

(1969) 11 DEL CK 0015

In the Delhi High Court

Case No : Civil Writ Appeal No. 109 of 1969

Ramesh Chander

APPELLANT

Vs

Delhi Electric Supply Undertaking and others

RESPONDENT

Date of Decision : 13-11-1969

Acts Referred:

Citation : (1970) ILR Delhi 310

Hon'ble Judges : V.S. Deshpande, J

Bench : Single Bench

Advocate : P.N. Lekhi, B. Dayal, O.P. Malhotra, D.D. Chawla, K.L. Mehra, Y. Dayal, P.P. Rao and K.P. Singh, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) This is a dispute between two groups of Executive Engineers appointed by the Delhi Electric Supply Committee (Respondent No. 5) in the Delhi Electric Supply Undertaking (Respondent No. 1) which is vested in the Municipal Corporation of Delhi (Respondent No. 2) and is a part thereof. The petitioners, Constituting one group, have been appointed in consultation with the Union Public Service Commission as required by the principal part of section 96 of the Delhi Municipal Corporation Act, 1957 (hereinafter called the Act of 1957) which reads as below :-

"NO appointments to the post of the General Manager (Electricity) or the General Manager (Transport) or to any post carrying a minimum monthly salary of three hundred and fifty rupees or more (exclusive of allowance) shall be made except after consultation with the Union Public Service Commission. . . ."

(2) Petitioners I to 3 and 5 to 8 were appointed on various dates from 10-5-1962 to 8-4-1964. Petitioner No. 4 is however a civil engineer, and may not belong to the common cadre of Executive Engineers constituted by the Office Order dated 3-8-1960 at Annexure E to the Writ petition at page 63 of the paper book. The opposing group consists of Respondents 6 to 14 who were at first appointed for a

period of less than one year without consultation with the Union Public Service Commission as permitted by the first part of proviso (d) to section 96 of the Act of 1957 which is as below :-

"PROVIDED that no such consultation with the Commission shall be necessary in regard to the selection for appointment- (a) to any acting or temporary post for a period not exceeding one year; or (b) to such ministerial posts as may from time to time be specified by the Corporation in consultation with the Commission when such posts are to be filled by promotion; or (c) to a post when at the time of such appointment the person to be appointed thereto is in the service of the Central Government or a State Government in a class I post; or (d) to a permanent or temporary post, if the officer or other employee to be appointed is not likely to hold that post for more than one year; or if such officer or other employee is likely to hold the post for more than one year but not more than three years and the Commission advises that the appointment may be made without consulting the Commission."

(3) Their appointments were made ad hoc on various dates from 27-12-1960 to 7-12-1962. Respondents 6, 7 and 8 came to be regularly appointed to the same posts of Executive Engineers in consultation with the Union Public Service Commission in 1963 (Respondent No. 8) and in 1965 (Respondents 6 and 7) respectively. The inter se seniority among these Executive Engineers was never determined mainly because no decision could be taken as to whether the ad hoc period of service of the respondents before their appointments were regularised in consultation with the Union Public Service Commission should be taken into account in determining the length of their service or not. Apparently, under the impression that the ad hoc periods of their service had to be taken into account, Sarvashri I. C. Sangar, Ramesh Chandra and P. S. Sawhney (Respondents 6, 8 and 7) were promoted in October, November and December 1968 respectively to the selection posts of Controller of Stores, Superintending Engineer (G) and Chief Commercial Officer in that order for periods of less than one year. The validity of these appointments of Respondents 6 to 8 is challenged by the petitioners mainly on two grounds. Firstly, from before the Act of 1957 came into force, the appointment and other service conditions of Executive Engineers serving in the then Delhi State Electricity Board were governed by the regulations made by the said Board u/s 79(c) of the Electricity (Supply) Act, 1948 in 1951 (hereinafter called the Regulations of 1951). The said Board was succeeded by the Delhi Electric Supply Undertaking under the Act of 1957. Section 516(2)(a) of the Act of 1957, however, provided inter alias that any appointment, notification, order, scheme, rule, form, notice or bye-law made or issued" under the Act of 1948 shall, "in so far as it is not inconsistent with the provisions of this Act (Act of 1957), continue in force and be deemed to have been made, issued or granted under the provisions of Act of 1957, unless and until it is superseded by any appointment, notification, order, scheme, rule etc. made under the Act of 1957". Petitioners contend that the Regulations of 1951 are still in force inasmuch as they are not inconsistent with the provisions of the Act of 1957. Paragraph I-B-I

of Regulation 5 reproduced at pages 6 and 7 of Annexure D to the Writ Petition (at page 62 of the paper-book) these appointments could be made only by direct recruitment. The appointments of Respondents 6 to 8 made by promotion are, Therefore, contrary to the said regulation and as such illegal.

(4) Secondly, in case it is held that the said regulation No. 5 of the Regulations of 1951 is not now in force, then the appointments of Respondents 6 to 8 are illegal as being discriminatory against the petitioners and as such contrary to Article 16(1) of the Constitution. For, Respondents 6 to 8 were chosen for these appointments in the belief that after taking into account their periods of ad hoc service, they were senior to the petitioners. But such ad hoc periods of service could not be taken into account and excluding the same, Respondents 6 to 8 were not the senior-most officers; the petitioners were excluded from consideration as being junior to the Respondents 6 to 8 and were thus denied "equality of opportunity in matters relating to employment to an office under the State" within the meaning of Article 16(1) of the Constitution.

(5) Respondents 1, 2 and 5 and Respondents 6 to 8 and 11 to 13 filed two sets of written statements supporting each other. They pointed out that the Regulations of 1951 were no longer in force as they were inconsistent with the provisions of sections 90 and 96 of the Act of 1957. The appointments of Respondents 6 to 8 were made in accordance with the provisions of section 96 of the Act of 1957 and under the provisions of the Union Public Service Commission (Consultation by the Delhi Municipal Corporation) Regulations, 1959, (hereinafter called the Regulations of 1959) made by the Union Public Service Commission u/s 97 of the Act of 1957 reproduced at pages 58 to 63 of the booklet at Annexure D to the Writ petition. Regulation 4(a) of the Regulations of 1959 provides that the method of recruitment to a post shall be decided by the appointing authority in consultation with the Union Public Service Commission. In pursuance of this regulation, the appointing authority framed the Recruitment and Promotion Rules of 1963 (hereinafter called the Rules of 1963) in consultation with the Union Public Service Commission. These are reproduced at Annexure R-13 to the written statement at pages 239 and 240 of the paper-book. The appointments are also in accordance with these rules. The appointments were, Therefore, legal. Respondents 9 and 10 generally supported Respondents 6 to 8 while Respondent No. 14 was inclined to support the petitioners. Respondent No. 3, the Union of India, also generally supported Respondents 1, 2 and 5.

(6) The question for decision, Therefore, is whether the appointments of Respondents 6 to 8 are vitiated for either of the two reasons urged by the petitioners.

(7) The first reason would seem to be untenable on its scrutiny as below. Section 2(10) of the Act of 1948 defines "regulations" to mean regulations made by the State Electricity Board u/s 79 thereof. Such regulations are to be distinguished from the rules made u/s 78 thereof by the State Government. The Act of 1948, Therefore, makes a clear distinction between the rules made u/s 78 by the State

Government and the regulations made u/s 79 by the Board. Section 516(2)(a) of the Act of 1957 does not expressly save operation of any regulations made u/s 79 of the Act of 1948. Though it makes a detailed provision for the saving of "any appointment, notification, order, scheme, rule, form, notice or bye-laws" made under the Act of 1948, it does not save any regulations made there under. In view of the express distinction made between the rules and the regulations by the Act of 1948 (and also by the Act of 1957 in sub-sections 48 and 51 of section 2 thereof), the omission to save regulations seems to be deliberate. The regulations cannot, Therefore, be taken to be included in the word "rule" used in section 516(2)(a) of the Act of 1957. On this short ground alone, the petitioners' reliance on the regulations of 1951 would be shown to be without any basis.

(8) Further, the scheme of the Regulations of 1951 is not reconcilable with the scheme of sections 90 and 96 of the Act of 1957. Under the Regulations of 1951, the Board alone was competent to make the appointments to the Class I posts in which the posts of Superintending Engineer, Controller of Stores and Chief Commercial Officer with which we are concerned in the present case would be included. But under the principal part of section 96 of the Act of 1957, such appointments can be made by the Delhi Electric Supply Committee only after consultation with the Union Public Service Commission. As the consultation with the Public Service Commission takes some time, the proviso to section 96 enables an. ad hoc appointment without consultation with .the Union Public Service Commission for short periods. The question of making such an ad hoc appointment could not arise under the Regulations of 1951 at all. We are primarily concerned with the validity of ad hoc appointments of Respondents 6 to 8 in the present case. The Regulations of 1951 are totally inapplicable to them.

(9) Though section 96 does not specify the method of recruitment, section 97 enables the Union Public Service Commission to make regulations regarding selection of candidates for appointment by the Corporation. Section 97 provides (a) the procedure to be followed in advertising posts, inviting applications, scrutinizing the same and selecting candidates for interview, and (b) the procedure to be followed for selecting candidates for appointment and by the Corporation for consultation with the Union Public Service Commission. It would appear that the procedure in (a) above is for direct recruitment while the procedure in (b) above is for appointment by the Corporation in consultation with the Commission otherwise than by direct recruitment. Reading Section 97 with section 96. Therefore, it would appear that appointments both by direct recruitment as also by promotion are included in the scope of section 96. Inasmuch as section 96 contemplates appointment either by direct recruitment or by promotion, it is directly contrary to Regulation 5 of the Regulations of 1951 which restricts the appointments to Class I posts to direct recruitment only. In this respect, Therefore, Regulation 5 is inconsistent with section 96. It does not, Therefore, survive u/s 516(2)(a) of the Act of 1957. I find, Therefore, that the Delhi Electric Supply Committee was entitled to make the appointments to the posts of Superintending Engineer, Controller of Stores and Chief Commercial

Officer by promotion and that it was not restricted to make these appointments by direct recruitment only. These appointments cannot, Therefore, be attacked on this ground,

(10) The second ground of attack urged by the petitioners is, however. so formidable that the respondents would be found totally unable to meet the same. The crux of the controversy is whether the periods of service put in by Respondents 6 to 8 after their initial appointments without consultation with the Union Public Service Commission till they were appointed to the same posts of Executive Engineers in consultation with the Union Public Service Commission could be taken into account to determine their seniority vis-a-vis other Executive Engineers including the petitioners. Section 96 of the Act of 1957 itself makes the distinction between a regular appointment and an ad hoc appointment, and shows thereby that the two cannot be equated. The rule laid down by the principal part of section 96 is that every such appointment has to be made in consultation with the Union Public Service Commission. The exception to this rule is made by the proviso to section 96 which enables a short term appointment to be made without consultation with the Union Public Service Commission. The reason underlying the proviso is that the consultation with the Union Public Service Commission may in a particular case take some time while the appointment may have to be made immediately. This is why a short term appointment without consulting the Union Public Service Commission is allowed to be made so that in the meanwhile steps to consult the Union Public Service Commission may be taken by the appointing authority. Such a short term appointment is called, for the sake of convenience, an ad hoc appointment as meaning an appointment for the time being. Such an appointment to any acting or temporary post could be made for a period not exceeding one year under clause (a) of the proviso. Under clause (d) thereof, such an appointment to a permanent or temporary post could be made for a period of less than a year if the officer or the employee to be so appointed is not likely to hold that post for more than one year. Such an appointment could be made for more than one year but not more than three years if the Commission advises that the appointment may be made without consulting the Commission. Obviously the advice of the Commission under the second part of the proviso (d) has to be obtained at the time of making such appointment and not after the expiry of the period of appointment. The underlying intention of the proviso to section 96 is that either the post to which the ad hoc appointment is to be made is itself to be for a short period or the officer or the employee to be appointed thereto is not likely to hold the post for more than one year. In the present case both these reasons seem to be absent. The posts of Superintending Engineer (G), Chief Commercial Officer and Controller of Stores are not created for a short period of less than one year. Nor was it intended that the Respondents 6 to 8 were not to hold these posts for more than one year. The Delhi Electric Supply Committee were not Therefore acting according to the true intention of the proviso in making the appointments of Respondents 6 to 8 to these posts there under. What is worse is that the

appointments of Sarvashri Sangar and Sawhney were made in 1960 and were continuing without consultation with the Union Public Service Commission till 1965 and the appointment of Shri Ramesh Chandra was made in 1960 and was continued till he was directly recruited by the Union Public Service Commission in 1963. The question of continuing an ad hoc appointment beyond the period of one year without consultation with the Union Public Service Commission cannot arise under clause (a) and the first part of clause (4) of the proviso to section 96. If these provisions are construed to mean that the appointing authority can make ad hoc appointments each time for one year and go on extending the same appointments each time for one year, then the principal part of section 96 would be circumvented. The proviso was not intended to defeat the object of consultation with the Union Public Service Commission intended by the principal part of section 96. The action of the Delhi Electric Supply Committee in extending the ad hoc appointments of Respondents 6 to 8, particularly those of Sarvashri Sangar and Sawhney for such a long period, Therefore, amounted to a fraud on the power conferred on them by the proviso to section 96.

(11) If the period of ad hoc service would be on the same footing as the period of regular service after appointment in consultation with the Union Public Service Commission, the distinction made between the two by section 96 would become irrelevant. The Legislature would not then have made the distinction at all.

(12) The Corporation authorities were well aware that the period of ad hoc service was not to be treated on the same footing as the period of regular service and was not to be taken into account in determining seniority. This is why in the order dated 21-12-1960 at Annexure F at page 64 of the paper-book, the order appointing Respondents 6 to 8 as acting Executive Engineers expressly states that they were being appointed "till such time the nominees of U.P.S.C. are available or for one year, whichever is earlier". Even when these ad hoc appointments of Respondents 6 to 8 were extended beyond the period of one year, it was made clear in Annexure R-II at page 237 of the paper-book that they were to last only "till such time the nominees of the Union Public Service Commission are made available or one year whichever is earlier". That the Corporation has consistently acted on this principle is shown by the following documents : In Annexure J dated 10-6-1964 at page 81 (at page 84) laying down the general principles for determining seniority it is observed as follows:

"AD-HOC appointments . 10. Persons appointed on ad-hoc basis to a grade are to be replaced by persons approved for regular appointment by direct recruitment or promotion as the case may be. Until they are replaced such persons will be shown in the order of their ad-hoc appointments and below all persons regularly appointed to the grade. The seniority lists should clearly show that such persons are not eligible for promotion or confirmation."

(13) At page 87 of Annexure K (page 86) dated 6-4-1966, again dealing with the general principles of determining seniority, the following is laid down :-

"3.How the seniority of staff appointed provisionally without selection or promoted to higher grades on ad- hoc basis should be fixed ? It has been decided that seniority of staff appointed provisionally without selection or promotion to higher grades on ad-hoc basis should be fixed from the date of regularisation."

(14) In Annexure L dated 24-10-1966 at page 89 also dealing with general principles of determining seniority, the following clarification is made:

"THE Office order dated 6-4-1966 will not have retrospective effect except that the decision relating to ad hoc appointments given at Sr. No. 3 thereof for which no provisions existed in the existing regulations, will apply to all appointments made on ad hoc basis before or after 6-4-1966. The past cases are Therefore, not to " be reopened except those were in consistent with the principles of seniority adopted in similar other cases be- before 6-4-1966".

(15) This consistent view of the Corporation is repeated in the latest circular dated 20-1-1969 at Annexure V at page 125 in the following words:

"ALL the Assistant Engineers, who have already been appointed on ad hoc basis on these posts should also apply for the same as the regular appointments to the posts are to be made on the basis of selection made by the Union Public service Commission, failing which they will have no claim for their continued ad hoc appointments and will be replaced when nominees of the U.P.S.C. are available".

(16) At page 95 of the paper-book, it was admitted in the Agenda of the meeting on 22-1-1969 of the Delhi Electric Supply Committee (Annexure in at page 94) that the Union Public Service Commission did not agree that the Departmental Promotion Committee (which is usually presided over by a Member of the Commission) should be convened as this could be done only after the seniority list of Executive Engineers is finalised. There has thus been never any doubt either in section 96 or in the understanding of the Delhi Electric Supply Committee that the period of ad hoc service of an Executive Engineer is not to be accounted when his seniority is to be determined.

(17) The promotions of Respondents 6 to 8 were also made in the same manner as above and were to last only "for a period not exceeding one year" or "till such time the nominees of the Union Public Service Commission are available whichever is earlier" as would be found in the order of appointment at page 77 and in the note for consideration of the seniority of Sarvashri Sangar and Sawhney at page 108. At page Iii, the General Manager (E) states that "the consistent stand of the Administration has been earlier and even now that the period of service as in this case rendered on ad hoc basis cannot be reckoned for purposes of determining regular seniority".

(18) If the promotions of Respondents 6 to 8 are made on the understanding that they are liable to be replaced by the nominees of the Union Public Service Commission, it is clear that their appointments were made without prejudice to

the rights of the petitioners and other eligible candidates any of whom could be appointed to these posts in consultation with the Union Public Service Commission. Learned counsel for the respondents, therefore, had to admit that Respondents 6 to 8 could not be said to be the senior-most Executive Engineers who could be promoted to these posts. They, however, took the stand that the discretion of the appointing authority u/s 96 in making the appointments was absolute and was not open to challenge. They also pointed out that the appointing authority had not anywhere stated that Respondents 6 to 8 were being appointed in preference to the petitioners and others because they were the senior-most officers. They contended, therefore, that these appointments were not open to the above challenge. This argument, however, breaks down on scrutiny. It is not true that section 96 gives an absolute power of appointment. On the contrary, by its very terms, the consultation with the Union Public Service Commission is necessary for making any regular appointment. The power to make a short term appointment without such consultation does not in any way affect the rule that for every regular appointment, such consultation is necessary. The Delhi Electric Supply Committee cannot, therefore, avoid the necessity of such consultation. Unfortunately, they have put themselves in the wrong by making an illegitimate use of the proviso to section 96 in appointing Survashri Sangar and Sawhney as Executive Engineers without consultation with the Union Public Service Commission and extending their appointments for about five years. They are in danger of landing themselves in the same difficulty by appointing Respondents 6 to 8 to the higher posts of Superintending Engineer, Controller of Stores and Chief Commercial Officer without consultation with the Union Public Service Commission. For, Article 16 of the Constitution acts as a limitation on the power of the Electric Supply Committee even under the proviso to section 96. Even in making such an ad hoc appointment the Committee is obliged to give equality of opportunity to the other executive Engineers who are similarly situated with Respondents 6 to 8. The petitioners and other Executive Engineers " have got a constitutional right under Article 16(1) to be considered along with the Respondents 6 to 8 by the Delhi Electric Supply Committee before the latter makes even an ad hoc appointment under the proviso to section 96 of the Act of 1957. If such a consideration has not been given to them, then Article 16(1) is contravened and this is sufficient to invalidate the appointments of Respondents 6 to 8.

(19) The appointment of Shri Sawhney to the post of Superintending Engineer was recommended by the General Manager by his note dated 11th December 1968 at Annexure S-2 (page 117 of the paper-book). He recommended that the post of Chief Commercial Officer may be filled up "from amongst the Executive Engineers taking into account the provision of the Recruitment & Promotion Rules as approved by the U.P.S.C. for the post of Superintending Engineer. Shri P. S. Sawhney who is an Executive Engineer and working at present as Commercial Officer in the Commercial branch of Distribution side of the Undertaking and is the next senior officer due for appointment to this post is recommended for

appointment to the post of Chief Commercial Officer. ". This recommendation has contravened Article 16(1) of the Constitution inasmuch as Shri Sawhney alone was considered and recommended for the post. The recommendation suffers from two other flaws. Firstly, it was based on the so-called Recruitment and Promotion Rules, 1963, which are at page 271 of the paper-book. Under sections 2(48) and 98 of the Act of 1957, the Corporation could make regulations but not rules. Even if these rules are to be regarded as regulations, they were not framed u/s 98(1)(c). According to the learned counsel for the respondents, they were framed under the Union Public Service Commission (Consultation by the Delhi Municipal Corporation) Regulations, 1959. This argument has merely to be stated to be rejected. The Regulations of 1959 were made by the Union Public Service Commission u/s 97 of the Act of 1957. They did not confer any power on the Corporation to make any regulations there under. Therefore, the provisional approval given by the Union Public Service Commission to the so called Rules of 1963 was later found by the Union Public Service Commission itself to be wrong. The Union Public Service Commission rightly pointed out that the Corporation could make regulations only u/s 98 of the Act of 1957 and that such regulations had, in addition to the consultation with the Union Public Service Commission u/s 98(2), to be approved by the Central Government and published in the Official Gazette as required by section 480(2) of the Act of 1957. As the so called Rules of 1963 were never approved by the Central Government and never published in the Official Gazette, they were totally void.

(20) The second defect in the recommendation of the General Manager is that Shri Sawhney has been described as the senior- most officer. It is well known that no seniority list of Executive Engineers has been drawn up even till now. The General Manager in regarding Shri Sawhney as a seniormost officer was obviously taking into account the ad hoc period of service of Shri Sawhney from 1960 to 1965. For the reasons stated above, this could not be done. The whole basis of the recommendation was, Therefore, void. The empty formality of putting a provisional seniority list before the Delhi Electric Supply Committee was of no use.

(21) The provisional seniority list was apparently based on the same misconception that the benefit of the ad hoc period of service had to be given to Shri Sawhney. This misconception resulted in the petitioners being regarded as junior to Sawhney. The appointing authority could act only on the material put before it. The only material put before the appointing authority is the note of the General Manager referred to above. Since this note was based on a misconception, it misled the appointing authority into appointing Shri Sawhney, contrary to Article 16(1) of the Constitution. Unless and until the seniority of the Executive Engineers including the petitioners is determined from the dates of the regular appointments made in consultation with the Union Public Service Commission, the appointing authority will not be in a position to consider the claims of each of them to promotion. Till then, equality of opportunity must be said to have been denied to the petitioners within the meaning of Article 16(1) of

the Constitution inasmuch as they were regarded wrongly as junior to Shri Sawhney when in fact they were senior to him inasmuch as all of them were regularly appointed as Executive Engineers prior to 1965 when Shri Sawhney was so appointed.

(22) Had the appointment of Shri Sawhney been made on the ground purely of merit and his being superior in merit to all other Executive Engineers, it could be argued "for the respondents that the appointment was not based on a misconception. But the Respondents would have to show that such a view of the merit of Shri Sawhney was taken by the appointing authority. There is absolutely no evidence to show that this was the reason for Shri Sawhney's appointment. We must, Therefore, rely on the note of the General Manager as giving the only reasons for his appointment. We have seen that these reasons are completely wrong and they did not save the appointment from being vitiated for non-compliance with Article 16(1) of the Constitution.

(23) The appointment of Respondent No. 8 Ramesh Chandra to the post of Superintending Engineer (G) was recommended by the General Manager in his note dated 3-12-1968 at page 78 of the paper-book. At page 79, it is stated that Shri Rainesh Chandra was appointed on ad hoc basis to the post of an Executive Engineer on 27-12-1960. He was regularly appointed thereto on 16-4-1963. By 1968, he had about "eight years service in the grade". This is the ground on which his appointment was recommended. This ground is vitiated by the fact that the service from 27-12-1960 to 16-4-1963 was wrongly taken into account in coming to the conclusion that Shri Ramesh Chandra had about 8 years service in the grade. The conclusion suggests that other Executive Engineers did not have such a long service in the grade. In fact the service of Shri Ramesh Chandra which could be compared with the service of other Executive Engineers should have been counted only from 16-4-1963 onwards. We know that some of the petitioners were appointed regularly as Executive Engineers prior to 16-4-1963 and would, Therefore, be senior to Ramesh Chandra. Here again, the appointing authority acted on a material which was misleading. The so called provisional seniority list of Executive Engineers placed before them apparently showed Shri Ramesh Chandra as having 8 years service in the grade. This was a wrong statement and prejudiced the petitioners who were wrongly regarded as junior to him by the appointing authority. They were thus deprived of the benefit of "equal opportunity" of being considered as required by Article 16(1) of the Constitution. This appointment is also, Therefore, vitiated for the same reason.

(24) The same remarks apply to the appointment of Shri Sangar. In his note at Annexure P at page 107 of the paper-book, the General Manager has compared the cases of Shri Sawhney and Sangar and regarded Shri Sangar as senior to Shri Sawhney mainly because Shri Sangar was confirmed as Station Superintendent earlier than Shri Sawhney was confirmed. Shri Sawhney was denied the benefit of ad hoc service in the post of a commercial Officer in as much as the appointing authority had made it clear that Shri Sawhney would be

sent back if a more suitable candidate was available later. This was basically a temporary and ad hoc arrangement for meeting the emergent requirement. It is in this context that the General Manager refers to the consistent stand of the Administration that the period of ad hoc service cannot be reckoned for purposes of determining regular seniority. No other Executive Engineer was considered at all by the appointing authority. The mere fact that Shri Sangar was senior to Sawhney does not mean that he was senior to others including the petitioners. The petitioners were not, Therefore, considered. Their fundamental right of being considered as required by Article 16(1) of the Constitution was thus violated. The appointment of Shri Sangar is also thus contrary to Article 16(1) and, Therefore, illegal.

(25) Learned counsel for the respondents finding themselves unable to defend the case on merits, took resort to some technical objections. They pointed out to the reliefs sought by the petitioners, namely:--

(1) a writ of mandamus directing Respondents 1, 2, 4 and 5 to frame list of seniority of Class I officers in the cadre of Executive Engineers and to give effect to the same; (2) a writ of quo warranto against Respondents 6, 7 and 8 directing (hem to show cause against their appointments, and (3) a writ or order quashing the appointments of Respondents 6 to 8.

(26) It was argued that a demand by the petitioners for the framing of the seniority list was necessary before the petitioners could file this petition for writ of mandamus. It is well-known that the scope of Article 226 of the Constitution is not restricted by the technicalities attaching to the issue of writ of mandamus in the United Kingdom. It is yet to be decided by the Supreme Court whether the requirement of a demand before seeking a writ of mandamus is a technicality of the English procedure or is an essential principle relating to the jurisdiction to grant mandamus. Assuming that this requirement is not a technicality, the answer of this argument is two-fold. Firstly, the petitioners had actually represented to the Corporation that their claims on the basis of the correct seniority should be considered (vide representation of Petitioner No. 1 Shri R. C. Khanna at pages 366 and 367 and the representation of Petitioner Shri Jogendra Singh at page 369 and 370 of the paper-book). Representations by employees must be considered a demand for justice. This demand was not complied with by the Corporation. Secondly, the appointments, of Respondents 6 to 8 contravened the fundamental right of the petitioners guaranteed by Article 16(1) of the Constitution. A contravention of the fundamental right has to be relieved against without having regard to the question of demand, as was held by Chagla CJ. in *Fram Nusservanji Balsara Vs. State of Bombay and Another*, . The correctness of this holding does not seem to have been challenged in the appeal decided by the Supreme Court in *The State of Bombay and Another Vs. F.N. Balsara*, .

(27) Learned counsel for the respondents argued that the appointments of Respondents 6 to 8 were authorised by section 96 of the Act of 1957 and this was sufficient to show that Respondents 6 to 8 were legally appointed. It is clear

to me that this is not a sufficient answer to a writ for quo warranto. Section 96 did not authorise the Delhi Electric Supply Committee to appoint Respondents 6 to 8 in contravention of Article 16(1) of the Constitution as pointed out above.

(28) Lastly, the learned counsel for the respondents have conveniently forgotten to look at the third relief asked for by the petitioners. It asks for the quashing of the orders of appointment of Respondents 6 to 8. The scope of Article 226 is wide enough to enable this Court to quash such appointments which are contrary to Article 16(1) of the Constitution. This is established law. [See decisions of the Supreme Court in T.C. Basappa Vs. T. Nagappa and Another, and Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, The decisions in The Vice-chancellor, Utkal University and Others Vs. S.K. Ghosh and Others, and Veerappa Pillai Vs. Raman and Raman Ltd. and Others, relied upon by the respondents do not hold anything to the contrary.

(29) When section 96 requires the appointing authority to consult the Union Public Service Commission before making an appointment and the proviso thereto enabled only a short term appointment pending consultation with the Union Public Service Commission the abuse of the proviso by extending the short term appointments of Respondents 6 to 8 for three and five years was not only opposed to the said statute but also to Article 16(1) of the Constitution. It is the duty of this Court to set aside appointments based on such abuse of statutory power and contravention of Article 16(1) of the Constitution. This principle was recognised by the Supreme Court in K.N. Guruswamy Vs. The State of Mysore and Others,

(30) The Seniority Regulations, 1968. have at last been framed by the Corporation u/s 96 of the Act of 1957 in August 1968. Regulation 8 clearly adheres to the principle that until persons appointed on ad hoc basis to a grade are replaced by persons approved for regular appointment by direct recruitment, promotion or transfer, they will be shown in the order of their ad hoc appointments and below all persons regularly appointed to the grade. Proviso to Regulation 10 states that the cases pending at the commencement of these regulations shall be disposed of in accordance with the provisions of Regulations of 1951 as if the said regulations had continued in force and the Regulations of 1968 had not come into force. The relevant portion of the Regulations of 1951 dealing with seniority is in paragraphs 2 and 3 at pages 13 and 14 of Annexure D. According to sub paragraph 2 of paragraph 2, "for selection posts and other common cadre posts, seniority list according to the date of appointment in the present scale will be drawn and claims considered accordingly". The question is whether the "date of appointment" herein refers to the date of regular appointment only or to the date of ad hoc appointment. The only correct answer can be that it refers to the date of regular appointment. For, to determine seniority on the basis of the date of ad hoc appointment would be contrary to section 96 of the Act of 1957. Regulations framed u/s 98 of the Act of 1957 do not empower the Corporation to repeal section 96 of the Act of 1957. The

construction of sub-paragraph 2 of paragraph 2 of Regulations of 1951 at page 13 of Annexure D should Therefore be such as to accord with the provisions of the Act of 1957. Secondly, paragraph 4 at page 14 of Annexure D separately deals with officiating arrangements which included ad hoc appointments. This shows that sub-paragraph 2 of paragraph 2 at page 13 of Annexure D does not deal with ad hoc appointments but only with regular appointments. The Delhi Electric Supply Committee would, Therefore, have to determine seniority after excluding the period of ad hoc service even in pending cases. It is reassuring to note that the General Manager (E) has in his note dated 23-9-1969 already pointed out that the Union Public Service Commission has consistently advised the Corporation to exclude the period of ad hoc service in computing seniority. The Corporation was not well-advised in not following this advise without delay. The Union Public Service Commission was not at all impressed by the plea advanced on behalf of the respondents that some of them did not apply for regular appointment after they were appointed ad hoc inasmuch as they thought that their appointments would be regularised from the date of the ad hoc appointment. The Union Public Service Commission has pointed out in this regard that two of the respondents Survashri P. D. Sharma and B. B. Das actually applied for such posts which were advertised by the Union Public Service Commission but were not selected by the Commission whereas the petitioners Sarvashri R. C. Khanna and Joginder Singh were selected and in the opinion of the Union Public Service Commission, it would not be in order to give seniority to Respondents P. D. Sharma and B. B. Das above the petitioners R. C. Khanna and Joginder Singh. "The same reasoning applies to Respondents 6 to 8. If they did not apply for regular appointment for the posts to which some of the petitioners were appointed in consultation with the Union Public Service Commission, Respondents 6 to 8 were going against their own interests. They had absolutely no reason to believe that their seniority would count from the date of their ad hoc appointment if and when they would be regularly appointed in future by the Union Public Service Commission. The only reason why they did not apply for regular appointment in competition with the petitioners must have been their fear of being found inferior to the petitioners by the Commission. If to avoid that risk they had abstained from competing with the petitioners, they cannot now turn round and say that they should be regarded as being senior to the petitioners because of their appointment ad hoc prior to the petitioners. Their ad hoc appointments could not prejudice the petitioners inasmuch as the petitioners had no opportunity to compete with the respondents 6 to 8 when they were appointed ad hoc. The stand taken by the Union Public Service Commission is, Therefore, in accordance with justice and law and it should have been accepted immediately by the authorities concerned. Acceptance of the advice of the Union Public Service Commission would have avoided injustice to the petitioners and the feeling of uncertainty regarding seniority created in the minds of the Executive Engineers working in the Delhi Electric Supply Undertaking. Now that the .Seniority Regulations of 1968 have at last been framed, the seniority list of the Executive Engineers should be immediately drawn up on the lines of

Annexure I to the letter of the General Manager dated 23-9-1969 as soon as possible and future promotions should be made thereafter.

(31) The application made by the petitioners (C.M. 671-W of 1969 at page 310 of the paper-book) for inspection of documents in the custody of Respondents 1, 2 and 5 was opposed by Respondents 1, 2 and 5 on the ground that they contain communications made in official confidence and could not be disclosed without the express permission of the Union Public Service Commission in view of section 124 of the Indian Evidence Act. The requirement of section 96 that the Union Public Service Commission must be consulted in making appointments made it necessary for me to know if the Union Public Service Commission was consulted in making the regular appointments of Respondents 6 to 8 and if so whether they had agreed that the ad hoc period of service could be taken into account in determining the seniority of Respondents 6 to 8. This matter being itself in issue, the Union Public Service Commission would have been requested to permit the disclosure of the correspondence even if it is assumed that the privilege u/s 124 of the Evidence Act was rightly claimed by Respondents 1, 2 and 5. The petitioners, however, produced a true copy of the letter dated 23-9-1969 by the General Manager with its annexures. In this document, the advice of the Union Public Service Commission was referred to along with the desire of the General Manager to accept the same. I, Therefore, told the learned counsel for the respondents that if they would not object to this document being filed at this stage, the petitioners would not press their application for inspection of documents. Learned counsel for the respondents agreed that the letter dated 23-9-1969 appeared to be a true copy duly certified by the Administrative Officer of the Corporation and that it may be taken on record. In view of this, the petitioners did not press the application for inspection of documents. It is hereby dismissed.

(32) In the result, the writ petition succeeds and the appointments of Survashri 1. C. Sangar, P. S. Sawhney and Ramesh Chandra, Respondents 6 to 8, to the posts of Controller of Stores, Chief Commercial Officer and Superintending Engineer (G) are quashed as being contrary to Article 16(1) of the Constitution. The costs of the petitioners shall be paid by Respondents 6 to 8 and Respondent 2 inasmuch as Respondents 6 to 8 have secured undue advantage of promotion which was unconstitutional and which has directly prejudiced the interest of the petitioners. The Corporation authorities were aware of the correct rule that the ad hoc period of service of Respondents 6 to 8 would not be counted in determining their seniority but seemed to have been persuaded to act contrary to the correct principle only in an attempt to support the illegality benefiting Respondents 6 to 8. The respondents shall bear their own costs.