State of Rajasthan and anr. Vs. Vinod Kumar and ors.

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Court : Rajasthan

Decided On : Jul-04-2000

Reported in : 2000(3)WLC340; 2000(3)WLN606

Judge : Rajesh Balia and; S.K. Garg, JJ.

Acts : Rajasthan Administrative Service Rules, 1954 - Rules 6, 7, 9 and 154; Central Engineering Service Class I Recruitment Rules, 1949 - Rules 4(2) and 154; Central Engineering Service Class I Recruitment Rules(Amendment), 1954 - Rules 16 and 17; Delhi Higher Judicial Service Rules, 1970; United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936; Uttar Pradesh Higher Judicial Service Rules, 1975 - Rules 22 and 231; Rajasthan Higher Judicial Service Rules, 1969 - Rules 6 and 8; Rajasthan State and Subordinate Services (Direct Recruitment by Combined Competitive Examinations) Rules, 1962 - Rule 4; Constitution of India - Articles 16 and 309; All India Services Act, 1951; Forest Service (Recruitment) Rules, 1966 - Rule 3; IFS (Probation) Rules, 1

Appeal No. : D.B. Civil Special Appeal No. 1278 & 1303 of 1999

Appellant : State of Rajasthan and anr.

Respondent : Vinod Kumar and ors.

Advocate for Def. : M.S. Singhvi, Adv.

Advocate for Pet/Ap. : P.C. Sharma, Adv.

Judgement :
ORDER

Balia, J.

1. These two special appeals are against common order passed in Vinod Pareek & Ors. vs. State of Rajasthan (S.B. Civil Writ Petition No. 2861/98) andRamchandra Kothari vs. State of Rajasthan & Ors. (S.B. Civil Writ Petition No. 4537/98) on 18th August, 1999.

(2). The facts giving rise to these appeals arc that the petitioners in these two writ petitions were members of the Rajasthan Tehsildar Service. The recruitment to the Rajasthan Administrative Service is governed by the Rajasthan Administrative Service Rules, 1954. Under Rule 7, two sources of recruitment have been provided namely direct recruitment through combined competitive examination and by promotion of Tehsildars. The ratio between two sources from which recruitment is to be made to the service have been varied from time to time. Vide notification dated 21.8.97, the rules were amended and the ratio through direct recruitment and promotion was fixed as 66.7% and 33.3% respectively in place of 75% and 25%. The said amendment in the rules had been made effective with effect from 1.4.97. According to the petitioners, the cadre strength of RAS is about 752 and the same is likely to increase in future. The grievance of the petitioners is that with effect from 1.4.97 1/3 of the cadre strength accounts for 257 posts which should be filled up by promotion from the members of RTS whereas the respondents have filled up only 195 posts by promotion and therefore mandamus was sought against the respondents, the present appellants, to fill in the balance quota through promotion out of the vacancies lying in the junior scale of RAS. According to respondents, the cadre strength is fixed by notification dated 7.12.95 is 630. This includes not only permanent posts of deputation reserved and ex- cadre posts but also temporarily encadred posts in the RAS and 25% of the total duly posts i.e. 113 and training reserved as 10% of the direct recruits i.e. 42.5% of the leave reserved of the direct recruits i.e. 21 and this has been done by taking liberal view of computing the cadre strength by including such posts in the cadre. Thus, they have determined total 210 posts to be filled by promotion as on 1.4.97. 159

persons of promotion quota were working and to fill up the remaining promotional posts a departmental promotion committee was held on 29.11.97 and some of the petitioners did not fall within the zone of consideration as per rules. Apparently, the present appellants have not included all the temporary posts created upto 1.4.97 in the cadre strength in computing the cadre strength and by excluding such posts they have also determined the quota at 25% as it was existing prior to issuance of Notification dated 21.8.97 amending the rules retrospectively with effect from 1.4.97.

(3). The principal question contended before the learned Single Judge and also before us by the appellants is that temporary vacancies created by the Governor to be filled by the officers of the Rajasthan Administrative Service cannot be counted in the cadre strength for the promotions and operating promotion quotas. The petitioners have been urging to the contrary. The learned Single Judge found that the cadre strength includes all types of posts including temporary posts and it is not open for the State to urge that persons belonging to the cadre of the petitioners are entitled to be promoted by the notification on 1/3rd of the cadre strength as on 1.4.97 as per the amendment Rule. On these findings, the respondents were directed to determine the cadre strength on the 1st of April, 1997 and on 1st April of each subsequent year and to consider the persons from RTS for 33% of the cadre strength so determined by including temporary vacancies of a long term duration, leave reserve, trainee reserve or any such kind of vacancies. For carrying out this exercise four months time was allowed and to hold Review DPC to fill up the vacancies if any strictly in accordance with law.

(4). Aggrieved with the aforesaid judgment, the State of Rajasthan has preferred these appeals. It has been urged primarily relying on Rule 6 of the Rajasthan Administrative Service Rules 1954 that cadre strength includes only the permanent posts or the substantive posts and such strength is to be determined by the Govt. from time to time. Such determination having been made by Notification dated 6.12.95 fixing the cadre strength at 630 which has also been included in the schedule, the cadre strength must be taken to be 630 only until the same is altered or varied by another notification.

(5). On the other hand. Mr. M.S. Singhvi, learned counsel for the petitioner-respondents, urged that the cadre strength is governed by the Rules of 154 and there is nothing in the Rules which exclude the temporary posts created in exercise of powers under the Rules to be excluded from the computation of cadre strength for the purpose of considering the promotion to such posts. He too places reliance on Rule 6, 7 and 9 of the Rules of 1954. Learned counsel placed reliance on the decisions of Supreme Court in O.P. Garg vs. State of U.P. (1) and Ram Kishore Gupta vs. State of Uttar Pradesh & Ors. (2) to urge that for the purpose of computing vacancies for operating quota rule to be allotted to each source of recruitment as per rules all types of vacancies as are available on 1st April of each financial year has to be taken into consideration, it makes little difference whether the vacancy to be filled in the ensuing year is permanent, temporary or any other kind envisaged under the Rules.

(6). What is the strength of Service in a given case depends on the rules governing the service and no straight jacket answer can be given i.e. whether it includes only permanent posts; whether it includes only notified posts or whether it includes permanent as well as temporary posts as will be seen from some of the cases which we intend to refer.

(7). In A.K. Subraman vs. Union of India (3), the question arose under the Central Engineering Service Class I Recruitment Rules, 1954. Rules of 154 which are similar to those of 1949 Recruitment Rules, provided that officers in the grade of Assistant Executive Engineer (Class I) and certain Assistant Engineers (Class II) are eligible for promotion to the grade of Executive Engineer (Class I), The Rules further provided that vacancies in the grade of Executive Engineer can only be filled by promotion from the aforesaid two grades in the ratio of 75% and 25%. The aforesaid quota was retrospectively altered with effect from September 7, 1955 to 66-2/3% and 33-1/3% respectively. The question was for operating aforesaid quota of promotion, what should be considered the strength of the grade of Executive Engineer. Whether, it will include temporary posts from time to time or not? A situation very much similar to one arising in the present case was before the Court. The Court answered:

'Now the question which arises for consideration is what is the meaning of the words 'vacancies in the grade of Executive Engineer' as used in the aforesaid paragraph of Rule 4(2). When does a vacancy in the grade of Executive Engineer arise? To answer this question it is necessary to ascertain what are the posts which the grade of Executive Engineer consists of, for the vacancies can only be in the posts in the grade' of Executive Engineer. The word 'grade' has various shades of meaning in the service jurisprudence. It is sometimes used to denote a pay scale and sometimes a cadre. Here it is obviously used in the sense of cadre. A cadre may consists only of permanent posts or sometimes, as is quite common these days, also of temporary posts. .... Whenever therefore, a vacancy arises in a permanent post or in a temporary post it would be a vacancy in the grade of Executive Engineer and the quota rule for promotion would apply.'

Thus, temporary posts were treated to be posts of cadre strength to which quota rule applied.

(8). In. O.P. Singla vs. Union of India (4), the Court was considering the question arising under Delhi Higher Judicial Service Rules, 1970. The question arose in the context of a petition seeking enforcement of quota rule vis a vis direct recruitment for the promotees in the Delhi Higher Judicial Service Rules, On the question as to what should be the considered cadre post for the purpose of controversy that was before the Court, the court referred to the definition given to the cadre post under Rule 2(b) of the said Rules which provided that 'Cadre Post' means any post specified in theSchedule and includes a temporary post carrying the same designation as that of any of the posts specified in the Schedule. Commenting on the second part of the definition, which included a temporary post carrying the same designation as that of any of any cadre post, the Court said that that part of the definition says that Cadre Post includes a temporary post carrying the same designation as that of any of the posts specified in the Schedule. This provision is consequential to and in consonance with Rule 16. Since it is permissible under the rule to create temporary posts in the Service, such posts are also regarded as Cadre Posts. It would have been anomalous to treat a post in the Service as an ex-cadre post merely for the reason that the post is temporary. Normally, an ex-cadre post means a post outside the cadre of posts comprised in a Service.

Therefore, all posts in the Service, whether permanent or temporary, are generally regarded as Cadre Posts. On this count there was no difference of opinion between the majority view and the minority view. The difference existed whether quota rule applied to ex-cadre temporary posts, when the rules envisaged direct recruitments only to substantive posts.

(9). In G.C. Gupta vs. N.K. Pandey (5), the question arose under the United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936. The issue related to the determination of seniority concerning the persons who were appointed as Assistant Engineers against temporary posts. Such person, the petitioner, had demanded to assign seniority on the basis of his initial appointment to the Service as temporary Assistant Engineer claiming that he became member of Service with effect from that date. The claim of the petitioner was contested on the ground that he does not become member of Service because the temporary post cannot be considered to be a cadre post and a person appointed against it cannot be considered to be a member of the Service, a member of Service can only be one who has been appointed substantively against substantive post. The contention is like before us that only substantive permanent posts are included in the cadre strength under Rule 6. The Court rejected the plea by holding:

'..... The argument that their appointment being made against temporary posts and not against permanent posts and not on probation as well as they being not confirmed and their confirmation being not notified in the United Province's Gazette before 1956, they are not entitled to be treated as members of the Service being appointed in the substantive capacity, cannot be sustained under any circumstances. Rule 4 of the Service Rules clearly states that the cadre of Assistant Engineers will comprise of both permanent and temporary posts and as such the argument that unless and until the respondent are appointed on probation against permanent posts and unless they are confirmed they cannot be treated as members of the Service is wholly untenable. One can be a member of Service if he is appointed in a substantive capacity as distinguished from a fortuitous appointment or an appointment for a fixed tenure or on purely temporary basis against a temporary post of Assistant Engineer in the cadre.'

Thus, the Court held that the temporary post too was a post of the cadre and a person regularly appointed to such post also becomes member of the Service. It was however made clear that if to a temporary post, person is not appointed in regular manner, or the appointment is fortuitous, adhoc or to fill stop gap arrangement, such appointment cannot be treated as appointment to cadre.

(10). In O.P. Garg vs. State of U.P. (supra) the question again arose under the U.P. Higher Judicial Service Rules, 1975. The Court on construction of Rule 4(4) which provided creation of temporary posts and Rules 231 provided, for making appointment on the substantive post, the court held that all temporary posts created under Rule 4(4) of the 1975 Rules are additions to the permanent strength of the cadre and as such form part of the cadre. Appointments under Rule 22 of the 1975 Rules can be made toa permanent post as well as to a temporary post. So long as the temporary post has an independent existence and is a part of the cadre strength the appointment against the said post has to be treated substantive appointment.

(11). The same principle was reiterated by the Apex Court in Ram Kishore Gupta vs. State of Uttar Pradesh & Ors. (supra) which also arose under the U.P. Higher Judicial Service Rules, 1975. The Court reiterated the view expressed by it in O.P. Garg's case (supra) that the temporary posts created under Rule 4 are addition to the permanent strength of the Service and vacancies whether of temporary or permanent posts will be taken not in determining the quota available for different sources of recruitment.

(12). A similar view has been expressed by this Court in Kumari Veena Verma vs. State (6). The case arose in connection with the operation of quota rule for recruitment to the Rajasthan Higher Judicial Service from different sources namely direct recruitment and the promotional recruitments. Rule 6 of the Rajasthan Higher Judicial Service Rules, 1969 which was considered by the learned Single Judge, read as under:

'Strength of the Service.- (1) Strength of the Service shall, until orders varying the same have been passed under sub- rule (2), be as specified in schedule I.

(2) The strength of the Service may be varied by the Governor, from time to time, in consultation with the Court.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the Governor may, in consultation with the Court, hold any appointment to the Service in abeyance for such time as he deems fit, without thereby entitling any person to compensation.'

(13). On the aforesaid strength, the petitioners who were the applicants for the direct recruitments, contended that vacancies have not been properly determined as per the strength of Service to be made available for direct recruitments. Considering the controversy whether the strength of Service includes only such number of posts as has been specified in the schedule, until the schedule is modified, the Court by conjoint reading of clause (1) and (2) ruled against the necessity of amending the schedule every time for the purpose of determining the strength of Service and held the issuance of the orders by the Governor for creating temporary or permanent posts in addition to the existing posts resulting in automatic variance of the strength of Service. The learned Judge said:

'A consideration of Rule 6 shows that the number of posts shown in the Schedule I was intended to be varied. The strength of Service was liable to be varied by the executive order of the Governor from time to time with consultation of Court. Such variance was to be frequent also. A rapid growth in the number of courts required the growth of the cadre also. The frequency of increase in number of courts, increased the number of officers in the cadre. Without increase in the cadre, such officers cannot be appointed substantively. If the cadre strength cannot be changed without change in Schedule-I, then it leads to an absurdity, by an order passed under Rule (2) strength of cadre can be changed. If corresponding ministerial act of changing the Schedule is not done, then can it be said that the cadre of the strength has not changed? I am afraid that this is not the purport of Rule 6(1). This rule clearly says that until orders varying the same have been passed under sub-rule (2), the strength of Service shall be as specified in the Schedule. Once the order under Rule 6(2) has been passed, the number given in Schedule I looses its significance and the strength of the cadre will be what the order passed under Rule 6(2) would say. Thus, the cadre strength has to be seen

in thelight of the orders passed under Rule 6(2). Numbers given in Schedule cannot be a guiding factor for an order under Rule 6(2).'

(14). Though, the decision on merit has since been reversed by the Division Bench in Special Appeal No. 410/98 decided on 30th April, 1999, the conclusion of the learned Single Judge on the aforesaid issue has been affirmed by the Division Bench also. The Division Bench speaking through Kokje Ag. CJ. said:

'..... The appellant's interpretation which has been accepted by thelearned Single Judge appears to be correct. Amendment of the Schedule is not necessary and by creation of posts the strength of Service has to be taken to be varied from time to time. The respondents, however, submitted that the proper and correct construction to be put on Rule 6 would be that the Strength of Schedule I and mare orders creating posts in the RHJS exceeding the number of posts mentioned in the Schedule cannot be taken to be orders passed under sub-rule (2) of Rule 6 varying the strength of the Service ..... Having heard the learned counsel, we are ofthe opinion that on harmonious construction, creation of posts beyond the cadre strength mentioned in Schedule I have to be taken to be increase in the strength of the Service under sub-rule (2) of Rule 6. If a narrow interpretation is accepted, the rule would completely defeat the provisions of Rule 8 and Rule 9 and would bring about a situation whereby a mere non-amendment of the Schedule the provisions for direct recruitment to the RHJS can be effectively done away with.'

(15). From the aforesaid decisions it is well settled that ordinarily unless the Rules otherwise provide, the cadre strength of the Service for the purpose of operating quota rule and determining the vacancies available to be filled by different sources, the permanent as well as temporary posts or any other posts created in addition to the permanent posts under the service rules, constitute the cadre strength of the Service against which appointment by regular mode can be made and ordinarily the quota rule operates against the total strength of the cadre including temporary as well as permanent posts. Illustration of such rule can be found in O.P. Singla's case (supra) wherein, notwithstanding cadre strength consisting of permanent and temporary posts, appointment by direct recruitment was open only substantively against permanent posts and temporary posts as a

consequence necessarily remain exclusive preserve for recruitment by promotions.

(16). In this connection, we may now notice the relevant rules on which great emphasis has been laid by the learned counsel for the appellants.

Rule 6. 'Strength:- The strength of posts in each grade of the Service shall be such as may be determined by the Government from time to time.

Provided that -

(i) the Government may create any post, permanent or temporaryfrom time to time, as may be found necessary and may abolish anypost in the like manner without thereby entitling any person to anycompensation;

(ii) the Government may leave unfilled or hold in abeyance or allow to lapse any such posts, permanent or temporary, from time to time, without thereby entitling any person to any compensation.'

(17). At the outset we may notice that Rule 6 in the present form has been substituted vide Notification No. F.1(15)DOP/A-Il/79 dated 30th June, 1981, prior to the amendment the rule in its original form reads as under:-

6. Strength of Service.- The strength of the Service and the nature of posts therein shall be as specified in Schedule-I:

Provided-

(i) that Government may revise the Schedule every five years 'or earlier, if necessary'; and

(ii) that Government may leave unfilled or hold in abeyance any vacant post-without thereby entitling any person to compensation or may create additional temporary posts in the Service, from time to time,as may be found necessary.

(18). A marked difference in the rule that existed prior to amendment and as it exists now after the amendment, can be noticed. Prior to the amendment, the rule

required that the strength of Service and the nature of posts therein to be a specified in the Schedule I and for amendment of the strength of Service was provided under sub-rule (2) which required the Govt. to revise the Schedule every five years or earlier if necessary. Thus, under the rule as it existed prior to 1981, the cadre strength of the Service was expressed through the strength shown in the Schedule-I appended to the rules and for any variation in the strength of Service the Schedule itself was required to be amended and since Schedule itself was a part of the Rules, it could only be done by notification. This, in our opinion, answers the first contention raised by the learned counsel for the appellants that the cadre strength is as notified in the Schedule I can only be amended by issuing a notification for amending the Schedule or by issuing such notification notifying the strength of Service for which reliance was placed on the such notification referred to above. The argument obviously flows from the repealed Rule 6 giving definition of the Strength of Service. The Schedule now no more a part of the Rules as determining the strength of the Service. Therefore, that part of the submission of the learned counsel for the appellants that in absence of notification specifying the strength of Service and consequently amending the Schedule, no change in the earlier notified strength of the posts in the cadre can take place merely by creation of posts temporarily or permanent, cannot be accepted on the plain reading of Rule 6. The substantive part of Rule 6 reads 'The strength of posts in each grade of the Service shall he such as may be determined by the Government from time to time' and not as 'notified', as is sought to be contended by the learned counsel. The substantive rule does not classify the posts of the cadre in two categories of the permanent or temporary. On the other hand, proviso envisages creation and abolition of cadre posts of both categories by same process. It cannot be assumed that even if some of the parts, already notified as cadre strength are abolished, can continue to form part of cadre strength unless earlier notification is also independently amended. Result can be different if by the same process posts are created under the proviso to Rule 6.

(19). Moreover, the rule on its plain construction includes all posts created by the Govt. whether permanent or temporary from time to time in cadre strength. In the first instance, the rule provides that the strength as may be determined by the Govt. from time to time. This general provision about specifying cadre strength is

subjected to two provisos. It is cardinal rule of interpretation that a proviso to a particular provision ordinarily only embraces the field which is covered by the main provision to which it has been enacted as proviso and to no other. The main rule enacts about the cadre strength of the posts in Service to he as determined by the Govt. from time to time. Proviso to this provision ought ordinarily be read in the context of determination of cadre strength from time to time. The proviso also envisages that the Govt. may create any post temporary or permanent from time to time as may be found necessary and may abolish any post in the like manner without entitling any person any compensation. The fountain head for determining the strength of posts as well as for creation and abolition of posts remain the State Government. The strength of the post is also tobe determined by the Govt. from time to time so also the same rule empowers the Govt. to create posts temporary and permanent from time to time. Thus, the provisions read in totality must mean that cadre strength (which means strength of posts in the service) shall he as determined from time to time; and such determination depends on creation of or abolition of posts by the State Govt. from time to time. As the rule itself envisages creation of posts of temporary as well as permanent nature, posts in the cadre include both permanent as well as temporary if the same are created under Rule 6 of the Rules. Once the posts are created under the service rules, the recruitment to such posts is also governed by the same rules which is subject of Rule 7 which reads as under:

'7. Source of Recruitment - (1) Recruitment to the Service shall be made:

(a) by direct recruitment through combined competitive examination;

(b) by promotion of Tehsildars.

(2) Recruitment to the Service by aforesaid methods shall be made in such a manner that the persons appointed to the Service by each method do not any time exceed the following percentage of the total cadre strength as sanctioned from time to time:

(1) by direct recruitment 75%

(2) by promotion 25%

Provided -

(i) the Government in special circumstances, consider recruitingpersons by special selection not exceeding 5% of the total promotion quota posts in ordinary scale of the Service in any particular year.

(ii) for direct recruitment by combined competitive examination, the vacancies shall be reserved for candidates who are non-gazetted employees in accordance with sub-rule (2) of Rule 4 of the Rajasthan State and Subordinate Services (Direct Recruitment by Combined Competitive Examinations) Rules, 1962.

(3) The expression 'No person shall be appointed to the Service by Selection unless he be less than 45 years of age on the first day of January next following the year in which the selection is made if he is already officiating on a post encadred in the Service, he was less than 45 years of age on the date from which he has been continuously so officiating;

Provided that in the case of a Scheduled Caste or of a Scheduled Tribe the crucial age shall be 48 years;

Provided further that till the 1st January, 1958 this sub- rule shall not be in force occurring below proviso (iv) to Rule 11 shall be deleted.'

(20). Vide Notification dated 21.8.97 sub-rule (2) has been amended by inserting the respective proportion of direct recruitment as 66.7% and by promotion 33.3%.

(21). We also notice that in the Notification dated 7.12.95 the Govt. too has included posts of all sources; permanent, temporary, deputation, leave reserve while notifying the cadre strength of the Rajasthan Administrative Service. That obviously must determinate vacancy position for the purpose of recruitment process commencing with Financial Year on 1.4.95. Therefore, there is no reason to exclude the temporary posts when the question of determining the vacancies on first of April at the commencement of each subsequent financial year arise for consideration. The availability of posts whether temporary or permanent as on that

date to be filled up under the Rules has to be taken into consideration. The vacancy determination often takesplace later on. There does not appear to be serious dispute on considering the temporary posts while determining the vacancies. The bone of contention was whether such temporary posts can be made available for operating quota rule. We see no reason in the Rules to exclude such consideration of temporary vacancies to operate promotion quota.

(22). The prescribed manner of determining the vacancies occurring in each year in different Services through RPSC, give a clue and lends support to our conclusion.

(23). While carrying out the exercise of promotion in various Services under the State Government by different rules framed under Article 309 of the Constitution of India, the Govt. has laid down a uniform procedure in Part I of the said procedure. The primary requirements for DPC have been detailed and under clause I of it subject to the provisions of the rules, the appointing authority is required to determine on the 1st April of every year the actual number of vacancies appearing or likely to occur during the financial year and sub-clause (c) of clause I further provides that where a post is to be filled by more than one method as prescribed in the rules or Schedule, the appointment on vacancy determined under clause (1) by each method shall be done maintaining the prescribed proportion for the overall number of posts already filled in. By Circular No. F.7(2)/DOP/A-II/81/Part V dated 18.2.84 (10/84) vide clarification No.2, the procedure for primary requirement of determining vacancies was detailed as under:

'(2) Vacancies occurring in a year to be determined:

(a) clear vacancies of the department, as it exist on the 1st April of the year, irrespective of the ad-hoc or urgent temporary appointments made against such vacancies;

(b) newly created posts, if any, included in the budget or may have been agreed to by the Finance Department upto the date the vacancies are determined;

(c) vacancies occurring on account of retirement during the year in question;

(d) vacancies which shall occur consequent to promotion to higher posts against clear vacancies as existed on 1st April of the year;

(e) deputation posts exceeding one year (only those deputation posts would be taken in which persons have already proceeded on deputation on the date of determination of vacancies; and

(f) long leave vacancies exceeding a period of one year.'

(24). A reading of the aforesaid requirement leaves no room of doubt that while determining vacancies occurring in any year, it has not only to take into account the clear vacancies of the concerned department as it existed on the 1st April of the year irrespective of the adhoc or urgent temporary appointments made against such vacancy. Meaning thereby that appointment made against such posts on fortuitous circumstances and without making regular selection for the post whether permanent or temporary is to be ignored and such post has to be treated as a vacant post for the purpose of determining vacancies to take recruitment including promotional exercise under the relevant rules governing the posts. It also includes newly created posts if the same have been included in the budget or might have been agreed to by the Finance Department upto the date the vacancies are determined. Clause (b) of the aforesaid guidelines leave no room of doubt read with Rule 6(1) of the Rules of 1954 that if the posts have been created by the Govt. under the Rules of 1954, whether permanent or temporary, and such posts have been included in the Budget or even if it has not been included in the budget but has been agreed by the Finance Department to provide for such posts upto the date of determination of the vacancies, same are to be taken into account for determining the vacancies occurring in that year. It makes no distinctionbetween the posts of temporary or permanent nature. The only criteria is that the posts must exist independently if not already existing, must have been provided for in the budget or agreed to by the Finance Department and once in the determination of the vacancies, the temporary vacancies of Service for which provision in the budget has been made or Finance Department has agreed, the exercise of promotion to make this in accordance with the rules. If the rules provide for operation of quota without any reservation as to the nature of the post, such quota

must be applied to the number of vacancies keeping in view the cadre strength against which the proportionate source of recruitment has been provided. It needs hardly to be emphasized that all vacancies have to be filled ordinarily by following the procedure prescribed for regular recruitment whether the post is permanent or temporary and the law frowns upon resort to adhoc appointment as a matter of course, reference, in this connection may be made to State of Haryana vs. Piara Singh (7) wherein the Court while considering the claim to regularisation raised by ad hoc/temporary appointments said:

'The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an adhoc or temporary appointment to be made. In such a situation, effort should always be to replace such an adhoc/temporary employee by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an adhoc/temporary employee.

Secondly, an adhoc or temporary employee should not be replaced by another adhoc or temporary employee; he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

Thirdly, even where an adhoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words, there must be a notice published in the appropriate 869 manner calling for applications and all those who apply in response thereto should be considered fairly.

An unqualified person ought to be appointed only when qualified persons are not available through the above processes.

If for any reason, an adhoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State.

The proper course would be that each States prepares a scheme, if one is not already in vogue, for regularisation of such employees consistent with its reservation policy and if a scheme is already framed, the same may be made consistent with our observations herein so as to reduce avoidable litigation in this behalf. If and when such person is regularized he should be placed immediately belowthe last regularly appointed employee in that category, class or service, as the case may be.

So far as the work-charged employees and casual labour are concerned, the effort must be to regularise them as far as possible and as early as possible subject to their fulfilling the qualifications, if any, prescribed for the post and subject also to availability of work. If a casual labourer is continued for a fairly long spell - say two or three years - a presumption may arise that there is regular need for his services. In such a situation, it becomes obligatory for the concerned authority to examine the feasibility of his regularisalion. While doing so, the authorities ought to adopt a positive approach coupled with an empathy for the person. As has been repeatedly stressed by this court, security of tenure is necessary for an employee to give his best to the job. In this behalf, we do commend the orders of the Government of Haryana (contained in its letter dated 6.4.90 referred to hereinbefore) both in relation to work- charged employees as well as casual labour.

We must also say that the orders issued by the Governments of Punjab and Haryana providing for regularisalion of ad hoc/temporary employees who have put in two years/one year of service are quite generous and leave no room for any legitimate grievance by any one. 870 These are but a few observations which we thought it necessary to make, impelled by the facts of this case, and the spate of litigation by such employees. They are not exhaustive nor can they be understood as immutable. Each Government or authority has to devise its own criteria or

principles for regularisation having regard to all the relevant circumstances, but while doing so, it should bear in mind the observations made herein.'

(25). Moreover, if the contention of the appellants were to be accepted that cadre strength consist of only permanent and substantive posts, that will be self defeating the contention to exclude temporary posts to be filled in by promotion. In that event, appointment by direct recruitment under the Rules can only refer to direct recruitment against substantive posts as was the case in O.P. Singla's case (supra) wherein the Court considering the combined reading of the Rules which provided for substantive appointments to be made to Service with 1/3 quota reserved for direct recruitments and the Rules also provided for creation of temporary posts and filling of substantive vacancies temporarily, said;

'The position which emerges from the provisions contained in Rules 16 & 17 is that it is permissible to create temporary posts in the Service and, even substantive vacancies in the Service can be filled by making temporary appointments. The two- fold restriction on this dual power is that the High Court must be consulted and such appointments must be made from amongst the promotees only.'

(26). Keeping in view the law laid down by the Supreme Court as noticed above and the Division Bench of this Court in Veena Kumari's case it must be held that for the purpose of determining the vacancies for each year all sorts, of vacancies including temporary vacancies of long term duration has to be taken into account. The determination of vacancies definitely has nexus with the cadre strength and the operation of the distribution of vacancies amongst each source as envisaged under the rules. The decisions relied on by the learned counsel for the appellants are relating to determination of cadre strength under the All India Services Rules which have altogether a different scheme.

(27). Therefore, we cannot on the plain rending of Rule 6 find support for the contention that the substantive part of it confine the strength of posts to the permanent posts only, nor the interpretation suggested by the learned counsel for the appellants flow from the definition of the 'Member of the Service'. The Member of the Service has been defined in Rule 4(j). It reads:

2(j) 'Member of the Service' means a person appointed in a substantive capacity to a post in the cadre of the Service under the provisions of rules or any rule or orders superseded by Rule 2' Administrative Service, and

Obviously, the Member of Service also does not refer to a person appointed to a permanent or temporary post. It merely states a person appointed in a substantive capacity. It needs hardly any elaborate explanation, as the issue is well settled, that appointment to a temporary post can also be in a substantive capacity if it has been made in a regular manner if the creation of the said post has taken place in regular manner and appointment to it is not a fortuitous or adhoc. In this connection reference may be made G.C. Gupta & Ors. vs. N.K. Pandey (supra) wherein the Court said that appointment to temporary posts can also be made substantively. In coming to this conclusion the Court referred to following observations from its earlier decision in Baleshwar Dass vs. Stale of U.P. (8).

'Substantive capacity refers to the capacity in which a person holds the post and not necessarily to the nature or character of the post.... a person is said to hold a post in a substantive rapacity when he holds it for an indefinite period especially of long duration in contradistinction of a person who holds it for a definite or temporary period or holds it on probation subject to continuation.

Once we understand 'substantive capacity' in the above sense, we may be able to rationalise the situation. If the appointment is to be a post and the capacity in which the appointment is made is of indefinite duration, if the Public Service Commission has been consulted and has approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that the post was held by the incumbent in a substantive capacity.'

(28). The same view was expressed by the Apex Court in G.K. Dudani vs. S.D. Sharma (9). The Court referring to Baleshwar Dass's case and Singla's case opined that appointment to temporary posts in regular manner which is not ad hoc or fortuitous is also substantive appointment so as to treat the appointee as member of service. The Court said:

'The position that a temporary post can be held in a substantive capacity is now firmly established by decisions of this Court in Baleshwar Dass vs. Slate of U.P. and O.P. Singla vs. Union of India. According to these decisions, all persons holding substantive posts or temporary posts in substantive capacity are members of the service. In Singla's case this Court further pointed out (at SCC 483, para 81): 'A person can be said to hold a post, permanent or temporary, in a substantive capacity only if his appointment to that post is not fortuitous or ad hoc.'

(29). A great reliance was placed by learned counsel for the appellants on the decisions given in the case of K. Prasad vs. Union of India (10), C. Krishna Gowda vs. Stale of Karnataka (11) and Tamil Nadu Administrative Service Officers Association vs. Union of India (12) to urge that expansion in the cadre strength cannot be inferred from temporary appointments given on the posts.

(30). The Supreme Court in K. Prasad vs. Union of India (supra) was considering the All India Services Act, 1951 and Forest Service (Recruitment) Rules, 1966 and the Rule 4 of the cadre rules which envisaged that the strength and composition of each of the cadres constituted under Rule 3 shall be as determined by regulations made by the Central Govt. in consultation with the State Government in this behalf. Rules also envisaged revision of cadre strength at the intervals of three years and composition of each such cadre by the Central Govt. in consultation with the State Government concerned. Since it was an All India Service and on recruitment, the candidates were assigned to the respective State cadres at whose disposal their services were placed, the regulations further envisaged that the posts borne on the strength on the Indian Forest Service in each of the State shall be specified in the Schedule to these regulations. In the Schedule, the strength and composition of cadres of various States was set out. Thus, the Indian Forest Service Rules in their different shades which is an All India Service and where persons recruited are assigned to different State cadres had their own peculiar rules for determining the strength of cadre on all India basis and composition of State cadres as per the strength assigned to it. Any alteration in the cadre was required to be made by the Central Govt. after consultation with the State Government. Proviso 2 to Rule 4(2) of the Cadre rules further envisaged that the State Government may add for a period not exceeding one year and with the

approval of the Central Govt. for a further period not exceeding three years to a State or joint cadre one or more posts carrying duties of the like nature posts. In the aforesaid set of rules which consisted of the IFS (Cadre) Rules, 1996, IFS (Recruitment) Rules, 1966, IFS (Probation) Rules, 1968, IFS (Pay) Rules, 1996, and IFS (Regulation of Seniority) Rules, 1968, the Court held:

'It is not open to the Central Govt. to alter the strength and composition of the Cadre without consulting the State Government concerned. The mere appointment of an excess number of officers cannot be treated as an automatic expansion of the cadre strength and composition in exercise of the powers available under Rule 4(1) of Recruitment Rules. It is a well settled principle that if a statutory power has to be exercised in a particular manner, any exercise of that power has to comply with that procedure. It follows, therefore, that if the initial composition can be only drawn up in consultation with the State Government and by regulations, it will not be permissible for the Central Government to modify or alter the same save in the same manner.'

(31). Commenting on the power of the Central Government to alter the strength and composition of strength at any time as provided under provision (1) Rule 4(2) of the Cadre Rules, the Court made it plain that this power was in recognition of the general principle that, whoever has any power to exercise he can exercise such power from time to time but was further of the view that since exercise of such power was regulated by the Rules, to be exercised in the manner prescribed therein, every time such power was to be exercised as to follow the same procedure. On these premise, the Court held as under:-

'If the terms of the relevant rules are scrutinised, it will be seen that the strength and composition of the cadre has to be determined by regulations and that these regulations have to be made by the Central Government in consultation with the State Government. It is a well settled principle that, if a statutory power has to be exercised in a particular manner, any exercise of that power has to comply with that procedure. It follows, therefore, that if the initial composition can be only drawn up in consultation with the State Government and by regulations, it will not be permissible for the Central Government to modify or alter the same save in the

same manner..... Itis not the case of the Government that before the second and third selections were made, either the State Government was consulted or the regulations were amended for increasing the strength. Nor is it even their case that there was any specific order by the Central Government changing the strength and composition of any cadre. We are, therefore, of opinion that it is not possible to accept the contention of the initial recruits that the mere appointment of an excess number of officers should be treated as an automatic expansion of the cadre strength and composition in exercise of the power available under Rule 4(1).'

(32). From the aforesaid, it will be seen that while the Court did not denounce that on creation of additional posts the cadre strength would increase if the same were created in the manner prescribed under the Rules. The Court did not agree that any creation of posts unilaterly by the Central Government without following the procedure prescribed under the rules for enhancement of the cadre, which made it imperative that Central Government consults the State Government before creation of posts, would result in enhancement of the cadre strength. In fact the exercise of the Central Govt. in creation of the posts without following procedure itself was held to be bad. The facts noticed and the rules applicable to the case makes it obvious that the case has no bearing on the controversy before us. It is not the case before us that the creation of posts permanent or temporary beyond what was notified in the earlier notification was not in accordance with the procedure prescribed under the rules. It can also be noticed from Rule 6 as it exists in the present form, unlike Cadre Rules under consideration before the Apex Court in K. Prasad's case (supra), no specific mode for exercising of the power for creating vacancies or determining cadre strength has been prescribed. Rule G declares the power of the State Government given to determine the cadre strength and also to create temporary or permanent posts in the Service from time to time. The expression 'from time to time' only goes to show that such power can be exercised as many times as occasion for exercise of such power arises. In the absence of any prescribed mode to be followed for the purpose of determining the cadre strength or for creating the posts, we are unable to see any parity between the case at hand with case before the Supreme Court in the aforesaid decision. The decision in K. Prasad's case (supra) turn on its own facts and the rules governing the said service.

(33). The next decision on which reliance was placed by learned counsel for the appellants is C. Krishna Gowda vs. State of Karnataka (supra) to contend that the cadre consisted of only permanent posts. Having closely read the decision, we find that in making the statement in the cadre consisted only permanent posts. The Court was considering the 4th round of litigation and was only referring to the finding recorded in its earlier decision in V.B. Badami vs. State of Mysore (13). The Court has stated that 'history of the rules governing the Service need not to be repeated here as it has been set out in detail in the previous rulings. Perusal of the earlier decision in Radami's case (supra) reveals that the judgment refers to the Mysore Administrative Service (Cadre) Rules framed under Article 309 by Notification dated January 23, 1958 to be operative with effect from November 1, 1956 and according to the said cadre rules, the cadre consisted only of permanent posts comprising 12 senior scale posts and 135 junior scale posts. The cadre under the Rules did not include temporary posts. The Court held that the proportion of quota fixed under the rules also operates on the cadre posts and not beyond the cadre posts and quota rule will not be applicable on the non-cadre posts. We are not here concerned with the rule which is restrictive in laying down its cadre strength to the permanent posts only. Therefore, the decision of the court in C. Krishna Gowda's case (supra) considered alongwith Badami's case (supra), referred to therein, does not lend any assistance to the case of the appellants.

(34). Lastly, learned counsel has placed reliance on T.N. Administrative Service Officers Association vs. Union of India (supra). This again is a case that arises in connection with the grievance of the members of the Tamil Nadu and Haryana State Administrative Services seeking direction from the Apex Court to encadre all the State deputation reserve posts, ex-cadre posts and temporary posts hitherto manned by the members of the Indian Administrative Services having a continuous service of three years in the IAS cadre. In other words, mandamus was sought from the Court for directing the Union of India to enhance the cadre of IAS posts and review its composition by distributing the additional posts to Tamilnadu and Haryana taking into account the persons functioning on deputation, ex-cadre posts and temporary posts. Apparently, the rules governing the IAS cadre which is an All India Service are alike the IFS Cadre Rules which were before the Court in K. Prasad's case (supra) which concerns with the Indian Forest Service. Keeping

in view the Rules, the Court opined as under:-

'Under Rule 3 of the Cadre Rules, an IAS cadre is created for each State or a group of States in the Indian Union. Rule 4 of the said Rules provides that the Central Government in consultation with the State Governments should determine the strength and composition of the cadres constituted under Rule 3 by framing the regulations in this behalf. This Rule also provides for a review of the cadre from time to time which used to be at an interval of every 3 years and presently amended to 5 years, the review of the cadre strength contemplated under the Rules is to be done in consultation with the State Governments concerned. The proviso to this Rule empowers the State Government concerned to temporarily add to its cadre one or more post(s) for a period not exceeding one year on its own and with approval of the Central Government for a further period not exceeding two years. Thus, a conjoint reading of these sub-clauses and proviso of Rule 4 shows the fixation of the cadre strength and review thereof is the responsibility of the Central Government and for any urgent need of temporary nature, the State Government is empowered to add to this cadre one or more posts on its own as provided in the proviso to Rule 4(2). Therefore, creation of a cadre and fixation of the cadre strength are statutorily controlled and the same will have to be reviewed periodically bearing in mind the necessity prevailing at the time of review.'

(35). For the reasons already stated above, while discussing the decision in K. Prasad's case, this case of the appellants also has to be considered in the light of the rules governing the Service in question.

(36). No other issue has been raised before us.

(37). As a result of aforesaid discussion, we find ourselves in agreement with the conclusions reached by the learned Single Judge and dismiss the appeals. There shall no orders as to costs.