

Indu Shekhar Singh & Ors vs State Of U.P. & Ors on 28 April, 2006

Equivalent citations: AIR 2006 SUPREME COURT 2432, 2006 AIR SCW 2582, 2006 LAB. I. C. 2237, 2006 (4) ALL LJ 245, 2006 (2) UPLBEC 1910, 2006 (5) SCALE 107, 2006 (8) SCC 129, 2006 (7) SRJ 486, (2007) 2 SERVLR 694, 2006 (2) ALL CJ 1554, (2006) 4 SCJ 562, (2006) 2 SCT 808, (2006) 5 SUPREME 12, (2006) 5 SCALE 107, (2006) 4 MAD LJ 135, (2006) 3 ALL WC 2187, (2006) 2 UPLBEC 1910

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Bench: S.B. Sinha, P.P. Naolekar

CASE NO.:
Appeal (civil) 6960 of 2005

PETITIONER:
Indu Shekhar Singh & Ors.

RESPONDENT:
State of U.P. & Ors.

DATE OF JUDGMENT: 28/04/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:

J U D G M E N T With Civil Appeal No.6961 of 2005 S.B. SINHA, J :

These appeals arising out of a judgment and order of the Allahabad High Court dated 4.4.2003 were taken up for hearing together and are being disposed of by this common judgment.

The Respondent No.2- Mani Kant Gupta, Respondent No.3-Virendra Kumar Tyagi and Respondent No.4-Sukhpal Singh and the intervener herein (now Respondent No.6-Vijay Kumar) were appointed in U.P. Jal Nigam on 5.2.1979, 12.12.1978, 16.11.1978 and 15.11.1977 respectively. Several town planning authorities including Ghaziabad Development Authority were created by Uttar Pradesh Urban Planning and Development Act, 1973 ('the Act', for short) with a view to provide for development of certain areas of State of Uttar Pradesh according to the plans and for other matters incidental thereto. Section 4 of the Act empowers the State

Government to issue a notification constituting a development authority for any development area.

In exercise of the said power, the State of U.P. constituted various development authorities, including the Ghaziabad Development Authority. By reason of U.P. Act No.21 of 1985, the State of U.P. inserted Section 5-A in the said Act to create centralized services of all the development authorities, sub-sections 1 and 2 whereof read as under:

"5-A (1) Notwithstanding anything to the contrary contained in Section 5 or in any other law for the time being in force, the State Government may at any time, by notification, create one or more 'Development Authorities Centralized Services' for such posts, other than the posts mentioned in sub-section (4) of Section 59, as the State Government may deem fit, common to all the development Authorities, and may prescribe the manner and conditions of recruitment to, and the terms and conditions of service of persons appointed to such service.

(2) Upon creation of a Development Authorities Centralised Service, a person serving on the posts included in such service immediately before such creation, not being a person governed by the U.P. Palika (Centralised) Services Rules, 1966, or serving on deputation, shall, unless he opts otherwise, be absorbed in such service, --

(a) finally, if he was already confirmed in his post, and

(b) provisionally, if he was holding temporary or officiating appointment."

The said provision came into force with retrospective effect from 22.10.84.

Uttar Pradesh Development Authority Centralised Services Rules were notified by the Government of Uttar Pradesh on 25th June, 1985 (the '1985 Rules', for short), some of the relevant provisions whereof would be noticed by us hereinafter.

The Respondent Nos.2, 3, 4 and 6 (the intervener) were deputed to Ghaziabad Development Authority on diverse dates, i.e., 26.6.1986, 6.5.1989, 16.10.1985 and 1.4.1984 respectively.

U.P. Jal Nigam, admittedly, is not and has never been a development authority. The employees on deputation to the development authorities from U.P. Jal Nigam, therefore, could not have been absorbed in the centralized services in terms of Sub-section (2) of Section 5-A of the Act. Options were, however, called for from the officers of U.P. Jal Nigam on deputation on various dates by the State of U.P. By letter 27.8.1987 and 28.11.1991, they were asked to communicate their acceptance stating as to whether they would like to be absorbed in the authorized centralized service subject to the conditions specified therein, e.g., their past services rendered in U.P. Jal Nigam would not be reckoned for the purpose of determination of seniority and they would be placed below the officers who had been appointed on regular basis in centralized service after their absorption. A copy of the Office order dated 3rd February, 1997 by way of example may be noticed:

"GOVERNMENT OF UTTAR PRADESH HOUSING SECTION-5 No.338/9 Housing-5-97-2628/96 Lucknow dated 03 February, 1997 OFFICE ORDER For fixation of seniority of Shri Sushil Chandra Dwivedi, Assistant Engineer in Authority Centralised Services, the Government Order No.416912/9Aa-5-91/94 dated 6.11.95 with respect to inclusion of service rendered by him in State Planning Institute was not found legal in view of Rule 7(1) of Authority Centralised Services Rules. Consequently, after consideration, the said order dated 6.1.95 is hereby cancelled.

2. As a result, in Authority Centralised Services on the post of Assistant Engineer, in the Seniority list declared vide Government Order No.1596/9 Aa-5-95- 1235/95 dated 12.4.96, the seniority of Shri Dwivedi is ordered by the Governor to be fixed below Shri Anil Kumar Goel shown at serial no.64 and in order of seniority at serial no.6 above Shri Ramesh Kumar at serial 64A in order of seniority.

Illegible Chief Secretary"

The Respondents herein, admittedly, resigned from their services from U.P. Jal Nigam. The Respondent No.2 accepted the said offer of the State in terms of his letter dated 27.8.1987 stating:

"With regard to the conditions stated in your Office memo referred to above on the aforementioned subject, I submit as follows :

(a) The applicant fully accepts the condition Nos.1,2,3,4 mentioned in your Office Memo, whereas with respect to condition no.5, I submit that this condition has already been complied with vide letter No.66/87 dated 2.5.87 of Vice Chairman, Ghaziabad Development Authority.

(b) With respect to condition No.2, I submit that the applicant has been appointed on regular basis in U.P. Jal Nigam on the post of Assistant Engineer (Civil) in accordance with the rules and regulations in the year 1978 after qualifying in written examination and interview etc. Subsequently w.e.f. 1.4.84 my services on the post of Assistant Engineer were made permanent. Photocopy of the Office memo is enclosed for your perusal. Therefore, presently the applicant is appointed on permanent basis on the post of Assistant Engineer in U.P. Jal Nigam. Thereafter, according to my knowledge, on the basis of Government Orders which are at present in existence my absorption in Authority Centralised Services should be treated as regular selection from the date of absorption.

Therefore, you are again requested that a decision in this regard should be taken on a sympathetic consideration. Thereafter, whatever decision is taken shall be acceptable to the applicant.

In accordance with the instructions contained in the last paragraph of your above referred office memo, I am enclosing my resignation addressed to the Managing Director, U.P. Jal Nigam, Lucknow. Kindly forward the same to the Managing Director."

No option, however, was given to Respondent Nos.3 and 6 (the intervener). They, however, presumably opted on their own for their absorption in the authorized centralised services of the development authorities. It is not in dispute that the State issued letters of absorption, so far as Respondent Nos.2 and 3 are concerned on 18.3.1994 and so far as Respondent Nos. 4 and 6 (the intervener) are concerned on 6.4.1987. The Appellants herein were appointed in various development authorities the details whereof are as under:

S.No. Name Date of appointment

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.

Indu Shekhar Singh Shivraj Singh S.N. Tripathi S.S. Verma P.C. Pandey Rakesh Kr. Shukla Ajay Kr. Singh 14.2.83 14.5.82 24.7.79 27.6.84 12.10.84 15.5.82 24.4.82 In view of Rule 7 of the Uttar Pradesh Development Authorities Rules, 1985, the Appellants were placed above the Respondent Nos.2, 3, 4 and 6 in the seniority list. Questioning the said orders, Respondent Nos. 2 to 4 herein filed a writ petition before the Allahabad High Court praying, inter alia, for the following relief:

"i. To issue a writ order or direction in the nature of mandamus commanding the respondents to give benefit of past service to the petitioners rendered by them in the parent department and to treat the petitioners for promotion or promote them when the juniors were considered and promoted else they shall suffer irreparable loss and injury."

By reason of the impugned order dated 4.4.2003, the said writ petition has been allowed. The High Court, relying on or on the basis of the decision of this Court in Sub-Inspector Rooplal & Anr. vs. Lt. Governor through Chief Secretary, Delhi & Ors. [(2000) 1 SCC 644], opined:

(1) That refusal on the part of the State to grant benefit of past service in U.P. Jal Nigam in favour of the Respondents is violative of Articles 14 and 16 of the Constitution of India;

(2) By reason of acceptance of offer to give up their past services, the optees did not and could not have waived their fundamental right and, thus, acceptance of the conditions for their absorption was not material; (3) In view of the fact that similar benefits were granted by the court in favour of S/Shri Brij Mohan Goel and Sushil Chandra Dwivedi, the Respondents could not have been discriminated against.

Mr. Rakesh Dwivedi, learned Senior Counsel appearing on behalf of the Appellants in support of these appeals would submit:

I.(i) That the plea of discrimination raised by the Respondents was misconceived as the High Court overlooked the fact that no finality has been attained in the cases of Brij Mohan Goel and Sushil Chandra Dwivedi and the matters are still sub-judice;

(ii) So far as the case of Sushil Chandra Dwivedi is concerned, the order impugned therein was quashed on the ground that the principles of natural justice had not been complied with and thus, the same must be held to be pending decision before the appropriate department;

(iii) In the case of Shri D.C. Srivastava, the writ petition having wrongly been dismissed as infructuous, this Court, by Judgment dated 24.3.2003 in Civil Appeal Nos.2403-04 of 2003, restored the writ petition and remitted the matter back to the High Court;

(iv) Rule 7 was amended by the State by an order dated 9.12.2002 whereby and whereunder the post of Assistant Engineer in Jal Nigam, an autonomous body under the U.P. Water Sewarage Act, was held not to be equivalent to the post of Assistant Engineer in the Development Authority Centralized Service;

(v) S/Shri Brij Mohan Goel and Sushil Chandra Dwivedi being already in the services of the Development Authority, were not required to opt for Centralised Service in terms of Section 5-A of the Act and Rule 7 of the Rules, whereas Jal Nigam being not a Development Authority and its services having not merged in the Centralised Service, Rule 7 could not have been applied in the fact of the present case, as in fact Rule 28 would apply hereto.

(vi) An erroneous order cannot be made the basis for sustaining a plea of discrimination.

II.(i) The Respondents did not have any fundamental right to be deputed to any other autonomous organization or being absorbed permanently and thus, the question as regard reckoning of their past services for the purpose of seniority was a matter which was within the exclusive domain of the State in respect whereof the High Court should not have exercised its power of judicial review.

(iii) Reckoning of past services was directed to be made by this Court only in the cases:

(a) where Army Officers were recruited during national emergencies and where such past services were directed to be counted in terms of the Rules;

(b) where recruitment had been made from multi sources including that of deputation;

(iii) The said principles would not, thus, apply to the present case having regard to the provisions of Section 5-A of the Act and in that view of the matter, Articles 14 and 16 of the Constitution cannot be said to have any application whatsoever;

(iv) Doctrine of Election would apply in the case of Respondents as they had a choice to refuse absorption and ask for their reversion to the parent department, but having not done so, they cannot now be allowed to turn round and contend that they had been discriminated against;

(v) The Respondents having accepted conditional appointment as far back in the year 1987 and 1994, could not have filed a writ petition in the year 2000 which, thus, suffering from inordinate delay and laches, the writ petition should have been dismissed.

(vi) The Respondent Nos. 2 to 4, having not been absorbed in terms of Section 5-A of the Act, the provisions of Rule 7 of the Rules, 1985 were not attracted.

The learned counsel appearing on behalf of the State submitted that in view of the notification dated 9.12.2002, the writ petition filed by the Respondents has become infructuous and in this connection our attention was drawn to paragraph 5 of its counter affidavit, which is to the following effect:

"5. That, it may further be stated that under the provisions of the U.P. Development Authorities Centralised Services Rules 1985 and the 11th Amendment dated 9.12.2002 therein whereby Rule 7(1) of the said Rules stood substituted, the past services of only those officers/employees shall be counted towards seniority, who are finally absorbed in the service under section 5- A(2) of the Act, on the criterion of continuous length of service including the services rendered in a Development Atuhority, Nagar Mahapalika, Nagar Palika, Improvement Trust or in Government Department on similar posts. Respondent nos. 2 to 4 have not been absorbed under Section 5-A(2) of the Act. Hence, the benefit of Rule 7(1) of the 1985 Rules is not available to the said respondents."

Mr. M.L. Verma, learned Senior Counsel appearing on behalf of the Respondent Nos. 2 to 4, on the other hand, submitted:

(i) That no ground of delay and laches having been raised by the State and the Appellants who were not parties to the writ petition and hence, they cannot be allowed to raise the said contention before this Court;

(ii) It is not a case where the Respondent Nos. 2 to 4 had been appointed through side door and having regard to the fact that the conditions imposed for their absorption by the State were unfair and unreasonable, the same would be violative of Article 14 of the Constitution of India and in that view of the matter, the impugned judgment of the High Court is sustainable in law;

(iii) There being not much difference between deputation and transfer, and the Respondents, being deputationists, must be regarded to have been appointed on transfer from Jal Nigam and hence, could not be denied an equivalent position in the transferee department, wherefor their past services could not have been ignored;

(iv) Length of service being the ordinary law for reckoning seniority of the employees, the State of U.P. could not deny the benefits thereof to the Respondents;

(v) Even assuming that the Respondent Nos. 2 to 4 gave concurrence to that effect that they would not be conferred the benefits of the services rendered in Jal Nigam, for fixation of seniority they are at least entitled to the seniority from the date of their deputation till the date of their absorption as the decision on their offer could not have been taken after an unreasonable period, which is itself violative of Article 14 of the Constitution of India;

(vi) The State or for that matter the Authority, during the pendency of the cases of the Respondents, could not have made ad-hoc appointments and give seniority to those ad-hoc employees.

(vii) The High Court has rightly followed the cases and the decisions passed in Sushil Chandra Dwivedi and Brij Mohan Goel as seniority had been given to them, although they were appointed on work charge basis and they have not only been promoted to the post of Executive Engineer, they have also been promoted to the post of Superintending Engineer.

Sections 2(vi) and 2(vii) of the Act are :

"2(vi) 'Member of the service' means a person absorbed against or appointed to a post in the cadre of the service under these rules;

(vii) 'Service' means the Uttar Pradesh Development Authorities Centralised Services created under the Act."

Rule 7(1) of the U.P. Development Authorities Centralised Services Rules, 1986 which has been amended by Amendment Rules, 2002 reads thus:

Column-1 Existing Rule Column-1 Rule as hereby substituted 7(1) Notwithstanding anything in rule 28 the seniority of such officers and other employees who are finally

absorbed in the service under Sub-section (2) of section 5-A of the Act shall be determined on the criterion of continuous length of service including the services rendered in a Development Authority, Nagar Mahapalika, Nagar Palika or Improvement Trust on similar posts.

7(1) Notwithstanding anything in rule 28 the seniority of such officers and other employees who are finally absorbed in the service under Sub-section (2) of section 5-A of the Act shall be determined on the criterion of continuous length of service including the services rendered in a Development Authority, Nagar Mahapalika, Nagar Palika or Improvement Trust or in Government Department on similar posts.

Rule 28 of the Rules, 1985 reads:

"28. Seniority.- (1) Except as hereinafter provided, the seniority of persons in any category of post, shall be determined from the date of order of appointment and if two or more persons are appointed together, by the order in which their names are arranged in the appointment order:

Provided that if more than one order or appointment are issued in respect of any one selection, the seniority shall be mentioned in the combined order of appointment issued under Sub- rule (3) of Rule 25.

(2) The seniority inter se of persons appointed directly on the result of any one selection, shall be the same as determined by the Commission or the Selection Committee, as the case may be :

Provided that a candidate required directly may lose his seniority if he fails to join without valid reasons when vacancy is offered to him. The decision of the appointing authority as to the validity of reasons shall be final.

(3) The seniority inter se of persons appointed by promotion shall be the same as it was in the cadre from which they were promoted.

(4) Notwithstanding anything in Sub-rule (1) the inter se seniority of persons appointed by direct recruitment and by promotion shall be determined from the date of joining the service in the case of direct recruits and from the date of continuous officiation in the case of promotees and where the date of continuous officiation of promotee and the date of joining of the direct recruit is the same, the person appointed by promotion shall be treated as senior:

Provided that where appointments in any years of recruitment are made both by promotion and direct recruitment and the respective quota of the source is prescribed, the inter se seniority shall be determined by arranging the names in a combined list in accordance with Rule 17 in such manner that the prescribed

percentage is maintained."

Rule 37 of the Rules states:

"37. Regulation of other matters.- (1) If any dispute of difficulty arises regarding interpretation of any of the provisions of these rules, the same shall be referred to the government whose decision shall be final.

(2) In regard to the matters not covered by these rules or by special orders, the members of service shall be governed by the rules, regulations and orders applicable generally to U.P. Government servants serving in connection with the affairs of the State.

(3) Matters not covered by Sub-rules (1) and (2) above shall be governed by such orders as the Government may deem proper to issue."

Part III of the Rules, 1985 deals with Suitability or Provisionally Absorbed Persons, Part VII deals with Appointment, Probation, Confirmation and Seniority. Rule 25 provides for appointment by the Authority in terms of the selection process, which has been specified in Part V of the said Rules. Part-IV deals with recruitment.

The terms and conditions of recruitment/appointment to the post, seniority and other terms and conditions of service are governed by statutory rules. The statute provides that only those, who were in the employment of the different Development Authorities, shall be borne to the cadre of the Central Services. The U.P. Jal Nigam was not a Development Authority. It was constituted under a different statute. It was an autonomous body. The employees working with Jal Nigam might have been deputed to the services of the Development Authorities, but only by reason thereof they did not derive any right to be absorbed in the services. Ordinarily, an employee has no legal right to be deputed to another organization. He has also no right to be permanently absorbed excepting in certain situation as was held by this Court in U.O.I. thr. Govt. of Pondicherry & Anr. vs. V. Ramkrishnan & Ors. [(2005) 8 SCC 394].

The Respondent Nos. 2 to 4 were deputed to the Ghaziabad Development Authority on their own. They were presumed to be aware that they were not borne in the cadre of Centralised Services. The Rules do not provide for appointment by way of transfer. Appointment by way of absorption of a deputed employee would amount to fresh appointment which may be subject to the offer given by the Authority. The Development Authority is a statutory authority. So is the Jal Nigam. The Schedules appended to the Rules provide for posts to be filled up by promotion or by direct recruitment or by both. Schedule IV provides for the posts which were outside the purview of the Public Service Commission and are required to be filled up by promotion only, whereas Schedule V specifies those posts outside the purview of the Public Service Commission, but were to be filled up through direct recruitment only. It is not disputed that the State of U.P. has since issued a notification on 9.12.2002 whereby and whereunder Rule 7(1) of the Rules, 1985 stood substituted, in terms whereof the past services of only those officers and employees were to be counted who would finally be absorbed in the services in terms of Section 5-A(2) of the Act on the criteria of continuous

length of service, including the service rendered in Development Authority, Nagar Mahapalika, Nagar Palika or Improvement Trust on similar posts. The Respondent Nos. 2 to 4 were not and could not have been absorbed under Section 5-A(2) of the Act and thus evidently Rule 7(1) is not attracted. The only Rule, which provides for seniority, is Rule

28. Rules 7 and 28, as noticed hereinbefore, occur in different Chapters providing for different situations.

The Respondent Nos.2 to 4, therefore were not entitled to the benefits of Rule 7. In terms of the rules, there is no provision for appointment by way of transfer. There is also no provision for appointment on permanent absorption of the deputed employees. The only provision which in the fact situation obtaining in the present case would apply and that too in the event the State intended to absorb the employees of Jal Nigam, would be Section 7(1) of the Act and Sub-Rule (2) of Rule 37 of Rules, 1985 Seniority, as is well settled, is not a fundamental right. It is merely a civil right. [See *Bimlesh Tanwar vs. State of Haryana* (2003) 5 SCC 604, paragraph 49 and also *Prafulla Kumar Das & Ors. vs. State of Orissa & Ors.*(2003) 11 SCC 614.] The High Court evidently proceeded on the premise that seniority is a fundamental right and thereby, in our opinion, committed a manifest error.

The question which arises is as to whether the terms and conditions imposed by the State in the matter of absorption of Respondent Nos. 2 to 4 in the permanent service of Ghaziabad Development Authority is ultra vires Article 14 of the Constitution of India.

The State was making an offer to the Respondents not in terms of any specific power under Rules, but in exercise of its residuary power (assuming that the same was available). The State, therefore, was within its right to impose conditions. The Respondents exercised their right of election. They could have accepted the said offer or rejected the same. While making the said offer, the State categorically stated that for the purpose of fixation of seniority, they would not be obtaining the benefits of services rendered in U.P. Jal Nigam and would be placed below in the cadre till the date of absorption. The submission of Mr. Verma that for the period they were with the Authority by way of deputation, should have been considered towards seniority cannot be accepted simply for the reason that till they were absorbed, they continued to be in the employment of the Jal Nigam. Furthermore, the said condition imposed is backed by another condition that the deputed employee who is seeking for absorption shall be placed below the officers appointed in the cadre till the date of absorption. The Respondent Nos.2 to 4 accepted the said offer without any demur on 3.9.87, 28.11.91 and 6.4.87 respectively.

They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they cannot be allowed to turn round and contend that the conditions are illegal. [See *R.N. Gosain vs. Yashpal Dhir* (1992) 4 SCC 683, *Ramankutty Guptan vs. Avara* (1994) 2 SCC 642 and *Bank of India & Ors. vs. O.P. Swarnakar & Ors.* (2003) 2 SCC 721.] Further more, there is no fundamental right in regard to the counting of the services rendered in an autonomous body. The past services can be taken into consideration only when the Rules permit the same or where a special situation exists, which would entitle the employee to obtain such benefit of past service.

We may now look into some decisions of this Court.

In *Ram Janam Singh vs. State of U.P. & Anr.* (1994) 2 SCC 622, this Court held:

" It is now almost settled that seniority of an officer in service is determined with reference to the date of his entry in the service which will be consistent with the requirement of Articles 14 and 16 of the Constitution. Of course, if the circumstances so require a group of persons, can be treated a class separate from the rest for any preferential or beneficial treatment while fixing their seniority. But, whether such group of persons belong to a special class for any special treatment in matters of seniority has to be decided on objective consideration and on taking into account relevant factors which can stand the test of Articles 14 and 16 of the Constitution. Normally, such classification should be by statutory rule or rules framed under Article 309 of the Constitution. The far-reaching implication of such rules need not be impressed because they purport to affect the seniority of persons who are already in service. For promotional posts, generally the rule regarding merit and ability or seniority-cum-merit is followed in most of the services. As such the seniority of an employee in the later case is material and relevant to further his career which can be affected by factors, which can be held to be reasonable and rational."

The Constitution Bench decision of this Court in *Prafulla Kumar Das & Ors.* (supra), whereupon Mr. Verma placed reliance, does not lay down any universal rule that length of actual service is the determining factor in the matter of promotion and consequential seniority. In *Roshan Lal Tandon vs. Union of India* [AIR 1967 SC 1889], this Court was concerned with inter se seniority of the employees drawn from two different sources in different situations.

Such is not the position here. The Appellants herein are borne in the cadre of the Centralized Services by reason of provision of a statute. The statute provides for constitution of the Centralized Services. The State Government has framed Rules, which having validly been made would be deemed to be a part of the statute.

Absorption of the deputationists, on the other hand, would depend upon an arrangement, which may be made by the State being not a part of the statutory Rule. They would, thus, be borne in the cadre in terms of the directions of the State in exercise of its residuary power.

In *Ram Janam Singh* (supra), this Court laid a distinction between those who were in the services of Army during emergency and who had joined Army after the emergency. It was held that those who have served the country during emergency formed a class by themselves and if such persons have been treated as a separate class for obtaining benefit in the matter of seniority, no grievance could be raised on the ground that such classification would be upheld on the touchstone of Articles 14 and 16 of the Constitution of India. Those employees who joined Army after emergency cannot claim extension of such benefits as a matter of right.

In *R.S. Makashi & Ors. vs. I.M. Menon & Ors.* [(1982) 1 SCC 379], this Court was considering a case where the staff of a new department had been drawn from four different sources.

Thus, in a case where employees were drawn from different sources, although as part of single scheme, which was considered to be a special situation, was formulated in that behalf, this Court opined:

"When personnel drawn from different sources are being absorbed and integrated in a new department, it is primarily for the government or the executive authority concerned to decide as a matter of policy how the equation of posts should be effected. The courts will not interfere with such a decision unless it is shown to be arbitrary, unreasonable or unfair, and if no manifest unfairness or unreasonableness is made out, the court will not sit in appeal and examine the propriety or wisdom of the principle of equation of posts adopted by the Government. In the instant case, we have already indicated our opinion that in equating the post of Supply Inspector in the CFD with that of Clerk with two years' regular service in other government departments, no arbitrary or unreasonable treatment was involved."

Despite the fact that the Court held that a rule whereby full benefits having been given and two years' period had been reduced is not ultra vires it was stated:

"The reasons stated by the learned Single Judge of the High Court for declaring the aforesaid rule to be arbitrary and violative of Article 16 of the Constitution do not appeal to us as correct or sound. Almost the entire reasoning of the learned Single Judge is based on an assumption that there is an invariable "normal rule" that seniority should be determined only on the basis of the respective dates of appointment to the post and that any departure from the said rule will be prima facie unreasonable and illegal. The said assumption is devoid of any legal sanction. We are unable to recognize the existence of any such rigid or inflexible rule. It is open to the rule-making authority to take a note of the relevant circumstances obtaining in relation to each department and determine with objectivity and fairness what rules should govern the inter se seniority and ranking of the personnel working in the concerned departments and the courts will only insist that the rules so formulated should be reasonable, just and equitable. Judged by the said test of reasonableness and fairness, the action taken by the Government in equating the clerical personnel which had rendered two years' regular service in other departments with the temporary Supply Inspectors of the CFD and in directing as per impugned Rule 4(a) that their inter se seniority shall be determined with reference to the length of service calculated on the basis of the said equation cannot be said to be in any way discriminatory or illegal. We are unable to accept as correct the view expressed by the learned single Judge of the High Court that "while fixing the seniority in the higher post, it is not open to take into consideration any service rendered in the lower post and that by itself spells out discrimination." Firstly, it is not correct to regard the post of a regular Clerk in the other departments as lower in grade in relation to that of a

Supply Inspector in the CFD. Further, in *S.G. Jaisinghani v. Union of India*, this Court has pointed out that in the case of recruitment to a service from two different sources and the adjustment of seniority between them a preferential treatment of one source in relation to the other can legitimately be sustained on the basis of a valid classification, if the difference between the two sources has a reasonable relation to the nature of the posts to which the recruitment is made. In that case, this Court upheld the provision contained in the seniority rules of the Income Tax Service, whereby a weightage was given to the promotees by providing that three years of outstanding work in Class II will be treated as equivalent to two years of probation in Class I (Grade II) Service. "

In *Wing Commander J. Kumar vs. Union of India & Ors.* [(1982) 2 SCC 116, this Court negated the contention that any employee had acquired vested right to have his seniority reckoned with reference to the date of his permanent secondment and to all officers joining the organisation on subsequent dates ranked only below him. The question, which fell therein for consideration was as to whether the principle enunciated in Rule 16 can be said to be unreasonable or arbitrary. The Court took into consideration the factual aspect of the matter and held that it will not be reasonable, just or fair to determine the seniority of the permanently seconded service personnel merely on the basis of the date of their secondment to the Organization.

In that case also Officers from three services holding different ranks were inducted into the R & D Organisation. Unreasonable consequence that flowed from the acceptance of the arguments of the Appellant therein were considered opining:

" When due regard is had to all the aspects and circumstances, narrated above, it will be seen that the principle adopted under the impugned rule of reckoning seniority with reference to a date of attainment of the rank of substantive Major/equivalent strikes a reasonable mean as it ensures to all the service officers in the R & D the fixation of seniority in the integrated cadre giving full credit to the length of service put in by them in their respective parent services."

In *K. Madhavan & Anr. vs. Union of India & Ors.* [(1987) 4 SCC 566], whereupon Mr. Verma placed strong reliance, this Court was considering a case where deputation was made to CBI. The said decision was rendered in a situation wherein the original Rule 5 of 1963 Rules providing for 85% of the recruitment by way of transfer or deputation was altered to 75%. In that case, the earlier services rendered by the Appellants therein were directed to be considered having regard to the statutory rules governing the field. Therein no question of a person joining the services after resigning from his old post arose. It is only in that situation, the Court opined that there was not much difference between deputation and transfer.

A difference between transfer and deputation would be immaterial where an appointment by transfer is permissible, particularly in an organization like CBI where personnel are drawn from different sources by way of deputation. It is one thing to say that a deputationist may be regarded as having been appointed on transfer when the deputation is from one department of the Government

to another department, but it would be another thing to say that employees are recruited by different Statutory Authorities in terms of different statutory rules. In a given case, the source of recruitment, the qualification, etc., may be different in different organizations. The Statutory Authorities, it is trite, are not and cannot be treated to be the departments of the Government. Their employees are governed by the rules applicable to them. Their services are not protected under Article 311 of the Constitution.

The State can compel an employee to go on deputation from its parent department to another Public Sector Undertaking unless a statutory rule exists in this behalf. In absence of such a rule, no employer can force an employee to join the services of another employer. Thus, K. Madhavan (supra), in our opinion, has no application in the instant case.

K. Anjaiah & Ors. vs. K. Chandraiah & Ors. [(1998) 3 SCC 218 was again a case where this Court was concerned with multi source recruitment. In that case construction of Regulation 9 came under consideration, which is to the following effect:

"9. (1) The persons drawn from other departments will carry on their service and they will be treated as on other duty for a tenure period to be specified by the Commission or until they are permanently absorbed in the Commission whichever is earlier.

(2) The services of those staff members working in the Commission on deputation basis and who opted for their absorption in the Commission, shall be appointed regularly as the staff in the Commission, in the cadre to which they belong, as per the orders of Government approving their appointments batch by batch and to determine the seniority accordingly. For this purpose the Commission may review the promotions already affected."

Therein, thus, existed a provision for appointment by way of absorption of the deputationist. The said Regulation was declared unconstitutional by the Tribunal. This Court, however, having regard to the fact situation obtaining therein, thought it fit to uphold the Regulations stating:

" ..that the phraseology used in Regulation 9(2) is no doubt a little cumbersome but it conveys the meaning that the total length of service of these deputationists should be taken into account for determining the inter se seniority in the new service under the Commission and the past service is not being wiped off. We find considerable force in this argument and reading down the provision of Regulation 9(2) we hold that while determining the inter se seniority of the deputationists in the new cadre under the Commission after they are finally absorbed, their past services rendered in the Government have to be taken into account. In other words the total length of service of each of the employees would be the determinative factor for reckoning their seniority in the new services under the Commission."

Such a finding was, thus, arrived at by way of reading down the Rules so as to uphold the constitutionality of the said provision and not by laying any law in that behalf upon interpreting

Rule 9(2).

Having noticed the afore-mentioned decisions of this Court, we may now notice Sub-Inspector Rooplal & Anr. (supra), which is the sheet anchor of the judgment rendered by the High Court. In that case, this Court was concerned with interpretation of Rule 5(h) of the Delhi Police (Appointment and Recruitment) Rules, 1980 providing that if the Commissioner is of the opinion that it is necessary or expedient in the interest of work so to do, he may make appointment(s) to all non-gazetted categories of both executive and ministerial cadres of the Delhi Police on deputation basis and by drawing suitable persons from any other State, Union Territory, Central police organization or any other force. The Appellants therein were deputed on transfer from BSF to the Delhi Police pursuant to the aforementioned provisions. Rule 5(h) of the said rules empowered the Authority to appoint the employees of other departments drawn by way of deputation depending upon the need of the Delhi Police. There was no seniority rule. Seniority in that case was sought to be determined by way of an executive order, which in turn was issued on the basis of a Memorandum dated 29.5.1986 issued by the Government of India. The Memorandum in question was neither made public nor the existence thereof was made known to any person involved in the controversy. The said Memorandum was not made ipso facto applicable to the employees. In the aforementioned factual backdrop referring to R.S. Makashi & Ors. (supra) and Wing Commander J. Kumar (supra), this Court observed:

" .Therefore, it is reasonable to expect that a deputationist, when his service is sought to be absorbed in the transferred department would certainly have expected that his seniority in the parent department would be counted. In such a situation, it was really the duty of the respondents, if at all the conditions stipulated in the impugned memorandum were applicable to such person, to have made the conditions in the memorandum known to the deputationist before absorbing his services, in all fairness, so that such a deputationist would have had the option of accepting the permanent absorption in the Delhi Police or not."

In that case a Coordinate Bench of the Tribunal had opined that those personnel who were drawn from other departments were entitled to get their past services counted for the purpose of seniority. The said decision attained finality. In the case of the Appellant herein, the benefit of the said judgment was not extended and the question was sought to be reopened stating that the post of Sub-Inspector in BSF was not equal to the post of Sub-Inspector in the Delhi Police. The relevant part of the Memorandum issued on 29.5.1986, which was relied upon, reads thus:

"Even in the type of cases mentioned above, that is, where an officer initially comes on deputation and is subsequently absorbed, the normal principles that the seniority should be counted from the date of such absorption, should mainly apply. Where, however, the officer has already been holding on the date of absorption in the same or equivalent grade on regular basis in his parent department, it would be equitable and appropriate that such regular service in the grade should also be taken into account in determining his seniority subject only to the condition that at the most it would be only from the date of deputation to the grade in which absorption is being

made. It has also to be ensured that the fixation of seniority of a transferee in accordance with the above principle will not effect any regular promotions made prior to the date of absorption. Accordingly it has been decided to add the following sub-para (iv) to para 7 of general principles communicated vide OM dated 22-12-1959:

'(iv) In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "transfer on deputation/transfer"), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has so ever been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from the date he has been holding the post on deputation, or the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department, whichever is later.' "

The interpretation of clause (iv) and in particular, the words "whichever is later" came up for consideration in the said decision and on interpretation of the Rule it was held that the earlier decision in R.S. Makashi & Ors. and Wing Commander J. Kumar would be applicable. It was, however, of some interest to note it was held that such a right of the Appellants-petitioners therein could not have been taken away in the garb of an Office Memorandum. In the aforementioned fact situation, the law was stated in the following terms:

"It is clear from the ratio laid down in the above case that any rule, regulation or executive instruction which has the effect of taking away the service rendered by a deputationist in an equivalent cadre in the parent department while counting his seniority in the deputed post would be violative of Articles 14 and 16 of the Constitution. Hence, liable to be struck down. Since the impugned memorandum in its entirety does not take away the above right of the deputationists and by striking down the offending part of the memorandum, as has been prayed in the writ petition, the rights of the appellants could be preserved, we agree with the prayer of the appellant-petitioners and the offending words in the memorandum "whichever is later" are held to be violative of Articles 14 and 16 of the Constitution, hence, those words are quashed from the text of the impugned memorandum. Consequently, the right of the appellant- petitioners to count their service from the date of their regular appointment in the post of Sub-Inspector in BSF, while computing their seniority in the cadre of Sub- Inspector (Executive) in the Delhi Police, is restored."

For the said reasons only the executive instruction was held to be ultra vires Articles 14 and 16 of the Constitution of India. It was further held that by reason of the Memorandum impugned therein the right of the deputationists could not have been taken away and in that view of the matter, the offending part of the Memorandum was struck down, as prayed in the writ petition. The rights of the Appellants were held to have been preserved and the words "whichever is later" were held to be ultra

vires Articles 14 and 16 of the Constitution of India.

The decisions referred to hereinbefore, therefore, lay down a law that past services would only be directed to be counted towards seniority in two situations: (1) when there exists a rule directing consideration of seniority; and (2) where recruitments are made from various sources, it would be reasonable to frame a rule considering the past services of the employees concerned.

The said decisions, in our considered view, have no application in this case, having regard to the provisions of Section 5-A of the Act, in terms whereof no provision exists for recruitment of deputationists. Recruitment of deputationists, in fact, is excluded therefrom.

In the instant case while exercising, as to its power under Rule 37(3), there was no embargo for the State Government to lay down conditions for permanent absorption of employees working in one Public Sector Undertaking to another. Laying down of such conditions and acceptance thereof have been held not to be violative by this Court in some decisions to which we may refer to now.

In *Government of Andhra Pradesh & Ors. vs. M.A. Kareem & Ors.* [(1991) Supp. 2 SCC 183], this Court made a distinction between appointments from one cadre to another, stating:

" .It has to be appreciated that the cadre of the Chief Office is altogether different from cadre of the district police offices/units where the respondents were earlier appointed and they were not liable to be transferred to the Chief Office. The service conditions at the Chief Office were better, which was presumably the reason for the respondents to give up their claim based upon their past services. It is true that the differential advantage was not so substantial as to attract every LDC working in the district offices/units, and in that situation the letter Annexure 'B' had to be circulated. However, so far as the respondents and the two others were concerned, they found it in their own interest to forgo their claim of seniority on the basis of their past services and they did so."

In *U.P. Awas Evam Vikas Parishad & Ors. vs. Rajendra Bahadur Srivastava & Anr.* [(1995) Supp.4 SCC 76], this Court opined:

" ..In view of the unequivocal undertaking given by the first respondent, it is no longer open to him to contend that his dismissal (sic termination) order of 1971 was illegal. He approached the High Court in 1991 seeking to quash his termination order of 1971 after securing conditional reinstatement. His challenge after his appointment on his representation and acceptance of conditions subject to which he was to be appointed is an attempt to overreach his goal in a circuitous route. It is hard to accept that within a short period of five months he has shown such a remarkable capabilities in discharging duties as appeared to be commendable to the officers recommended in the letters relied on by the respondent."

Yet again in *Union of India & Anr. vs. Onkar Chand & Ors.* [(1998) 9 SCC 298], this Court was considering the effect of clause 7(iii) of the Recruitment Rules, which was applicable therein. The said rule reads thus:

"Where a person is appointed by transfer in accordance with provision in the Recruitment Rules providing for such transfer in the event of non-availability of a suitable candidate by direct recruitment or promotion such transferees shall be grouped with direct recruits or promotees, as the case may be, for the purpose of para 6 above. He shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion."

In that case, the Respondent was permanently absorbed on 31.12.1977 and interpreting the said Rules, this Court held that he must, therefore, take his seniority below the persons in the department already in the cadre on that date. It was further held:

"..On these factors, one cannot find fault with the fixation of seniority of the said Onkar Chand by the appellants, which was challenged before the Tribunal. The Tribunal was not right in holding that the services rendered by the said Onkar Chand as a deputation promotee in the officiating cadre of ACIO-II from 2-1-1978 has to be reckoned. The earlier ad hoc promotion as ACIO-II being against the deputation quota that service cannot be claimed by a deputationist once he opted for permanent absorption in the department. If he wanted to continue the seniority in the deputation quota by running the risk of being repatriated to his parent department, he ought not to have opted for permanent absorption. After opting for the permanent absorption, he cannot claim the benefits of absorption as well as the service put in by him in the deputation quota as ACIO-II."

This Court in *Anand Chandra Dash vs. State of Orissa & Ors.* [(1998) 2 SCC 560], while considering a reverse case, i.e., when an employee who was working as Senior Auditor in Revenue and Excise Department and subsequently applied for the post of Senior Auditor in Labour Department, opined:

"..We find sufficient force in the aforesaid contention of the learned counsel appearing for the appellant. That the appellant was appointed as a Senior Auditor on being duly selected by the Member, Board of Revenue on 28-10-1966 is not disputed. It is also not disputed that his services were brought over to the Labour Department on requisition being made to all the government departments and on his name being sponsored by the Revenue Department. It is no doubt true that the Labour Department had indicated that the seniority will be determined on the basis of the date of joining of the Labour Department itself but the appellant had at no point of time agreed to the said condition, and on the other hand, unequivocally expressed his unwillingness to come over to the Labour Department by letter dated 6-11-1970 and without consideration of the same the Revenue Department relieved him requiring him to join in the Labour Department."

It was thus, open to the Respondents herein not to agree to in spite of the said conditions as they had already been working with a statutory authority, they, however, expressly consented to do so. They must have exercised their option, having regard to benefits to which they were entitled to in the new post. Once such option is exercised, the consequences attached thereto would ensue.

[See HEC Voluntary Retd. Emps. Welfare Soc. & Anr. vs. Heavy Engineering Corporation Ltd. & Ors. [JT 2006 (3) SC 102] There is another aspect of the matter. The Appellants herein were not joined as parties in the writ petition filed by the Respondents. In their absence, the High Court could not have determined the question of inter se seniority. [See Prabodh Verma & Ors. vs. State of U.P. & Ors. (AIR 1985 SC 167).] In Ram Janam Singh (supra) this Court held:

" ...It is now almost settled that seniority of an officer in service is determined with reference to the date of his entry in the service which will be consistent with the requirement of Articles 14 and 16 of the Constitution. Of course, if the circumstances so require a group of persons, can be treated a class separate from the rest for any preferential or beneficial treatment while fixing their seniority. But, whether such group of persons belong to a special class for any special treatment in matters of seniority has to be decided on objective consideration and on taking into account relevant factors which can stand the test of Articles 14 and 16 of the Constitution. Normally, such classification should be by statutory rule or rules framed under Article 309 of the Constitution. The far-reaching implication of such rules need not be impressed because they purport to affect the seniority of persons who are already in service."

There is yet another aspect of the matter, which cannot be lost sight of. This Court, in D.R. yadav & Anr. vs. R.K. Singh & Anr. [(2003) 7 SCC 110], having regard to the statutory scheme, opined:

"What was, therefore, relevant for the purpose of determination of seniority even in terms of Rule 7 of the 1985 Rules, was the continuous service rendered by the employees concerned "on similar posts", which would mean posts which were available having been legally created or borne on the cadre.

The ad hoc or temporary promotion granted to the appellants on 3-5-1986 and 13-1-1987 respectively on non-existent post of Assistant Executive Engineer would not, therefore, confer any right of seniority on them. Thus, for all intent and purport for the purpose of determination of seniority, the appellants were not promoted at all. Once they have been absorbed with Respondent 1 and other employees similarly situated, their inter se seniority would be governed by the statutory rules operating the field. The case of the appellants vis- ` -vis Respondent 2 although may be governed by the special rules, in terms of Rule 7, the same has to be determined on the criterion of continuous length of service including the service rendered in a Development Authority, Nagar Mahapalika, Nagarpalika or Improvement Trust on similar posts. The appellants, it will bear repetition to state, although were promoted at one point of time on purely ad hoc basis to the post of Assistant Executive

Engineer as the said posts even in their parent authority were not of similar type, the same would not be relevant for the purpose of determining the inter se seniority. If the rule of continuous service in same and similar posts is to be resorted to, the date of initial appointment would be a relevant criterion therefor. [See M. Ramchandran v. Govind Ballabh (1999) 8 SCC 592, K. Anjaiah v. K. Chandraiah (1998) 3 SCC 218, Vinod Kumar Sharma v. State of U.P. (2001) 4 SCC 675 and S.N. Dhingra v. Union of India (2001) 3 SCC 125.] xx xx xx xx As the post of Assistant Executive Engineer was not a cadre post, the appellants cannot be said to have been working on a higher post for the purpose of Rule 7 of the 1985 Rules."

For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly.

However, in the event Respondent Nos.2 to 4 and 6 (intervener) herein intend to question the validity of the notification dated 9/12/2002, it would be open to them to do so, if they are aggrieved thereby. It is made clear that we have not gone into the question of the validity or otherwise thereof.

The appeals are allowed. No costs.