, the Hon'ble Supreme Court dealt with the question as to whether an employee, whose appointment was irregular at the inception, can seek the relief of absorption or regularization. It was held that, if an appointment was made contrary to the relevant provisions of law, the illegality cannot be condoned in the name of regularization. A distinction, however, was made between illegal appointments, on the one hand, and irregular appointments, on the other hand. Appointment of qualified persons against sanctioned vacancies in accordance with the prescribed procedure, though with some deviation, was treated as an illegal appointment, in contradistinction to irregular appointments, where unqualified persons are appointed against non-existent vacancies. It was observed that the services of the former can be regularized, subject to certain conditions. In the instant case, the appointments were made against substantive vacancies meant for direct recruitment, and the prescribed procedure was

followed. The only difference was that the orders of appointment were issued indicating contractual appointment.

46. Heavy reliance is placed by the petitioners, on the judgment of the Supreme Court in Ch. Narayana Rao Vs. Union of India (UOI) and Others, wherein it was held that in case the initial appointment is only ad hoc in nature, not in accordance with the relevant Rules, and made as a stop-gap arrangement, the period of such a service cannot be reckoned for seniority. The judgment in Union of India (UOI) Vs. Dharam Pal Etc., was quoted with approval. This principle could certainly have been applied to the facts of the case, had the appointments been made on ad hoc basis and the prescribed procedure was not followed.

47. It has already been mentioned that the appointments were made against substantive vacancies, as the prescribed procedure was followed. The mere fact that the initial engagement was restricted to one year and that certain clauses were incorporated, limiting the rights of the appointees should not make any difference.

48. In The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, this very question was dealt with from a different angle. It was observed,

Para 13:...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 unequals 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...

49. There is hardly any doubt that appointments, in the instant case, were made after considering the claims of all the eligible candidates, the prescribed procedure was adhered to, and the candidates who were initially appointed on contractual basis were continuing, still their services were regularized. The

relevance of this precedent may be felt, while discussing the next question also.

50. Reference can also be made to Regulation 15(1) of Part-II. It reads, Regulation 15: Appointment by agreements:-

(1) When, in the opinion of the Andhra Pradesh State Electricity Board, special provisions inconsistent with any of these regulations are required in respect of any or all of the conditions of service, pay and allowances, pension, discipline and conduct with reference to any particular post it shall be open to Board to make an appointment to such post otherwise than in accordance with these regulations and to provide, by agreement with the person so appointed for any of the matters in respect of which, in the opinion of the Board, special provisions are required to be made and to the extent to which such provisions are made in the agreement, nothing in these regulations shall apply to any person so appointed in respect of any matter for which provision is made in the agreement.

Provided that in every agreement made in exercise of the power conferred by this regulation, it shall further be provided that, in respect of any matter in respect of which no provision has been made in the agreement, the provisions of these regulations shall apply.

(2) A person appointed under sub-regulation (1) shall not be regarded as a member of the service in which the post to which he is appointed is included and shall not be entitled by reason only of such appointment to any preferential claim to any other appointment in that or any other service.

51. From this, it is clear that it is competent for the Board to make appointment, otherwise than in accordance with the Regulations, and to provide for various contingencies. The agreement need not be confined to a particular instrument and the terms thereof can be altered with the consent of both the parties. The petitioners cannot have any genuine grievance, as long as such appointments were not made against their slot, in a given recruitment year.

52. The judgment in AIR 1977 251 (SC) relied upon by the petitioners dealt with totally a different question altogether. Appointment to the post of Deputy Collectors was partly through direct recruitment and partly through promotion. For one reason or the other, the process of direct recruitment did not take place between 1959 and 1962, but promotions have been effected during that period. Next direct recruitment took place in the year 1963, and the Deputy Collectors so appointed claimed seniority over the Deputy Collectors, that were appointed on promotion, between 1959 - 1962. The Supreme Court took the view that such claim is not valid, particularly when no rotation system was incorporated. There is hardly any comparison between the facts of that case and those of the case on hand.

53. It is certainly permissible for the Board, to absorb an employee appointed on contractual basis in the regular service, in case the appointment was against a substantive vacancy and the prescribed procedure, viz., considering the case of

all the eligible candidates and conducting the tests and interview, under the Rules, was followed.

54. Now remains the last question, viz., whether the benefit of contractual service can be extended to an employee.

55. The petitioners contend that an employee becomes a member of service if only he is appointed on regular basis and the period during which, he worked on contractual basis cannot be counted towards seniority. They submit that the A.Es appointed on contractual basis did not even commence their probation by the time they (the petitioners), were appointed on regular basis, though, under Regulation 14(1).

56. It is needless to mention that in any service, an employee has to undergo several stages, before he comes to be implanted permanently. Even where the entire procedure prescribed is followed, the initial appointment would be treated as temporary, and different expressions are used to connote the same. In certain cases, where the channels of appointment are different, regularization of a section of employees needs to be withheld, till the employees are appointed through other channel. In such cases, provisions similar to Rule 10(a)(1) of the A.P. State and Subordinate Service Rules, or Regulation 14(1) of Part-II of the Regulations of the Board are resorted to. Once the impediments are cleared, the stage for commencement of the probation may arise. Once the probation is commenced, another stage starts, paving the way for evaluation of the performance of the probationers. Depending on such evaluation, either the probation is declared or services are terminated.

57. The Hon'ble Supreme Court held in several cases that the steps of this nature should not be permitted to have their impact upon the process of reckoning the seniority. Though it may be some-what difficult to determine the inter se seniority, till the uncertainty as to the appointments is cleared; the seniority must be reckoned from the date of initial appointment, once the appointments are treated as regular.

58. It is no doubt open to the Board to deny the benefit of contractual service, to the A.Es appointed against the vacancies earmarked for direct recruitment. However, if discretion, as provided for under the Regulations is exercised in favour of such candidates, no one can have any genuine grievance. The fact that the benefit of regularization was not extended fully in terms of Regulation 3(d) of Part-I, and that it was confined to the limited purpose of seniority; can not at all be the genuine grievance of the petitioners. If the employees that were extended the said benefit were satisfied, the petitioners cannot be said to have suffered any detriment. Further, it is not as if the A.Es appointed on contract basis were extended any service benefit for the period during which, they did not perform the functions of that post. But for the hindrance created by the Government, the Board would have been under obligation to make appointments on regular basis, as was done prior to 2003 and subsequent to 2005.

59. The petitioners contend that the Board has taken a definite stand in W.P.No.2189 of 2009, to the effect that the A.Es appointed on contractual basis would be placed below those, appointed on regular time scale of pay, meaning thereby, the petitioners, and that it cannot take a different stand now. In paragraph 6 of the counter-affidavit filed therein, such a stand, no doubt, was taken. However, the writ petition was disposed of, directing that the seniority shall be determined in accordance with the provisions of Part-III Regulations, in so far as they apply to the posts of A.Es. Clause 3 thereof, which is extracted in the preceding paragraphs, mandates that a Sub-Engineer, who is appointed as Assistant Engineer, by transfer, shall take his seniority, immediately after the A.E appointed on regular basis. The mere fact that the regularization of services appointed on contractual basis has taken some time, cannot be a ground for the petitioners to steal a march over such candidates. Further, Regulation 26 of Part-II becomes relevant. It mandates that the seniority of an employee in a class of service, category or grade shall be determined on the basis of the rank or place assigned by the appointing authority in the list of approved candidates. The proviso thereto directs that, if no such ranking has been given, the seniority shall be determined by the date of his first appointment to the service, class, category or grade. The summary of the discussion is that,

a) where the appointment to a particular post in a service is partly through direct recruitment and partly by appointment by transfer/promotion, from in-service candidates, appointment by transfer/promotion cannot take place in isolation, and the steps therefor must be taken simultaneously with those, for direct recruitment;

b) under the Regulations framed by the Board, it is permissible to treat an employee appointed on contractual basis, as a regular member of the service;

c) the Board is conferred with the power and discretion to treat the contractual service rendered by the employees as regular service, if

i) the appointments were made in accordance with the prescribed procedure;

ii) appointments were made on a consideration of the cases of all eligible candidates; and

iii) such employees are in continuous service.

60. The writ petitions are therefore dismissed. There shall be no order as to costs.