

(2025) 01 SC CK 1535

In the Supreme Court Of India

Case No : Civil Appeal Nos. 3994, 3995, 3996, 3997 Of 2024

Geetha V.M. & Ors

APPELLANT

Vs

Rethnasenan K. & Ors

RESPONDENT

Date of Decision : 03-01-2025

Acts Referred:

Kerala State and Subordinate Service Rules, 1958 — Rule 8, 27(a), 27(c)

Citation : (2025) 01 SC CK 1535

Hon'ble Judges : J.K. Maheshwari, J;Rajesh Bindal, J

Bench : Division Bench

Advocate : V. Giri, Alim Anvar, Krishna Dev Jagarlamudi, Harshed Sundar, Mohammed Sadique T.A., Santhosh K, Dileep Poolakkot, K. Rajeev, Jaideep Gupta, C. K. Sasi, Meena K Poullose, Riddhi Bose, Racheeta Chawla, Rishi Agarwal, Sampriiti Bakshi, Siddharth Banerjee, Arvind Gupta

Final Decision : Allowed

Judgement

J.K. Maheshwari, J

1. The present appeals have been filed impugning the order passed by High Court of Kerala at Ernakulam on 13.03.2019 in W.A. Nos. 1418, 1525, 1527 and 1652 of 2010, reversing the judgments dated 29.06.2010 and 30.06.2010 passed by learned Single Judge in W.P. (C) Nos. 4599, 12381 and 14091 of 2010 and W.P. (C) No. 20269 of 2010 respectively.

2. Appellants herein are the employees who were working in the Directorate of Health Services (the "DHS"), later absorbed on furnishing option as demanded, in the Directorate of Medical Education (the "DME") on account of abolition of dual control system of the staff in medical colleges under the policy decision of the State of Kerala. The rival claims of inter-se seniority between employees') and absorbed employees from DHS in the respective categories of DME (hereinafter referred to as 'absorbed employees') made by both were decided by the order impugned.

3. Writ Petition No. 4599/2010 was filed by the absorbed employees contending that they are entitled to retain their existing seniority even on absorption in the DME in terms of Rule

8 of Appendix I of the G.O. (P) No. 548/2008/H&FWD dated 25.10.2008. Since the inter-se seniority of the absorbed employees was yet to be finalized, during the pendency of the said Writ Petition, promotions made to the post of Junior Superintendent and Upper Division Clerks in the DME were cancelled.

4. In the meantime, the Government of Kerala issued clarificatory letter No. 8195/K1/10/H&FWD dated 24.04.2010 (the "clarificatory letter") indicating that seniority of the absorbed employees shall be reckoned from the date of order of promotion for the promotees and from the date of first effective advice in case of direct recruits. The said clarificatory letter was assailed by filing Writ Petitions Nos. 12381 and 14091 of 2010 by the original employees. The case set out was that once the absorbed employees were transferred after exercising their 'option', in terms of G.O. (P) No. 548/2008/H&FWD dated 25.10.2008, to join DME, they must rank junior and be placed at the bottom of the seniority list and their seniority be reckoned from the date of joining in the DME as per Rule 27(a) and Rule 27(c) of 'Kerala State and Subordinate Service Rules, 1958 (in short "KS&SS Rules")'.

5. Learned Single Judge decided the writ petitions of the original and absorbed employees by passing the common judgment and relying upon Rule 8 of Appendix I of G.O. dated 25.10.2008 opined that seniority of staff who opted to join DME will be maintained as per Rule 27(a) and 27(c) of Part II, KS&SS Rules and the clarificatory letter dated 24.04.2010. The Writ petition filed by the absorbed employees was allowed and the Writ Petitions of the original employees were dismissed holding that absorbed employees would be entitled to retain their past service rendered in DHS and their seniority in DME shall be reckoned from the date of initial appointment in DHS.

6. On filing Writ Appeal by the original employees of DHS, the Division Bench by the order impugned set-aside the judgment of learned Single Judge and observed that once absorbed employees had joined DME on their own request opting for inter-departmental transfer, proviso to Rule 27(a) of Part II of KS&SS Rules, would attract and the seniority of the absorbed employees will be determined with reference to their date of joining in the DME. The said order is under challenge in these appeals.

Factual Background

7. Prior in time, DME was formed w.e.f. 10.05.1983, to manage and coordinate Medical Colleges and Collegiate Hospitals in the State of Kerala. Hospitals attached to medical colleges were under the control of the DME, while Primary Health Centres (PHCs), Community Health Centres (CHCs), Taluk Hospitals, District Hospitals and Specialty Hospitals were under the control of DHS. Before formation of the DME, medical colleges were operated independently but under

the administrative control of DHS and the 'Principal' was the head of the department. After formation of DME, the authority of Principal was transferred to DME, however, the 'nursing, paramedical, and ministerial staff' associated with hospitals and affiliated institutions continued to remain under the administrative control of DHS which also included the power of appointment. This resulted in 'dual control', where even though administrative authority of the medical colleges and collegiate hospitals was shifted to DME, but the staff continued to remain under the control of DHS, due to which significant delay and administrative difficulties were being faced in ensuring timely assignment/posting of Staff Nurses, Nursing Assistants, Technicians, Attendants, Cleaning Staff, and other categories of Paramedical Staff at Medical College Hospitals and affiliated institutions. Additionally, Superintendents of Medical Colleges and Heads of Clinical Departments were encountering tremendous hardship to maintain discipline amongst staff inter-se departments. Resultantly, it posed as an extreme impediment for the Government of Kerala to ensure smooth functioning of both the Departments.

8. Elaborating on further challenges, particularly regarding appointments, majority of the hospital staff was appointed either by the DHS or the District Medical Officer. Although Hospital Superintendents had the power to initiate disciplinary action, yet the power for appointments, transfers, promotions, and discipline for these employees continued to remain with the DHS or District Medical Officer. Identifying the issues, the Government of Kerala formed several committees that recommended elimination of dual control system in Medical Colleges as a corrective measure, aimed for benefiting the public at large. To cite few examples, as per Indian Medical Council regulations, "All the teaching hospitals shall be under the academic, administrative and disciplinary control of Dean / Principals of Medical Colleges or Medical Institutions"; as per State Planning Board's Working Group report on Health, Nutrition and Sanitation on 10th Five Year Plan (2002 - 2007), the Principals / Superintendent of Medical Colleges have no administrative or disciplinary control over the staff. Therefore, all the above categories of paramedical and ministerial staff in Medical College Hospitals and attached other hospitals have to be appointed directly by DME and the existing staff must be given freedom to opt for either DHS or DME and all new appointments must be done separately.

9. Further, the 'Estimates Committee' (1998 - 2000) of Kerala Legislature in its 28th Report recommended that the employees working in the Medical Colleges such as Nurses, Paramedical Staff are to be bifurcated from DHS and are to be brought under the control of DME and the existing staff should be given an opportunity to exercise option. Subsequent thereto, 'Estimates Committee' (2001 - 2004) of the Kerala Legislature reiterated that employees working in medical colleges shall be brought under the control of DME and staff which at present is in existing control of DHS should be afforded an opportunity to furnish options either of DHS or DME. The State Government after examining the recommendations in public interest accorded sanction to abolish the dual control

system for the Staff attached to the Medical Colleges and Hospitals and brought them out from the administrative and disciplinary control of DHS by issuing the G.O. (MS) No. 124/2007/H&FWD dated 01.06.2007.

10. While according sanction, the State decided to ask for the options from existing employees of the DHS to move to the posts which stood transferred to DME. The relevant clauses of the said G.O. for understanding are quoted herein below -

"1. The sanctioned posts of all categories of staff (except doctors in Primary Health Centres who are appointed by the Health Services Department) such as Nursing, Paramedical and Ministerial Staff in the hospitals under the Director of Medical Education will stand shifted to the service of Directorate of Medical Education w.e.f. 01.06.2007.

2. The employees of the Health Services Department now working against these shifted posts shall be treated as on deputation to the Directorate of Medical Education, until further orders.

3. The existing employees of Health Services Department will be given an opportunity to exercise opinion (sic) to move to the posts transferred to the Director of Medical Education. A committee will be constituted under the Chairmanship of Secretary (Health), with Director of health Services, as Convener for discussions with service organizations regarding rules for exercising of option, the arrangements to be made in the Health Service Department due to the transfer of these posts, promotion and other service matters and for submitting recommendations to Government.

4. The appointing authority of the transferred categories of posts (except last grade service posts) will be Director of Medical Education. The Principal will be the appointing authority of last grade service posts.

5. (i) The appointment to the category / post of Nursing Assistant now transferred to Directorate of Medical Education shall be made by direct recruitment and the special rules will be changed accordingly. The Director of Medical Education will submit proposals for qualification for direct recruitment to the post of Nursing Assistant.

(ii) However, the existing vacancies of Nursing Assistants are to be filled up by promoting the eligible Hospital attendants after giving them training. Direct recruitment as per 5 (i) above shall be done only to the remaining vacancies, after giving promotion to all the eligible Hospital - Attendants.

(iii) Considering the acute shortage of staff, the Last grade service special rules shall be deemed to be modified in the public interest in the case of Directorate of Medical Education only and the Principals are permitted to make temporary appointment through Employment Exchange to all the vacant posts in the categories of Nursing Assistant and Hospital Grade - I and II, except the vacancies to be kept apart for promotion of eligible hands in these posts.

(iv) The Secretary (Health) is authorized to obtain remarks from PSC if required for the implementation of any of the above decisions and submit proposals.

(v) The steps to transfer of budget allotment for salary and other items from Director of Health Services to Director of Medical (sic) Education will be taken up in consultation with Finance Department."

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11. From the aforementioned G.O., it is also evident that State actively intended to identify the issues and decided to address them involving all the stakeholders. After extensive deliberations with all, the Government of Kerala by G.O. (Ms.) No. 163/07/H&FWD, dated 16.07.2007, constituted a Committee under the Chairmanship of Additional Secretary (Health) to resolve the issues related to abolition of dual control system. A meeting was convened on 10.10.2007 with all the stakeholders inviting their views and suggestions. During the meeting, highlighting the recommendations of the Estimates Committee (1998-2000) and Estimates Committee (2001-2004), consensus was reached to implement the same. After extensive discussions, the committee framed the 'Draft Rules' for options, 'Draft Option form', and the qualifications required and method of appointment for the categories other than the common categories in DHS and DME, which were required to be absorbed.

12. The Government of Kerala vide G.O. (Rt.) No. 1273/08/H&FWD, dated 07.04.2008, and G.O. (Rt.) No. 2321/08/H&FWD, dated 05.07.2008, also nominated Administrative Officer, Kerala Heart Foundation along with Nodal Officers from DHS and DME to coordinate and oversee the implementation of abolition of dual control system. Based on the aforesaid, the Committee submitted the 'Draft Rules' and also the 'Draft Form of option' to the Government for consideration and approval.

13. Having considered these recommendations, the State Government issued G.O. (P) No. 548/2008/H&FWD dated 25.10.2008, partially modifying the G.O. dated 01.06.2007 and directed that all the ministerial staff, nurses, paramedical staff, including last grade staff under the establishment of DHS working with the DME, shall be brought under the administrative control of the DME, subject to furnishing options as specified in the rules contained in 'Appendix I' and form contained in 'Appendix II'.

14. Appendix I of the G.O. dated 25.10.2008 is titled as 'Rules for filing option by the staff, on abolition of dual control systems'. Rule 8 therein governs the seniority of staff who have opted for the DME. This Rule is central to the present dispute and extracted for ready reference below -

".....8. The seniority of the staff opted to Department of Medical Education will be maintained as per Rule 27(a) and Rule 27(c) of Part II, KS & SS Rules."

15. Appendix II of the said G.O. was for option which is in shape of a form required details of the employee and declaration. The declaration is relevant,

which is extracted hereinbelow for ready reference -

" DECLARATION

I, hereby opt to be absorbed / continued in the Department of Medical Education and if my option is accepted, I will not put forth any claim in future to return to Health Services Department under any provisions.

Place: Signature:

Date: Name and Designation"

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16. In furtherance of the G.O. dated 01.06.2007 and G.O. dated 25.10.2008, an 'Option Cell' with officers from DHS and DME both was constituted to scrutinize the option forms submitted by the existing employees from DHS. After scrutiny, 3072 options against 6022 transferred posts were found valid, and the list of 3072 employees 'seniority wise' and 'category wise' was forwarded by DHS for switching them to DME. In continuance, State Government vide G.O. (P) No. 56/2009/H&FWD dated 27.02.2009, directed that 6022 posts under DHS establishment will be 'shifted' to DME. It was also made clear vide Order No. PLA1-2462/05/DHS dated 28.02.2009 that lien of the employees whose names were forwarded shall stand transferred from DHS to DME.

17. In the meantime, since the model code of conduct for the General Elections of 2009 came into effect from 02.03.2009, therefore, the said two G.O.s mentioned above could not be implemented. After elections and on formation of new Government, in supersession of the previous G.O.s dated 27.02.2009 and 28.02.2009, the G.O. (P) No. 167/2009/H&FWD dated 17.06.2009 was issued directing that 3096 posts in 57 categories will be forthwith transferred to the DME, and the DHS will issue orders transferring those employees category wise and station wise. As such, the employees of DHS included in the list be continued in DME, as per their options. The employees of DHS not included in the list of DME were allowed to continue on deputation as per G.O. 01.06.2007 until further orders.

18. In the meantime, clarifications were sought by the DME about fixation of seniority of staff who opted for DME from DHS. The State Government vide its clarificatory letter dated 24.04.2010 clarified that the seniority of the staff who opted for DME, will be reckoned as per Rules 27(a) & 27(c) of Part II, KS&SS Rules, i.e., as per date of order of promotion in case of promotees and as per date of first effective advice in case of direct recruits (entry cadre) in the respective categories in the DHS.

Relevant Rules

19. In reference to the various G.O.s, the KS&SS Rules referred above are also relevant, therefore, extracted here as under -

"27. Seniority - (a) Seniority of a person in a service, class, category or grade shall, unless he has been reduced to a lower rank as punishment, be determined by the date of the order of his first appointment to such service, class, category or grade.

Explanation - For the purposes of this sub-rule, "appointment" shall not include appointment under rule 9 or appointment by promotion under Rule 31.

This amendment shall be deemed to have come into force with effect on and from the 17th December, 1958, but shall not affect the seniority of any member of a service settled prior to the date of publication of this amendment in the Gazette:

Provided that the seniority of persons on mutual or inter-unit or inter-departmental transfer from one Unit to another within the same Department or from one Department to another, as the case may be, on requests from such persons shall be determined with reference to the dates of their joining duty in the new Unit or Department. In the case of more than one person joining duty in the same grade in the same Unit or Department on the same date, seniority shall be determined, -

(a) if the persons who join duty belong to different unit or different departments, with reference to their age, the older being considered as senior, and

(b) if the persons who join duty belong to the same category of post in the same department, in accordance with their seniority in the Unit or Department from which they were transferred.....

(b) (This sub-rule is not relevant for the case)

(c) Notwithstanding anything contained in clauses

(a) and (b) above, the seniority of a person appointed to a class, category or grade in a service on the advice of the Commission shall, unless he has been reduced to a lower rank as punishment, be determined by the date of first effective advice made for his appointment to such class, category or grade and when two or more persons are included in the same list of candidates advised, their relative seniority shall be fixed according to the order in which their names are arranged in the advice list:

Provided that the seniority of candidates who have been granted extension of time to join duty beyond three months from the date of the appointment order, except those who are undergoing courses of study or training which are prescribed as essential qualification for the post to which they are advised for appointment, shall be determined by the date of their joining duty:....."

20. From contextual perusal of Rule 27(a), the seniority of a person will be determined from the date of the order of his first appointment to such service, class, category or grade. Proviso to it deals with the contingency where an employee asks for transfer mutually or inter-unit or inter-departmental from one

unit to another within the same Department or from one Department to another as the case may be. On such transfers, the seniority of the person who requested, shall be determined from the date of joining and as per clause (a) and (b) of the said proviso.

21. Thus, accompanying proviso only contemplates determination of seniority when transfer as specified therein has been sought mutually and on request. It is relevant to clarify that the language of the proviso does not deal with the transfers of employees due to administrative exigencies or their transfer by way of absorption under the policy decision of the Government bifurcating the dual control system of the staff.

22. So far as Rule 27(c) is concerned, it deals with the relative seniority of the employees, by which the inter-se seniority of the employees appointed to a class, category or grade shall be fixed according to the order in which their names are arrayed in the first advice list for his appointment to such class, category or grade. For clear understanding, we can say the order of recommendations in the selection list by Commission or Selection Board, at the time of their selection, shall be relevant for maintaining the relative seniority as specified in the final advice memo of the Commission or Board as the case may be.

Findings recorded by learned Single Judge reversed by the Division Bench

23. The absorbed employees succeeded before learned Single Judge. The Court referring to Rule 8 of Appendix I of the G.O. dated 25.10.2008, held that seniority of the staff opted for joining DME will be maintained as per Rules 27(a) and 27(c) of Part II, KS&SS Rules and they will be entitled to get seniority including their past service under the DHS in terms of the aforementioned rules. The relevant findings are reproduced for ready reference as under -

"5. It was thereupon that WP(C) No. 12381/10 and 14091/10 were filed by persons, who were employees of the DME. According to them, on exercising option and coming over to DME, the optees should rank junior most in seniority, and therefore, the clarification, as contained in Ext. P5 referred to above is illegal. Therefore, the only question that arises is whether the optees of DHS who have come over to DME are entitled to retain their seniority for their prior service in DHS.

6. In my view, the issue can be answered with reference to Clause 8 of Appendix I of Ext. P1 order dated 25/10/2008, which provides that seniority of staff opted to Department of Medical Education will be maintained as per Rule 27(a) and Rule 27(c) of Part II KS&SSR. This precisely is what is reiterated in Ext. P5 and this order does not introduce anything which is not provided in Ext. P1. Clause 8 of Appendix 1 of Ext. P1 is also not under challenge in WP (C) Nos. 12381/10 or 14091/10. If that be so, necessarily, optees like the petitioners in WP(C) No.4599/10 and the additional party respondents in WP(C) No. 14091/2010 are entitled to seniority for their prior services under the DHS in terms of Rules 27(a) and (c) of Part II KS&SSR.

9. In view of the above, the challenge against Ext. P5 order referred to above dated 24.04.2010 raised in WP(C) Nos. 12381/10 and 14091/2010 will stand repelled. The claim of the petitioners in WP(C) No. 4599/10 for maintaining seniority for their service prior to exercising option, is upheld, in view of Clause 8 of Appendix 1 of Ext. P1 Government Order dated 25/10/2008 and Ext. P5 dated 24.4.2010 referred to above. The Directorate of Medical Education is directed to finalise the inter se seniority list of the optees and the existing employees of the Department in accordance with law and as expeditiously as possible.

24. Being aggrieved, the original employees filed Writ Appeal, which was allowed and the Division Bench vide impugned judgment set aside the order of the Single Bench. The findings as returned by Division Bench are reproduced below for ready reference -

"The dual control system of hospital staff attached to the Directorate of Medical Education and Directorate of Health Services was abolished by Government Order dated 25.10.2008 and clause 8 of Appendix I of thereto is as follows:

"8. The seniority of the staff opted to Department of Medical Education will be maintained as per Rule 27(a) and Rule 27(c) of Part II, KS&SSR".

2. Many employees in the Department of Health Services opted for transfer to the Department of Medical Education and necessarily therefore the proviso to Rule 27(a) of Part II of KS&SSR extracted below applies:

"Provided that the seniority of persons of mutual or inter unit or inter departmental transfer from one unit to another within the same department or from one department to another, as the case may be, on request from such persons shall be determined with reference to the dates of their joining duty in the new unit or department". (emphasis supplied)

3. The seniority of those employees who have opted from the Department of Health Services can only be determined with reference to the dates of their joining duty in the Department of Medical Education. The fact that they have given their option for an inter-departmental transfer indicates that it was on their request attracting the proviso to Rule 27(a) of Part II of KS&SSR.

4. The learned Single Judge has obviously overlooked the rigour of the proviso to Rule 27(a) of Part II of KS&SSR which springs into action the moment there is an inter-departmental transfer on request. We therefore direct that the seniority of the optees aforesaid shall be determined with reference to the proviso to Rule 27(a) of Part II of KS&SSR and the inter se seniority list finalised....."

25. The Division Bench held that once an employee has furnished his/her option, it should be termed as 'inter-departmental' transfer on 'request', hence, proviso to Rule 27(a) of Part II of KS&SS Rules will be attracted. The said proviso contemplates that seniority of such employees can be determined with reference

to his/her date of joining duty in DME, which was not duly considered by the learned Single Judge. These findings of the Division Bench have been assailed before us in these Appeals.

Rival Contentions

26. We may now refer the submissions of the parties. Learned Senior Advocate Mr. V. Giri appearing on behalf of absorbed employees submitted as follows -

26.1 In the present case, the State by a 'policy decision' abolished the 'dual control' system of the 'hospital staff' between DHS and DME. The administrative control was given to DME, however, certain categories such as 'Nursing, Paramedical and Ministerial Staff' were under the governance of DHS. To do away with the anomaly, State by G.O. dated 25.10.2008 directed that all ministerial staff, nurses, paramedical staff (including last grade staff) working under DHS shall be brought under the administrative control of the DME. The G.O. specifically stipulated that seniority of the persons who opt for absorption in DME will be maintained and their 'lien' will be shifted.

26.2 Pursuant thereto, out of 12044 posts, as many as 6022 posts (50%) were 'shifted' to DME. DHS employees were given an option either to retain their post with DHS or opt for DME on the very same post which they occupied in DHS. After examination, options of 3072 employees were found to be valid.

26.3 State vide G.O. dated 27.02.2009, directed that the Director of Health Service will issue orders transferring the 'lien' of those 3072 employees at the disposal of DME. Further, it was submitted that, essentially, it was never an 'inter-departmental' transfer of the employees on their 'request'. They were given a 'choice' to exercise an 'option' by the State in furtherance of a policy decision. Making such a choice would not fall within the ambit of 'request' as stipulated in the proviso to Rule 27(a) of KS&SS Rules and seniority of the absorbed employees cannot be reckoned from the date, they joined DME.

26.4 The entire exercise was carried out by a committee set up by the State after due consultation and by transferring lien to DME, the service of the absorbed employees rendered in DHS was specifically protected.

27. Learned Senior Counsel Mr. Raghenth Basant appearing on behalf of the original employees straight away drew our attention to the proviso to Rule 27(a) of KS&SS Rules and contended that when any inter-departmental transfer is made on the 'request' of an employee, then in such case, his/her seniority must be reckoned from the date of joining the new department. To further buttress, he submitted that -

27.1. Out of 6022 posts that stood transferred to DME from DHS, only 3072 posts were filled by transferring absorbed employees from DHS to DME. The remaining posts were filled on deputation. Even though the inter-departmental transfer was an administrative decision of the State, the Appendix II - 'Form of Option' annexed with G.O. dated 25.10.2008 reveals that the absorbed

employees had to give a declaration as to 'Stations requested for posting' before getting transferred.

27.2. Once it is settled that it is a case of inter-departmental transfer subject to filling up of request for posting, proviso to Rule 27(a) of KS&SS Rules will automatically attract for determining seniority of the transferred employees and as provided, it shall be from the date of joining duty in the new Unit. Rule 27(c) has no applicability in the lis at hand.

27.3. This Hon'ble Court in 'K.P. Sudhakaran and Another Vs. State of Kerala and Others (2006) 5 SCC 386' while dealing with issue of seniority and applicability of Rule 27(a) of KS&SS Rules, has categorically held that on transfer, the employee has to forego his past service and his seniority will be determined from the date of his joining duty in the new department/unit.

27.4. Lastly, if the seniority of the original employees vis-à-vis absorbed employees is reckoned from the date of initial appointment of absorbed employees, then it will cause grave prejudice since original employees were never given an option.

28. Learned Senior Counsel Mr. Jaideep Gupta appearing on behalf of the State, argued in support of the appellants -absorbed employees and at the outset submitted that there is no question of prejudice being caused to original employees for the reason that, after the abolition of dual control system, the original posts in DHS along with their promotional posts in respective category were transferred to DME. In other words, effectively additional posts as they existed in DHS were shifted to DME. The options were exercised by the absorbed employees only on the premise of assured seniority and on absorption to DME, if they are placed at the bottom of seniority list in the respective category, they will have to forego their previous service. This was never the intention of the Government of Kerala while taking the policy decision.

29. Generally, in inter-departmental transfers, only the employee is transferred to the respective post, however, in the present case, the post itself along with the employee have been shifted. DHS employees were given an option to switch to DME after policy decision and transfer of posts to DME. The said option was never in the nature of request as contemplated under proviso to Rule 27(a) of KS&SS Rules. Hence, the said proviso has no bearing on the inter-se seniority between the original employees and absorbed employees.

Analysis of contentions and reasonings

30. After hearing learned counsel for the parties at length, in our view the short question which falls for consideration is 'whether the option exercised by DHS employees to join DME pursuant to a policy decision of the State of Kerala ought to be considered as an option for absorption or a request for transfer under proviso to Rule 27(a) of KS&SS Rules and in that situation, the inter-se seniority of such employees in the DME shall be reckoned from which date?'

31. Having perused the material placed, it is luculent that in furtherance to the policy decision of the Government and on account of abolition of the dual control system, employees of the DHS were required to be transferred by way of absorption to DME in public interest looking to the administrative exigency. In furtherance as per G.O. (Ms.) No. 124/07/H&FWD dated 01.06.2007, existing staff of DHS were required to be switched to DME for implementation of the said decision. In this connection, the Government first decided to identify the issues and invited the stakeholders to deliberate. A meeting was convened under the Chairmanship of the Additional Secretary, Health, on 10.10.2007 and taking note of the recommendations of the Estimates Committees 1998-2000 and 2001-2004, it was decided to abolish the dual control system to increase the efficiency of public administration. In furtherance, the Committee framed the 'Draft Rules for Option' and 'Draft Option Form.' As per the Government order vide G.O. (Rt.) No. 1273/08/H&FWD dated 07.04.2008 and G.O. (Rt.) No. 2321/08/H&FWD dated 05.07.2008, the Government nominated nodal officers of the DHS and DME and the Administrative Officer from the Kerala Heart Foundation to coordinate the activities in connection with the implementation of abolition of dual control system. They prepared the list of such staff of various categories and grade working under their control and also the list of employees along with the posts for transfer to the DME. On receiving the information, the Government examined those in detail and was of the view that the existing qualification and method of appointment for the posts in DHS will be followed for appointment to the post after shifting them to DME and modification, if any, shall be considered separately.

32. In consequence, the Government after partial modification in G.O. (Ms.) No. 124/07/H&FWD dated 01.06.2007, issued the G.O. (P) No. 548/2008/H&FWD dated 25.10.2008, and the recommendations made therein are enumerated as under -

(i) All the ministerial staff, nurses, paramedical staff including the last grade staff under the establishment of Director Health Services and now working in the Medical Education Department will be brought under the administrative control of Director of Medical Education subject to filing of option in accordance with the Rules for option. The Rules of option is given in Appendix-I and Form of option is given in Appendix II. The category-wise list and number of post as above is given in Appendix III. The persons who opt for the Medical Education Department from the Health Services Department will be allotted to the Medical Education Department based on the seniority in service. The option will be applicable only for the staff of Health Services Department. The staff of Health Services Department now working under Director of Medical Education also will have to file option if they wish to continue in the Medical Education Service.

(ii) The staff of Health Services Department will file option in the prescribed form in Appendix-II. If the number of persons in a particular category who opt to the Medical Education Department is in excess of the sanctioned strength of that

category in Medical Education Service, the senior most among such persons will be shifted to Medical Education Service as per Rule 27(a) and 27(c) of Part II KS & SSRs, subject to their option. If sufficient options are not received for a particular post, the junior most person will be shifted to the Medical Education Department from the Health Services Department making mandatory posting according to seniority. If staff is in surplus in that category in Health Services Department, such mandatory posting will continue till such time Director of Health Services has no surplus staff under any category.

(iii) The employees will file option in the prescribed form in Appendix II duly recommended by the head of office, to the Senior Administrative Officer (Dual Control Option Cell), Office of the Director of Health Services, Thiruvananthapuram. The employees shall file option within a period of 45 days from the date of this order.

(iv) The option form will be scrutinized by a Cell, with the following staff, within a period of one month thereafter, that is by 15.1.2009. The Cell will function in the office of the Director of Health Services.

(1) The Senior Administrative Officer, Health Services Department, Thiruvananthapuram (Convener).

(2) The Administrative Officer, Medical Education Department, Thiruvananthapuram.

(3) The Administrative Officer, Kerala Heart Foundation, Medical College, Thiruvananthapuram.

(4) The Administrative Assistant, Health Services Department, Thiruvananthapuram.

(5) The Administrative Assistant, Medical Education Department, Thiruvananthapuram.

(6) 2 Clerks each from the Medical Education Department and Health Services Department, Thiruvananthapuram.

(v) The Director of Health Services will issue orders transferring the employees on the basis of options received, subject to the Draft Rules in Appendix I, before 31.01.2009. The Director of Health Services and Director of Medical Education will identify the surplus staff thereafter, if any, after completion of the process, to Government and Director of Medical Education will identify the surplus staff in all categories and report to Government after 31.1.2009.

By order of the Governor,

Dr. Vishwas Mehta,

Secretary (Health)"

33. From the above, it can clearly be spelt out that by the mechanism carved

out, the employees of the DHS were required to be transferred along with the posts to DME by way of absorption in the exigency of public administration and necessity. The factum of absorption by way of transfer is clear from the declaration of Appendix II of G.O. dated 25.10.2008, i.e., the form prescribing details of the employees and attached declaration, by which it is clear that the employees have opted for absorption in DME and wish to continue and do not intend to return to DHS as referred in paragraph 15 of the judgment.

34. After receiving the declaration and Appendix II, the Committees of the officials of DHS and DME made recommendations for transferring 3096 posts of 57 categories and accordingly, the Government of Kerala issued G.O. (P) No. 167/2009/H&FWD dated 17.06.2009, including the names and posts of those employees whose options were found valid. After passing such order, the issue arose regarding seniority of the employees absorbed in DME. In this regard, a clarificatory letter was issued by the Government on 24.04.2010, specifying that the seniority of the staff who opted for DME shall be reckoned as per Rule 8 of Appendix I of G.O. dated 25.10.2008 in terms of Rules 27(a) and 27(c) of Part II of KS&SS Rules. It was clarified that in case of promotion the seniority shall be reckoned from the date of promotion and in case of direct recruit (entry cadre) as per the date of first effective advice issued at the time of appointment.

35. The reference of above Rule 8 of Appendix I is in paragraph 14 of the judgment whereby, the seniority of the staff who opted for absorption to DME will be maintained as per Rule 27(a) and 27(c) of Part II, KS&SS Rules. The word 'maintained' used for seniority has its own significance and be further referred for inter-se seniority of the absorbed employees in terms of the said Rules.

36. The Rule 27(a) as quoted in paragraph 19 of judgment above emphasizes that seniority of a person in service in any class, category or grade shall be determined from the date of order of first appointment to the service unless he has been reduced to lower rank by way of punishment. Its proviso only deals with the contingencies wherein an employee seeks transfer on request as specified or applied mutually. Therefore, the proviso applies only for the contingencies of mutual or inter-unit or inter-departmental transfer from one unit to another within the same department or from one department to another as the case may be on request by such employee. It does not apply to the cases in which transfer is made by the Government in administrative exigency or the transfer by way of absorption under policy decision of the Government.

37. In our view, the intent of Rules 27(a) and 27(c) is clear that seniority be reckoned from the order of his first appointment and the inter-se seniority be determined as per the date of first effective advice made for his appointment in service, class, category or grade as the case may be. The proviso of Rule 27(a) is merely an exception to the said Rule of maintaining the seniority from the date of appointment in the cases of 'on request' and mutual transfer. The said exception does not attract in a case of transfer by way of absorption made by the Government in public interest or in administrative exigencies. Thus, proviso to

Rule 27(a) is an exception to the transfer on administrative grounds in public interest. The said fact is also clear from the Rules framed in Appendix I, and Option Form of Appendix II and its declaration as contained in G.O. dated 25.10.2008, by which the employee has furnished option for absorption without making any request for transfer.

38. The whole dispute revolves around the interpretation of the words transfer on request, transfer applied mutually and transfer by way of absorption. In the said context, it is necessary to lay emphasis on the definition of transfer as given in Kerala Service Rules (KSR), 1959, which reads as under: -

"(36) 'Transfer' - means the movement of an officer from one headquarter station in which he is employed to another to such station, either,

(a) to take up the duties of a new post, or

(b) in consequence of a change of his headquarter."

The said definition postulates the change of headquarter or station to another either to take up the duties of a new post or in consequence of change of headquarter. Indeed, the said change may be on request as prescribed in proviso to Rule 27(a) of KS&SS Rules or on his/her mutual request based on the needs of the employees who have applied or for administrative reason in public interest. As discussed, the said proviso only deals with first two contingencies and not the last one, i.e., transfer in public interest for administrative reason.

39. The transfer of an employee is an incidence of service if it is in public interest. It cannot be disputed that the Government is the best judge to decide how to distribute and utilise the services of an employee. Simultaneously, if employee makes a request due to some hardship and if the authority or the Government as the case may be is satisfied, it may post such employee as per request, but such transfer cannot be termed as transfer in public interest because it is on the request of the employee and not in the exigencies of the public administration.

40. Here, it is a case of transfer by way of absorption. Now, to deal with the meaning of absorption, we can profitably refer to the different glossaries. As per P. Ramanatha Aiyar's Advanced Law Lexicon, 7th Edition, 'absorption' means 'to take in. On absorption, the employee becomes part and parcel of the department absorbing him and partakes the same colour and character of the existing employees of the department.'

41. In Corpus Juris Secundum (CJS), 'absorb' is defined as 'to suck up; to drink in, to imbibe; to draw in as a constituent part; and it has been said to be also a synonym of "consume".'

42. On perusal of the above, it is clear that if transfer is by absorption, then such employee becomes part and parcel of the department absorbing him and partakes the same colour and character of the existing employees. In other

words, absorb clearly indicates to suck up, to imbibe to draw as a constituent part and consume.

43. In addition, the words option and request have different meanings which require further emphasis. In colloquial usage, Merriam-Webster defines 'option' as - 'an act of choosing; the power or right to choose: freedom of choice; something that may be chosen', whereas, 'request' is defined as - 'by asking for something, usually in a formal way'.

44. In legal usage, Black's Law Dictionary defines 'option' as - 'right or power to choose; something that may be chosen'. On the other hand, it defines 'request' as - 'an asking or petition; the expression of a desire to some person for something to be granted or done'.

45. In P. Ramanatha Aiyar's Advanced Law Lexicon, 7th Edition, 'option' is defined as - 'simply choice or freedom of choice. The essential requisites of an option or election is that a party opting should be cognizant of his right. The party must have the knowledge of his or her right and of those circumstances which will influence the exercise of option. The person to whom an option is given in regard to any matter must be left to his own free will to take or do one thing or another.' and 'request' is defined as 'a demand or requirement'.

46. After going through the definitions, it is clear that option gives a right to choose with freedom of choosing amongst the choices presented to the person concerned, whereas a request is the desire of a person to be granted something by asking or is a demand or requirement of the employee.

47. In the present case, the transfer has been made by way of absorption on the basis of option and not on the basis of request. The said absorption was in furtherance to a policy decision of the Government to abolish the dual control system enhancing the efficiency of the administration of medical colleges and attached hospitals thereto giving it to DME withdrawing from DHS. Therefore, the transfer by way of absorption on exercise of option as specified in Appendix I and Appendix II contained in G.O. dated 25.10.2008 does not attract the proviso to Rule 27(a) of KS&SS Rules, which only deals with the transfer on request or on mutual request. Thus, the action taken in public interest due to administrative exigency even on option is different than the action done on request. In our view, the proviso to Rule 27(a) does not attract in case of a transfer by way of absorption done by the Department in furtherance to the policy decision of the Government. Therefore, transfer by way of absorption in public interest cannot be equated with the transfer on request in contingencies as specified in proviso to Rule 27(a) or applied mutually.

48. In the fact situation of the present case, the judgment of Full Bench of the Punjab and Haryana High Court in the case of 'Kartar Singh v. State of Punjab, 1989 SCC OnLine P&H 482', is relevant. The Full Bench in a similar situation while dealing with the issue of seniority of Patwaris working in the State's Consolidation Department who were absorbed into the Revenue Department held

that the employees of Consolidation Department after absorption into the Revenue Department, will have the benefit of length of service in the Consolidation Department, on the new post. While concurring the view, in the separate note, Justice M.M. Punchhi, expressed his view that absorption is akin to amalgamation, in the sense that, an employee becomes part and parcel of the department absorbing him and partakes the same colour and character of the existing employees of the department, classified as promotees, direct appointees or transferees. In the facts discussed in detail above, definition of absorption which was based on option and the definition of request discussed above, we concur with the view taken by the Punjab and Haryana High Court by the said Full Bench.

49. At this stage, the judgment relied upon by the learned Senior Counsel Mr. Raghenth Basant representing private respondents in the case of K.P. Sudhakaran and Anr. (supra) is also relevant to refer wherein interpretation of Rule 27 of KS&SS Rules was expressly made in the context of the transfers of employees on request and maintaining the seniority. This Court dealt the proviso to Rule 27(a) in paragraph 11 and observed as thus:

"11. In service jurisprudence, the general rule is that if a government servant holding a particular post is transferred to the same post in the same cadre, the transfer will not wipe out his length of service in the post till the date of transfer and the period of service in the post before his transfer has to be taken into consideration in computing the seniority in the transferred post. But where a government servant is so transferred on his own request, the transferred employee will have to forego his seniority till the date of transfer, and will be placed at the bottom below the junior most employee in the category in the new cadre or department. This is because a government servant getting transferred to another unit or department for his personal considerations, cannot be permitted to disturb the seniority of the employees in the department to which he is transferred, by claiming that his service in the department from which he has been transferred, should be taken into account. This is also because a person appointed to a particular post in a cadre, should know the strength of the cadre and prospects of promotion on the basis of the seniority list prepared for the cadre and any addition from outside would disturb such prospects. The matter is, however, governed by the relevant service rules."

In the case, Court dealing with clause (a) and (c) of Rule 27 of the said Rules further observed as under -

"16. A careful reading of clause (c) shows that it did in no way affect the contents of proviso to clause (a) of Rule 27 inserted by amendment by GO dated 13-1-1976. Clause (a) of Rule 27 provided that seniority of a person in a service, class, category or grade shall be determined by the date of the order of his first appointment to such service, class, category or grade. Clause (b) provides that the appointing authority shall, at the time of passing an order appointing two or more persons simultaneously to a service, fix the order of preference among

them, and seniority shall be determined in accordance with it. Clause (c) made it clear that notwithstanding anything contained in clauses (a) and (b), where a person is appointed to a class, category or grade in a service on the advice of the Commission, the seniority of such person shall be determined by the date of first effective advice made for his appointment to such class, category or grade and when two or more persons are included in the same list of candidates advised, their relative seniority shall be fixed according to the order in which their names are arranged in the advice list. The effect of clause (c) is to clarify the date with reference to which seniority should be reckoned when they are initially appointed on the advice of the PSC. It only means that where the appointments are from the selection list published by PSC, their seniority will be reckoned/determined by the first effective advice made for such appointment by PSC and not by the actual date of his appointment by the appointing authority. Clause (c) has therefore no effect or application over the proviso which regulates subsequent "own-request" transfers."

50. The Court with said observations concluded that if the request is made for transfer by an employee and accepted by the authority, then on joining the transferred post, seniority be counted from the date of his joining at new place foregoing the previous service and advantage of clause (c) of Rule 27 is not available to such employee. The said judgment is of no help to private respondents - original employees since the transfer in the present case is in the administrative exigencies by way of absorption. As discussed above, the absorption based on option is completely different than the transfer on request and the said judgment rather fortifies the discussions made above and favours the case of the absorbed employees.

51. In conclusion, we can observe that in furtherance to the conscious policy decision of the Government, abolition of dual control system was inevitable, therefore, bifurcation of DHS and DME was directed based on the recommendations. The employees existing in DHS were absorbed in DME along with posts and lien. In the present case, in terms of the G.O. (P) No. 548/2008/H&FWD dated 25.10.2008, particularly Rule 8 of Appendix I, seniority of the absorbed employee cannot be disturbed applying the proviso of Rule 27(a) of KS&SS Rules. Learned Senior counsel representing the State has supported the said view pointing out that while forming the policy for transfer by way of Appendix I, II and III, the Government never intended to forgo the seniority of the employees in any class, category and grade existing in service of DHS and absorbed in DME. Therefore, the Government has specifically mentioned in Rule 8 of Appendix I that the seniority of such employee shall be 'maintained' as per Rule 27(a) and 27(c) of Part II of KS&SS Rules giving due weightage to the service rendered by them in DHS while absorbing in DME.

52. In totality of facts as discussed, the inescapable conclusion that can be drawn is that the transfer of appellants - absorbed employees was by way of absorption as per the policy decision of the Government of Kerala and it would

not fall within the purview of proviso to Rule 27(a) of KS&SS Rules. The appellants exercised the option for absorption by transfer from DHS to DME in line with the policy decision taken by Government of Kerala and not on their own volition. Such being the situation, it cannot be considered as a case of transfer based on voluntary choice or own request. Their seniority and inter-se seniority shall be maintained as per Rule 27(a) and 27(c) of Part II of KS&SS Rules read with clarificatory letter dated 24.04.2010 with reference to Rule 8 of Appendix I to G.O. dated 25.10.2008. The question as framed by us in paragraph 30 is answered accordingly.

53. In view of the foregoing discussion, we are of the considered opinion that the findings recorded by the Division Bench reversing the judgment of learned Single Judge are without due consideration of the material placed and based on wrong interpretation of rules. Therefore, such findings and the judgment stand set-aside.

54. Resultantly, the present appeals are allowed. The State of Kerala is directed to draw the seniority list of DME employees, including original and absorbed employees, reckoning the seniority of the absorbed employees as directed in paragraph 52 above. Pending interlocutory applications (if any) stand disposed-of.