
(2008) 07 GAU CK 0062
In the Gauhati High Court

M. Nakro

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 22-07-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 226, 309
Nagaland Engineering Services Rules, 1997 — Rule 7, 8

Citation : (2009) 5 GLR 162 : (2008) GLT 676 Supp

Hon'ble Judges : I.A. Ansari, J;H. Baruah, J

Bench : Division Bench

Judgement

I.A. Ansari, J.—Before we deal with this appeal on merit, certain facts, which were relevant and not in dispute in WP(C) No. 30(K)/2006, are set out as under:

(i) The five writ petitioners and respondent No. 6 in the writ petition (i.e., the present appellant) are B.E./B.Tech degree holders in Electrical Engineering. The petitioners were appointed as SDO (Electrical), in the Power Department, Govt. of Nagaland, as direct recruits, through selection process conducted by the Nagaland Public Service Commission ("the NPSC") during the period from 25.1.1994 to 16.3.2005. The respondent No. 6 (i.e., the present appellant) had participated, in the selection process, for the post of SDO (Electrical), conducted by the NPSC, in the year 1992, but failed to get selected. In the year 1993, respondent No. 6 (i.e., the present appellant), having been recommended by the NPSC for the post of Lecturer, was appointed, vide Govt. order, dated 6.10.1993, as Electrical Engineer, Class II (Gazetted), in Khelhoshe Polytechnic, Atoizu.

(ii) The service conditions of the petitioners, as employees of the Power Department, Govt. of Nagaland, are governed by Nagaland Engineering Service Rules, 1997 [Class I and Class II] ("the recruitment rules"), the recruitment rules having been framed by the state Government in exercise of powers under the proviso to Article 309 of the Constitution of India. Rules 7 and 8 of the Recruitment Rules provide for direct recruitment to the posts of Assistant Engineer/SDO, through NPSC, to the extent of 60% and 1 40% of the total

vacant posts of Assistant Engineer/SDO are to be filled up by promotion from the Grade of Junior Engineers, who may possess requisite qualification as laid down under the Recruitment Rules. There is no provision, in the Recruitment Rules, for bringing any officer to the level of Assistant Engineer/SDO on "deputation" nor do the rules provide for appointment to the post of Assistant Engineer/SDO, on "transfer", from any other department or service. The Recruitment Rules also do not have any provision for "absorption" of persons, brought, on "deputation", to the posts aforementioned.

(iii) For the purpose of regulating the filling up of the vacant posts on "deputation" and on permanent "absorption" of the "deputationists", in general, the Govt. of Nagaland issued an office memorandum as far back as on 17.9.1986. Under this memorandum, appointment on "deputation", when considered necessary and justified, shall be made only after due advertisement/circulation of the vacancy and the selection of the candidates has to be done by a Selection Board. The conditions precedent for appointment on "deputation", which office memorandum, dated 17.9.1986, aforementioned, embodies, were, however, not followed, when respondent No. 6, (i.e., the present appellant), who was, at the relevant point of time, serving as a lecturer, as stated hereinbefore, was appointed as SDO Electrical, in the Department of Power, on "deputation", by order, dated 15.12.1998, issued, in this regard, by the Commissioner and Secretary to the Govt. of Nagaland, Department of Power.

(iv) On 31.10.2002, the Association of Power Engineers, commonly known as "APEN", submitted a representation to the respondents/authorities concerned requesting them to stop bringing officers on "deputation" and not to extend further services of the deputationists, in the Department concerned. As the representation, so made, did not yield requisite result, the APEN submitted another representation, dated 5.6.2003, to the Chairman, NPSC, pointing out to him the violation of the Recruitment Rules in the matter of bringing of "deputationists" and their "absorption". By this representation, dated 5.6.2003, the APEN drew, in particular, attention of the Chairman, NPSC, to the case of respondent No. 6, by stating. Inter alia, that the respondent No. 6 (i.e., the present appellant), had earlier failed to qualify in the selection process meant for filling up of the post of SDO (Electrical) and yet he was brought, on "deputation", to the said post and attempts were on to absorb him in the power department. By this representation, the APEN further requested the Chairman, NPSC, not to "absorb" respondent No. 6 (i.e., the present appellant), in the power department, inasmuch as initial "deputation" to the post concerned was ordered in violation of the office memorandum, dated 17.9.1986, aforementioned. Following the representation so made, the notification, dated 1.7.2003, was published releasing all the three "deputationists", in the power department, who were serving in the posts of SDO (Electrical) including the respondent. No. 6 (i.e., the present appellant). Notwithstanding the notification, dated 1.7.2003, so issued, respondent No. 6 (i.e., the present appellant), remained, in the power department, for no assigned reasons, while his two other colleagues, (who had

been released under the same notification, i.e., the notification, dated 1.7.2003, aforementioned), had to leave the power department.

(v) In order to lay down a comprehensive procedure for filling up of vacant posts on "deputation" and by way of "absorption", Govt. of Nagaland, Department of Personal and Administrative Reforms, published the memorandum, dated 21.8.2004. This memorandum was applicable to all the departments of the Govt. of Nagaland. The relevant guidelines, issued under this office memorandum, state as under:

(i) Normally a Department should fill up a vacancy on "deputation" only if there is provision for this in the relevant service rules or if the Department requires an officer with specific qualification for a specialized job or personnel, with required qualification and "seniority" within the Department, are not available for specific reasons,

(ii) Such a vacancy will be invariably advertised through newspapers and official circulars indicating qualifications, experience, other eligibility conditions, last date of receipt of application, etc.

(iii) The candidates will be selected by a Screening Board which will be chaired by the Secretary of the Department with representative of the P&AR Department and representative of the concerned Directorate and an expert in the relevant discipline.

(iv) A person shall be eligible to apply for a "deputation" post only if he is in the same or equivalent grade or if the candidate is in the next lower grade, he should have fulfilled the qualifying years and other criteria for promotion to the next higher grade and possess the specified qualifications/experiences for the "deputation" post. The Department must also certify that no suitable candidate from the feeder service is available in the near future for promotion.

(v) Any proposal to absorb a candidate must have the prior clearance of the NPSC, P&AR and the cabinet stating that no suitable candidate is available from the feeding cadre for promotion to that post. The consent of the person concerned and the lending Department will be mandatory before considering permanent "absorption".

(vi) The "seniority" of a person so "absorbed" in the "deputation" post shall be counted from the date of such "absorption" only (i.e., from the date of Cabinet approval)."

(vi) The office memorandum, dated 21.8.2004, thus, embodies, amongst others, two important conditions as "conditions precedent" for "absorption" of "deputationists", namely, no "absorption" shall be made unless it is certified by the NPSC, Department of Personal and administrative reforms and also the state cabinet that there is no suitable candidate, available in the feeding cadre, to be promoted to the post, which is sought to be filled up by way of "absorption". Yet another condition, imposed under the office memorandum, dated 21.8.2004, is

that the "seniority" of the persons, on being "absorbed", shall be counted from the "date" of such "absorption", i.e., from the date of cabinet approval. Thus, under the Office Memorandum, dated 21.8.2004, it was made clear that the "absorption" of a "deputationist" would be possible only against the quota of "promotees" and not against the quota of "direct recruits" and that the "seniority" of such an "absorptionist" or "deputationist" would be "prospective" not "retrospective".

(vii) Notwithstanding the guidelines, so Issued, as indicated hereinabove, by the office memorandum, dated 21.8.2004, the respondent No. 6 (i.e., the present appellant), was "absorbed" by notification, dated 29.9.2005, as SDO (Electrical), in the Department of Power, without any certification by the appropriate authority that no suitable candidate was available for "promotion" to the post of SDO (Electrical) from the feeding cadre, i.e., from the cadre of junior engineers. This notification absorbing respondent No. 6 (i.e., the present appellant), in the post of SDO (Electrical), did, however, mention that his "seniority", in the Department of Power, would be counted from the date of the cabinet decision, i.e., 15.9.2005. Superceding, however, the notification, dated 29.9.2005 (whereby the respondent No. 6 had been absorbed, in the post of SDO (Electrical), with his "seniority" being countable w.e.f. 15.9.2005, another notification was issued, on 7.12.2005, by the Commissioner and Secretary, Department of Power, Govt. of Nagaland, whereby "seniority" of respondent No. 6 (i.e., the present appellant) was made to be counted from the date of his appointment, as a Lecturer in his parent department, i.e., with effect from 6.10.1993, though the decision for his "absorption" was taken by the cabinet only on 15.9.2005 and the "seniority", under the office memorandum, dated 21.8.2004, was" countable, at best, from the date of his "absorption" i.e., 15.9.2005.

(viii) As the effect of granting of such "seniority" to the respondent No. 6 (i.e., the present appellant), with retrospective effect, was that all the present private respondents had become junior to the present appellant (i.e., respondent No. 6 in the writ petition) in the Department of Power, in the post aforementioned, they all came to This Court seeking, with the help of a writ petition, made under Article 226 of the Constitution of India, issuance of a writ of certiorari setting aside and quashing the impugned orders, dated 29.9.2005, and 7.12.2005, whereby the present appellant (i.e., the respondent No. 6 in the writ petition) had been absorbed in the post of SDO (Electrical) and, on being so absorbed in the post aforementioned, was granted "seniority" w.e.f. 6.10.1993, the writ petitioners, case being, in brief, thus: The bringing of respondent No. 6 (i.e., the present appellant), on "deputation" to the Department of Power, was in violation of the office memorandum, dated 17.9.1986, inasmuch as he had been brought, on "deputation", to the Department concerned, without any advertisement having been published, in respect of the vacancy and without a selection process having been conducted, in this regard, by a selection board in terms of the office memorandum, dated 17.9.1986, aforementioned. This apart, the relevant

Recruitment Rules do not provide for bringing a person to the Department of Power either by way of "deputation" or "absorption" and, hence, not only that the bringing of respondent No. 6, as a "deputationist", to the post of SDO (Electrical), but even his "absorption" is against the relevant Recruitment Rules and, further, that the "absorption" of the respondent No. 6 (i.e., the present appellant), in the said post, is in violation of the office memorandum, dated 21.8.2004, too, inasmuch as "absorption" was possible, under the said office "memorandum, dated 21.8.2004, only against promotional vacancies (i.e., vacancy meant for filling up of the post by "promotion" and there ought to have been certification by the appropriate authority that no suitable candidate was available from the feeding cadre for granting promotion to the post to which the "deputationist", in question, i.e., respondent No. 6 (i.e., the present appellant), was sought to be brought. And above all, the "absorption" of respondent No. 6 is clearly against even the office memorandum, dated 21.8.2004, inasmuch as he has been granted "seniority" w.e.f. 6.10.1993, i.e., with effect from the date of his appointment, as a lecturer, in his parent department (i.e., on date, when he was not even born in the Department of Power) nor was he holding a post equivalent to the post of SDO (Electrical) and, thus, the office memorandum, (which permitted "absorption" subject to the condition that the "seniority" of a "deputationist" would be counted from the date of "absorption"), stood flagrantly violated.

(ix) Resisting the writ petition, the case, which respondent No. 6 (i.e., the present appellant), had set up, in the writ petition, was as under: By notification, dated 1.7.2003, when respondent No. 6, along with two other "deputationists" in the power department, were released, respondent No. 6 (i.e., the present appellant), had challenged his release by way of a writ petition, which gave rise to WP(C) No. 6737/2003. By an order, dated 23.5.2005, the High Court disposed of the said writ petition with direction to the State respondents to consider the case of the respondent No. 6 (i.e., the present appellant) for the purpose of deciding as to whether he shall be absorb or not in the Department of Power and that this shall be done within two months from the date of receipt of the order. It was pursuant to this direction given by the High Court that the State Government, eventually, decided to absorb the respondent No. 6 in the said post. The "absorption" respondent No. 6 was legal and valid and granting "seniority" to him, w.e.f. 6.10.1993, was in tune with law as had been laid down in S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others, . There have been many other instances, in the past, in the State of Nagaland, where "absorption" of "deputationists" had taken place and the refusal to absorb respondent No. 6 would have, thus, been discriminatory and against the guarantee of equality of treatment as envisaged in the Constitution of India.

(x) As far the State respondents were concerned, they had no specific case in support of their action of "absorption" of respondent No. 6 except contending, in the writ petition, that it was pursuant to the High Court's direction to consider

the case of the respondent No. 6, for permanent "absorption", that the case of respondent No. 6 was considered and the cabinet decided to absorb him and this decision was, subsequently, reviewed and he was granted "seniority" from the date, when he had joined, as a lecturer, his parent department. This action of the State Government is justified, because similar treatment had been given, in the past, to persons, similarly situated.

(xi) By judgment and order, dated 12.10.2007, while disposing of the writ petition, a learned single judge of this Court, having agreed that the relevant Recruitment Rules do not make provisions for appointment by way of "absorption" of "deputationists", opined that since the Recruitment Rules do not specifically bar the Government from filling up any post, by way of "deputation" or by way of "absorption" "of the "deputationists", the State Government's power to make appointment, by way of "absorption" of a "deputationist" in the borrowed department, must be upheld. The learned Single Judge, however, also opined that in the face of complete absence of any provision, in the Recruitment Rules, for appointment of a "deputationist" by way of "absorption", the appointment of respondent No. 6 (i.e., the present appellant) ought to have been treated as a "fresh appointment". The learned single Judge further opined that the respondent No. 6 (i.e., the present appellant) must be held to have elected to be governed by the existing terms and conditions of the Recruitment Rules, while being absorb, and he cannot, therefore, be, subsequently, allowed to turn around and contend that the existing terms and conditions of the Recruitment Rules are illegal. The relevant observations made by the learned single judge read as under:

12. It is however, to be noted that in view of the absence of any provision in the relevant Service rules for filling up the post of SDO (Electrical) in the Power Department by way of absorption of a deputationist, respondent No. 6 was not having any legal right to claim for the said absorption to the Power Department. At the same time, it is to be noted that there is no provision in the relevant Service rules under which the State Government can compel the respondent No. 6 to go on deputation from his parent department to the Power Department. In these circumstances, having regard to the fact that respondent No. 6 sought for the said absorption and the State Government also decided to absorb him, it is to be concluded that respondent No. 6 elected to get himself absorbed to Power Department with approval of the State Government. Presumably, the respondent No. 6 was aware that he was not born in the cadre of SDO (Electrical) in the Power Department. In the absence of any provision in the Service rules for appointment on permanent absorption of a deputed employee, the said appointment of respondent No. 6 by way of absorption was a fresh appointment to be governed by the term and condition of the then existing Government's memorandum in that regard. Respondent No. 6 exercised his right of election. If he did not like to be governed by the said terms and conditions, he could have rejected the said absorption but apparently, the respondent No. 6 accepted the said appointment by way of absorption under the said existing terms and

conditions. After obtaining entry into service as SDO (Electrical) he cannot be allowed to turn around and contend that the terms and conditions are illegal. In fact, the respondent No. 6 never challenged the legality or otherwise of the said terms and conditions. Since he (respondent No. 6) accepted the said appointment by way of absorption without any compulsion, consequences attached thereto would ensue and he was bound by the said terms and conditions. Accordingly, the seniority of respondent No. 6 should have been determined on the basis of the then existing memorandum.

13. *** ** 14. *** **

15. In my considered opinion, the decision of the Apex Court in *S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others*, will not be applicable in the facts and circumstances of the present case. In the said case, the appellants were deputed on transfer from BSF to the Delhi Police (Appointment and Recruitment) Rules, 1980, which empowered the authority to appoint the employees of other departments drawn by way of deputation depending on the need of the Delhi Police. In the absence of any seniority rules, seniority was sought to be determined by way of an executive order, which was issued on the basis of a memorandum dated 29.5.1986 issued by the Government of India. It was found that the memorandum in question was neither made public nor the existence thereof was made known involved in the dispute. The said memorandum was not made ipso facto applicable to the employees. In the said background, the Apex Court observed at paragraph 19 as follows:

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

(xii) For the conclusions reached above, the learned single judge, While not interfering with the notification, dated 29.9.2005, (whereby respondent No. 6 had been absorb in the Department of Power), set aside the subsequent notification, dated 7.12.2005, whereby respondent No. 6 had been granted "seniority" w.e.f, the date of his joining, as a lecturer, in his parent department.

2. Claiming that his "absorption" the Department of Power was legal and ought to have been counted, w.e.f. 6.10.1993, (i.e., the date of his joining the parent department, as a lecturer), respondent No. 6 has, now, preferred this appeal.

3. We have heard Mr. B.N. Sarma, learned senior Counsel, appearing on behalf of the appellant, and Mr. C.T. Jamir, learned Counsel appearing on behalf of the Private respondents. We have also heard Mr. L.S. Jamir, learned Senior Govt.

advocate, appearing on behalf of the State respondents.

4. Presenting the appeal on behalf of the appellant, Mr. B.N. Sarma, learned senior Counsel, has submitted that though in the writ petition, private respondents herein had challenged not only the "absorption" of the present appellant, in the Department of Power, by the notification, dated 29.9.2005, but also the Government's action of granting him "seniority", w.e.f. 6.10.1993, by subsequent, notification, dated 7.12.2005. However, the learned Single Judge, points out Mr. Sarma, chose not to interfere with the notification, dated 29.9.2005, and set aside only the subsequent notification, dated 7.12.2005, whereby the present appellant, had been granted "seniority", as aforesaid, with effect from the date of his joining, as a lecturer, in his parent department. As the writ petitioners did not challenge the learned Single Judge's order upholding the present appellant's "absorption" virtue of the notification, dated 29.9.2005, it is, according to Mr. Sarma, clear that no legal right of the private respondents has been infringed by the present appellant's "absorption" it was for the reason that they chose not to challenge the decision rendered in the writ petition. However, aggrieved by the order passed by the learned Single Judge setting aside the subsequent notification, dated 7.12.2005, (whereby "seniority" had been accorded to the respondent No. 6 in the writ petition w.e.f. 6.10.1993), the appellant has preferred this appeal and since after filing of this appeal too, no cross-appeal has been filed by the private respondents, the effect, according to Mr. Sarma, is that the "absorption" of the appellant (who was respondent No. 6 in the writ petition) by virtue of the order, dated 29.9.2005, remains unassailed and undisturbed even in this appeal and if this "absorption" legal, all natural consequences, following therefrom, must be made available to the appellant.

5. Contending as to how the appellant is entitled to his "seniority" being counted w.e.f. 6.10.1993, Mr. Sarma submits that the office memorandum, dated 21.8.2004, is prospective in nature and could not have been applied to the case of the appellant inasmuch as the appellant had come, on "deputation", to the Department of Power, as far back as, in the year 1998, by an order passed, in this regard, on 18.12.1998, and the Office Memorandum, dated 21.8.2004, came into force on 21.8.2004. To buttress his arguments, Mr. Sarma submits that the decision, rendered by the Apex Court, in S.I. Rooplal and Anr. (supra), was squarely applicable to the facts of the present case.

6. Appearing on behalf of the appellant, Mr. Sharma, learned senior Counsel, further submits that the learned Single Judge has clearly held, in the impugned judgment and order, that there being no bar in the Recruitment Rules, in question, as regards "absorption" of "deputationists", the State Government has the power to appoint a "deputationist" in a service, by way of his "absorption" in the service. Where the learned Single Judge, according to Mr. Sharma, has fallen in error is that while upholding the State's power to absorb a "deputationist" in the service, the "absorption" of the present appellant, in the service, in question, has been treated to be a "fresh appointment". In the light of the decision in S.I.

Rooplal's case (supra), points out Mr. Sharma, it is well-recognized principle of service jurisprudence that when a "deputationist" is "absorbed", his past service, rendered in his parent departments also in the "deputation post", shall be counted for the purpose of fixing his "seniority". In the light of the decision in S.I. Rooplal's case (supra), contends Mr. Sharma, the present appellant ought to have been "absorbed" by giving him "seniority" with retrospective effect and this is what the State Government had precisely done by issuing subsequent notification, dated 7.12.2005, whereby the petitioner was "absorbed" with effect from 6.10.1993, i.e., the date of his regular appointment, as a lecturer, in the parent department.

7. The impugned notification, dated 7.12.2005, was, further submits Mr. Sharma, wholly legal and valid and ought not to have, therefore, been interfered with in the writ petition. The conclusion, reached by the learned single Judge, in the writ petition, that the decision, in S.I. Rooplal's case (supra), was not applicable to the present case, is, contends Mr. Sharma, an incorrect conclusion inasmuch as when a "deputationist" is, according to Mr. Sharma, "absorbed", his past service cannot be ignored. It is further pointed out by Mr. Sharma that the reliance placed by the learned Single Judge on the case of Indu Shekhar Singh and Others Vs. State of U.P. and Others, is incorrect inasmuch as the facts of Indu Shekhar's case (supra), according to Mr. Sharma, were quite different from the one at hand. Indu Shekhar's case (supra), points out Mr. Sharma, is a case of an autonomous body and did not involve any State Government. This apart, in Indu Shekhar's case (supra), the appellant had, contends Mr. Sharma, "elected" to be governed by the policy of the Corporation concerned, which stipulated that "absorption" of a "deputationist" would be with prospective effect. As against these facts, the facts in the present case, similar to the ones in S.I. Rooplal's case (supra), show, submits Mr. Sharma, that the Office Memorandum, dated 21.8.2004, which had been relied upon for the purpose of denying to the appellant "absorption" the service, with effect from 6.10.1993, had never been published and was not within the knowledge of the appellant. In such circumstances, the learned Single Judge's conclusion that the present appellant had "elected" to be governed by the Office Memorandum, dated 21.8.2004, is wholly incorrect. To a case of present nature, reiterates Mr. Sharma, the decision, in S.I. Rooplal's case (supra), is clearly applicable inasmuch as the Apex Court has pointed out, in S.I. Rooplal's case (supra), that when the Office Memorandum, which was the basis for denying "seniority" to a "deputationist", had not been made known to the "deputationist", the Office Memorandum could not have been made the basis for not counting or past service, while fixing "seniority" of the absorbed "deputationist".

Opposing the submissions made on behalf of the appellant, Mr. C.T. Jamir has submitted that the appellant came to the Department of Power by using his influence inasmuch as his appointment, on "deputation", was, even at the very initial stage, contrary to the guidelines embodied in the office memorandum, which stood issued as far back as on 17.9.1986, which had laid down that no

appointment, on "deputation", can be made without advertisement/circulation of vacancy and without adhering to a selection process; whereas the appellant was brought, on "deputation", without following the procedure so laid down. This apart, points Mr. C.T. Jamir, the Office Memorandum, dated 17.9.1986, has remained in force till date and, hence, retention of the appellant, as a "deputationist", in the Department of Power, too, was in violation of the Office Memorandum, dated 17.9.1986.

9. Mr. C.T. Jamir also submits that the relevant Recruitment Rules do not provide for any appointment by way of "absorption" of a "deputationist", hence, the "absorption" of the present appellant, being contrary to the relevant Recruitment Rules and such "absorption" having been done by taking resort to the Government's executive authority under Article 162, cannot be held to be valid and could not have been upheld by the learned Single Judge. It is further submitted by Mr. C.T. Jamir that in the writ petition, it was never contended by the present appellant that he was unaware of the office memorandum, dated 21.8.2004, and, hence, he cannot, now, be allowed to contend that he was ignorant of the existence of the office memorandum, dated 21.8.2004.

10. It is contended by Mr. C.T. Jamir that the writ petitioners are basically affected by the grant of "seniority" to the present appellant w.e.f. 6.10.1993 and since the learned Single Judge had set aside the impugned order, dated 7.12.2005, (whereby the appellant was granted "seniority" w.e.f. 6.10.1993), the writ petitioners did not choose to come, in appeal, against the learned single judge's order; but when this appeal has been preferred, the writ petitioners' interests are likely to be adversely affected and, hence, the writ petitioners have, now, contended that neither "absorption" of the appellant nor the grant of "seniority" to the appellant, w.e.f. 6.10.1993, is sustainable in law. Support for his submissions is sought to be derived by Mr. C.T. Jamir from the cases of Indu Shekhar Singh and Others Vs. State of U.P. and Others, Arun Kumar and Others Vs. Union of India (UOI) and Others, Attar Singh Kaushik Vs. Secretary/Commr. Transport Department and Another, , Secretary, State of Karnataka and Others Vs. Umadevi and Others, and the judgment and order, dated. 12.4.2006, passed, in Writ Appeal No. 16(K)/05 (Hugie Zeliang and Anr. v. State of Nagaland and Ors.), by a Division Bench of this High Court.

11. Explaining the case, on behalf of the private respondents, Mr. C.T. Jamir, learned Counsel, points out that in S.I. Rooplal's case (supra), the recruitment rules had provisions for appointment of a "deputationist"; whereas, in the case at hand, there is no such provision in the relevant Recruitment Rules. In such circumstances, "absorption" of the appellant, in the service, in question, while working as a "deputationist", was, according to Mr. C.T. Jamir, wholly illegal. In support of this submission, Mr. Jamir also places reliance on Secretary, State of Karnataka and Others Vs. Umadevi and Others,

12. Mr. C.T. Jamir also points out that the present appellant is a person, who had failed to get selected in the selection process held for the purpose of

appointment of SDO (Electrical) and yet he managed to come, on "deputation", from the post of a lecturer, in a Polytechnic, to the Department of Power as SDO (Electrical). The appellant's very entry into the service as a "deputationist", reiterates Mr. C.T. Jamir, was in violation of the relevant Office Memorandum, dated 17.9.1986, which envisaged that no "deputation" shall be provided without due advertisement and that even a "deputationist" shall be selected by a Selection Board; whereas the appellant had come, as a "deputationist", to the post of SDO (Electrical) without facing any selection process. Having entered into the service as a "deputationist", the appellant, submits Mr. C.T. Jamir, has managed to remain on "deputation" and, on repeated representations made, in this regard, by the APEN, when the Government released the appellant along with two others, the appellant still managed to remain in the Department of Power and, eventually, got himself "absorbed" in clear violation of the Office Memorandum, dated 21.8.2004, with retrospective effect inasmuch as this Office Memorandum makes it clear that "absorption" of a "deputationist" is possible only when it is certified that no suitable candidate is available in the "feeding cadre" for "promotion" to the post; whereas it has never been contended by the state respondents that none in the service. In question, was found suitable for promotion to the post of SDO (Electrical).

13. Notwithstanding the fact, points out Mr. C.T. Jamir, that the "absorption" of the appellant was wholly illegal, the private respondents did not object to his "absorption" by the impugned notification, dated 29.9.2005, for the simple reason that they were not affected by the appellant's "absorption" in the service, but when the subsequent notification, dated 7.12.2005, absorb the appellant, with effect from 6.10.1993, making him senior to the private respondents, the private respondents' rights, under the relevant service rules, were adversely affected and it was for this reason that they had challenged not only the legality of the "absorption" of the appellant, but also the subsequent notification, dated 7.12.2005. When the learned Single Judge set aside the impugned notification, dated 7.12.2005, the private respondents' rights, under the relevant Recruitment Rules, stood restored and they had no reason to go for appeal against the order of "absorption" of the appellant. This does not mean, hastens to add Mr. C.T. Jamir, that the private respondents cannot, now, show, before this Court, that the appellant's "absorption" by the impugned notification, dated 12.9.2005, as well as granting of "seniority" him, with effect from 6.10.1993, by the subsequent notification, dated 7.12.2005, are illegal.

14. To the facts of the case at hand, according to Mr. Jamir, the case of S.I. Rooplal (supra) was not at all attracted inasmuch as in S.I. Rooplal's case (supra), apart from the fact that there existed provisions for appointment of a "deputationist" in the service, the relevant Office Memorandum, which was sought to be relied upon, for the purpose of denying benefit of "past service" to the absorb "deputationist", had not been made public or had not been made known to the "deputationist" concerned; whereas, the present one is a case, where, reiterates Mr. C.T. Jamir, the present appellant never contended, in the

writ proceeding, that he was unaware of the existence of the Office Memorandum, dated 21.8.2004. In such circumstances, the appellant ought to have been held, and has been rightly held by the learned single judge, to have "elected" to be governed by the Office Memorandum, dated 21.8.2004, and in such circumstances, the appellant could not have sought "absorption" retrospective effect.

15. Continuing to dig holes in the case of the appellant, Mr. C.T. Jamir further submits that in S.I. Rooplal's case (supra), there was an additional factor in favour of the "deputationist" inasmuch as the court had found that the "absorption" of the "deputationist" was in an equivalent post; whereas, in the case at hand, duties and responsibilities of a "lecturer" in a Polytechnique cannot be compared to those of a SDO (Electrical) inasmuch as the post of a SDO (Electrical) is an executive post. This apart, points out Mr. Jamir, the appellant's appointment, as a lecturer, vide order, dated 6.10.1993, was as Class-II Gazetted Officer; whereas the post of SDO (Electrical) is a Class-I Gazetted post. It can, thus, be seen, contends Mr. Jamir, that the present appellant was not occupying, on "deputation", a post, which was equivalent to the post of a Lecturer in his parent department and, in such circumstances, the question of counting his "past service", even in the light of the decision in S.I. Rooplal's case (supra), did not arise at all.

16. As far as Mr. L.S. Jamir, learned Senior Govt. Advocate, is concerned, he has submitted that it was pursuant to the directions of the High Court, in WP(C) No. 6737/2003, that the Government had considered the appellant's case for the purpose of his "absorption" SDO (Electrical) and having found him suitable for "absorption", the Government decided accordingly to absorb him. Such an action of the State Government cannot, according to the learned Senior Government Advocate, be said to be illegal. It is also submitted, on behalf of the State respondents, that when a "deputationist" is absorbed in his "deputation" post, the service law mandates that his "past service" be taken into account for the purpose of fixing his "seniority" since the earlier notification, dated 29.9.2005, had denied to take into account the "past service" of the appellant, the Government corrected its decision by the subsequent notification, dated 7.12.2005, whereby the appellant was granted "seniority" with effect from 6.10.1993. None of the two notifications aforementioned could have, therefore, been held to be illegal nor could have the appellant's case be treated under the law, according to the learned Senior Govt. Advocate, as a case of "fresh appointment".

17. Reacting to the submissions made on behalf of the private respondents, Mr. Sharma has further pointed out that though the petitioner's order of appointment mentioned that he stood appointed as a Lecturer in a Class-II Gazetted post, the fact remains that according to the Revision of Pay Rules ("the ROP Rules"), the scale of pay of a Lecturer is same as that of Class-I Gazetted post; and, hence, in such circumstances, the appellant was, according to Mr.

Sharma, a Class-I officer, when he came, on "deputation", as a SDO (Electrical). The post of a lecturer, in a Polytechnic College, was, insists Mr. Sharma, a post, which was equivalent to the post of SDO (Electrical) and, hence, his "absorption" the service, in question, was legal and the Government had rightly taken into account his "past service", while absorbing him, in the service, by the impugned notification, dated 7.12.2005.

18. Mr. Sharma further submits that there had been instances, in the past, when persons from different services were brought to the Department of Power and absorbed. When such past instances had existed, the Government could not have treated the present appellant with discrimination and, hence, the Government, according to Mr. Sharma, was fully justified in absorbing the petitioner in the post of SDO (Electrical) treating the post of a Lecturer of a Polytechnic as a post equivalent to the post of SDO (Electrical) and in granting "seniority" with effect from the date of his joining his present department.

19. While considering the rival submissions made by the learned Counsel for the parties, it needs to be borne in mind that since after the decision of the Constitution Bench, in Secretary, State of Karnataka and Others Vs. Umadevi and Others, the sustainability or otherwise of ever, case of public employment has to be viewed in the light of the constitutional scheme of public employment as has been laid down in Uma Devi (supra). Though the case of Uma Devi (supra) was a case of regularization of service, the law laid down therein, with regard the making of public employment, would apply, with equal force, to all cases of public employment including a case of "absorption" of the present nature. The Constitution Bench, in Uma Devi (supra), has pointed out that the power of a State, as an employer, is, unlike a private employer, subjected to constitutional limitations and cannot be exercised arbitrarily. It has been pointed out, in Uma Devi (supra), that Article 309 of the Constitution gives the government the power to frame rules for the purpose of laying down the conditions of recruitment and the conditions of service in respect of persons to be appointed to public service in connection with the affairs of the Union or of any of the States. Making it crystal clear that when the recruitment rules, framed under Article 309, exist, in a given case, the Government can make appointments "only" by adhering to such rules and not otherwise, the Apex Court has held, in Uma Devi (supra), that no order, notification or circular can be substituted for statutory rules framed under the authority of law, for, allowing a government order, notification or a circular to supersede statutory rules would deprive the persons, under government employment, of the security of their tenure and the right of equality conferred on civil servants under the constitutional scheme and, further, consequence of permitting the rules to be prevailed upon by government's order, notification or circular, would amount to negating the accepted principle of service jurisprudence. The relevant observations, made in this regard, in Uma Devi (supra), at para 4 and 5, read as under:

(4) This Court has also on occasions issued directions which could not be said to

be consistent with the constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualization of justice. The question arises, equity to whom? Equity for the handful of people who have approached the court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the constitutional scheme, certainly tend to water down the constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench.

(5) The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (See Basu's Shorter Constitution of India) Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That Article, contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedure which specify the necessary qualifications, the mode of appointment etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognized that no Government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed.

(emphasis is added)

20. It may be noted that the Constitution Bench, in Uma Devi (supra), was conscious of the fact that there may be occasions, when a sovereign State or its

instrumentalities will have to employ persons as additional hands or without following the required procedures; it, therefore, pointed out that such engagements/employment's, which are resorted to in exigencies of service, cannot be utilized for the purpose of defeating the very scheme of public employment. It has been pointed out, in Uma Devi (supra), that it is not the role of the governments to encourage or approve appointments made outside the constitutional scheme and, hence, orders, based on such sentiments or approach, would result in perpetuating illegalities and jettisoning the scheme of public employment as envisaged in the Constitution.

21. Ensuring that no doubt is entertained by anyone in his mind with regard to the status of an employee, whose appointment is in breach of the relevant recruitment rules or the constitutional guarantees as regards public employment, the Apex Court has also pointed out, in Uma Devi (supra), that when a person enters into, or is engaged in, a service, without following the proper procedure for selection and/or by arbitrarily ignoring the rules, such a person cannot invoke the doctrine of legitimate expectation. Obviously, when the State is not free to make any appointment by ignoring the relevant rules of recruitment, the State cannot be said to have held out a promise, which it ought to have fulfilled. Thus holds the Apex Court in Uma Devi (supra). When a State, without having any lawful authority, holds out a promise, such a promise cannot be enforced by resorting to the doctrine of legitimate expectation.

22. Lastly, but, perhaps, the most significant part of the decision, in Uma Devi (supra), is the categorical pronouncement by the Constitution Bench that any decision, which runs contrary to the principles, settled in Uma Devi (supra), or any direction, which runs counter to what has been held in Uma Devi (supra), shall stand denuded of their status as precedents. The relevant observations, made in Uma Devi (supra), in this regard, read, "45. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents." (Emphasis is added)

23. In the light of the above observations, made in Uma Devi (supra), there remains no room for doubt that even in a case of "seniority", when the very question of appointment is, at its threshold, challenged, on the ground that the appointment, "by transfer or absorption", has been made by violating the relevant recruitment rules, the case has to be considered in the backdrop of the position of law governing public employment, as has been envisaged and propounded, in Uma Devi (supra).

24. Bearing in mind what is indicated above, let us, now, turn to the various decisions, which form the basis of conflicting submissions made before this Court. There is no dispute before us, as already indicated above, that under the relevant Recruitment Rules, there are two modes of recruitment, namely, (i) by way of direct recruitment and (ii) by way of promotion. The Recruitment Rules do not perceive of any third mode of appointment, such as, appointment made on

transfer or by way of "absorption" any "deputationist". In such circumstances, no appointment, in the light of the relevant Recruitment Rules, can be made, or could have been validly made, by way of absorption" of a "deputationist", by taking resort to any Government circular or notification, which the State may have had issued in exercise of its executive authority, for, this is precisely what Uma Devi (supra) aims at stopping inasmuch as Uma Devi (supra), in unequivocal terms, lays down that when rules, framed under Article 309, exist, an appointment can be made only be adhering to such rules and not otherwise. Uma Devi (supra) further clarifies, as already indicated above, that no circular, no order and no notification, issued by a government, can prevail upon recruitment rules. With this limitation borne in mind, we, now, consider the present case and, for this purpose, we look into the various decisions, which have been relied upon by the learned Counsel for the parties, appearing before us, in support of their respective cases.

25. Since it is the S.I. Rooplal's case (supra), which forms the sheet-anchor of the entire arguments placed on behalf of the appellant, let us take note of the facts of this case and the law, which the Supreme Court laid down therein. In S.I. Rooplal's case (supra), the Apex Court held that Rule 5(h) of the Delhi Police rules embodies provisions for appointment on "deputation" inasmuch as Rule 5(h) provides that if the Commissioner is of the opinion that it is necessary or expedient in the interest of work to do so, he may make appointments, to all non-gazetted categories of both executive and ministerial cadres of the Delhi Police, on "deputation" basis, by drawing suitable persons from any other State, Union Territory, Central Police Organisation or any other force. It was in exercise of this power that Sub-Inspector Rooplal and many others were deputed, on transfer, from BSF to the Delhi Police, because, in the year 1985, as many as twelve new police stations had been established, in Delhi, with a view to strengthening the security system in the capital and as a consequence to the establishment of these police stations and also in view of the then prevailing situation, it had been felt necessary to fill up the required posts, in Delhi Police, within the shortest possible time. It is in the backdrop of these facts and in exercise of powers, contained in Rule 5(h), that Sub Inspector Rooplal, and some others had come to be appointed, in Delhi Police, on the basis of their transfer, on "deputation", from BSF. Rule 17 of the said rules also empowers the Commissioner of Police, Delhi, to sanction "permanent absorption" of persons, sent on "deputation", with the consent of the deputed official and with the concurrence of the head of the police .-force from which the official may have been brought on "deputation". It was in exercise of the powers, conferred on the Commissioner under Rule 17, that the "absorption" of Rooplal and other similarly situated officials, in the Delhi Police, in the cadre of Sub Inspector (Executive), was done. There was no provision, in the recruitment rules, governing "seniority" of the persons in the service and, hence, "seniority" to S.I. Rooplal, was sought to be denied on the strength of an executive order, which, in turn, was issued on the basis of a memorandum, dated 29.5.1986, of the Government of India.

26. It is, however, extremely important to note that in S.I. Rooplal's case (supra), the memorandum, in Question, was not ipso facto applicable to the employees of the Delhi Police. This apart, this memorandum was neither made public nor existence thereof was ever made known to any person involved in the controversy. Thus, S.I. Rooplal's case (supra) is a case, where the memorandum, which had been relied upon for determining "seniority", was neither ipso facto applicable to the employees concerned nor was it made known to the persons, whose service career were to be affected, if "seniority" were to be determined on the basis of the said executive order.

27. In the present case, as already pointed out above, there is no provision, like Rule 5(h) in S.I. Rooplal's case (supra), empowering anyone to make appointment on "deputation" basis. Above all, there is no provision, in the recruitment rules (which we are concerned with), for appointment of a "deputationist" by way of "absorption". On the contrary, there existed, in S.I. Rooplal's case (supra), in the form of Rule 17, requisite powers with the Commissioner of Police, Delhi, to "absorb" a "deputationist". In fact, the scheme of the recruitment rules, in S.I. Rooplal's case (supra), conceived of drawing persons, into the Delhi Police service, from different sources. As against this conceptual background of recruitment rules of S.I. Rooplal's case (supra), the present one is a case, which envisages making of appointment either by way of direct recruitment or by way of promotion; and the recruitment rules, in the present case, do not at all conceive of constituting the service, in question, by drawing people from various sources or from sources, other than the two modes of recruitment (i.e., direct recruitment and promotion), as indicated hereinbefore.

28. Moreover, what cannot be ignored is that unlike S.I. Rooplal's case (supra), where the memorandum, in question, concerning "seniority" was issued by the Government of India and was not ipso facto applicable to the employees of the Delhi Police, the office memorandum, dated 17.9.1986, as well as the office memorandum, dated 21.8.2004, have been Issued, in the present case, by the Government of Nagaland and are binding on all its departments including the Department of Power. In fact, the legal position that these office memoranda are binding on the State Government employees are not even in dispute in the present case. What is being sought to be contended, on behalf of the appellant, is that the existence of the office memoranda, dated 17.9.1986 and 21.8.2004, was not made known to the present appellant. S.I. Rooplal's case (supra), we must bear in mind, at the cost of repetition, is a case, where the office memorandum, in question, which was sought to be relied upon, for the purpose of determining "seniority", was not ipso facto applicable to an employee in Delhi Police and it was in this context that the question arose as to whether the fact that the memorandum, issued by the Government of India, would be applicable in determining "seniority" of the employees of Delhi Police if the same had never been made known to the employee concerned and it had never been acted upon. In these circumstances, in S.I. Rooplal's case (supra), the Supreme Court, referring to R.S. Makashi v. J.M. Menon (1981) 1 SCC 379 , and Wing

Commander J. Kumar Vs. Union of India (UOI) and Others, , observed.

19. This leaves us to consider the validity of the office memorandum which was relied upon by the Tribunal in the impugned judgment. We have noticed earlier in the judgment that the constitutional validity of this memorandum is independently challenged by the appellants in WP(C) No. 191 of 1999. There is considerable force in the argument addressed on behalf of the appellants that this memorandum had neither been made public nor the existence thereof made known to anybody concerned with the controversy in question. We have already referred to this fact. Hence, we do not want to repeat the same in detail. On facts, we are of the opinion that the respondents ought not to have been permitted to rely upon this document because there is no material whatsoever produced by the respondents to show that this memorandum which was issued by the Government of India was either ipso facto applicable to the Delhi Police Force or the same was adopted and applied by the Delhi Police Force. It is to be noted that the law in regard to the right of a deputationist to count his service for the purpose of seniority in the transferred department was settled as far back as in the year 1982 itself in the cases of R.S. Makashi and Wing Commander J. Kumar (if not earlier). Therefore, it is reasonable to expect that a deputationist, when his service is sought to be absorbed in the transferred department would certainly have expected that his seniority in the parent department would be counted. In such a situation, it was really the duty of the respondents, if at all the conditions stipulated in the impugned memorandum were applicable to such a person, to have made the conditions in the memorandum known to the deputationist before absorbing his services, in all fairness, so that such a deputationist would have had the option of accepting the permanent absorption in the Delhi Police or not. The very fact that such steps were not taken shows that this memorandum was, in fact, never acted upon. Apart from the above question of equity, the appellants have challenged the constitutional validity of the above memorandum on the ground that the same violates Articles 14 and 16 of the Constitution.

One of the grounds raised is that their vested right of counting the seniority in the deputed department, after absorption in an equivalent post, is arbitrarily taken away, if the memorandum in question is applicable to them. Therefore, they had prayed for a declaration that the memorandum be declared as ultra vires to the extent it offends their fundamental right.

(emphasis is added)

29. In fact, the above aspects of S.I. Rooplal's case (supra) have been considered and pointed out by the Apex Court, in its later decision. In Indu Shekhar's case (supra), at para 43, in the following words:

43. Having noticed the aforementioned decisions of this Court, we may now notice Sub Inspector Rooplal which is the sheet anchor of the judgment rendered by the High Court. In that case, this Court was concerned with interpretation of

Rule 5(h) of the Delhi Police (Appointment and Recruitment) Rules, 1980 providing that if the Commissioner is of the opinion that it is necessary or expedient in the interest of work so to do, he may make appointment(s) to all non-gazetted categories of both executive and ministerial cadres of the Delhi Police on deputation basis and by drawing suitable persons from any other State, Union Territory, Central Police Organisation or any other force. The appellants there in were deputed on transfer from BSF to the Delhi Police pursuant to the aforementioned provisions. Rule 5(h) of the said Rules empowered the Authority to appoint the employees of other departments drawn by way of deputation depending upon the need of the Delhi Police. There was no seniority rule. Seniority in that case was sought to be determined by way of an executive order, which in turn was issued on the basis of a memorandum dated 29.5.1986 issued by the Government of India. The memorandum in question was neither made public nor the existence thereof was made known to any person involved in the Controversy. The said memorandum was not made ipso facto applicable to the employees. In the aforementioned factual backdrop referring to R.S. Makashl and Wing Commander J. Kumar, This Court observed (Sub Inspector Rooplal case, SCC p. 658, para 19)

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

30. In contrast to the facts involved in S.I. Rooplal's case (supra), the present one is a case, wherein, as already pointed out above, both the office memoranda, dated 17.9.1986 as well as 21.8.2004, are the office memoranda issued by the Government of Nagaland and that it is not even in dispute that these office memoranda are binding on all the State government departments in Nagaland. These office memoranda, unlike S.I. Rooplal's case (supra), are, thus, ipso facto applicable to the employees of the Nagaland Government. This apart, as already indicated above, it has not been the case of the present appellant, (as respondent No. 6 in the writ petition), that the existence of office memorandum, dated 21.8.2004, was not within the knowledge of the appellant. Since such was not the contention of the present appellant in the writ proceeding, such a question of fact cannot be allowed to be contended in this appeal, particularly, when it is the specific finding of the learned Single Judge that the respondent No. 6 (i.e., the present appellant) had not contended, in the writ proceeding, that he was unaware of the existence of the office memorandum, dated 21.8.2004.

31. In the light of what have been pointed out above, when we turn to the factual matrix of the present case, it becomes transparent that the very coming

of the present appellant (i.e., respondent No. 6 in the writ petition) into the service, in the Department of Power, on "deputation", was in violation of the office memorandum, dated 17.9.1986, and was, thus, an illegal entry into the service, in question, on "deputation". Even if this entry of the present appellant could be ignored, the fact of the matter remains that the office memorandum, dated 21.8.2004, was, and is, ipso facto, applicable to the Department of Power, Government of Nagaland, and the Government could not have, under the law, ignored its own office memorandum. The office memorandum, dated 21.8.2004, embodies the scheme of bringing persons on "deputation" also "absorption" of "deputationists". When this office memorandum, dated 21.8.2004, is juxtaposed against the relevant Recruitment Rules, it becomes more than abundantly clear that this office memorandum cannot, in the light of the Constitution Bench decision, in Uma Devi (supra), supersede the relevant Recruitment Rules. When the recruitment rules, in the present case, do not conceive of making of any appointment except by way of direct recruitment or by way of promotion, and when the Recruitment Rules do not permit making of appointment on transfer or by way of "absorption" of "deputationists" unlike S.I. Rooplal's case (supra), it is but obvious that this Office Memorandum, dated 21.8.2004, would apply only to such cases, where either the recruitment rules do not prescribe any definite mode of appointment or when the recruitment rules prescribe appointment by way of transfer or by way of "absorption" of a "deputationist" or by drawing persons from various sources as was the case in S.I. Rooplal (supra).

32. We have also pointed out above that in S.I. Rooplal's case (supra), the scheme of recruitment conceived of bringing of people, even on permanent basis, from different sources; whereas the service, which we are concerned with, does not conceive of appointing persons by drawing them from different sources by way of "transfer" of "deputation" or by way of "absorption" of the "transferees" or "deputationists". By no extension of logic, therefore, Sub Inspector S.I. Rooplal's case (supra) could have been applied to the facts of the present case.

33. As regards the contention of the appellant as well as the State respondents that it was pursuant to the directions given by the High Court, in WP(C) No. 30(K)/2006, that the Government had considered the case of the appellant and absorbed him, it needs to be pointed out that the High Court never issued mandamus for appointment of the present appellant, in the Department of Power, by way of absorption or otherwise. What had actually happened was that by order, dated 12.10.2007, three persons, who included the present appellant, and, who were all, on "deputation", in the Department of Power, Government of Nagaland, were released giving them two months' time to enable them to join their respective parent departments. While the other two persons went away to their respective parent departments, the appellant herein approached this Court and, eventually, the High Court directed the State respondents concerned to consider the present appellant's case for permanent "absorption". As the High Court had not directed the State respondents, in positive terms, to appoint the

present appellant by absorbing him in the Department of Power and when the High Court had merely directed the State Government to consider the present appellant's case for permanent absorption, the High Court's direction has to be logically construed, and ought to have been construed, as a direction to the State Government to consider the case of the present appellant for absorption in accordance with law and not in violation thereof. There can, therefore, be no escape from the conclusion that what the High Court had really wanted the State respondents to do was to examine the case of the, present appellant in the light of the relevant recruitment rules. Since the Recruitment Rules do not provide for "absorption", the appellant's case could not have been treated as a case of direct recruitment. When the High Court, therefore, directed the respondents to consider the petitioner's case under the quota of direct recruitment, the Government's duty was to examine if the appellant could have been appointed in terms of the relevant Recruitment Rules under the quota of direct recruitment. When the relevant Recruitment Rules did not conceive of making of appointments by way of transfer or by way of "deputation" or by way of absorption of a "transferee" or a "deputationist", it was the duty of the State Government to hold, on a dispassionate analysis of the provisions of the Recruitment Rules, that the present appellant was not entitled to be appointed under the quota of direct recruitment. Instead, the Government acted upon its Office Memorandum, dated 21.8.2004, which was not even applicable to the present case, and absorbed the appellant, in the service, with effect from 15.9.2005. As this "absorption" did not affect the "seniority" of the writ petitioners-private respondents herein, they chose not to challenge the same; but when the appellant's "seniority" was fixed with retrospective effect, the private respondents herein challenged the same and, as the learned Single Judge's order had not adversely affected the interest of the private respondents, they chose not to challenge the "absorption" of the present appellant. Still dissatisfied, the present appellant has, now, come to this Court and when he is unable to sustain his very "absorption" or the order of appointment, in the Department of Power, the directions of the learned single judge, divesting the present appellant of the retrospective "seniority", which had been given to him in the brazen violation of the Office Memorandum, dated 21.8.2004, cannot be interfered with.

34. What is, now, of crucial importance to note is that having recognized that the Recruitment Rules did not make provisions for filling up of any vacant post of SDO (Electrical) by way of "deputation" or by way of "absorption" of "deputationist", the learned single judge concluded that since there, is no specific provision, prohibiting the State Government from filling up the vacant post by way of transfer or by way of "absorption" of a "deputationist", the State's power to fill up a vacant post by way of "absorption" of a "deputationist", in the exigency of service, cannot be doubted. The conclusion, so reached, we are constrained to hold, are contrary to the settled position of law, particularly, when, in Uma Devi (supra), the Apex Court categorically held

that when the recruitment rules are in existence, appointment has to be made in terms of the relevant Recruitment Rules and not under the executive authority of the government. It is with this reasoning that the learned single judge upheld the "absorption" "treating the same as a fresh appointment. Though the "absorption" of the appellant is not under challenge, we could have still interfered with the same, in this appeal, because unlike a civil suit, there need not be any specific challenge to an illegal act, when the High Court is confronted, in a writ proceeding, either originally or at the appellate stage, with commission of such an illegality. It would be incorrect way to read a recruitment rule to hold that since a particular way of appointment is not prohibited, it is permitted. If, in a given case, Recruitment Rules do not permit making of appointments by way of "transferor" by way of "absorption", it cannot be done by taking the view that since there is no specific prohibition in the recruitment rules, in this regard, an appointment, on transfer or by way of "absorption", is permissible.

35. Coupled with the above, we also find no fault with the conclusion, reached by the learned single judge, that the appellant opted to get himself absorb with the limitations imposed by the Office Memorandum, dated 21.8.2004, which lays down that "absorption" a "deputationist" would be with prospective effect. When the recruitment rules do not provide for "absorption" of a "deputationist" and an order of "absorption" made, there can be no escape from the conclusion, in a case of present nature, wherein the Office Memorandum prohibited "absorption" retrospective effect, that the present appellant opted to get himself absorbed with prospective effect, for, the Office Memorandum, in question, was applicable to him and it was never his case, unlike S.I. Rooplal's case (supra), that he was unaware of the office memorandum, dated 21.8.2004. Even if it is assumed, for a moment, that the appellant was not aware of the Office Memorandum, dated 21.8.2004, it would not make any difference, because the Office Memorandum, whether known or unknown to the appellant, was ipso facto applicable to the service to which he was appointed to by way of "absorption".

36. The case of K. Madhavan and Another Vs. Union of India (UOI) and Others, was one of the cases, which forms the basis for the decision in S.I. Rooplal's case (supra). K. Madhavan's case (supra) was not a case, unlike the present case, wherein the recruitment rule provides for only two sources of recruitment, namely, direct recruitment and promotion; rather, the relevant recruitment rules, in K. Madhavan (supra), envisaged making of recruitment from various sources, the service, in question, being the Central Bureau of Investigation. What had happened, in K. Madhavan's case (supra); was that original Rule 5 of the Rules of 1963, which had made provisions for 85% of recruitment by way of transfer or "deputation", was altered by the Government and it reduced the quota of recruitment to 75% from 85%. In K. Madhavan's case (supra), the earlier service of the persons, who were brought on "deputation" or on transfer and appointed, on the basis of such transfer, were directed to be taken into account for the purpose of determining "seniority". Thus, K. Madhavan's case (supra) is, primarily, a case of appointment of a person, who may have been brought on

transfer or on "deputation". When the rules permit appointment on transfer, it is not really material as to whether the appointment has been made on transfer or by way of "absorption" of a "deputationist". This aspect of K. Madhavan's case (supra) become clear, when the relevant observations, made by the Apex Court, in Indu Shekhar's case (supra), are taken into account. The relevant observations read:

39. A difference between transfer and deputation would be immaterial where an appointment by transfer is permissible, particularly in an organisation like CBI where personnel are drawn from different sources by way of deputation. It is one thing to say that a deputationist may be regarded as having been appointed on transfer when the deputation is from one department of the Government to another department, but it would be another thing to say that employees are recruited by different statutory authorities in terms of different statutory rules. In a given case, the source of recruitment, the qualification, etc., may be different in different organisations. The statutory authorities, it is trite, are not and cannot be treated to be the departments of the Government. Their employees are governed by the rules applicable to them. Their services are not protected under Article 311 of the Constitution.

40. The State can (sic cannot) compel an employee to go on deputation from its parent department to another public sector undertaking unless a statutory rule exists in this behalf. In absence of such a rule, no employer can force an employee to join the services of another employer. Thus, K. Madhavan, in our opinion, has no application in the instant case.

37. In the case at hand, as we have already pointed out above, the Recruitment Rules do not conceive of appointment by bringing persons from different sources, such as, the Central Bureau of Investigation, which specifically makes provisions for appointment on transfer. In the absence of any provision, in the relevant Recruitment Rules, for appointment on transfer or "absorption" of a "deputationist", no appointment can be made to the Department of Power, Government of Nagaland, by bringing any person on transfer or by way of absorbing a person, who may have been brought, on "deputation", to the Department of Power.

38. Coupled with the above, it is also worth noticing that even R.S. Makshi's case (supra) is a case, wherein the staff of a new department had been drawn from various sources as a part of the scheme of appointment. Considering the case in the face of such facts, which had given rise to a special situation, the court observed:

34. Thus, in a case where employees were drawn from different sources, although as part of single scheme, which was considered to be a special situation, was formulated in that behalf, this Court opined: (SCC p. 404, para 34)

34. When personnel drawn from different sources are being absorbed and integrated in a new department, it is primarily for the Government or the

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

39. Similar to the cases of K. Anjaiah and Others Vs. K. Chandraiah and Others, is a case, where persons were drawn into service from different sources and, in fact, in K. Anjiah (supra), specific provisions existed for appointment by way of "absorption" of "deputationist". As a Tribunal had upheld the regulations, which had provided for such a scheme of appointment, the Apex Court directed the past services to be counted in the case of the "absorptionist". Thus, even the case of K. Anjiah (supra), as already indicated above, is a case of recruitment of persons brought into a service from different sources.

40. Having, thus, considered a large number of authorities on the above aspect of law, the Apex Court, in Indu Shekhar's case (supra), made it abundantly clear that past services can be counted towards "seniority" only in two specific situations: (i) when there exists a rule directing consideration of "past service" in determining "seniority"; and (ii) where recruitments are made from various sources. The relevant observations of the Apex Court, in Indu Shekhar's case (supra), read, at para 47, thus:

47. The decisions referred to hereinbefore, therefore, lay down a law that past services would only be directed to be counted towards seniority in two situations:

- (1) when there exists a rule directing consideration of seniority; and
- (2) where recruitments are made from various sources, it would be reasonable to frame a rule considering the past services of the employees concerned.

41. It was in the backdrop of the large number of authorities, cited above, that the Supreme Court, at para 48 of Indu Shekhar's case (supra), observed,

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

42. What is also of immense importance to note is that in S.I. Rooplal's case (supra), the Apex Court has clearly pointed out that if the previous service of a "deputationist" or a transferred officer has to be counted for the purpose of according him "seniority", then, the two posts, i.e., the post, which the officer had held in his parent department, and the post, which he held on his "deputation" or on his "transfer", are equivalent posts. Referring to the case of

Union of India (UOI) and Another Vs. P.K. Roy and Others, , the Supreme Court has pointed out that in P.K. Roy .(supra), the Committee of Chief Secretary, which had been constituted for the purpose of settling the disputes regarding equivalence of posts arising out of States" Re-organization Act, 1956, considered four factors as relevant, these factors being (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. The said four factors were held, in R.K. Roy (supra), as valid factors for determining the question as to whether a post is equivalent to another post. In S.I. Rooplal's case (supra), however, the Supreme Court has pointed out that so far as the salary of a post is concerned, it is the last of the criteria for determining the equivalence of posts. Consequently, if two different posts carry the same salary, it would not be sufficient to treat the two posts as equivalent posts unless the other three criteria, as mentioned hereinbefore, were fulfilled. No wonder, therefore, that the Supreme Court specifically pointed out, in S.I. Rooplal's case (supra), that if the earlier three criteria, mentioned hereinbefore, are fulfilled, the fact that the salary of the two posts are different would not be material.

43. From these observations, made above, in S.I. Rooplal's case (supra), it becomes abundantly clear that merely because of the fact that two posts, in a given case, carry equivalent salary, it cannot be a reason for treating both the posts as equivalent posts inasmuch as not only the nature and duties of the two posts must be the same, but even responsibilities and powers exercised by the holders of the two posts and the minimum qualifications, if any, prescribed for recruitment to the two posts, must also be the same. In S.L Rooplal's case (supra), it was never contended that the first three criteria as regards equivalence of posts had not existed. The two posts were sought to be contended to be not equivalent post, in S.I. Rooplal's case (supra), by solely relying on the factor that the two posts, in question, did not carry the same scale of pay. Thus, the decisions, R.K. Roy (supra) and S.I. Rooplal's case (supra), make it more than abundantly clear that even if the pay scales of two posts are different, the two posts may still be regarded as equivalent posts if the three pre-dominant criteria, namely, (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, are available.

44. In the present case, the ROP rules cannot equate a Class-II post with a Class-I post merely by giving same pay scale to a post of Class-I. The order of appointment of the present appellant clearly shows that the post of lecturer, for which he was appointed, is a Class-II Gazetted post; whereas SDO (Electrical) is, admittedly, a Class-I Gazetted post. Even if, for a moment, this factor is ignored and it is treated that the two posts carry same pay scales and are Class-I gazetted posts, the two posts, in question, namely, the post of lecturer in a

Polytechnique college, and the post of SDO (Electrical), in the Department of Power, cannot be treated as equivalent posts, for, the fact of the matter remains that the nature and duties of a Lecturer are not same as that of a SDO (Electrical). In fact, it has not been contended, on behalf of the appellant, that the nature, duties and responsibilities of a Lecturer are same as those of SDO (Electrical). This apart, a person, holding a post of lecturer, imparts knowledge and educates people so as to produce engineers, who may be used for engineering plans and projects; whereas the post of SDO (Electrical) is a post of planning and of execution of engineering projects. By no stretch of imagination, therefore, the post of Lecturer of a Polytechnic can be compared to a post of SDO (Electrical). Indeed, not even an attempt has been made, either in the writ petition or in this appeal, to show as to how the two posts can be said to be equivalent posts. Merely because of the fact, therefore, that the two posts carry the same pay scales or were Class-I Gazetted posts, the two posts could not have been regarded as equivalent posts, particularly, when, removing all doubts, the Supreme Court, has categorically laid down, in S.I. Rooplal's case (supra), that if the previous service of a transferred officer or a "deputationist" is to be counted for the purpose of determining his "seniority" the "deputation" in post, the two posts must be equivalent posts.

45. In S.I. Rooplal's case (supra), we reiterate, it is the specific finding of the court, at para 19, that the memorandum, in question, had, in fact, never been acted upon, the memorandum was not ipso facto applicable and that the Memorandum had not been made known to the "deputationists" before their "absorption" in the service. While considering these aspects of the case, it is also noteworthy that S.I. Rooplal's case (supra) is a case, where, as already indicated above, the service, in question, consisted of persons brought from various sources and, obviously, in such a service, when provisions for "absorption" had been made, it was the bounden duty of the State to have made known, in advance, to the "deputationist", who was to be absorbed in the service, that his appointment would not give him the benefit of his past service.

46. In R.S. Makashi v. J.M. Menon (1981) 1 SCC 379, the court held that it is a just and wholesome principle, commonly applied to persons coming from different sources and drafted to serve a new service, to count their pre-existing length of service for determining their rank in the new service cadre. This principle has been reiterated in K. Madhavan and Another Vs. Union of India (UOI) and Others, and Wing Commander J. Kumar Vs. Union of India (UOI) and Others,

47. Referring to the cases of R.S Makashi (supra), K. Madhavan (supra) and Wing Commander J. Kumar (supra), the Supreme Court has pointed out, in S.I. Rooplal's case (supra), at para 23, that the ratio, laid down in these cases, are that any rule, regulation or executive instruction, which has the effect of taking away the service rendered by a "deputationist", in an equivalent cadre in the parent department, while counting his "seniority" in the deputed post, would be

violative of Articles 14 and 16 of the Constitution; hence, liable to be struck down. We may, now, pause here to point out that the principle that pre-existing length of service shall be taken into account for the purpose of determining the "seniority" of a person (brought to a department or a new service cadre) would apply only when the "service" concerned conceives of making appointment by bringing people from different sources. This principle cannot be ipso facto applied to, or taken resort to, in all cases of "absorption", particularly, when the recruitment rules, in a given case, such as, the present one, do not even conceive of making of appointment on transfer or by way of "absorption" of a "deputationist".

48. In fact, in *Arun Kumar and Others Vs. Union of India (UOI) and Others*, , it has been pointed out that the direct appointment, as a source of recruitment, is different from an appointment on transfer or on "deputation". That is to say, appointment, by direct recruitment, is different from appointment on transfer or appointment on "deputation" or an appointment by way of "absorption" a transferee or a "deputationist". The consequence, flowing from the distinction, which has been so pointed out, in *Arun Kumar (supra)*, is that a direct recruitment, in every case, cannot be equated with an appointment on transfer or on "deputation".

49. Thus, the principle, laid down in *K. Madhavan (supra)*, is that the past service shall be counted, while determining the "seniority" of a transferee or an absorbs "deputationist", is applicable to only those cases, where the service consists of persons having drawn from various sources and where the recruitment rules make provisions for appointment on transfer, "absorption" or "deputation".

50. In *K Madhavan (supra)*, Madhavan and Sen were directly recruited as DSP, in CBI, on 6.7.1963 and 10.8.1963 respectively. O.P. Sharma, respondent 5, who was appointed as DSP, on 13.7.1962, in Rajasthan State Police, was sent, on "deputation", to CBI, as DSP, on 1.7.1967. The; court's finding was that at the relevant point of time, the majority of officers, in CBI, were "deputationists". O.P. Sharma was confirmed, as DSP, in Rajasthan Police Service, on 1.12.1964. Madhavan and Sen were confirmed, as DSP, in CBI, on 30.3.1967. In the "seniority" list., published by the CBI, on 17.10.1981, the name of O.P. Sharma, Respondent 5, was shown above the names of the petitioners, Madhavan and Sen. The petitioners, Madhavan and Sen, challenged the inter se "seniority" on the ground that respondent 5 was a "deputationist" in CBI and that on "absorption" he was not entitled to the benefit of his services in Rajasthan Police Service. Rejecting this contention, the court, at para 19, held that, in computing the requisite period of service in the matter of appointment/promotion to the post of SP in CBI, the period, during which O.P. Sharma, respondent 5 had held the post of DSP, in Rajasthan State Police Service, should be taken into consideration.

51. The Supreme Court has pointed out in *Arun Kumar (supra)* that in its earlier

decision, in K. Madhavan (supra), the court, having examined the relevant service rules, found that service consisted of a third source of recruitment, namely, "transfer", and it was for this reason that the court had held, in K. Madhavan (supra), that there was not much difference between transfer and "deputation" since, under the rules, transfer was a source of recruitment, O.P. Sharma was held entitled to weightage of his past service rendered in Rajasthan State Police Service. Pointing out these aspects of K. Madhavan's case (supra), the Supreme Court held, in ho uncertain words, in Arun Kumar (supra), that "transfer" is not the third source of recruitment in Arun Kumar's case (supra), and, hence, the principle, in K. Madhavan (supra), cannot be ipso facto applied to a case, where third source of recruitment does not exist. (See para 10 of Arun Kumar).

52. Thus, the settled principle remains that unless the relevant service joules recognize making of appointment on transfer or making of appointment on "deputation", the question of giving a person, who is absorb as a "deputationist", the benefit of his past service, would not arise at all. This has been made clear, in Arun Kumar (supra) at para 11, which reads:

11. Before we proceed further, we may make it clear that, in our judgment, we have observed earlier that we do not find any infirmity in the action of the State Government in absorbing respondent 4 as Deputy Superintendent of Police in Punjab Police Service. However, there is a caveat. According to us, strictly on interpretation of the said 1959 Rules, there is no scope for opening of a third mode of recruitment, "deputation" is not the source of recruitment under the said 1959 Rules. It is only as an exceptional case that respondent 4 was given the benefit of "absorption" in Punjab Police Service as Deputy Superintendent of Police and we do not find any fault with that exercise. It is the genuine exercise. However, when her services are regularised by the State not from 16.8.1993, 17.8.1993, when she stood appointed as a "deputationist", but from 9.6.1989, when she was appointed as Assistant Commandant in CRPF, then infirmity in the action of the State Government crept in. CRPF functions cannot be compared with Punjab Police Service. Apart from policing, an officer of Punjab Police Service has to do the work of investigation of crime detection, which is not within the purview of CRPF. A deputy Superintendent of Police in CRPF need not have the knowledge of Cr.PC, IPC, etc. which an officer in Punjab Police Service needs to possess. The Service Rules governing CRPF are different from the Service Rules which governed Punjab Police Service. Therefore, even functionally, the two cadres are different. In fact. Respondent 4 Ms. Amrit Brar, has not undergone training as contemplated under the Punjab Police Service Rules. However, she has put in 5 years" service as Deputy Superintendent of Police in Punjab Police Service between 16.8.1993/17.8.1993 and 11.9.1998. That experience should be given due weightage. In our view, having examined the above Punjab Police Service Rules, 1959, it is clear that "deputation" is not the source of recruitment. Direct recruitment is the source. Promotion is the source. However, "deputation" is not the source for recruitment. Moreover, in the present

case, we are concerned with the rights of the appellants. We are concerned with the inter se "seniority" in the said post of Deputy Superintendent of Police since that "seniority" ultimately counts for promotion to the next higher cadre. The post of Deputy Superintendent of Police is a feeder post in that sense and when the post is a feeder post, the inter se "seniority" has the role to play. In the circumstances, if "deputation" is not the source of recruitment, then even in exceptional cases of this nature, weightage cannot be given, in the absence of the Rules, to the services rendered by Ms. Amrit Brar in CRPF. Rule 14 talks of relaxation. However, Rule 14 is not applicable to the rules which do not provide for recruitment through "deputation". Rule 14 would have applied if the said 1959 rules had a third source of recruitment, namely, "deputation". There is no such third source of recruitment. Hence, Rule 14 has no application. Rule 14 refers to relaxation of Rules. Rule 14 contemplates existence of a rule of recruitment. If there is no such rule providing for third source of recruitment, the Government cannot relax a non-existent rule. Therefore, the High Court had erred in treating "deputation" as a third source of recruitment. There is a difference between direct appointment as a source of recruitment and "deputation"⁷"transfer" as a source of recruitment. In certain cases, cited before us, weightage has been given to the service put in by the "transferee". However, in all those cases, the third source of recruitment was "transfer"⁷"deputation". In the present case, there is no such rule to that extent. There is an error in the impugned judgment of the High Court. As stated above, Ms. Amrit Brar has put in 5 years' service as a "deputationist" in Punjab Police Service between 16.8.1993/17.8.1993 and 11.9.1998. She is certainly entitled to the weightage for the services rendered by her during these 5 years. However, she is not entitled to weightage of service between 9.6.1989 and 16.8.1993/17.8.1993, as held by the High Court, for the fixation of inter se "seniority".

53. Attar Singh Kaushik Vs. Secretary/Commr. Transport Department and Another, , is yet another case of determination of "seniority" amongst the "deputationists". This case reiterates the principle laid down in Indu Shekhar's case (supra) at para 47, that the "past service" would be directed to be counted towards determination of "seniority" in two situations, namely, (i) when there exists a rule directing consideration of "seniority", and (ii) where recruitments are made from various sources.

54. What surfaces from the discussions, held, as a whole, is that when the Recruitment Rules, framed under Article 309, exist, in the present case, governing the conditions of recruitment conditions of service of the employees of the Department of Power, Government of Nagaland, every appointment has to be made in consonance with these rules and not in violation or derogation thereof. No order, notification or circular, issued by the Government of Nagaland; can, in the light of the decision in Uma Devi (supra), override, or become substitute for, the Recruitment Rules, in question. When seen in the light of the decision in Uma Devi (supra), it becomes transparent that since the Recruitment Rules, in the present case, provides for appointment to the post of SDO (Electrical) by way of

either direct recruitment or promotion, no third mode of appointment either by way of transfer or by way of absorption of a deputationist can be made. The case of S.I. Rooplal (supra) does not support an appointment made in contravention of the relevant recruitment rules. In view of the fact that a permanent appointment by way of transfer or absorption of a transferee or deputationist can be made only when the relevant recruitment rules provide for such appointment and since no such provisions exist, in the present Recruitment Rules, the permanent absorption of the present appellant by placing reliance on the Office Memoranda, dated 17.9.1986, and 21.8.2004, aforementioned could not have been made. These memoranda will apply, as already indicated above, to those cases only, where the recruitment rules make provisions for appointment by bringing persons from different sources or where no recruitment rules exist. Thus, the very appointment of the present appellant, by way of permanent absorption, being glaringly in violation of the relevant recruitment rules was wholly illegal and not sustainable. This apart, even granting of seniority, with retrospective effect, to the present appellant was clearly in violation of the office memorandum, dated 21.8.2004. The permanent absorption of the appellant, with retrospective effect, is also not supportable by the decision in S.I. Rooplal (supra), which the appellant relies upon. Considered thus, it becomes abundantly clear that the learned single judge's interference with the impugned notification, dated 7.12.2005, whereby "seniority" of the present appellant was made to be counted from the date of his appointment, as a lecturer, in his parent department, i.e., with effect from 6.10.1993, cannot be said to be illegal and does not, therefore, warrant interference in this appeal.

55. We may point out that since the appellant's appointment by way of permanent absorption, in the post of SDO (Electrical), is, as discussed above against the law, his appointment could not have been treated as a legally valid appointment at all. To this extent, the learned single Judge, we are constrained to point out, could not have treated the appellant's such appointment as a "fresh appointment" and even the notification, dated 29.9.2005, being ultra vires the recruitment rules, not sustainable in law and ought to have been sustained in the writ proceeding.

56. We must place on record that we have seriously considered the question if we should, now, interfere with the impugned notification, dated 29.9.2005, too. We have no hesitation in our mind that a writ proceeding is not like a civil suit. When this appeal has been preferred, the whole writ proceeding gets reopened and whatever could not have been ex-facie done, or ought not to have been done, in the writ proceeding, by the learned single Judge, can be undone in this appeal. Viewed from this angle, we have no hesitation that in a writ proceeding, the High Court cannot wait for a cross-objection to be filed if it is, otherwise, convinced that an order, made in a writ proceeding, is not sustainable in law. There were two reasons, which we considered relevant for the purpose of not interfering with the impugned notification, dated 29.9.2005. The first reason is that the appellant's permanent absorption by the impugned notification, dated

29.9.2005, does not adversely affect the interest of the writ petitioner-private respondents herein. The second and more important reason is that in a given case, out of the two recruitments, made in a particular service, while one of the recruitments made is valid and the other is not, the court may, in an appropriate case, choose not to interfere with the invalid appointment by making such order(s), which can take care of the interest of the regular appointee. Hence, if a writ court chooses not to interfere with an invalid appointment, it must ensure that the beneficiary of an illegal appointment or an illegal promotion does not steal a march over the regular appointee. To ensure such a protection of regular appointee is the bounden duty of the High Court, when it is in seisin of a matter under Article 226. We may, at this stage, pause and refer to the case of State of State of U.P. Vs. Rafiquddin and Others, . In this case, the Apex Court was confronted with a situation in which, while, on the one hand, a Batch of persons was appointed in the judicial service of the State in violation of the relevant rules of recruitment, another batch of persons was, on the other hand, appointed, in the same service, in accordance with the rules, the irregular appointees having, however, been accorded seniority over the regular, appointees on the ground that the irregular appointees were selected from the selection test held in the year 1970, whereas the regular appointees were selected from the selection test held in the year 1972. Dealing with such a situation, the Apex Court observed and held as follows:

13. ...The appointment of unplaced candidates made in pursuance of the decision taken by the high level committee is not countenanced by the Rules. There is no escape from the conclusion that the unplaced candidates were not appointed to the service on the basis of the result of the competitive examination of 1970. Their appointment was made in breach of the rules, in pursuance to the decision of the high level committee. It is well settled that where recruitment to service is regulated by the statutory rules, recruitment must be made in accordance with those rule, any appointment made in breach of rules would be illegal. The appointment of 21 "unplaced candidates" made out of the third list was illegal as it was made in violation of the provisions of the rules. The high level committee which took decision for recruitment of candidates to the service on the basis of the 40 per cent aggregate marks disregarding the minimum marks fixed by the Commission for viva voce test had no authority in law, as the rules do not contemplate any such committee and any decision taken by it could not be implemented.

14. We are surprised that the Chief Justice, Chief Minister or as well as the Chairman of the Commission agreed to adopt this procedure which was contrary to the rules. The high level committee even though constituted by highly placed persons had no authority in law to disregard the rules and to direct the Commission to make recommendation in favour of unsuccessful candidates disregarding the minimum marks prescribed for the viva voce test. The high level committee's view that after the amendment of Rule 19, the minimum qualifying marks fixed for viva voce could be ignored was wholly wrong. Rule 19 was

amended in January 1972, but before that 1970 examination had already been held. Since the amendment was not retrospective the result of any examination held before January 1972 could not be determined on the basis of amended rules. The Public Service Commission is a constitutional and independent authority. It plays a pivotal role in the selection and appointment of persons to public services. It secures efficiency in the public administration by selecting suitable and efficient persons for appointment to the services. The Commission has to perform its functions and duties in an independent and objective manner Uninfluenced by the dictates of any other authority. It is not subservient to the directions of the Government unless such directions are permissible by law. Rules vest power in the Commission to hold the competitive examination and to select suitable candidates on the criteria fixed by it. The State Government of the high level committee could not issue any directions to the Commission for making recommendation in favour of those candidates who failed to achieve the minimum prescribed standards as the rules did not confer any such power on the State Government. In this view even if the Commission had made recommendation in favour of the unplaced candidates under the directions of the Government the appointment of the unplaced candidates was illegal as the same was made in violation of the rules.

15. ...But even if the Commission had agreed to the Government's suggestion, their appointments continued to be illegal, as the same were made in breach of Rules. There was no justification for the appointment of the unsuccessful candidates in 1975, because by that time result of 1972 examination had been announced and duly selected candidates were available for appointment.

16. ...If selected candidates are available for appointment on the basis of the competitive examination of subsequent years, it would be unreasonable and unjust to revive the list of earlier examination by changing norms to fill up the vacancies as that would adversely affect the right of those selected at the subsequent examination in matters relating to their seniority under Rule 22. The 1970 examination could not be utilized as a perennial source or inexhaustible reservoir for making appointments indefinitely.

*** ** 19. The unplaced candidates were appointed to the service in breach of the rules and they form a separate class. They cannot be equated with those who were appointed to the service from the first and second list of 1970 examination as their appointment was made on the recommendation of the Public Service Commission. They remain unchallenged. Similarly, Candidates appointed to the service on the basis of the result of the competitive examination of 1972 before the unplaced candidates were appointed, formed separate class as they were also appointed in accordance with the rules. The "unplaced candidates" of 1970 examination cannot claim seniority over them on the basis of Rule 22 as their appointment was not made on the basis of the list approved by the Commission under Rule 19. In *Shitla Prasad Shukla Vs. State of U.P. and Others*, This Court held that an employee must belong to the same stream before

he can claim seniority vis-a-vis others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-a-vis those who may have been regularly and properly appointed.

20. ...But we are also of the view that having regard to the period of 12 years that have elapsed, we do not propose to strike down their appointments.

21. Now the question arises as to when seniority should be assigned to the unplaced candidates. Their claim for assigning them seniority on the basis of the competitive examination of 1970 is not sustainable in law as discussed above. They were appointed to service after five years of the examination and before their appointment, competitive examination of 1972 had taken place and candidates selected under that examination had been appointed to service prior to their appointment. The directions issued by the High Court for rearranging the merit list of 1970 examination seriously affect the seniority of those who were regularly selected in accordance with the norms prescribed by the Commission. Having regard to these facts and circumstances of the case we are of the opinion that the view taken on by the High Court on its administrative side and the State Government that the unplaced candidates of 1970 examination should be assigned seniority below the last candidate of 1972 examination appointed to the service is just and reasonable. In our opinion it would be just and proper to assign seniority to the unplaced candidates of 1970 examination at the bottom of the line of 1972 candidates. There were 37 unplaced candidates of 1970 examination who were included in the third list, of them 16 candidates appeared in the 1972 examination and they were successful and their names were approved by the Commission in the list prepared under Rule 19. The State Government appointed them in service. Under Rule 22 they are entitled to seniority of 1972 examination but in view of the judgment of the High Court in Rafiquddin's case their seniority has been determined on the basis of their recruitment to service under the 1970 examination. We have already recorded findings that unplaced candidates of 1970 examination (as included in the third list) have not been recruited in service according to the rules and their recruitment to service cannot be treated under 1970 examination for purposes of determining their seniority under Rule 22. We have further directed that 21 unplaced candidates of 1970 examination should be placed below the candidates of 1972 examination. But so far as 16 remaining candidates are concerned, they were appointed to the service on the result of 1972 examination and their appointment does not suffer from any legal infirmity. They are therefore entitled to seniority of 1972 examination on the basis of their position in the merit list of that examination. They are, however, not entitled to the seniority of 1970 on the basis of the examination of that year as held by the High Court.

(emphasis is added)

57. From the case of Rafiquddin (supra), it is clear that even when the High Level Committee consisted of persons, who had occupied highest of offices in the State, the action taken by such a High Level Committee was, being in breach of

the rules, not upheld by the Apex Court reminding all of us of the principle, "however, high you may be, the law is above you".

58. The second underlying principle of the decision, in Rafiquddin (supra), is that even when, on account of lapse of a long period, appointment made to a service, in breach of the relevant recruitment rules, is not set aside and quashed, such irregular appointee shall not be allowed to steal a march over the regular appointees, for, as reiterated in Rafiquddin (supra), "an employee must belong to the same stream before he can claim seniority vis-a-vis others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-a-vis those, who may have been regularly and properly appointed".

59. Following the principle of law as indicated hereinabove, it is possible that without setting aside and quashing the appointment of an irregular appointee, the Court or Tribunal may direct the appointing authority to treat a regular appointee in service, though appointed later in point of time than the irregular appointee, as senior to the irregular appointee. In other words, an irregular appointee cannot be allowed to gain seniority over the regular appointee, for, they cannot be said to belong to the same stream even if the appointment of the irregular appointee is prior in point of time and is not disturbed on account of long period of service, which the irregular appointee might have put in.

60. It may be pointed out that the principles governing seniority between a regular appointee and an irregular appointee, as enunciated in Rafiquddin (supra), have also been followed in State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, In Sukanti Mahapatra (supra), the Tribunal, on review of its earlier order, reversed its earlier finding and directed that the appointees, whose entry into the service was irregular being *de hors* the rule, would rank junior to the regular appointees. In Sukanti Mahapatra (supra) too, if I may emphasise, the Tribunal did not set aside the appointment of the irregular appointees having regard to the long period of service put in by the irregular appointees. While not setting aside the appointment of irregular appointees, the Tribunal, however, moulded the relief as regards seniority between the irregular appointees vis-a-vis the regular appointees by directing that the irregular appointees shall rank junior to the regular appointees.

61. Aggrieved by the Tribunal's direction as regards their seniority, the irregular appointees, as appellants, came before the Supreme Court in Sukanti Mahapatra (supra). Dealing with the case, the Supreme Court, while upholding the Tribunal's order, observed and held as follows:

10. Now even though the Tribunal came to the conclusion that Rule 14 did not permit regularization made under the impugned orders of 3rd January, 1985 and February 14, 1985, it, having regard to the long service put in by the employees named in the same two orders and on compassionate considerations, has supported the regularization under Article 162 of the Constitution. It has moulded the relief on such considerations. Since that part of the order has not

been assailed and since the appellants cannot be worse off by appealing, we cannot interfere with that part of the order. It will, therefore, be worked out as directed by the Tribunal but we may clarify that it will not have the effect of disturbing the seniority of regular appointees who will rank senior to the irregular appointees.

62. From the principles of law as discussed hereinabove and reflected from the cases of Rafiquddin (*supra*) and Sukanti Mahapatra (*supra*), it clearly follows that in a given facts and circumstances, when the appointment of a Government employee is found to be irregular and the court, having regard to the long period of service, which the irregular appointee might have put in, may not set aside the appointment, yet it shall, ordinarily, make him rank junior to the regular appointee, particularly, when the regular and irregular appointees had not come to be selected through the same selection process.

63. In view of the fact the present appellant's appointment has been found to be de hors the Recruitment Rules and not sustainable in law, the question of giving him the additional benefit of "seniority" by taking into account his "past service", rendered either in his parent department or in the deputation post, does not arise at all. In a situation, such as the present one, even if this Court, on account of peculiarity of the present case, chooses not to interfere with the permanent absorption of the present appellant by virtue of the notification, dated 29.9.2005, this Court must ensure that the appellant is not allowed to reap the benefit of the illegal and arbitrary action of the State respondents. Viewed from this angle, it becomes clear that this Court must ensure, as has been rightly done by the learned single judge, that the present appellant does not reap the benefit of seniority, with retrospective effect, on the strength of the impugned notification, dated 7.12.2005.

64. Lastly, we turn to the submissions of Mr. B.N. Sharma, learned senior Counsel, that in the past, since some persons, brought on deputation, were granted seniority with retrospective effect, not granting of such seniority to the present appellant would be discriminatory.

65. It needs to be pointed out that if anyone has, in the past, received benefit of an illegal act of a State, such an illegal act cannot be commanded by a Writ court to be repeated in the name of removing discrimination, for, discrimination must arise out of legally valid and enforceable acts and not a wrong, illegal or arbitrary act. The answer to this vital aspect of law has been succinctly given by the Apex Court in Chandigarh Administration and another Vs. Jagjit Singh and another, wherein the Apex Court has held that the mere fact that an authority has passed a particular order in the case of another person, similarly situated, cannot be a ground for issuing a writ in favour of the petitioner on the plea of discrimination if the order, in favour of the other person, is found to be contrary to law or not warranted in the facts and circumstances of the case. Noticing that the High Courts, in exercise of their writ jurisdiction, have been passing orders to remove discrimination and thereby asking the authorities concerned to repeat the

illegality, the Apex Court has expressed its anxiety on such approach and has laid down succinctly the position of law, in Chandigarh Administration (supra), in the following words:

8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent authority has passed a particular order in case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be allowed and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat the illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law indeed, wherever, it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such plea would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and similar relief can be given to the petitioner if it is found that the petitioners' case is similar to the other persons' case. But then why examine another person's case in his absence rather than examining the case of the petitioner who is present before the court and seeking the relief. Is it not more appropriate and convenience to examine the entitlement of the petitioner before the court to the relief asked for in the facts and circumstances of his case, than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the case nor is his case. In our considered opinion, such a course barring exceptional situations - would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or

otherwise. Each case must be decided on its own merits, factual and illegal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial word. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises).

(emphasis is added)

66. From the decision in Chandigarh Administration (supra), it becomes clear that in the name of removing discrimination, this Court cannot, and ought not to, permit a situation to develop, whereby this Court, inadvertently, restores an illegal order and thereby give to the present appellant a benefit, which, under the law, he is neither entitled to nor shall he be given.

67. Because of what have been discussed and pointed out above, we find absolutely no merit in the present appeal. We, therefore, dismiss the appeal with cost of Rs. 5,000.

68. Before parting with this appeal, we make it clear that though we have not interfered with the present appellant's permanent absorption by the impugned notification, dated 29.9.2005, we shall not be treated to have put our seal of approval on his permanent absorption by the said notification. If anyone, other than the private respondents, was adversely affected, on 29.9.2005, by the appellant's permanent absorption by virtue of the notification, dated 29.9.2005, such a person may approach this Court or any other court in accordance with law and the fact that we have not interfered with the impugned notification, dated 29.9.2005, shall not cause any legal impediment in granting such relief, which such an aggrieved person may be, otherwise, entitled to under the law.

69. With the above observations and directions, this appeal shall stand disposed of.