

MRIGANK JOHRI & ORS.

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v.

UNION OF INDIA & ORS.

(Civil Appeal Nos. 9316-9320 of 2013)

JULY 10, 2017

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**[ABHAY MANOHAR SAPRE AND
SANJAY KISHAN KAUL, JJ.]**

Service law – Permanent absorption on deputation – Seniority, claim of – Appellant-junior engineers (Electrical) in All India Radio went on deputation to the Postal Department – Thereafter, appellant opted for permanent absorption in the Postal Department on the terms and conditions specified by the absorbing department that services would be counted in the earlier cadre for all purposes except his/her seniority in the cadre – Subsequently seniority list published by the Postal Department – Challenge to, by the appellants – Direction by tribunal to re-draft the seniority list counting the regular service of the appellants – However, said direction set aside by the High Court – On appeal, held: Where absorption is on specified terms and conditions with the benefit of such past service in the previous cadre as well as the period of service rendered on deputation being denied, the OMs, which provide for the benefit of service rendered in the previous cadre in an equivalent post on being absorbed in another department would not apply – Thus, the order passed by the High Court upheld – Constitution of India – Arts 14 and 16.

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Dismissing the appeals, the Court

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HELD: 1.1 The OMs, which generally provide for the benefit of service rendered in the previous cadre in an equivalent post on being absorbed in another department would not apply to a case where the absorption is on specified terms and conditions with the benefit of such past service in the previous cadre as well as the period of service rendered on deputation being denied. [Para 29][366-A-B]

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1.2 The OM dated 29.5.1986 as modified by OM dated 27.3.2001 did provide for the benefit of the previous service

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A rendered in the cadre. This is in effect also the ratio of the judgment in *SI Rooplal* case. This would also be in conformity with the normal service jurisprudential view. However, it would be a different position if the absorbing department clearly stipulates a condition of giving willingness to sacrifice the seniority while preserving all other benefits for the absorbee (which are accepted) failing which the option was available to the absorbee to get himself repatriated to the parent department. The terms and conditions are categorical in their wording that the absorbees would be “deemed to be new recruits” and the previous service would be counted for all purposes “except his/her seniority in the cadre”. The appellant accepted this with open eyes and never even challenged the same. Their representations to give them the benefit of their past seniority was also turned down and thereafter also they did not agitate the matter in any judicial forum. The controversy was thus not alive and it was not open for them to challenge the same after a long lapse of period of time. In fact on the day of filing of the OM, any prayer to set aside the terms and conditions of absorption would have been clearly barred by time u/s. 21 of the Administrative Tribunals Act, 1985. [Para 31][366-C-F]

E 1.3 The appellants sought to rake up the issue only when the seniority list was finalized. This was preceded by the draft seniority list. Whatever may be the dispute of seniority *qua* other persons, insofar as the appellants were concerned, their seniority was based on the terms and conditions of their absorption. The position of the appellants in the seniority list was thus a sequitur to the terms and conditions of their absorption. It is precisely for this reason, anticipating that their claim would be time barred, that a challenge was laid only to the seniority list without challenging the terms and conditions of absorption though in the grounds, a plea was raised against the terms and conditions of absorption. Unless the terms and conditions of absorption were to be set aside, the seniority list prepared was in conformity with the same. Since the appellants accepted the terms and conditions of absorption, they could not plead otherwise. [Paras 32, 33][366-G-H; 367-A-B]

H 1.4 The submission of the respondents that this issue has

been squarely dealt with in *Indu Shekhar Singh's* case where almost identical issues have been dealt with by holding that the State was within its right to impose conditions where the employees had the option to exercise their right of election, is accepted. The entitlement was not under any rules but under what was called the residuary power. [Para 34][367-B-C]

1.5 The High Court rightly interpreted the Rules. The method of recruitment as per Rule 3, has to be specified in Column 5 to 15 of the Schedule, while Rule 5 provides for power of relaxation. Column 11 provides for the method of recruitment—whether by direct recruitment, or by promotion, or by deputation or transfer, and the percentage of the vacancies to be filled by various methods. This may vary from post to post. For the Junior Engineer (Electrical) post, the ratio is mentioned as 83.33 % by direct recruitment and 16.66% by promotion through a departmental competitive examination. The office note regarding the absorption dated 2.11.1998 also refers to the open competitive examination not being held and the consequences thereof, with absorption of persons like the appellants being envisaged to deal with the given situation, but subject to the terms and conditions which were then set out in OM dated 9.11.1999. [Para 35][367-D-F]

1.6 Whenever the post could be filled by deputation as a method of recruitment it was so specifically provided. Column 12 deals with the scenario where the recruitment method provides for appointment by promotion, on deputation or transfer. Thus, Column 12 would apply only if the mode of recruitment was prescribed as per Column 11 which is not applicable in this case. [Para 36][367-F-G]

1.7 The failure of the Government to assail the judgment of the Ernakulum Bench did create a situation of implementation of the OM as in the case of Shri Hari Singh but in view of the judicial pronouncement by the impugned order which arose from the Delhi Bench of the Tribunal, the legal position was settled at the level of the High Court. The impugned judgment cannot be faulted in its conclusion. The applications for direction and contempt petition are closed. [Paras 37, 38][367-H; 368-A-B]

- A *SI Rooplal & Anr. v. Lt. Governor through Chief Secretary, Delhi & Ors.* (2000) 1 SCC 644 : [1999] 5 Suppl. SCR 310; *K.Madhavan v. Union of India* (1987) 4 SCC 566 : [1988] 1 SCR 42; *Union of India & Ors. v. Deo Narain & Ors.* (2008) 10 SCC 84 : [2008] 13 SCR 402; *T. Vijaykumar & Anr. v. Union of India & Ors.* O.A.No.734 of 2002; *Union of India v. Kuldip Singh Permer & Ors.* (2003) 9 SCC 472 : [2003] 2 Suppl. SCR 677; *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.* (1986) 3 SCC 156 : [1986] 2 SCR 278; *Indu Shekhar Singh & Ors. v. State of U.P. & Ors.* (2006) 8 SCC 129 : [2006] 1 Suppl. SCR 497 – referred to.

Case Law Reference

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|---|-------------------------|-------------|---------|
| | [1999] 5 Suppl. SCR 310 | referred to | Para 4 |
| D | [1988] 1 SCR 421 | referred to | Para 7 |
| | [2008] 13 SCR 402 | referred to | Para 9 |
| | [2003] 2 Suppl. SCR 677 | referred to | Para 18 |
| | [1986] 2 SCR 278 | referred to | Para 19 |
| E | [2006] 1 Suppl. SCR 497 | referred to | Para 21 |

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 9316-9320 of 2013.

From the Judgment and Order dated 06.07.2011 of the High Court of Delhi at New Delhi in Writ Petition Nos. 372-76 of 2006

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WITH

Conmt. Pet. (C) Nos. 474-478/2014 in C. A. Nos. 9316-9320 of 2013

C. A. Nos. 8802-8806 of 2017.

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K. Radhakrishnan, Sr. Adv., K. V. Jagdishvaran, Ms. G. Indira, Advs. for the Appellant.

A. K. Panda, Yashank A., Amarendra Sharan, Sr. Advs., V. N. Raghupathy, Sudarshan Rajan, R. Balasubramanian, Ms. Sunita Rani Singh, Ms. Rashmi Malhotra, Ms. Aarti Sharma, D. S. Mahra,

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G. S. Makker, B. Krishna Prasad, Sudarshan Rajan, Arjun Gadhoke, A
R. Ramanmurthy, Advs. for the Respondents.

The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J. Leave granted.

1. The appellants were appointed as Junior Engineers (Electrical) B
in the All India Radio, New Delhi from time to time between 1987-1990.
On an option being invited for deputation as Junior Engineers to the
Electrical Wing of the Postal Department, the appellants opted for the
same and memorandums were issued for their deputation in 1996. The
initial period of deputation was two years but the appellants were desirous C
of permanent absorption in the Department of Post (hereinafter referred
to as the 'DOP').

2. The All India Radio had become an autonomous body, namely,
"Prasar Bharati" and it appears that some of the appellants thus did not
want to continue in the parent cadre. The option was, however, available D
for the deputation to either go back to their parent cadre or seek absorption,
as they did, on terms and conditions to be specified by the absorbing
department, the DOP. The request made by the appellant No.4 clearly
state that they would abide by the terms and conditions of absorption in
the DOP. However, the other appellants in their requests for absorption
requested for their previous seniority and service terms in the parent E
department to be preserved. It also appears that there was possibility of
some of the Junior Engineers to be declared surplus in their parent
department. The fact, however, remains that when ultimately the request
for absorption by the DOP was acceded to, it was on terms and conditions,
specified and agreed to by the appellants. The said terms and conditions
are as under :- F

(i) He/She will sever all connections with his/her parent Ministry/
Department.

(ii) He/She will not ask for repatriation to his/her parent Ministry/
Department.

*(iii) He/She will be deemed to be new recruits in the unit to which
he/she is ordered to be posted.* G

(iv) He/She will be given pay protection and his/her pay will be regulated
in accordance with the provisions in FR/SR, and pay will be drawn
as per CCA pay rules applicable to DOP Civil Wing. H

- A (v) *His/Her will count for all purposes except his/her seniority in the cadre.*
- (vi) He/She will move to the place of posting at his/her own cost.
- (vii) *He/She will stand Junior to all JEs (C)/(E) who have already opted for DOP Civil Wing and those who have joined the Postal Civil Wing before date of issue of letter of his/her absorption in the Civil Wing of Deptt. of Post.*
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- (viii) He/She will count his/her seniority from the date of issue of letter of permanent absorption in the Postal Civil Wing unit to which he/she is ordered to be posted on permanent absorption. However, the inter se seniority of JEs absorbed from CCW, AIR, will be in accordance with their seniority fixed by the AIR (Civil Construction Wing), Ministry of I & B.
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- (ix) He/She will resign from his/her present post of JE (C)/(E) from his/her parent department.
- D (x) As a JE(C)(E) his/her transfer liability will be within the jurisdiction of the Postal Civil/Elect. Circle in which he/she is posted.”

(emphasis supplied).

The aforesaid terms and conditions, so far as the present controversy is concerned, thus clearly set out that the appellants would be treated as “new recruits” and the service will be counted in the earlier cadre for all purposes “except his/her seniority in the cadre”. There was no murmur of protest at the relevant time.

3. However, after a couple of years, the appellants made representations seeking to consider their deputation period for fixing the seniority but such a request was not accepted. It is on the occasion of finalization of the seniority list that the appellants approached the Central Administrative Tribunal, Principal Bench, New Delhi by filing OA No.1490 of 2004 under Section 19 of the Administrative Tribunal Act, 1985 seeking to contend that the appellants were compelled to accept the terms and conditions of absorption on a permanent transfer basis while joining the Postal Department and that such terms and conditions were totally arbitrary, illegal and against the provisions of the Constitution of India, being opposed to public policy. The ground of challenge, *inter alia*, raised the plea of violation of Articles 14 and 16 of the Constitution of India and sought to rely on the guidelines contained in OM No.9/II/55-RPS dated 22.12.1959 which reads as under :-

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“(iv) In the case of a person who is initially taken on deputation and absorbed later, his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, 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 also should be taken into account in fixation of his seniority subject to the condition that he will be given seniority from the date he has been holding the post on deputation.

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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.”

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4. The plea of the appellants before the Tribunal was that the date of seniority would be from the date of deputation but in case the person was already holding the same or equivalent grade on a regular basis in his parent department, such regular service in the grade should also be counted. The stand of the appellants was that they were already holding the post of Assistant Engineer in the parent department on a regular basis. The expression “whichever is later” was, however, struck down in *SI Rooplal & Anr. Vs. Lt. Governor through Chief Secretary, Delhi & Ors.*¹ and thus OM dated 22.12.1959 was modified by OM No.20011/1/2000-Estt.(I) dated 27.3.2001 by replacing it with “whichever is earlier” and these instructions were to take effect from 14.12.1999. However, insofar as the relief is concerned, the same was only for quashing the seniority list published on 5.1.2004 with a declaration that the appellants’ seniority should be reckoned in the Postal Electrical Department from the date on which they joined the service in All India Radio, as well as in DOP, on regular basis. There was no specific prayer made for quashing the terms and conditions contained in the absorption letter.

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5. The aforesaid aspect is of some significance, since, if the terms and conditions of the absorption letter were sought to be quashed (which is really the grievance as the seniority list was a sequitur to the same), the bar of limitation of one year would stare in the face in view of Section 21 of the Administrative Tribunals Act, 1985.

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6. The counter affidavit filed by the DOP opposed the petition

¹ (2000) 1 SCC 644

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A primarily on the ground that the deputationists were absorbed as per the terms and conditions accepted by them given in the application and the seniority had been fixed accordingly. The draft seniority list was issued on 20.8.2002 and the final seniority list was only published thereafter on 5.1.2004. The plea of any compulsion on the appellants by the respondent Department to accept the terms and conditions for absorption were denied.

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7. The Tribunal by a judgment dated 30.8.2005 allowed the application with the direction to re-draft the seniority list counting the regular service of the appellants on the analogous post of Junior Engineer in the lending department of All India Radio preceding their deputation as also the period spent on deputation till their permanent absorption. The Tribunal took note of the fact that apparently there was also a modified seniority list on 16.2.1974 but the position of the appellants had not changed. Reliance was placed on the OM No.20020/7/80-Estt.(D) dated 29.5.1986, judgment in *SI Rooplal case* (supra) and the modified OM dated 27.3.2001 to come to the conclusion that the fixation of seniority of the appellants was thus in contravention of the ratio of the said judgment and was violative of Articles 14 and 16 of the Constitution of India and was thus liable to be quashed. The Tribunal also took note of the judgment in *K.Madhavan vs. Union of India*² where it was opined that there was not much of a difference between the deputation and transfer and thus it would be against all rules of service jurisprudence, if a Government Servant holding a particular post was transferred to the same or equivalent post in another Government Department and the period of his service in the post before his transfer was not taken into consideration in computing his seniority in the transferred post, thus the transfer could not wipe out his length of service in the post from which he had been transferred.

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8. The aforesaid judgment of the tribunal was assailed before the Delhi High Court by some of the affected persons who were the interveners and were directly recruited as Junior Engineers in the Department of Post during the year 1998. In terms of the judgment dated 6.7.2011 the Division Bench of the High Court allowed the writ petition and set aside the direction of the Tribunal.

9. The rationale of the view taken by the High Court is as under :-

(a) The recruitment to the post of Junior Engineer (Civil) in Civil

H ² (1987) 4 SCC 566

Wing in the DOP was as per the DOP Junior Engineer (Civil) in the Civil Wing Rules, 1995 framed on 20.1.1995 and published in the gazette on 2.12.1995 under the powers conferred by the proviso to Article 309 of the Constitution of India. The method of recruitment to the post of Junior Engineer was by only two modes – 83.33% by direct recruitment, through an All India Open Competitive Examination and 16.66% by promotion, through a departmental competitive examination. This was apparent from Column 11 of the said Rules. The appellants had not been appointed by any of the two modes. There was, however, a provision for relaxation of the Rules with the Central Government.

(b)The appellants herein could not be permitted to seek reliance on Column 12 which was for recruitment by promotion or deputation or transfer and deputation was one of the methods specified therein. This was so, as, if the mode of recruitment by deputation is not prescribed in Column 11, then, Column 12 could not be relied upon. No order has been produced under Rule 5 for relaxation by the Central Government.

(c)The office memorandum dated 29.5.1986, as modified, would have application only if the recruitment rules provide for deputation to be observed as a mode of recruitment.

(d)The appellants have consciously given their consent for absorption with the looming possibility of them being rendered surplus in All India Radio and could not assail at a subsequent date, the terms of absorption. The High Court placed reliance of the judgment in *Union of India & Ors. Vs. Deo Narain & Ors.*³ holding that employees who voluntarily and unilaterally seek transfer forgoing their seniority and join another cadre with open eyes and are placed below the employees working in the transferred cadre, cannot make a grievance later on regarding their seniority.

10. The appellants aggrieved by the said judgment preferred SLP (C) Nos. 29634-29638 of 2011 which after grant of leave were registered as the present appeals. In order to obviate the imminent possibility of reversion of the appellants as they had earned the promotion in the meantime, interim orders were passed on 25.2.2013 staying the reversion

³ (2008) 10 SCC 84

A of the appellants till final disposal.

11. Before dealing with the merits of the controversy before us, it is necessary to note that the respondent authority initially filed a counter affidavit before this Court on 16.2.2012 seeking to support the appellants but subsequently that counter affidavit was sought to be withdrawn and replaced with another counter affidavit vide I.A.Nos.21-25 of 2015. The new counter affidavit sought to be brought on record was more or less inconformity with the stand of the respondent authorities before the Tribunal. It may also be noted that, as informed, no counter affidavit was filed before the High Court by the respondent authorities. It is in these circumstances that we are of the view that the stand sought to be taken afresh by the respondent authorities is liable to be brought on record, being consistent with their original stand and the applications are accordingly ordered. Of course, it is not clear as to what was the reason for the earlier counter affidavit which was in divergence with the stand before the Tribunal.

D 12. Mr. K.Radhakrishnan, learned senior counsel appearing for the appellants sought to support the judgment of the tribunal and assail the judgment of the High Court by seeking to rely on the OM dated 29.5.1986 as modified by OM dated 27.3.2001, post the judgment in *SI Roop Lal & Anr.* (supra). He sought to contend that the ratio of the said judgment would squarely apply in the facts of the present case and thus the tribunal had rightly quashed the seniority list.

13. The second limb of his submission was based on Column 12 of the said Rules. In order to appreciate this controversy, it is necessary to reproduce the extracts of the said Rules –

F “New Delhi, the 21st November, 1995.

G.S.R.522- In exercise of the powers conferred by the provision to article 309 of the Constitution, the President hereby makes the following Rules regulating the method of recruitment to the post of Junior Engineer (civil) in Civil Wing of the Department of Post, namely :-

1. Short title and Commencement – (1) These Rules may be called the Department of Post Junior Engineer (Civil) in Civil Wing] Rules, 1995.

(2) They shall come into force on the date of their publication in

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the Official Gazette.

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3. Method of Recruitment, Age limit and Qualifications etc. – The method of recruitment, age limit, qualification and other matters relating thereto, shall be as specified in the columns 5 to 14 of the Schedule aforesaid.

5. Power to relax – Where the Central Government is of opinion that it is necessary or expedient so to do it may, by order for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons.”

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Method of Recruitment whether by direct recruitment or by promotion or by deputation or transfer and percentage of the vacancies to be filled by various methods :

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Col.11 – (i) 83 1/3% by direct recruitment through All India Open Competitive Examination conducted by the Department of Post/ Telecom and

(ii) 16.2/3% by promotion through departmental competitive Examination.

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In case of recruitment by promotion or deputation or transfer, grade from which promotion or deputation or transfer to be made.

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Col.12 – Promotion :

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Deputation :

Official under Central Government :

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(i) Holding analogous posts on regular basis ; or

(ii) With 5 years regular service in the pay scale of Rs.1400-2300 as Junior Engineer (Civil).

Transfer : Officials under Central Government holding analogous post.

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14. The rationale of the view adopted by the High Court was thus assailed on the ground that Column 12 provided for employment through the mode of deputation for officials holding an analogous post on regular basis.

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A 15. The third limb of his submission was that the Ernakulum Bench
of Central Administrative Tribunal in *T. Vijaykumar & Anr. Vs. Union
of India & Ors.*⁴ had dealt with some issues *qua* absorption of Junior
B Engineers in the DOP who were identically absorbed on 28.8.2000. A
similar plea raised before the Tribunal found favour with the Tribunal.
The stand the department made before the tribunal, that the terms and
conditions of absorption having been consciously agreed upon, could not
be violated, was repelled. It was also noted in the said judgment that the
order of absorption did not mention that it was in public interest or not
and thus any absorption, unless contrary is mentioned, would be in public
interest. The absorption was against the unfilled vacancy and thus no
C other senior or junior appointed by the Department would be sacrificing
his legitimate seniority to make way for the absorbee, as those aggrieved,
had not joined the Post Department by that time. It appears that against
this judgment, no appeal was filed.

D 16. The fourth limb of the submission connected with the same is
in case of Shri B.K.Singh, a Junior Engineer, wherein an order dated
2.11.2006 was issued giving him seniority and thus it would be
discriminatory not to give the same benefit to the appellants. It may,
however, be noted that at this stage itself that the said order was a
sequitur to the judgment of the tribunal (Ernakulum Bench) and it is
E stated that the authorities were facing contempt proceedings.

17. Learned senior counsel for the appellants while relying upon
the judgment in *SI Rooplal* (supra) drew our attention to Para 19 of the
observations which reads as under :-

F “19.....It is to be noted that the law in regard to the
right of a deputationist to count his service for the purpose of
seniority in the transferred department was settled as far back as
in the year 1982 itself in the cases of R.S.Makashi and Wing
Commander J. Kumar (if not earlier). Therefore, it is reasonable
to expect that a deputationist, when his service is sought to be
absorbed in the transferred department would certainly have
G 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 persons, to have made the
conditions in the memorandum known to the deputationist before

H ⁴ O.A.No. 734 of 2002 - Decided on 15.4.2005

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. The very fact that such steps were not taken shows that this memorandum was, in fact, never acted upon. Apart from the above question of equity, the appellants have challenged the constitutional validity of the above memorandum on the ground that the same violates Articles 14 and 16 of the Constitution.”

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A reference was also made to Paras 22 and 23 which reads as under:-

“22. However, in that case this Court instead of striking down the said Regulation, upholding the contention that a deputationist is entitled to count his seniority when absorbed in the deputed post, observed thus:

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“When the Commission finally takes a decision to permanently absorb these deputationists after obtaining their option the question of their inter se seniority in the Commission crops up and Regulation 9(2) deals with the said situation. In the case of R.S.Makashi vs. I.M.Menon this Court had indicated that it is a just and wholesome principle commonly applied to persons coming from different sources and drafted to serve a new service to count their pre-existing length of service for determining their ranking in the new service cadre. The said principle was reiterated by this Court in K.Madhavan case. A three-Judge Bench judgment of this Court in the case of Wing Commander J. Kumar also reiterated the aforesaid well-known principle in the service jurisprudence,.....”

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23. 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

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A the appellant-petitioners and the offending words in the
 memorandum “whichever is later” are held to be violative of Article
 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
 B 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.”

18. The sole purpose of referring to *Union of India vs. Kuldip
 Singh Permer & Ors.*⁵ was to bring to our notice that the same issue
 C has been discussed also in this case.

19. Learned senior counsel also refers to the observations in
*Central Inland Water Transport Corporation Ltd. & Anr. vs. Brojo
 Nath Ganguly & Anr.*⁶ on the issue of consent of the agreement being
 obtained by coercion, fraud and misrepresentation. We may, however,
 D clarify at this stage that really speaking, no factual matrix has been laid
 for this proposition and no details of any coercion have been really brought
 forth.

20. On the other hand, learned counsel appearing for the private
 respondents sought to support the impugned judgment of the High Court
 and referred to the observations where the High Court had noticed the
 E terms and conditions accepted by the appellants for their permanent
 absorption in the DOP. In such a situation, it could not be said that such
 terms and conditions were violative of Articles 14 and 16 of the
 Constitution of India and the consent so obtained was not tainted by any
 compulsion and the option to go back to the parent cadre remained. It is
 F in furtherance of their career prospects that the appellants, it was
 contended, preferred to be absorbed in the DOP forgoing the seniority
 rather than go back to their parent department.

21. Learned counsel contended that the aforesaid issue was no
 longer *res integra* in view of the subsequent judgment of this Court in
 G *Indu Shekhar Singh & Ors. vs. State of U.P. & Ors.*⁷. The question
 examined was whether the terms and conditions imposed by the State in
 the matter of absorption could be said to be *ultra vires* Article 14 of the
 Constitution of India. The offer had been made by the State not in terms

⁵ 2003 (9) SCC 472

⁶ (1986) 3 SCC 156

⁷ (2006) 8 SCC 129

of any specific powers under the Rules, but in exercise of its residuary power and thus the State was right to impose conditions, as the absorbees had exercised their right of election. We may usefully referred to Paras 25, 26, 31, 47, 48 and 55 which are as under :

“25. The State was making an offer to the respondents not in terms of any specific power under the 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 the U.P. Jal Nigam and would be placed below in the cadre till the date of absorption. The submission of Mr Verma that the period for which 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. Respondents 2 to 4 accepted the said offer without any demur on 3-9-1987, 28-11-1991 and 6-4-1987 respectively.

26. 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 v. Yashpal Dhir* [(1992) 4 SCC 683] *Ramankutty Guptan v. Avara* [(1994) 2 SCC 642] and *Bank of India v. O.P. Swarnakar* [(2003) 2 SCC 721 : 2003 SCC (L&S) 200] .) Furthermore, 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.

31. 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

A in the cadre in terms of the directions of the State in exercise of its residuary power.

B 47. 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.

C 48. 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.

D 55. 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. Employees Welfare Society v. Heavy Engg. Corpn. Ltd.* [(2006) 3 SCC 708 : 2006 SCC (L&S) 602 : JT (2006) 3 SC 102])”

E 22. It was emphasized that Column 11 of the said Rules providing for recruitment does not provide for the option of deputation and thus also the aforesaid observations would squarely apply.

F 23. Learned counsel submitted that there were different sources of recruitment for different posts. For example, in case of senior draughtsman (electrical), 100% recruitment was by promotion failing which it would be by deputation/transfer. It was specifically mentioned that the benefit of added years of service would be available. Thus, wherever the recruitment was by way deputation/transfer, it was so mentioned, which was not the case for recruitment as Junior Engineer (Electrical).

G 24. Learned counsel referred to *Union of India & Ors. vs. Deo Narain* (supra) to buttress the submission that while taking length of service/qualifying service in case of transfer from one cadre to the other

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of his own request, there could be loss of seniority. Eligibility and seniority are two different concepts and thus completion of combined qualifying service in previous and new cadres might render an employee eligible to be considered for promotion but does not entitle such an employee to be promoted by jumping over his seniors in new cadre. A

25. Learned senior counsel appearing for the UOI/Department also sought to support the impugned judgment and submitted that their revised counter affidavit which sought to replace the original counter affidavit was consistent with their stand before the Tribunal. B

26. Learned counsel drew our attention to Annexure P-7, which is a note of the Civil Engineer Wing, Department of Postal Services. The note records that there are only two sources of recruitment i.e. direct recruitment and departmental examination. The open competitive examination had not been held and a one-time relaxation to conduct the examination by the SE (Co-ordination) could also not be obtained. The work was thus being carried out by Junior Engineers who were on deputation from the D.O.T. A few were optees to the Postal Civil Wing and a few were on deputation from the Civil Construction Wing, AIR. The Member (P) of the D.O.T. had taken up the matter of repatriation with Member (D), DOP and it was committed that all Junior Engineers (Civil/Elect.) on deputation from DOT would be repatriated by 31.3.1999, which would create a void. Simultaneously, applications for permanent absorption were being received from Junior Engineers (Civil/Elect.) on deputation from CCW, AIR and thus this matter was taken up with their parent department. Since the permanent absorption of these Junior Engineers would give the DOP a slight respite from the dismal position, it was proposed to give its consent in principle for absorption on permanent basis. It is thereafter that the DOP issued the above memorandum dated 9.11.1999 annexed at Annexure P-8 towards the objective on the terms and conditions given in the annexure which were thus made applicable. C
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27. The whole process, it was thus contended, was with a clear understanding of the terms and conditions on which such absorption was to take place. In fact one of the Junior Engineers, P.David Adaikala Raj opted for repatriation to his parent department with the All India Radio on completion of deputation. G

28. We have given our careful consideration to the rival contentions made elaborately on both sides.

A 29. The contentions may be elaborate but the crux of the issue is whether the OMs referred to aforesaid which generally provide for the benefit of service rendered in the previous cadre in an equivalent post on being absorbed in another department would apply to a case where the absorption is on specified terms and conditions with the benefit of such past service in the previous cadre as well as the period of service rendered on deputation being denied ?

B 30. Our answer to this query is in the negative for which we proceed to pen down reasons.

C 31. It is no doubt true that the OM dated 29.5.1986 as modified by OM dated 27.3.2001 did provide for the benefit of the previous service rendered in the cadre. This is in effect also the ratio of the judgment in *SI Rooplal* case (supra). This would also be inconformity with the normal service jurisprudential view. However, it would be a different position if the absorbing department clearly stipulates a condition of giving willingness to sacrifice the seniority while preserving all other benefits for the absorbee (which are accepted) failing which the option was available to the absorbee to get himself repatriated to the parent department. The terms and conditions are categorical in their wording that the absorbees would be “deemed to be new recruits” and the previous service would be counted for all purposes “except his/her seniority in the cadre”. The D appellant accepted this with open eyes and never even challenged the same. Their representations to give them the benefit of their past seniority was also turned down and thereafter also they did not agitate the matter in any judicial forum. The controversy was thus not alive and it was not open for them to challenge the same after a long lapse of period of time. E In fact on the day of filing of the OM, any prayer to set aside the terms and conditions of absorption would have been clearly barred by time F under Section 21 of the Administrative Tribunals Act, 1985.

G 32. The appellants sought to rake up the issue only when the seniority list was finalized. This was preceded by the draft seniority list. Whatever may be the dispute of seniority *qua* other persons, insofar as the appellants were concerned, their seniority was based on the terms and conditions of their absorption. The position of the appellants in the seniority list was thus a sequitur to the terms and conditions of their absorption. We are of the view that it is precisely for this reason, anticipating that their claim would be time barred, that a challenge was H laid only to the seniority list without challenging the terms and conditions

of absorption though in the grounds, a plea was raised against the terms and conditions of absorption. Unless the terms and conditions of absorption were to be set aside, the seniority list prepared was in conformity with the same. A

33. Even otherwise, as noted above, since the appellants accepted the terms and conditions of absorption, they could not plead otherwise. B

34. We are in agreement with the submission of the respondents that this issue has been squarely dealt with in *Indu Shekhar Singh's case* (supra) where almost identical issues have been dealt with by holding that the State was within its right to impose conditions where the employees had the option to exercise their right of election. The entitlement was not under any rules but under what was called the residuary power. C

35. The High Court, in our view, rightly interpreted the Rules extracted aforesaid. The method of recruitment as per Rule 3, has to be specified in Column 5 to 15 of the Schedule, while Rule 5 provides for power of relaxation. Column 11 provides for the method of recruitment - whether by direct recruitment, or by promotion, or by deputation or transfer, and the percentage of the vacancies to be filled by various methods. This may vary from post to post. For the Junior Engineer (Electrical) post, the ratio is mentioned as 83.33 % by direct recruitment and 16.66% by promotion through a departmental competitive examination. The office note regarding the absorption dated 2.11.1998 also refers to the open competitive examination not being held and the consequences thereof, with absorption of persons like the appellants being envisaged to deal with the given situation, but subject to the terms and conditions which were then set out in OM dated 9.11.1999. D E F

36. It was further rightly pointed out that whenever the post could be filled by deputation as a method of recruitment it was so specifically provided, illustratively in the case of a senior draughtsman (electrical). Column 12 deals with the scenario where the recruitment method provides for appointment by promotion, on deputation or transfer. Thus Column 12 would apply only if the mode of recruitment was prescribed as per Column 11 which is not applicable in this case. G

37. It is true that the failure of the Government to assail the judgment of the Ernakulum Bench did create a situation of implementation of the OM as in the case of Shri Hari Singh but in view of the judicial H

A pronouncement by the impugned order which arose from the Delhi Bench of the Tribunal, the legal position was settled at the level of the High Court. We are thus of the view that the impugned judgment cannot be faulted in its conclusion and for these reasons the appeals stand dismissed.

38. The applications for direction and contempt petition accordingly
B stands closed.

Nidhi Jain

Appeals dismissed.