

PETITIONER:
K. MADHAVAN AND ANR. ETC.

Vs.

RESPONDENT:
UNION OF INDIA AND ORS. ETC.

DATE OF JUDGMENT 09/10/1987

BENCH:
DUTT, M.M. (J)
BENCH:
DUTT, M.M. (J)
MISRA RANGNATH

CITATION:
1987 AIR 2291 1988 SCR (1) 421
1987 SCC (4) 566 JT 1987 (4) 43
1987 SCALE (2) 727

ACT:

Service matter-Dispute about seniority-Notional/deemed date of appointment-Effect of-Length of service prior to transfer-Whether to be considered after transfer for purposes of seniority.

HEADNOTE:

(1) Writ Petitions Nos. 9847 and 9848 of 1983 involved a dispute as to seniority between the petitioners K. Madhavan and Santanu Sen on the one hand and respondent No. 5, O.P. Sharma, on the other.

The two petitioners were directly recruited as Deputy Superintendents of Police (DSP) in the Delhi Special Police Establishment (S.P.E.) in the Central Bureau of Investigation (C.B.I.) on 6.7.1963 and 10.8.1963, respectively. The respondent No. 5, appointed to the post of D.S.P. On 13.7.1962 in the Rajasthan State Police, came on deputation to the C.B.I. as D.S.P. On 1.7.1967, where majority of the officers are deputationists. The two petitioners were confirmed in the post of D.S.P. in the C.B.I. On 30.3.1967. The respondent No. 5 was confirmed as D.S.P. in the Rajasthan State Police on 1.12.1964. The two petitioners were promoted to the rank of Superintendent of Police (S.P.) in the C.B.I. On 21.10.1971 and 25.1.1972. The respondent No. 5 was appointed to the post of S.P. On 28.10.1972.

The Inspector General of Police, Delhi Special Police Establishment, and Director of C.B.I.-Respondent No. 2-published a seniority list of departmental S.Ps. On 1.10.1978, in which the respondent No. 5 was shown below both the petitioners. The respondent No. 2 also published another seniority list on 17.10.1981, in which the date of appointment of the respondent No. 5 was mentioned as 21.10.1971 (notional) instead of 28.10.1972, and on the basis of such notional date of appointment to the post of S.P. in the C.B.I., the name of the respondent No. 5 was placed above the names of the petitioners in that seniority list. The two petitioners felt aggrieved by the latter seniority list, showing them as junior to the respondent No. 5 on the basis of a notional date of appointment with retrospective effect from 21.10.1971. The two petitioners

moved this Court by Writ Petitions, challenging the said seniority list.

422

2. In the Writ Petition No. 1021 of 1986, filed by the petitioner A Dwarka Nath, the petitioner was regularly promoted on 14.6.1976 to the post of the Deputy Commandant in the BSF, which, according to him, was equivalent to the grade of S.P. in the CBI. The respondent No. S in the Writ Petition was promoted on 4.8.1978 and the respondents Nos. 6 and 7 in the petition were promoted on 28.7.1978 to the posts of S.P. in the CBI. The petitioner joined the CBI on deputation as S.P. On 29.9.79 and was permanently absorbed in the CBI in the rank of SP on 28. 10.1983. The respondents 5 to 7 were confirmed in the post of SP with effect from 4.8.1980. The principal question involved was whether in computing the seniority of the petitioner in the CBI in the rank of SP, his length of service from 14.6.1976, when he was the Deputy Commandant in the BSF, should be taken into account or not, as if his service from 14.6.1976 is taken into consideration, he would be senior to the respondents Nos. 5 to 7, who were appointed in 1978.

Allowing all the Writ Petitions, the Court,

^

HELD: (1) In the Writ Petitions Nos. 9847 and 9848 of 1987, the two petitioners, Madhavan and Sen, and the respondent No. S, o.P. Sharma, are all now holding the posts of D.I.G. The real question, therefore, boils down to the seniority of the petitioner vis-a-vis the respondent No 5 in the post of DIG, and that will depend upon the decision of the question of the seniority of the petitioners and respondent No. S in the post of SP in the CBI. [431D-E]

The most significant and crucial fact is the appointment of the respondent No. 5 to the post of SP with retrospective effect from a deemed date of appointment, that is, 21.10.1971. The petitioners strongly urged that such a deemed appointment with retrospective effect from 21.10.1971 was wholly illegal and should be struck down. The plea of the respondent Nos. 1, 2 and 5 was that the respondent No. 5 became eligible for appointment to the post of SP in the CBI in July 1970, and, indeed, the meeting of the DPC was scheduled to be held in October, 1970, but was arbitrarily postponed. [432G-G]

There can be no doubt that if the meeting of the DPC is scheduled to be held but is arbitrarily or mala fide cancelled without any reasonable justification, to the prejudice of an employee, the Government can in a suitable case do justice to such an employee by granting him promotion or appointing him to the higher post for which the DPC was to be held with retrospective effect so that he is not subjected to a lower position in the seniority list. But if the postponement or cancellation of

423

the meeting of the DPC is not arbitrary and is supported by good reasons, the employee concerned can have no grievance and the Government will not be justified in appointing him to the higher post with retrospective effect; an employee may become eligible for a certain post, but surely he cannot claim appointment to such a post as a matter of right. [433B-D]

It is true that the meeting of the DPC was to be held on 13. 10.1970 but the Director of the CBI appears to have considered that as the vacancies that existed were meant for non-deputationist DSPs and as two of such DSPs would become eligible for promotion in January and March, 1971, he postponed the meeting of the DPC to be held on 13. 10.1970.

The Court does not find any arbitrariness in the decision of the Director of the CBI to postpone the meeting of the DPC till after March, 1971. There was ample justification for the postponement or cancellation of the meeting of the DPC. The respondent No. 5 might have been eligible for being considered for appointment to the post of SP in July, 1970, but he had no right to claim such consideration when the vacancies were meant for non-deputationist DSPs. Therefore, the Government had no reasonable justification to contend that the postponement of the DPC meeting was arbitrary and high-handed. As the foundation of the appointment of the respondent No. 5 to the post of SP with retrospective effect from 21.10.1971, namely, postponement of the meeting of the DPC in October, 1970 arbitrarily, is shaken to a great extent, there was no question of any injustice done to the respondent No. 5. The retrospective promotion or appointment to a post should be given most sparingly and on sound reasoning and foundation. In this case, there was no justification for the appointment of the respondent No. 5 to the post of SP in the CBI with retrospective effect from 21.10.1971, so as to make him senior to the petitioner. The impugned order dated September 25, 1981, appointing the respondent No. 5, O.P. Sharma, with retrospective effect from a notional date, viz. 21.10.1971, and the seniority list dated 17.10.1981, showing the respondent No. 5 as senior to the petitioners, quashed. Writs in the nature of Certiorari, and mandamus, directing the respondents Nos. 1 and 2 to publish a fresh seniority list showing the petitioners as senior to the respondent No. 5, issued. [434E-H; 435A-B; 440B]

(2) In the Writ Petition No. 1021 of 1986, the principal question involved is whether the length of service of the petitioner Dwarka Nath in the Border Security Force (BSF) should be taken into account for the purpose of deciding his seniority in the CBI in the rank of SP. [435C] 424

The period from 14.6.1976 when the petitioner was promoted to A the post of Deputy Commandant in the BSF upto his joining the CBI on deputation on 29.7.1979 should be taken into consideration for the purpose of deciding his seniority in the CBI in the rank of SP. Paragraph 3 of the office memorandum dated 22.12.1959 relied upon by the respondents 3 to 5, which provides inter alia that permanent officers of each grade shall be ranked senior to persons who were officiating in that grade does not militate against the view taken by the Court as expressed above 'Grade' in paragraph 3 undoubtedly refers to the grade in respect of which the seniority is to be decided. The petitioner was a permanent officer on 14.6.1976 in the grade of Deputy Commandant which is equivalent to the grade of SP in the CBI. The petitioner was not in the CBI on that date, but that will not make any difference. The office memorandum above-mentioned does not stand in the way of counting the seniority of the petitioner from 14.6.1976. [435G-H; 436A-C]

When a deputationist is permanently absorbed in the CBI, he is appointed on transfer under the rules. Deputation may be regarded as a transfer from one Government department to another. It will be against all rules of service jurisprudence if, when a Government servant holding a post is transferred to the same or an equivalent post in another Government Department, the period of his service in the post before transfer is not taken into consideration in computing his seniority in the post to which, he is transferred. The transfer cannot wipe out his length of service in the post from which he has been transferred. [436C-E]

The seniority of the petitioner should be counted from 14.6.1976 on which date he was regularly promoted to the post of Deputy Commandant in the BSC, and he should be held senior to the respondents 5 to 7. Writ in the nature of certiorari issued, quashing the seniority list (Annexure P/1 to the Writ Petition) and all subsequent seniority lists of SPs in the CBI in which the petitioner was shown junior to the respondents 5 to 7. Further, writ in the nature of mandamus issued, commanding the respondents 1 and 2 to allot to the petitioner his proper seniority in the post of SP, CBI, by counting his service with effect from 14.6.1971, and to issue a fresh seniority list, showing the petitioner senior to the respondents Nos. 5 to 7. [440D, B]

R.S. Mokashi and ors. v. I.M Menon and others, [1988] 1 SCC 379, Wing Commander J. Kumar v. Union of India and others, [1982] 3 SCR 453, referred to.

425

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petitions Nos. 9847-48 of (Under Article 32 of the Constitution of India).

M.K. Ramamurthy, P.P. Rao, C.S. Vaidianathan, S.R. Bhatt, S.R. Setia, K.V. Mohan, R. Venkataramani, R. Ayyam Perumal and S.M. Garg for the Petitioners.

Kuldeep Singh, Additional Solicitor General, B. Dutta Additional Solicitor General, T.S. Krishnamoorthy Iyer, A.K. Sen, Kapil Sibal, O.P. Sharma, C.V. Subba Rao, R.P. Srivastava, P. Parmeswaran, R.C. Gubrele, K.R. Gupta, R.K. Sharma, Sanjay Sareen, S.K. Gambhir, M.S. Ganesh and T.C. Sharma for the Respondents.

Girish Chandra and Ashok K. Srivastava for the Interveners.

The Judgment of the Court was delivered by

DUTT, J. These two writ petitions, being Writ Petitions Nos. 9847-48 of 1983, involve a dispute as to seniority between the two petitioners, K. Madhavan and Santunu Sen, on the one hand and the respondent No. S, O.P. Sharma on the other. It may be recorded at the outset that although the petitioners have also challenged in the writ petitions the seniority of the respondent No. 4, P.C. Srivastava, over the petitioners, at the hearing of the writ petitions the challenge to the seniority of the respondent No. 4 has not been pressed on behalf of the petitioners inasmuch as the respondent No. 4 is to retire from service within about two years from now. We would, accordingly, exclude from our consideration the seniority of the respondent No. 4 which stands confirmed.

The two petitioners, Madhavan and Sen, were directly recruited as Deputy Superintendent of Police (DSP) in the Delhi Special Police Establishment (SPE) in the Central Bureau of Investigation (CBI) on 6-7-1963 and 10-8-1963 respectively. The respondent No. S, who was appointed to the post of DSP on 13-7-1962 in the Rajasthan State Police, was sent on deputation to CBI as DSP on 1-7-1967. It may be stated at this stage that majority of the officers in the CBI are deputationists. The case of the respondent is that the CBI organisation requires very capable and experienced police officers and, accordingly, such police officers are brought to CBI on deputation from

426

different states and, thereafter, they are generally absorbed in the A CBI. We shall presently refer to the recruitment rules of police personnel in the CBI, but before

that, we may indicate how the dispute between the parties arose with regard to their respective seniority. While Madhavan and Sen were both confirmed in the post of DSP in the CBI on 30-3-1967, the respondent No. 5 was confirmed as DSP in the Rajasthan State Police on 1-12-1964. The petitioners, Madhavan and Sen, were promoted to the rank of Superintendent of Police (SP) in the CBI with effect from 21-10-1971 (AN) and 25-1-1972 (AN) respectively. The respondent No. 5 was appointed to the post of SP on 28-10-1972. The respondent No. 2, the Inspector General of Police, Delhi Special Police Establishment, and Director of CBI published a seniority list of departmental SPs on 1-10-1978. In that seniority list, the respondent No. 5 o.P. Sharma was shown below both the petitioners. The respondent No. 2 also published another seniority list on 17-10-1981. In that seniority list, the date of appointment of the respondent No. 5 was mentioned as 21-10-1971 (FN) (Notional) instead of 28-10-1972 and on the basis of such notional date of appointment to the post of SP in CBI, the name of the respondent No. 5 was placed above the petitioners' names in that seniority list. The petitioners felt highly aggrieved by the said seniority list showing them as juniors to the respondent No. 5 o.P. Sharma, on the basis of a notional date of appointment with retrospective effect from 21-10-1971 (FN), that is, just before the appointment of Madhavan on 21-10-1971 (AN). The petitioners have challenged the said seniority list.

The case of the petitioners is that the deemed or notional date of appointment of the respondent No. 5 with retrospective effect from 21-10-1971 (FN) has been done mala fide with a view to making the petitioners juniors to the respondent No. 5 without any reasonable justification therefor. It is complained that before that deemed or notional date of appointment was made with retrospective effect, the petitioners were not given any opportunity of being heard to their great prejudice and detriment. The seniority of the respondent No. 5 has been challenged by the petitioners on more than one ground including the ground that the respondent No. 5 was not even eligible for appointment as SP in the CBI. The grounds of challenge will be considered by us presently. But, before that we may indicate the stand taken by the respondents Nos. 1 and 2, the Union of India and the CBI, and the respondent No. 5 in regard to his appointment to the post of SP, CBI, with retrospective effect from 21-10-1971 (FN).

It is not disputed that under the Special Police Establishment

427

(Executive Staff) Recruitment Rules, 1963, hereinafter referred to as '1963 Rules', for the appointment of a deputationist to the post of SP, the minimum qualification required was DSP in the Special Police Establishment with at least eight years' service in the grade, out of which two years should be probationary period in the CBI. It has been stated already that the respondent No. 5 O.P. Sharma became DSP in the Rajasthan State Police on 13-7-1962 and he joined the CBI as DSP on 10-7-1967. According to him, therefore, he was eligible for appointment to the post of SP after eight years of his service as DSP on July 13, 1970. It is also not disputed that under the 1963 Rules, the mode of recruitment was that not exceeding 15% of the sanctioned strength would be filled by promotion and the remaining by transfer on deputation. It is the case of the respondents Nos. 1, 2 and 5 that the proposal for convening the meeting of the DPC was approved on October 13, 1970, but as two departmental

officers were to complete eight years of service and become eligible for being considered for the post of SP in January and March 1971, the meeting of the DPC was postponed on that ground. It is the contention of the respondents Nos. 1, 2 and 5 that the meeting of the DPC was to be held in October, 1970, but was arbitrarily postponed without any justification therefor and, accordingly, the case of the respondent No. 5 for appointment to the post of the SP, CBI, could not be considered, although he was fully eligible for the same. The DPC finally met in July, 1971. But the respondent No. 5 was graded only 'good', which grading debarred him from getting the appointment. It is the case of the respondents Nos. 1, 2 and 5 that when the minutes of the DPC went to the Department of Personnel for Presidential approval, the Department of Personnel examined the matter in depth and found that DPC had erroneously graded the respondent No. 5 as 'good'. Consequently, the matter was referred by the Department of Personnel to the Senior Board which met in July, 1972 and graded the respondent No. 5 as 'very good' and recommended him for appointment to the post of SP. As noticed already, the respondent No. 5 was appointed to the post of SP in CBI on 28-10-1972.

The further case of the respondents Nos. 1, 2 and 5 is that for no fault of the respondent No. 5, the DPC was unjustly postponed and as the Senior Board had subsequently selected and recommended the respondent No. 5 for the post of SP in CBI, the respondents Nos. 1 and 2 appointed the respondent No. 5 as SP with retrospective effect from a deemed date of appointment, that is, from 21-10-1971 (FN) so as to mitigate his hardship and to do justice to him. An explanation has also been given in the affidavit of the respondents Nos. 1 and 2 as to why

428

the said date being 21-10-1971 (FN) was selected for the deemed appointment of the respondent No. 5. The explanation is that although his appointment as SP should have been from October, 1970 when the meeting of the DPC was originally scheduled to be held but postponed, and in that event, he would have been approved earlier than the two petitioners, yet basically the question for consideration before the Government being only inter se seniority of the respondent No. 5 vis-a-vis the petitioners, it was thought proper that ends of justice would be met if the respondent No. 5 was given a limited retrospective date of appointment as SP. The Government took note that the delayed appointment of the respondent No. 5 was on account of unjustifiable reasons, and assigned him the seniority over the two petitioners with a deemed date of appointment as 21-10-1971 (FN). That is how the dispute has arisen between the petitioners and the respondent No. 5 over the question of their respective seniority in the rank of SP in the CBI.

The petitioners have, in the first instance, challenged that the respondent No. 5 was not even eligible for appointment to the post of SP, CBI. The respondent No. 5 was a deputationist and under the 1963 Rules that were prevailing at the material time, he was to complete eight years' service in the grade. There has been much controversy over the expression "in the grade". According to the petitioners, the expression should be understood as meaning in the grade of SP in the CBI. In other words, the contention of the petitioners is that the respondent No. 5 should have been for eight years in the CBI as DSP before he would be eligible for appointment to the post of SP in the CBI. As the respondent No. 5 joined the post of DSP in the CBI on deputation on 1-7-1967, he could not be appointed to

the post of SP even on 28-10-1972, far less on 21-7-1971 (FN), for on either date, he did not complete eight years of service in the CBI. We are, however, unable to accept the contention. "Eight years' service in the grade" would mean "eight years' service in the grade of DSP". The 1963 Rules do not provide that the period of eight years should be computed from the date of deputation to the CBI as DSP. In the absence of any such express provision, it must be held that the period during which one held the post of DSP in the State Police Service should also be taken into account for computing the period of eight years. The 1963 Rules provide that two years must be spent on probation as DSP in the CBI. The position, therefore, comes to this that of the total period of eight years, two years must be on probation basis in the CBI. An officer may have been in the State Police as DSP for a period of six years and, thereafter, if he joins the CBI on deputation and spends

429

two years on probation, he would be eligible for consideration for appointment to the post of SP. If this view is not taken, no officer would be available to join the CBI on deputation. It has already been noticed that the CBI requires efficient and experienced police officers and if the period spent by police officers in the State Police Service is not taken into account for the purpose of computing the period of eight years, it would be doing injustice to such police officers who join the CBI on deputation. In our view, therefore, there is no substance in the contention of the petitioners that in order to be eligible for appointment to the post of SP in the CBI, one should be in the rank of DSP in the CBI for a period of eight years including a period of two years on probation. The respondent No. 5 having held the post of DSP for five years in the Rajasthan State Police and more than three years in the CBI, that is to say, over eight years, he was quite eligible for appointment to the post of SP. The two petitioners, Madhavan and Sen, and the respondent No. 5 O.P. Sharma are all now holding the post of DIG. By an order dated October 6, 1983, this Court directed that no selection list would be prepared for the post of DIG in the CBI/SPE, but it would be open to the respondents to make ad hoc appointments which would be subject to the result of the writ petition. As a result of that order, the respondent No. 5 was promoted to the post of DIG on October 13, 1983 on an ad hoc basis subject to the result of the writ petitions. The petitioners were also appointed DIGs on ad hoc basis by virtue of an interim order of this Court on April 24, 1985. Thus the petitioners and the respondent No. 5 have been in the post of DIG on ad hoc basis. After the lapse of time and after the appointment of the petitioners and the respondent No. 5 to the post of DIG, though on ad hoc basis, the real question is the question of their inter se seniority in the post of DIG in the CBI.

It has been strenuously urged on behalf of the petitioners at the very outset that the respondent No. 5 was not eligible for being appointed to the post of DIG, CBI. In support of this contention our attention has been drawn to the Central Bureau of Investigation (Deputy Inspector General of Police/Deputy Director) Recruitment Rules, 1975, hereinafter referred to as 'the 1975 Rules', which prescribe the following eligibility requirement for being considered for the appointment to the post of DIG in the CBI:-

"Superintendent of Police (including Assistant Inspector General of Police/Assistant Director) in the Central Bureau of Investigation-with eight

years' service in the grade rendered after appointment thereto on a regular basis. "

430

It is the contention of the petitioners that as the respondent No. 5 had not rendered eight years of regular service as SP in the CBI, he was not eligible for appointment to the post of DIG. It is submitted that eligibility requirement in the 1975 Rules is very specific inasmuch as it provides eight years of service in the grade after appointment thereto on a regular basis. The expression 'on a regular basis', according to the petitioners, means after absorption of the deputationist in the CBI as SP and, as the respondent No. 5 was absorbed in the rank of SP in the CBI on 1-7-1978, he was not eligible for appointment to the post of DIG on 13-10-1983, that is to say, within less than eight years of his service from the date of absorption. In support of that contention our attention has been drawn on behalf of the petitioners to the Central Bureau of Investigation (Deputy Inspector General of Police/Deputy Director) Recruitment Rules, 1966, hereinafter referred to as 'the 1966 Rules'. Under the 1966 Rules, the eligibility requirement for being considered for appointment to the post of DIG is as follows:-

"Superintendent of Police (including Assistant Inspector General of Police/Assistant Director) in the Central Bureau of Investigation with not less than eight years' service in the grade."

It is submitted that on a comparison of the eligibility clauses in the 1966 and the 1975 Rules, it will be apparent that while under the 1966 Rules it was only eight years' service in the grade which might mean eight years' service in the rank of SP in the CBI whether the deputationist was permanently absorbed or not, under the 1975 Rules it is "eight years' service in the grade rendered after appointment thereto on a regular basis". Accordingly, it is urged that the expression 'on a regular basis' can have only one meaning, that is to say, after permanent absorption of the deputationist in the CBI. Otherwise, there was no necessity for insertion of the words 'on a regular basis' in the eligibility clause of the 1975 Rules for the post of DIG in CBI. Under the 1984 Rules, it is only "eight years' regular service in the grade". So the entire contention of the petitioners centres round the expression 'on a regular basis.'

The 1975 Rules which are relevant for the purpose do not explain what is meant by the expression 'on a regular basis'. The expression has created some ambiguity in the eligibility clause giving rise to this controversy. There can be no doubt that when a person is appointed to a post against a permanent vacancy on probation, his appointment is

431

on a regular basis, but when a person is appointed to a post on a purely temporary or on an ad hoc basis, the appointment is not on a regular basis. The expression 'on a regular basis' in the 1975 Rules cannot, in our opinion, be interpreted to mean as on absorption in the CBI as SP. The general principle is that in the absence of any specific provision to the contrary, the length of service from the date of appointment to a post should be taken into consideration for the purpose of either seniority in that post or eligibility for the higher post. As no explanation has been given in the 1975 Rules of the said expression, we do not think it desirable to deviate from the established principle of computing the length of service for the purpose of seniority or eligibility for the higher post from the

date of appointment. In our view, therefore, the expression 'on a regular basis' would mean the appointment to the post on a regular basis in contradiction to appointment on ad hoc or stop-gap or purely temporary basis. The respondent No. S, in our opinion, satisfied the eligibility test of the 1975 Rules for consideration for the post of DIG. But, it is not disputed by the parties that the petitioners and the respondent No. S have, by the lapse of time during the pendency of this litigation, become eligible for appointment to the posts of DIG. Indeed, they are holding the posts of DIG, may be on ad hoc basis, under the interim orders of this Court and there is no chance of their being reverted to the next lower post of SP. The question, therefore, boils down to the seniority of the petitioners vis-a-vis the respondent No. S in the post of DIG. That again will depend upon the decision on the question as to the seniority of the petitioners and the respondent No. S in the post of SP.

We, therefore, focus our attention to the question of the seniority of the petitioners and the respondent No. S in the post of SP in the CBI. It is urged on behalf of the petitioners that the appointment of the respondent No. S to the post of SP was in violation of the quota rule. We have already noticed that under the 1963 Rules, the method of recruitment was provided as follows:-

(a) Not exceeding 15% of the sanctioned strength by promotion.

(b) The remaining by transfer on deputation.

There was an amendment with effect from 15-1-1971 and the method of recruitment was prescribed as follows:-

1. 25%-by promotion failing which by transfer on deputation.

2. 75%-by transfer/deputation.

432

The eligibility requirement was DSP in SPE/CBI with at least eight years' service in the grade. A chart has been prepared and filed by the petitioners and annexed to the writ petitions as Annexure-XVI. It appears from the chart that on 28-10-1972 on which date the respondent No. S was actually appointed on deputation to the post of SP/AD, the total sanctioned posts of SP/AD/AIG were 47.25% of the sanctioned posts was twelve, out of which only seven were filled by direct recruitment and five remained outstanding. 75% of the sanctioned strength was thirtyfive, to be filled by the appointment of deputationists, but forty deputationists were appointed to the posts of SPs, including the five posts out of the quota for direct recruitment. It is alleged by the petitioners that the respondent No. S was appointed to the post of SP in the CBI in one of the said five posts meant to be filled by direct recruits in violation of the quota rule. The chart also contains a submission that the appointment of five deputationists/transferees, including the appointment of respondent No. S, as SP on 28-10-1972 was illegal. In other words, it is alleged that the respondent No. S was appointed in one of the said five posts meant for direct recruits. There is no material whatsoever to suggest that the respondent No. S was appointed in one of the S posts in excess of the quota for the deputationists. In the circumstances, we are not inclined to accept such contention without any foundation therefor.

The most significant and crucial fact is the appointment of the respondent No. S to the post of SP with retrospective effect from a deemed date of appointment, that is, 21-10-1971 (FN). It is strenuously urged on behalf of the petitioners that such deemed appointment with

retrospective effect from 21-10-1971 (FN) was wholly illegal and mala fide and should be struck down. The plea of the respondents Nos. 1, 2 and 5 is that the respondent No. 5 became eligible for appointment to the post of SP in the CBI in July, 1970 after he had completed eight years of service in the grade of DSP with two years probation in the CBI. He was, accordingly, eligible for appointment to the post of SP and, indeed, the meeting of the DPC was scheduled to be held in October, 1970, but that was arbitrarily postponed. The DPC again met in July, 1971, but they had erroneously graded the respondent No. 5 as 'good' and not 'very good', as a result of which he could not be appointed in 1971. He was, however, found to be 'very good' on a review by the Senior Board which recommended the appointment of the respondent No. 5 to the post of SP and he was appointed to the post on 28-10-1972. The complaint of the respondents Nos. 1, 2 and 5 is that if the DPC had not been arbitrarily and without any reason whatsoever postponed and held its meeting in October, 1970, the

433

respondent No. 5 would have got the appointment to the post of SP in 1970 and would in normal course be senior to the petitioners. Thus, the sum and substance of the contention of the respondents Nos. 1, 2 and 5 is the arbitrary cancellation of the meeting of the DPC in October, 1970.

There can be no doubt that if the meeting of the DPC scheduled to be held is arbitrarily or mala fide cancelled without any reasonable justification therefor to the prejudice of an employee and he is not considered for promotion to a higher post, the Government in a suitable case can do justice to such an employee by granting him promotion or appointing him to the higher post for which the DPC was to be held, with retrospective effect so that he is not subjected to a lower position in the seniority list. But, if the cancellation or postponement of the meeting of the DPC is not arbitrary and is supported by good reasons, the employee concerned can have no grievance and the Government will not be justified in appointing the employee to the higher post with retrospective effect. An employee may become eligible for a certain post, but surely he cannot claim appointment to such post as a matter of right.

Let us now consider whether the DPC, scheduled to be held in October, 1970 was arbitrarily cancelled or not. The learned Additional Solicitor General has handed over to us the photocopy of the notings from the departmental file relating to the postponement of DPC. Paragraph 9 of the note of one O.P. Bansal is as follows:-

"In so far as the representation of Shri O.P. Sharma is concerned, it has been found from the records that in October, 1970 a proposal was made by the Administrative officer, CBI, for convening a meeting of the Selection Board for the consideration of suitability or otherwise of 6 non-IPS deputationist Dy. SPs who had completed 8 years' service in the grade of Dy. SP and Shri O.P. Sharma was No. 3 among them. It was stated in that note that there were 42 posts of SP and equivalent rank in CBI and that there were 3 vacancies in the grade. It was further stated that none of the non-deputationist Dy. SPs. had put in 8 years' service at that time and, as such, they were not eligible for consideration for promotion. As a result of this, all the 3 posts were to be filled by deputationists. It was not stated in that note whether any of the 3 posts fell in the

promotion quota, which at that time comprised not exceed-

434

ing 15% of the strength, i.e. 6 posts. The proposal for convening a meeting of the Selection Board was approved on 13-10-1970, but on 15-10-1970 the Director, CBI, ordered that the meeting might be held after S/Shri Ramender Singh and Jot Ram, Dy. SPs became eligible for promotion. These two officers were to complete 8 years' service as Dy. SP in January and March, 1971 respectively. It is, thus, correct that the meeting of the DPC was postponed to allow some non-deputationist Dy. SPs to become ripe for promotion to the grade of SP."

Thus, it appears from paragraph 9 of the note extracted above that three vacancies were to be filled by non-deputationist DSPs, otherwise the question of non-availability of non-deputationist DSPs with the requisite period of service would not have been mentioned. In the counter-affidavit of the respondents Nos. 1 and 2, it is also stated that at the relevant time no departmental DSP had eight years' service in that grade and, therefore, all the three vacancies then available were required to be filled by deputation of suitable State Police officers. It is, therefore, apparent that the three vacancies were meant to be filled by non-deputationist DSPs and not by deputationists, but as non-deputationist DSPs with the requisite period of service were not available, the vacancies were proposed to be filled by the deputationist DSPs. It is true that the meeting of the DPC was to be held on 13-10-1970 but the Director of CBI appears to have considered that as the vacancies were meant for the non-deputationist DSPs and as two of such DSPs would become eligible for promotion in January and March, 1971, he postponed the meeting of the DPC scheduled to be held on 13-10-1970. We do not find any arbitrariness in the decision of the Director of CBI postponing the meeting of the DPC till after March, 1971 when two non-deputationist DSPs would become eligible for promotion. There was, therefore, ample justification for the postponement or cancellation of the meeting of the DPC. The respondent No. 5 might have been eligible for being considered for appointment to the post of SP in July, 1970, but he had no right to claim such consideration when the vacancies were meant for non-deputationist DSPs. In our opinion, therefore, the Government had no reasonable justification to contend that the postponement of the DPC was arbitrary and high-handed. In July, 1971 also the respondent No. 5 was not found suitable by the DPC. It was only when the Senior Board found him suitable in July, 1972 and recommended him for appointment to the post of SP that the respondent No. 5 was appointed on October 28, 1972 to the post of SP, CBI. As the foundation of the appointment of

435

the respondent No. 5 to the post of SP with retrospective effect from 21-10-1971(FN), namely, the postponement of the meeting of the DPC in October, 1970 arbitrarily, is shaken to a great extent, there was no question of any injustice done to the respondent No. 5. The retrospective appointment or promotion to a post should be given most sparingly and on sound reasoning and foundation. In the instant case, we do not find that there was any justification for the appointment of the respondent No. 5 to the post of SP in the CBI with retrospective effect from 21-10-1971 (FN) so as to make him senior to the petitioners.

We may now deal with the Writ Petition No. 1021 of 1986. The principal question that is involved in this writ petition is whether the length of service of the petitioner Dwarka Nath in the Border Security Force (BSF) should be taken into account for the purpose of deciding his seniority in the CBI in the rank of SP. On 14-6-1976 the petitioner was regularly promoted to the post of Deputy Commandant in the BSF which, according to him, was equivalent to the grade of SP in the CBI. The respondent No. S was promoted on 4-8-1978 and the respondents Nos. 6 and 7 were promoted on the same date, that is, on 28-7-1978 to the post of SP in the CBI. The petitioner came to join the CBI on deputation as SP on 29-9-1979 and was permanently absorbed in the CBI in the rank of SP on 28-10-1983. The respondents Nos. 5 to 7 were confirmed in the post of SP with effect from 4-8-1980. The question that arises is whether in computing the seniority of the petitioner his length of service from 14-6-1976, when he was the Deputy Commandant in the BSF, should be taken into consideration or not. If his service from 14-6-1976 is taken into consideration, he would undoubtedly be senior to the respondents Nos. S to 7, who were appointed in 1978.

We have already considered the question in the Writ Petitions Nos. 9847-48 of 1983 in respect of the appointment of respondent No. S O.P. Sharma to the post of SP in the CBI. In that connection, it has been decided by us that in computing the requisite period of eight years, the period during which the respondent No. S held the post of DSP in the Rajasthan State Police Service should be taken into consideration. In our opinion, the period from 14-6-1976 when the petitioner was promoted to the post of Deputy Commandant in the BSF up to his joining the CBI on deputation on 29-7-1979, should be taken into consideration for the purpose of deciding his seniority in the CBI in the rank of SP.

Paragraph 3 of the office Memorandum dated 22-12-1959 relied upon by the learned Counsel for the respondents Nos. 3 to 5 does not,

436

in our opinion, at all militate against the view which we have taken. Paragraph 3 provides, inter alia, that permanent officers of each grade shall be ranked senior to persons who are officiating in that grade. 'Grade' in paragraph 3 undoubtedly refers to the grade in respect of which the seniority is to be decided. The petitioner was a permanent officer on 14-6-1976 in the grade of Deputy Commandant which is equivalent to the grade of SP in the CBI. It may be that he was not in the CBI on that date. But, in our view, that will not make any difference. We do not think that the office Memorandum dated 22-12-1959 stands in the way of counting the seniority of the petitioner with effect from 14-6-1976.

We may examine the question from a different point of view. There is not much difference between deputation and transfer. Indeed, when a deputationist is permanently absorbed in the CBI, he is under the rules appointed on transfer. In other words, deputation may be regarded as a transfer from one government department to another. It will be against all rules of service jurisprudence, if a government servant holding a particular post is transferred to the same or an equivalent post in another government department, the period of his service in the post before his transfer is not taken into consideration in computing his seniority in the transferred post. The transfer cannot wipe out his length of service in the post from which he has been transferred. It has been observed by this Court that it is a

just and wholesome principle commonly applied where persons from different sources are drafted to serve in a new service that their pre-existing total length of service in the parent department should be respected and presented by taking the same into account in determining their ranking in the new service cadre. See R.S. Mokashi & Ors. v. I.M. Menon & Ors. [1982] 1 SCC 379; Wing Commander J. Kumar v. Union of India & Ors.. [1982]3 SCR 453.

In this connection, we may notice one significant fact that although in the counter-affidavit the Union of India has opposed the claim of the petitioner that his seniority should be counted from 14-6-1976, at the hearing of the writ petition the learned Additional Solicitor General concedes that the petitioner's seniority should be counted from that date and that the said office Memorandum does not at all support the contention of the respondents Nos. 3 and 5.

The learned Counsel for the respondent Nos. 3 and 5 has, however, placed much reliance upon certain facts which will be stated presently. After the petitioner went on deputation to the CBI and

437
appointed to the post of SP, on 5-4-1980 the CBI invited options from the non-LPS deputationists for their permanent absorption in the CBI. The petitioner had sent a letter expressing his willingness to be absorbed in the CBI. On April 16, 1980, the Administrative officer, CBI, sent a wireless message to all concerned stating that seniority on permanent absorption in a rank would be counted from the date of permanent absorption and that those who had opted thinking otherwise, would be at liberty to revise their option by 13-4-1980. Again, on 11-9-1980 (10-9-1980?) another circular was issued in which it was re-emphasised that a deputationist who was willing to be absorbed in the CBI, would first be appointed on a regular basis in the CBI. He would be confirmed as and when permanent posts were available. Further, it was stated in the circular that his seniority in the CBI would begin from the date of his regular appointment. In other words, the service rendered from the date of regular appointment only would count for the purpose of seniority and promotion in the CBI. In the explanatory note regarding determination of inter se seniority, annexed to the said circular, it has been stated that a deputationist officer has no place in the seniority list as long as he is not absorbed (regularly appointed) in the CBI. Relying upon the said circulars and the petitioner's consent to be absorbed in the CBI, it is submitted on behalf of the respondents Nos. 3 and 5 that the petitioner's seniority should be counted from the date he was permanently absorbed or regularly appointed in the CBI, that is, with effect from 4-10-1983. On the other hand, it is submitted on behalf of the petitioner that as the said circulars dated 16-4-1980 and 10-9-1980 were found to be not workable, the CBI suspended the same for a further decision by its circular dated 6.10.1981, the relevant portion of which is extracted below:-

"In response to this office circular No. A. 31016/14/80-AD. I (DPC) dated 10-9-80, some of the branches have sent options of some of the officers for absorption in the CBI. Some options are conditional and some have sought some clarification with reference to seniority.

2. The matter is under correspondence with the DP & AR. The branches will be informed as soon as a decision is arrived at. Decision on the options received will be taken after the clarification has

been received from the DP & AR. "

No decision has yet been taken by the Government. Mr. P.P. Rao, learned Counsel appearing on behalf of the petitioner, has drawn
438

our attention to the counter-affidavit to the rejoinder in CMP Nos. A 5429 and 5430 of 1984 filed in the above writ petitions Nos. 9847 and 9848 of 1983, wherein it has been categorically admitted by the Union of India that after the issue of the circular dated 11-9-1980, the matter was re-examined by the Director of CBI and found to be unworkable. Thereafter, it was decided to take up the matter with the Government and no action was taken to implement the said circular. Further, it has been reiterated in the said counter-affidavit that the circular did not lay down the correct interpretation of recruitment rules, found unworkable and has not been acted upon even in a single case. The learned Additional Solicitor General has admitted the position that even now the Government has not come to any decision as to whether the seniority should be counted from the date of the regular appointment of the deputationists in the CBI, as stated in the circular. In the circumstances, we do not think that there is any merit in the contention of the respondent Nos. 3 and 5 that in view of the said circular dated 11-09-1980 and also the earlier circular dated 16-4-1980, the petitioner's seniority cannot be counted from 14-6-1976 when he was appointed to the post of Deputy Commandant in the BSF.

It is next contended on behalf of the respondent Nos. 3 and 5 that the petitioner's appointment from BSF to the rank of SP in the CBI on deputation was illegal. Reliance has been placed on the relevant provision in the recruitment rules relating to appointment on deputation which reads as follows:

" Transfer/Deputation:

Suitable officers of the State Police Forces or officers of the IPS or officers of the Indian Revenue Service or officers holding analogous post in the Central Government Department like the Directorate of Enforcement, Department of Customs etc."

It is submitted that the other Central Government Departments, two of which illustratively mentioned in the provision extracted above, are only those Departments in which statutory inquiries and investigations are conducted by the officers by arrest, search, examination of witnesses, prosecution of accused, etc. It is contended that the intention of the rule is that only officers of such Departments who have such experience would only function in the CBI as Investigation officers. As the petitioner had no such experience in the BSF, he was not eligible for being appointed to the CBI on deputation.
439

We are unable to accept the contention. It is true that in the rule two Government Departments have been mentioned, but that does not mean that only those Government Departments in which inquiries and investigations are made are contemplated by the rule. Nor does the rule contemplate that only those officers, who had experience of investigation would be appointed to the post in the CBI. Under the rule, such an officer should be a suitable officer and should be holding analogous post in the Central Government Department concerned. The petitioner was found to be a suitable officer and at the time of his deputation he was holding the post of Deputy Commandant which, according

to the petitioner, is equivalent to the post of SP in the CBI. We are unable to accept the contention of the respondents Nos. 3 and 5 that the post of Deputy Commandant in the BSF is not equivalent to the post of SP in the CBI. The letter of the Under Secretary to the Government of India dated November 25, 1983 shows on the face of it that the post of Deputy Commandant in the BSF is equivalent to that of SP in the CBI. It has been expressly conceded by the learned Additional Solicitor General that the Government accepts the post of the Deputy Commandant in the BSF as equivalent to the post of SP in the CBI. At this stage, we may refer to the letter dated January 24, 1984 of the CBI to the Government of India wherein it has been categorically stated inter alia that the petitioner was holding an analogous post in the BSF and was, therefore, eligible to be taken on deputation. Further, it has been stated that he had considerable experience of investigation of criminal cases, and that the Government and the UPSC had duly approved the substantive absorption of the petitioner on merit in accordance with the recruitment rules, as in force, in larger public interest. The said letter of the CBI resolves all controversy as to whether the petitioner was holding equivalent post in the CBI or whether he had experience of investigation or whether he was absorbed in the CBI in public interest. There is, therefore, no substance in the contention made on behalf of the respondents Nos. 3 and 5 that the petitioner's appointment in the CBI was illegal. In view of our decision that the petitioner's seniority should be counted from 14-6-1976 on which date he was regularly promoted to the post of Deputy Commandant in the BSF, the petitioner should be held to be senior to the respondents Nos. 5 to 7.

No other point has been urged on behalf of the parties.

In the result, so far as Writ Petitions Nos. 9847 and 9848 of 1983 are concerned, the impugned order dated September 25, 1981, appointing the respondent No. 5 O.P. Sharma with retrospective

440

effect from a notional date viz., 21-10-1971 (FN), and the seniority list dated 17-10-1981, showing the respondent No. 5 as senior to the petitioners, are quashed. Let a writ in the nature of certiorari issue in that regard. Further let a writ in the nature of mandamus issue directing the respondents Nos. 1 and 2 to publish a fresh seniority list showing the petitioners as seniors to the respondent No. 5. The writ petitions are allowed and the rules are made absolute to the extent indicated above.

With regard to Writ Petition No. 1021 of 1986, let a writ in the nature of certiorari issue quashing the seniority list, Annexure-P/1 to the writ petition, and all subsequent seniority lists of SPs in the CBI in which the petitioner has been shown junior to the respondents Nos. 5 to 7. Further, let a writ in the nature of mandamus issue commanding the respondents Nos. 1 and 2 to allot to the petitioner his proper seniority in the post of SP, CBI, by counting his service with effect from 14-6-1976, that is, the date on which he was regularly promoted to the post of Deputy Commandant in the BSF and to issue a fresh seniority list showing him senior to the respondents Nos. 5 to 7. The writ petition is allowed and the rule is made absolute to the extent indicated above.

We, however, make it clear that in Writ Petition No. 1021 of 1986 the issue as to the date of birth of the petitioner is left open and the petitioner would be at liberty to challenge any order, if adverse to him, on that

issue.

There will, however, be no order as to costs in any of the writ petitions.

S. L.

Petitions allowed

441

JUDIS