
(2008) 03 MP CK 0087

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2584 of 2003

Dr. Hemchandra Pandey and others

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 28-03-2008

Acts Referred:

Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 — Rule 12, 12(2)

Citation : (2008) ILR (MP) 2548 : (2008) 3 MPLJ 6

Hon'ble Judges : R.K. Gupta, J

Bench : Single Bench

Advocate : A.G. Dhande, with Sharad Verma, for the Appellant; Harish Agnihotri, Government Advocate for Respondents No. 1 and 2 and Sujoy Paul, for the Respondent

Final Decision : Allowed

Judgement

R.K. Gupta, J.

The present petition has been filed by the petitioners challenging the order Annexure P-10 dated 21-3-2003 whereby the services rendered by the respondent No. 3 in his parent department as Research Officer have been counted for the purposes of reckoning seniority to respondent No. 3 after his absorption on the post of Assistant Director with the borrowing department.

The facts leading to the present petition are that the petitioner No. 1 was working with the Panchayat and Social Welfare Department. He was sent on deputation with the respondents. The petitioner No. 1 was given ad-hoc promotion in his parent department on 24-4-1985 as a Leprosy Welfare Officer. Subsequently, by an order dated 15-8-1986 when the new Directorate i.e. the Woman and Child Development was opened the petitioner No. 1 was sent on deputation. At that time the petitioner was holding the pay scale of Rs. 2200-4000.

So far as the petitioner No. 2 is concerned, initially he was appointed in the Tribal Welfare Department on 19-3-1979. By an order dated 15-8-1986 the petitioner No. 2 was transferred on deputation to the Woman and Child Development Department. He was promoted in the parent department as Assistant Research Officer on 24-1-1994 in the pay scale of Rs. 2200-4000. The petitioner No. 2 was also sent on deputation in the Directorate of Woman and Child Development.

The petitioner No. 3 was directly recruited on the post of Assistant Director in the Woman and Child Development Department w.e.f. 23-2-1995 and he was promoted on the post of Joint Director in the pay scale of Rs. 12,000-16,500.

So far as the respondent No. 3 is concerned, he was initially employed with the Manpower and Planning Department and he was also sent on deputation. He came on deputation with the Woman and Child Development Department on 10th September, 1997 and at this time he was also in the pay scale of Rs. 2200-4000.

There is no dispute between the parties that all the petitioners and the respondent No. 3 have been absorbed as Assistant Director with the respondents. So far as the petitioner No. 2 is concerned, his absorption was cancelled, therefore, he filed a writ petition before this Court, which was registered as W.P. No. 3863/2006 (S), Harish Chandra Agrawal vs. State of M.P. and others. This Court allowed the said writ petition by passing an order on 18-5-2007 whereby the order of cancelling absorption of petitioner No. 2 was set aside. The order dated 18-5-2007 passed by this Court has also been upheld by a Division Bench of this Court in Writ Appeal No. 1107/2007, State of M.P. and anr. vs. Harish Chandra Agrawal decided on 15-2-2008.

A chart showing the position before the absorption of the petitioners and respondent No. 3 as well as position after their absorption is as under:

Petitioner No. 1 HemchandraPandey

Petitioner No. 2 H.C. Agrawal

Petitioner No. 3 R. C. Raghuwanshi

Respondent No. 3 R. C. Shukla

Date

Position

Date

Position

Date

Position

Date

Position

8-2-1980

Appointed as Supervisor, Panchayat and Social Welfare Deptt. in the pay scale of Rs. 246-460

19-3-1979

Appointed as Asst. Statistical Officer in Tribal Welfare Deptt. equivalent to Asstt. Director

23-2-1995

Appointed as Asstt. Director in Woman and Child Development Deptt. (Direct Recruittee)

1980

Entered as Steno-Clerk

24-4-1985

Promoted as Leprosy Welfare Officer on ad-hoc basis

15-8-1986

Transferred on deputation to Woman and Child Development Deptt. and absorbed on 3-11-1988

21-6-1993

Promoted as Research Officer in parent Deptt.

4-4-1998

Absorbed in Woman and Child Welfare Deptt. as Asst Director

26-12-1994

Promoted as Asstt. Research Officer in Tribal Welfare Deptt. (Parent Deptt)

10-9-1997

On deputation to Woman and Child Development Deptt. as Asstt. Director

25-4-1998

Promoted as Dy. Director

25-4-1998

Promoted as Dy. Director Absorbed as Asstt. Director on 24-7-98

Oct. 2002

Promoted as Dy. Director in Women and Child Dev. Deptt.

14-12-99

Promoted as Joint Director

14-12-99

Promoted as Joint Director

23-5-1998

Promoted as Joint Director

26-2-1998

Absorbed as Asstt. Director in Woman and Child Dev. Deptt.

The respondent No. 3 submitted a representation whereby he submitted that after absorption his seniority be counted by taking into account the previous services rendered by him in his parent department. The said representation was accepted by the respondents and the request of respondent No. 3 was acceded. Consequently, the order dated 21-3-2003 (Annexure P-10) was passed whereby the seniority was given to the respondent No. 3 from 21-6-1993 i.e. the service rendered by the respondent No. 3 in his parent department w.e.f. 21-6-1993 has been taken into account for the purposes of reckoning seniority to him in the borrowing department where he is also absorbed. The respondents have also passed a consequential order, which is Annexure P-11 to the petition, whereby seniority of the petitioners has been re-fixed. The petitioners being aggrieved have filed the present petition to challenge the order Annexure P-10 and so also the consequential order Annexure P-11.

Before considering the rival contentions of the parties it would be appropriate to refer here to the concerning Rule for reckoning the seniority. The Rule 12 of the M.P. Civil Services (General Conditions of Service) Rules, 1961 (in short "the Rules") provided for reckoning the seniority, which reads as under:

12. Seniority. -- The seniority of the members of a service or a distinct branch or group of posts of that service shall be determined in accordance with the following principles, viz.--

(a) Direct recruits. -- (i) The seniority of a directly recruited Government servant appointed on probation shall count during his probation from the date of his appointment: viz

(ii) The same order of inter se seniority shall be maintained on the confirmation of the normal period of probation. If, however, the period of any direct recruits is extended, the appointing authority shall determine whether he should be assigned the same seniority as would have been confirmed on the expiry of the normal period of probation or whether he should be assigned a lower seniority.

(b) Promoted Government Servants. -- A promoted Government servant shall count his seniority from the date of his confirmation in the service to which he

has been promoted and shall be placed in the gradation list immediately below the last confirmed member of that service but above all the probationers:

Provided that where two or more promoted Government servants are confirmed with effect from the same date, the appointing authority shall determine their inter se seniority in the service in which they are confirmed, with due regard to the order in which they were included in the merit list, if any, prepared for determining their suitability for promotion and their relative seniority in the lower service from which they have been promoted.

(c) Officiating Government servant. -- The inter se seniority of Government servants promoted to officiate in a higher service or a higher category of posts shall, during the period of their officiation, be the same as that in their substantive service or grade irrespective of the dates on which they began to officiate in the higher service or grade:

Provided that--

(i) If they were selected for officiation from a list in which the names of Government servants considered suitable for trial in a promotion, to the Higher service or grade were arranged in order of merit, their inter se seniority shall be determined in accordance with the order of merit in such list;

(ii) The seniority of a permanent Government servant appointed to officiate in another service or post by transfer shall be determined ad hoc by the appointing authority:

Provided that the seniority proposed to be assigned to such Government servant shall be determined and intimated to him in the order of appointment:

(iii) Where a permanent government servant is reduced to a lower service, grade or category of posts, he shall rank in the gradation list of the latter service, grade or category of posts above all the others in that gradation list, unless the authority ordering such reduction by a special order indicates a different position in the gradation list for such reduced Government servant.

(iv) Where an officiating Government servant is reverted to his substantive service or post he shall revert to his position in that gradation list relating to his substantive appointment which he held before he was appointed to officiate in the other service or post.

Subsequently, the aforesaid Rule 12 was substituted and was made effective from 2nd April, 1998. The relevant portion of the amended Rule 12(2) of the M.P. Civil Services (General Conditions of Service) Rules, 1961 is reproduced as under:

(2) Seniority of Transferees. -- (a) The relative seniority of persons appointed by transfer from one department to another department of the State Government shall be determined in accordance with the order of their selection for such transfer.

(b) Where a person is appointed by transfer in accordance with the provisions in the Recruitment Rules, providing for such transfer in the event of non-availability of suitable candidates by direct recruitment or promotion, such transferee shall be grouped with direct recruits or promotees, as the case may be, and he shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion.

(c) 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) 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.

Explanation -- The fixation of seniority of a transferee in accordance with the above rule will not however affect any regular promotions to the next higher grade made prior to the date of such absorption. In other words it will be operative only in filling up of vacancies in higher grade taking place after such promotion.

On the basis of the aforesaid facts, learned counsel for the petitioners submitted that the order impugned Annexure P-10 has been passed arbitrarily and the respondent No. 3 could not have been given ante-dated seniority i.e. from the date when he was not even absorbed. It is contended that the matter of grant of seniority was governed by the amended Rule 12(2) of the M.P. Civil Services (General Conditions of Service) Rules, 1961. It is also submitted that in the present case the order impugned Annexure P-10 has been passed treating it to be a special case in favour of the respondent No. 3 only and what was the special circumstance of the case, no record has been made available to this Court and thus, under these circumstances, the order Annexure P-10 is arbitrary. Learned counsel for the petitioner further contended that without there being equation of post the benefit as such should not have been granted in favour of the respondent No. 3 only by counting his past services which he has rendered in the parent department.

Learned counsel appearing on behalf of the respondent No. 3 in reply to the aforesaid submissions put forth by the learned counsel for the petitioners submitted that the matter with regard to grant of seniority is not governed by the Rules, which were amended w.e.f. 2-4-1998. He submitted that the matter for grant of seniority is governed by the general law of the service jurisprudence and the past services rendered by the respondent No. 3 in the parent department have rightly been taken into account. He also submitted that even assuming that in the order Annexure P-10 in para-2 it is stated that the order for counting past services which has been made in favour of the respondent No. 3

shall not be counted in case of any other officer in future, yet the petitioners can submit a representation and similar benefits can be claimed by the petitioners also. He further submitted that once the respondent No. 3 was in the pay scale of Rs. 2200-4000 on the date when he was sent on deputation and was also absorbed in the same pay scale then under the service jurisprudence the past services of the respondent No. 3 cannot be ignored.

To substantiate his contention, learned counsel for the respondent No. 3 placed heavy reliance on the judgment passed by the Apex Court in *K. Madhavan and Another Vs. Union of India (UOI) and Others*, and referred to para-21 of the said judgment, which is reproduced as under:

We may examine the question from a different point of view. There is not much difference between deputation and transfer. Indeed, when a deputationist is permanently absorbed in the CBI, he is under the rules appointed on transfer. In other words, deputation may be regarded as a transfer from one government department to another. It will be against all rules of service jurisprudence, if a government servant holding a particular post is transferred to the same or an equivalent post in another government department, the period of his service in the post before his transfer is not taken into consideration in computing his seniority in the transferred post. The transfer cannot wipe out his length of service in the post from which he has been transferred. It has been observed by this Court that it is a just and wholesome principle commonly applied where persons from different sources are drafted to serve in a new service that their pre-existing total length of service in the parent department should be respected and presented by taking the same into account in determining their ranking in the new service cadre. See *R. S. Makashi vs. I. M. Menon, Wing Commander J. Kumar vs. Union of India*.

On the basis of the aforesaid, learned counsel for the petitioners submitted that once a person has been appointed on transfer from one department to another department and subsequently is absorbed permanently then there is not much difference between deputation and transfer. It is contended by him that the deputation may be regarded as transfer from one department to another department and he submitted that it will be against all rules of service jurisprudence if the past services are not counted for seniority.

Learned counsel for the petitioners submitted that a true meaning of the judgment passed by the Apex Court in *K. Madhawan (supra)* would be that for the purposes of counting the past services what is material is the transfer on the equivalent post in another government department. It is submitted by him that the services rendered in the parent department on the equivalent post i.e. when both the posts are equivalent, would only be considered for counting seniority in terms of the decision rendered by Apex Court in *K. Madhawan (supra)*.

The contentions of the rival parties with regard to the applicability of the judgment rendered by the Apex Court in *K. Madhawan (supra)* are considered. In

the present case, at the first instance, it is to be seen that the State Government has not submitted any record for the satisfaction of this Court that at any point of time any mind was applied by the authority before passing the order Annexure P-10 that the post of Research Officer, which was occupied by the respondent No. 3 in his parent department before absorption was the equivalent post on which the respondent No. 3 has been absorbed in the borrowing department. Though the order Annexure P-10 states that the services rendered by the respondent No. 3 on the equivalent grade before absorption shall be taken into account for the purposes of reckoning seniority on the absorbed post. For the purposes of ascertaining the equivalent grade as per the general service jurisprudence for applying the principles in *K. Madhawan (supra)* one has to see whether there is any application of mind by any authority that both the posts of respondent No. 3 were the equivalent post. Merely because the pay scale of petitioners as well as of respondent No. 3 were the same before their sending on deputation and the petitioners and respondent No. 3 were absorbed in the same pay scale whether it would mean that both the posts were equivalent.

In this reference, the judgment passed by the Apex Court in *M. Hara Bhupal Vs. Union of India and Others*, is relevant and in para 2 of the said judgment the Apex Court has considered the question with regard to equivalence of post and ultimately the Apex Court came to the conclusion that the pay scale by itself is not determinative factor for the purposes of equivalence of the posts. What is material is the class or position in a class according to the value. The paragraph 2 from the said judgment is profitably reproduced as under:

2.Thus we have no hesitation in holding that these are two distinct posts. The eligibility criteria for absorption vide Rule 5 of both the sets of Rules lays down two essential conditions, namely, that on the date on which the two sets of Rules were brought into force the incumbent should have been holding the same post and would be eligible to be absorbed in the same grade. In the context although the scale of pay of the post of Private Secretary and Section Officer may be the same and both may be in the feeder cadre for further promotion yet the words same grade occurring in Rule 5 of the respective Recruitment Rules must mean the same post to which the particular Recruitment Rules would apply. Interchangeability in the two posts cannot be read in the Rules. In other words a Section Officer could be eligible to be absorbed only as Section Officer and a Private Secretary only as Private Secretary subject to the condition of holding the post on the date of commencement of the respective Rules.

It is submitted by the applicant that notwithstanding that he was holding the post of Private Secretary he should be deemed to be in equivalent grade or in analogous post and on that basis he could be absorbed even as Section Officer so that he would not lose the benefit of past service for seniority. The applicant seeks to rely on the decision of the Supreme Court in *Hari Nandan Sharan Bhatnagar vs. S. N. Dixit*. It was held in that case that the dictionary meaning of "grade" is rank, position in scale, a class or position in a class according to the

value. The term however was explained in *A.K. Subraman vs. Union of India* as having various shades of meaning in the service jurisprudence, sometimes used to denote a pay scale and sometimes a cadre. It is relevant to note that under the *Stenographers' Service Recruitment Rules, 1989*, 58 posts of Private Secretary were specified and under the *Miscellaneous Posts Recruitment Rules, 1989*, 91 posts of Court Officer/Section Officer were specified subject to variation depending on workload. In that sense posts of Private Secretary and Court Officer/Section Officer would fall in two separate cadres. The word "cadre" means permanent establishment of regiment forming nucleus for expansion at need and it does not mean post but strength of the establishment (See *D.G. of Health Services vs. Bikash Chatterjee*.) We are therefore unable to reach any element of interchangeability in the two posts for the purpose of absorption in the post of Section Officer as analogous to absorption in the post of Private Secretary for reckoning seniority. The argument of the applicant therefore cannot be accepted.

On the basis of the aforesaid law, under the service jurisprudence without deciding the equivalence of post held by a person came on transfer and a deputationist cannot be treated to be the holder of the equivalent post for the purposes of conferring seniority by counting his past services which he has rendered in the parent department. The question for grant of seniority is considered in *Indu Shekhar Singh and Others Vs. State of U.P. and Others*, wherein ultimately the Apex Court came to the conclusion that grant of seniority is not a fundamental right but is only a civil right.

Thus, it is not necessary that in every case where a person is absorbed by way of his transfer from one department to another department then his past services are to be counted necessarily. The past services have to be counted only subject to equivalence of post and before conferring seniority there has to be an application of mind with reference to the equivalence of post.

The question with regard to equivalence of post has also received consideration by the Apex Court in *S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others*, and in para-17 of the said judgment the Apex Court reiterated the principle of counting the past services rendered by a transferee who is absorbed and ultimately held that the past services which an incumbent has rendered before his absorption have to be counted. The Apex Court considered the question with regard to factors which may determine the equation of two post and ultimately in para-17 of the judgment the following law has been laid down:

In law, it is necessary that if the previous service of a transferred official is to be counted for seniority in the transferred post then the two posts should be equivalent. One of the objections raised by the respondents in this case as well as in the earlier case of *Antony Mathew* is that the post of a Sub-Inspector in the BSF is not equivalent to the post of a Sub-Inspector (Executive) in Delhi Police. This argument is solely based on the fact that the pay-scales of the two posts are

not equal. Though the original Bench of the tribunal rejected this argument of the respondent, which was confirmed at the stage of SLP by this Court, this argument found favour with the subsequent Bench of the same tribunal whose order is in appeal before us in these cases. Hence, we will proceed to deal with this argument now. Equivalency of two posts is not judged by the sole fact of equal pay. While determining the equation of two posts many factors other than "Pay" will have to be taken into consideration, like the nature of duties, responsibilities, minimum qualification etc. It is so held by this Court as far back as in the year 1968 in the case of Union of India (UOI) and Another Vs. P.K. Roy and Others, . In the said judgment, this Court accepted the factors laid down by the Committee of Chief Secretaries which was constituted for settling the disputes regarding equation of posts arising out of the States Reorganisation Act, 1956. These four factors are (i) the nature and duties of a post; (ii) the responsibilities and powers exercised by the officer holding a post; the extent of territorial or other charge held or responsibilities discharged; (iii) the minimum qualifications, if any, prescribed for recruitment to the post; and (iv) the salary of the post. It is seen that the salary of a post for the purpose of finding out the equivalency of posts is the last of the criterion. If the earlier three criteria mentioned above are fulfilled then the fact that the salaries of the two posts are different, would not in any way make the post "not equivalent". In the instant case, it is not the case of the respondents that the first three criteria mentioned hereinabove are in any manner different between the two posts concerned. Therefore, it should be held that the view taken by the tribunal in the impugned order that the two posts of Sub-Inspector in the BSF and the Sub-Inspector (Executive) in Delhi Police are not equivalent merely on the ground that the two posts did not carry the same pay-scale, is necessarily to be rejected. We are further supported in this view of ours by another judgment of this Court in the case of Vice-Chancellor, L.N. Mithila University Vs. Dayanand Jha, wherein at para 8 of the judgment, this Court held : "Learned counsel for the respondent is therefore right in contending that equivalence of the pay-scale is not the only factor in judging whether the post of Principal and that of Reader are equivalent posts. We are inclined to agree with him that the real criterion to adopt is whether they could be regarded of equal status and responsibility ****. The true criterion for equivalence is the status and the nature and responsibility of the duties attached to the two posts.

On the basis of the aforesaid, merely because the pay has been equal of an incumbent in the parent department and absorption in the same pay scale that by itself is not the determinative factor the purposes of equivalence of post and what further has to be considered is the nature of duties, the minimum qualification, responsibilities and powers exercised by an officer holding a post; the extent of territorial or other charge held or responsibilities discharged and the salary for the post. Ultimately the Apex Court held that the salary of a post for the purposes of finding out the equivalence of post is the last of the criteria and not the only criteria.

Thus, from the aforesaid analysis of the judgments rendered by the Apex Court in *M. Hara Bhupal (supra)* and *S. I. Rooplal (supra)* it is clear that the service jurisprudence is not allergic to count the past services of a transferee who is permanently absorbed in a department but the past services of such an incumbent are to be counted if he had been holding the equivalent post before his absorption in the department.

This being the law settled by the Apex Court, the "State" was under a duty to apply its mind to the equivalence of post and if there had been application of mind then that material should have been placed on record for the satisfaction of the Court. In this reference, it will be necessary to look into the other material filed by the petitioners along with their rejoinder in reply to the return filed by respondents. The same was filed on 10-5-2006 through I.A. No. 3635/2006. Along with the rejoinder certain copies of the note-sheets have been filed as Annexure P/13 which go to show as to how the matter has been processed for grant of seniority in favour of the respondent No. 3. In none of the documents it is shown that the respondents have applied their mind to the equivalence of post but the note-sheets reflect that the case of the respondent No. 3 be treated as a special case for conferring him seniority by counting his past services. Nothing is shown in the said note-sheet as to why the case of the respondent No. 3 be treated as a special case for the purposes of conferring the benefit of seniority to him. While counting the past services of the respondent No. 3, it is not apparent from the said note-sheet that at any point of time there had been any application of mind with reference to the equivalence of the two posts.

This leads to another question for consideration that when the law has been settled by the Apex Court that previous services of an incumbent who is transferred from one department to another department then after absorption the previous services on equivalent post have to be counted. The petitioners also before their absorption and deputation were holding the pay scale of Rs. 2200-4000, then the law which has universal application as settled by the Apex Court should also have been applied for the petitioners and if ultimately the respondents come to the conclusion that the petitioners were not holding the equivalent post in their parent department and are not entitled to count their seniority on the equivalent post on which they have been absorbed then the matter would have been entirely different. But, in the present case from the record submitted by the petitioners the case of the respondent No. 3 alone was considered treating it to be a special case. This also leads to think that there had been some special favour to the respondent No. 3 and the same standard or the norms were not applied with reference to the petitioners. The above discussion will be with reference to the respondent No. 3 vis-a-vis petitioners No. 1 and 2 and the case of the petitioner No. 3 is on a different footing. He was directly recruited on the post of Assistant Director and was selected by the Public Service Commission and held the post of Assistant Director w.e.f. 23-2-1995 i.e. the post on which the petitioners and the respondent No. 3 were initially absorbed.

The fixation of inter se seniority of a deputationist who is permanently absorbed vis-a-vis a person already working in the department by way of direct recruitment is considered in the light of the amended Rule 12(2) of the M.P. Civil Services (General Conditions of Service) Rules, 1961, which came into force w.e.f. 2-4-1998. It prescribes that where a person is appointed by transfer in accordance with the provisions in the Recruitment Rules, providing for such transfer in the event of non-availability of suitable candidates by direct recruitment or promotion, such transferee shall be grouped with direct recruits or promotees, as the case may be, and he shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion. The analogous Rule has received consideration in a judgment passed by the Apex Court in *Union of India and Another Vs. Onkar Chand and Others*, and paragraphs 10 and 11 from the same are reproduced as under:

10. The indisputable facts, which we have given above, will show that Onkar Chand was a deputationist. When he was permanently absorbed as JIO-I w.e.f. 31-12-1977 he was factually working as JIO-I. Though, he was promoted to officiate in the rank of ACIO-II in the deputation quota by an order dated 11-10-1977, he joined that post on 2-1-1978. A perusal of the promotion list (vide Ex. R-II at p. 124) will show that separate lists were prepared for departmental candidates, permanently absorbed candidates and deputationists. It is also worthy to note that the inter se seniority among the different categories were also fixed in the list. It is not in dispute that the deputationists have got certain percentage of quota for promotion. The said Onkar Chand was promoted to officiate in the rank of ACIO-II only against the deputationist quota is not in dispute. At this juncture, it is necessary to quote the relevant clause in the office memorandum dated 22-12-1959 regarding the fixation of seniority of persons appointed by transfer in accordance with the Recruitment Rules. Clause 7(iii) reads as follows:

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.

(emphasis supplied)

Therefore, when the said Onkar Chand was permanently absorbed (by transfer) in the cadre of JIO-I w.e.f. 31-12-1977 he must take his seniority below the persons in the department already in the cadre of JIO-I on that date. One more relevant factor will be that a person in the cadre of JIO-I has to put in a minimum years of service before aspiring for promotion as ACIO-II. The appellants, taking the date of permanent absorption of the said Onkar Chand as JIO-I w.e.f. 31-12-1977, fixed the seniority in that cadre and so considered his turn for regular promotion as ACIO-II came only in the year 1984 as his junior

departmental JIOs were promoted on the basis of 1984 DPC.

The grant of seniority to the respondent No. 3 w.e.f. 21-6-1993 adversely affected the civil right of seniority of the petitioner No. 3 who is a person directly appointed in the department and was appointed prior to the absorption of the respondent No. 3 because the petitioner No. 3 was appointed on 23-2-1995 and the respondent No. 3 is given seniority w.e.f. 21-6-1993. How such an arrangement of a special case would be permissible in the light of Rule 12(2)(b) by treating the case of the respondent No. 3 as a special case, would be contrary to the Rule 12(2)(b) of the Rules.

Learned counsel for the respondents submitted that by the impugned order Annexure P-10 dated 21-3-2003 the respondent No. 3 has been given seniority w.e.f. 21-6-1993 and the amended Rule 12(2) of the M.P. Civil Services (General Conditions of Service) Rules, 1961 has come into operation w.e.f. 2nd April, 1998, therefore, under the circumstances the new Rules have no application in any manner. Learned counsel appearing for the petitioners submitted that the new Rule shall have application in the present case.

The submission so put forth by the parties with regard to applicability of the amended Rule 12(2) of the Rules is considered. At the first instance, it has to be seen whether the new Rule will have the retrospectivity or not? The prospectivity and retrospectivity of the Rule will depend upon the nature of the Rule in which it has been worded. A reading down of the Rule 12(2) particularly the Clause (b) and (c) which may apply in the present case itself indicates that Rule 12(2)(b) and (c) shall apply with retrospective effect because under Rule 12(2)(b) and (c) if the seniority is to be conferred to a person who is appointed by transfer and such transferee is to be grouped with the direct recruits or promotees, as the case may be, then he shall be ranked below all direct recruits or promotees, as the case may be, selected on the same occasion. This is with reference to the Rule 12(2)(b). Thus, grant of seniority of a person ranked below to the direct recruits or promotees after his absorption may depend upon the date before the Rules have come into operation. If the order is passed on or after 2nd April, 1998 when new Rules have come into operation then the effect would be the grant of ante-dated seniority under the new Rules.

Similarly, reading down of Rule 12(2)(c) also indicates that when a person who has come on transfer/deputation and is permanently absorbed in the equivalent grade on regular service then seniority would be fixed by counting his past services which he has rendered in the equivalent post. The Rule 12(2)(c) also indicates the grant of seniority with retrospective effect, if the order is passed on or after 2nd April, 1998. The Apex Court in the case of S.I. Rooplal (supra) in para-24 has also taken note of the word "whichever is later" in the similar provision which is also used in Rule 12(2)(c) and held that the aforesaid provision is ultra vires to the Constitution. The paragraph 24 from the said judgment is reproduced as under:

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 Arts. 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 petitioners/appellants and the offending words in the Memorandum "whichever is later" are held to be violative of Arts. 14 and 16 of the Constitution, hence, those words are quashed from the text of the impugned Memorandum. Consequently, the right of the petitioners/appellants 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.

The judgment passed by the Apex Court in *S. I. Rooplal* (supra) further received consideration in the case of *Indu Shekhar* (supra) wherein the words "whichever is later" came up for consideration and the Apex Court in para-46 of its judgment in *Indu Shekhar* (supra) observed as under:

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.

Therefore, in view of the judgments passed by Apex Court the words "whichever is later" as used in Rule 12(2)(c) become meaningless.

In this reference, I may profitably refer to the judgment passed by Apex Court in *P. Mohan Reddy etc. Vs. E.A.A. Charles and Others etc.*, wherein the Apex Court has considered the question in respect of retrospective application of the Rules conferring seniority and came to a conclusion that reading down of the Rule and its effect is the decisive factor for applying the same for giving the retrospective effect accordingly the same is to be given effect to for the purposes of fixing seniority, if it is permissible with retrospective effect under the Rules. The relevant paragraphs 16 and 17 from the said judgment are reproduced as under:

16. It would be appropriate to notice a three Judge Bench decision of this Court in *S. S. Bola*. It is this judgment on which the High Court heavily relied upon. In that case the question of seniority between direct recruits and promotees had been decided by the Supreme Court adopting a particular principle and the seniority list had been drawn up. But the Haryana Legislature enacted an Act governing the conditions of service of the employees and that Act had been given

retrospective effect and the legislative intervention became necessary as the entire seniority position became topsy-turvy to such an extent that a direct recruit Assistant Executive Engineer, who was not even borne on the cadre when a promotee had been appointed as a Deputy Engineer became senior to the said promotee. It is because of the retrospectivity of the Act the seniority was required to be re-drawn up in accordance with the Act, the validity of the Act having been upheld. The principle decided in S. S. Bola's case, by this Court will have no application to the present case since, admittedly, the amended provisions which came into force in September, 1992, is not retrospective in nature. The High Court, therefore, was not justified in drawing its conclusion on the basis of the aforesaid judgment in Bola's case. At this juncture, we may notice yet another judgment of this Court in P. S. Mahal vs. Union of India. It is in this case the Supreme Court by its judgment dated 11th December, 1974 had indicated that in the absence of any Statutory Rules governing the inter se seniority of the Executive Engineers promoted from two sources, the seniority inter se should be determined on a General Principle indicated in the Memorandum dated 22nd June, 1949 on the basis of length of continuous officiation in the grade. The Rule making Authority then came forward with a set of Recruitment Rules in exercise of power under proviso to Article 309 and gave it retrospective effect from a date prior to the judgment of the Supreme Court, referred to earlier. When the seniority list was re-determined on the basis of the Statutory Recruitment Rules this Court held, that since by the earlier judgment it has been held that the inter se seniority of Executive Engineers promoted from the grades of Assistant Engineers up to 11-12-1974 would be governed by the Rule of length of continuous officiation, that direction and decision cannot be set at not by the subsequent Recruitment Rules coming into force and giving the same retrospective effect. The Court, therefore, directed that in respect of the appointees prior to the promulgation of the recruitment rules the seniority has to be determined on the basis of the decision in A.K. Subraman vs. Union of India.

A conspectus of the aforesaid decisions of this Court would indicate that even though an employee cannot claim to have a vested right to have a particular position in any grade, but all the same he has the right of his seniority being determined in accordance with the Rules which remained in force at the time when he was borne in the Cadre. The question of re-determination of the seniority in the cadre on the basis of any amended criteria or rules would arise only when the amendment in question is given a retrospective effect. If the retrospectivity of the Rule is assailed by any person then the Court would be entitled to examine the same and decide the matter in accordance with the law. If the retrospectivity of the Rule is ultimately struck down, necessarily the question of re-drawing of the seniority list under the amended provisions would not arise, but if however, the retrospectivity is upheld by a Court then the seniority could be redrawn in accordance with the amended provisions of the employees who are still in the cadre and not those who have already got promotion to some other cadre by that date. Further a particular Rule of seniority

having been considered by Court and some directions in relation thereto having been given, that direction has to be followed in the matter of drawing up of the seniority list until and unless a valid Rule by the rulemaking authority comes into existence and requires otherwise, as was done in Bola case. It may be further stated that if any rule or administrative instruction mandates drawing up of seniority list or determination of inter se seniority within any specified period then the same must be adhered to unless any valid reason is indicated for noncompliance with the same.

As I have already held above that a reading down of the Rule itself indicates the retrospectivity for conferring seniority then keeping in view the nature of the Rule and the language applied therein the submission so put forth by the learned counsel for the respondent No. 3 cannot be accepted merely because the seniority is given to the respondent No. 3 from 21-6-1993 by passing an order on 21-3-2003 (Annexure P-10) i.e. when the Rule 12(2) of the Rules was already in force w.e.f. 2nd April, 1998.

In view of the above, when the Rule 12(2)(b)(c) directs that a transferee who is permanently absorbed in the department on the equivalent post, he will be ranked below the persons already existing in the category and the petitioner No. 3 was already working in the cadre on the date of absorption of the respondent No. 3, as he was directly recruited on the post of Assistant Director on 23-2-1995 and the respondent No. 3 was absorbed on 26-2-1998 as Assistant Director and he is granted seniority w.e.f. 21-6-1993 then such an eventuality would also be contrary to Rule 12(2)(b)(c) and the action of the State Government as such will also be prejudicial to the interest of petitioner No. 3.

The Rule for fixation of seniority should stand to the test of Articles 14 and 16 of the Constitution. Granting seniority to the respondent No. 3 from the date he was not even borne in the cadre, over such persons who were already working in the cadre i.e. the petitioner No. 3, would only mean that the respondent No. 3 was treated to be a special class and has been given a special treatment without deciding and giving the objective consideration which were relevant and have already been considered above. In this reference, the Apex Court in the case of Indu Shekhar (supra) also referred to and relied upon the decision rendered by it in the case of Ram Janam Singh Vs. State of Uttar Pradesh and another, . The paragraph 28 from the judgment passed by the Apex Court in Indu Shekhar (supra) is reproduced as under:

28. In Ram Janam Singh vs. State of U.P. this Court held: (SCC p.627 para-10):

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.

For the reasons stated hereinabove, I am inclined to allow the present petition and set aside the order dated 21-3-2003 (Annexure P-10) and so also the consequential order dated 28-4-2003 (Annexure P-11) and further direct the respondents-State Government to take a fresh decision with regard to equivalence of post of the petitioners vis-a-vis the respondent No. 3 in terms of the Rule 12(2) of the Rules which was amended w.e.f. 2nd April, 1998 by ignoring the words "whichever is later" as provided in Rule 12(2)(c) of the Rules and then to determine the inter se seniority of the petitioners vis-a-vis the respondent No. 3. The necessary order shall be passed by the respondents-State within a period of two months from the date the petitioners furnish the certified copy of this order.

In the result, the present petition stands allowed. No order as to costs.