(2011) 10 GAU CK 0018

Gauhati High Court (Kohima Bench)

Case No: Writ Petition (Civil) No. 76 (K) of 2008, 112 (K) of 2009 &113 (K) of 2010

Fineson Pojar & Ors.		APPELLANT
	Vs	
State of Nagaland & Ors.		RESPONDENT

Date of Decision: Oct. 21, 2011

Citation: (2012) 1 GLT 338

Hon'ble Judges: P.K.Musahary, J

Bench: Single Bench

Advocate: Advocates appeared for the Petitioners: Mr. Imti Longjem, Mr. S.M. Ozukum, Mr. M. Singson, Mr. Taka Masa, Mr. K. Lotan, Mr. P. Choudhury, Mr.I. Iralu, Mr. L. Solo & Mr. L. Belho., Advocates appeared for the Respondents: Mr. L.S. Jamir, Addl. AG, Mr. P. Choudhury, Mr. I. Iralu, Mr. L. Solo, Mr. L. Belho, Mr. N Mozhui, Mr. Taka Masa & Mr. K. Lotan., Advocates appearing for Parties

Judgement

P.K. Musahary, J.

These are analogous matters. For the sake of convenience, the short facts in WP(C) No. 76 (K)/2008 and WP (C) No. 112 (K)/2009 are narrated hereunder. There is a lone petitioner in the first petition while there are 37 petitioners in the second petition. All the petitioners are degree holders in Civil Engineering and they were directly recruited through the Nagaland Public Service Commission (NPSC for short) during 19952001 to the posts of SDO/Assistant Engineer (Class I Gazetted) in the Works and Housing Department, Government of Nagaland.

2. The respondent No. 5, Mr. V. Vikheho Chishi and respondent No. 7, Mr. K. Tosuho Sema in the first petition are Diploma holders in Civil Engineering. They have neither filed any response nor engaged any counsel to represent them. One Mr. Kezholel Rhesto, has been impleaded as respondent No. 6 in the first petition and as Respondent No. 5 in the second petition (hereinafter referred to as private respondent only). This private respondent is a Degree Holder in Civil Engineering. He was initially appointed as a Lecturer, Class II Gazetted on 07.05.93 in Polytechnic under the Department of Higher

and Technical Education, through NPSC by Notification dated 17.05.93, along with one Mr. Toba Angami. They were brought on deputation on 02.06.1994 as SDO/Asstt. Engineer, Department of Works and Housing by a Notification dated 02.06.1994. A Cabinet Memorandum dated 18.06.2001 was prepared with prior clearance of the Personnel & Administrative Reforms Department (P&ARD in short) and the NPSC for their absorption in accordance with the OMNo. AR2/10/71 dated 12.08.75 and OMNo. AR07/08/86 dated 17.09.86. The State Cabinet took decision on 20.06.2001 to absorb the private respondent along with said Shri Toba Angami with effect from 20.06.2002 and an OM No. CAB1/2001 dated 21.06.2001 was issued by the Cabinet Secretariat followed by a Government notification dated 03.07.2001 to that effect issued by the Commissioner & Secretary Works and Housing Department. Subsequently, Notification No. WH/ESTT/54/95 dated 15.11.02 was issued by the Secretary to the Government of Nagaland, Works & Housing Department, superseding the earlier Notification dated 03.07.2001 providing absorption of private Respondent in the Nagaland Engineering Service with effect from 13.06.1994 and counting of his seniority as Asstt. Engineer in the NPWD from 13.06.94 i.e. the date of deputation. The interse seniority of Assistant Engineers was re fixed and the private Respondent was given officiating promotion to the post of Executive Engineer vide Notification No. WA/ESTT/22/98 dated 10.12.07. Similarly the Respondents No. 5 and 7 in the first petition were also given officiating promotion to the post of Executive Engineer vide separate orders/ notification dated 19.09.2007. The aforesaid notification dated 15.11.02 absorbing the private Respondent with effect from 13.06.94 (date of deputation) and 10.12.07 giving him officiating promotion to Executive Engineers are under challenge in these petitions. WP(C) No. 113 (K) 2010 (hereinafter referred to as the third petition) has been filed by the private respondent challenging the constitutional validity of OMs dated 12.08.75 and 17.09.86. In this writ petition prayer has been made for issuing direction to Respondent authorities to give full effect to the notification dated 15.11.2002.

3. I have heard Mr. Imti Longjem, learned counsel for the petitioner in the first petition and Mr. Taka Masa for the petitioners in the second petition. I have also heard Mr. L. S. Jamir, learned Addl. AQ Nagaland for State Respondents, Mr. N. Mozhui, learned Standing Counsel, NPSC (Respondent No. 3 in the second petition) and Mr. P. Choudhury, learned counsel appearing for the private Respondent in both first and second petitions.

4. Heard Mr. P. Choudhury along with Mr. I. Iralu, learned counsel for the petitioners, Mr. L. S. Jamir learned Addl. AQ Nagaland for Respondents No. 1, 2, 3 and Mr. Taka Masa, learned counsel appearing for the respondent No. 4 to 41 in the third petition.

5. In these writ petitions following legal issues have been posed for determination:

(1) Whether service on deputation can be absorbed from the date of joining in the borrower department or from the date of decision taken by the borrower department to absorb him in service;

(2) Whether the seniority of the employee on deputation could be counted from the date of joining in the borrower department or from the date of decision taken by the borrower department to absorb him in serivce;

(3) If the relevant Service Rules are silent about it, whether Government is authorized to issue necessary executive instructions in this regard;

(4) Whether the OMs dated 12.8.1975 and 17.09.86, dealing with filling up of vacancies on deputation/regular absorption of deputationists are valid constitutionally and legally.

6. Mr. Taka Masa, learned counsel appearing for the petitioners in second petition would submit that

(1) The Nagaland Engineering Service (Class I and II) Rules, 1984 (1984 Rules in short) were in operation when the private respondent was brought on deputation. The said 1984 Rules were repealed by the Nagaland Engineering Service (Class I & Class II) Rules, 1997, (1997 Rule in short), hi both these Service Rules, the source of recruitment are either by direct or through promotion. A third source like recruitment through deputation is not provided therein and as such absorption of private respondent through deputation is illegal and dehors the Rules.

(2) The OMs dated 12.08.75 and 17.09.86 were the only executive instructions holding the field when the private respondent was brought on deputation and absorbed, wherein it is clearly laid down that seniority should be counted from the date of decision with prior clearance of the P&ARD and NPSC and the approval of the State Cabinet. The private respondent having accepted the said conditions laid down in the said OMs, he cannot now turn round to claim seniority from the date of deputation. The impugned notification dated 15.11.2002 refixing the seniority with effect from 13.06.94 is in clear violation of the aforesaid OMs as pointed out by the NPSC in its letter dated 25.11.06 which calls for immediate cancellation.

(3) A portion of the OM dated 12.08.75, no doubt, was held to be violative of the Aticles 14 and 16 of the Constitution of India vide judgment dated 04.04.05 passed in WP (C) No. 16 (K) of 2003 but the said judgment cannot have retrospective effect to vitiate the decisions taken as early as in 1994 and 2001 inasmuch as private respondent was, admittedly appointed on deputation by notification dated 02.07.94, absorbed by the notification dated 03.07.01 w.e.f 20.06.2001 which was superseded by the impugned notification dated 15.11.02. The said judgment dated 04.04.05 is prospective in nature and it cannot be applied to the present case. Moreover, the OM dated 17.09.1985 is still valid till date.

(4) The present case is squarely covered by the judgment dated 30.04.09 passed in WP (C) No. 09 (K) of 2007 wherein the present petitioners challenged the absorption and promotion of Shri Toba Angami who is also similarly situated. The said judgment rendered by a Single Bench was upheld by a Division Bench of this Court vide judgment

and order dated 15.07.2010 passed in WANo. 16(K) of 2009.

(5) The present case is also squarely covered by the judgment dated 22.07.08 passed by a Division Bench of this Court in WANo. 40 (K) of 2007 and judgment dated 12.04.06 passed in WANo. 16 (K) of 2005, which was upheld by the Apex Court.

(6) It is well settled principle of law as laid down by the Apex Court that the past service can be counted towards seniority only when deputation is a source of recruitment and specifically provided in the Service Rules. In case the deputation and absorption is made dehors the Rules, the seniority should be counted from the date of decision. In the present case there is no provision in the existing Service Rules allowing appointment by deputation and absorption.

(7) The OM dated 12.08.75 and 17.09.86 are the only basis on which the private respondent was appointed on deputation vide notification dated 02.06.94 and absorbed vide notification dated 03.07.2001 with effect 20.06.2001 and as such he is barred from challenging it by way of riling the third petition, WP (C) No. 113 (K)/2010, at this belated stage after enjoying the benefits given in the said notifications.

(8) There is no laches and delay on the part of the petitioners in approaching this Court as the petitioner came to know about the impugned notification dated 15.11.01 only in the year 2006 and had immediately represented before the competent authority and diligently pursuing it till date. The delay and laches, if any, alone cannot be the sole ground to reject the prayer when violation of fundamental rights is involved. The Court, in such case, can condone the delay and infact, it was so done in similarly situated case (s).

(9) In terms of the impugned OMs, the seniority of the private respondent is to be counted from the date of decision to absorb on 20.06.2001 and if it is so counted, the petitioners stand senior to the private respondent. The impugned notification dated 10.12.05 giving officiating promotion as Executive Engineer without considering the petitioner''s case, is totally arbitrary, illegal and untenable in law and it should be quashed and set aside directing the StateRespondents to consider the petitioner''s case along with other eligible officers who are in the zone of consideration in accordance with the rules.

7. To substantiate the above submisions, he relies on the following cases:

(1) K. Madhavan &Anr. Union of India : (1987) 4 SCC 566;

(2) SubInspector Rooplal Vs. Lt. Governor Delhi & Ors. :(2000) 1 SCC 644;

(3) Indu Shekhar Singh & Ors. Vs. State of U.P. & Ors. : (2006) 8 SCC 129;

(4) Attar Singh Kaushik Vs. Secretary/ Commissioner, Transport Department & Anr. : (2008) 1 SCC 400;

(5) T. Shantharam Vs. State of Karnataka & Ors. : (1995) 2 SCC 538;

(6) Secretary, State of Karnataka & Ors. Vs. Umadevi & Ors. : (2006) 4 SCC 1;

(7) K. Thimmappa & Ors. Vs. Chairman, Central Board of Director, SBI & Anr. : (2001) 2 SCC 259.

8. It is submitted by Mr. Masa learned counsel for the petitioners that there is no conflict in the decisions/judgments referred to by the Divison Bench of this Court and no occasion/need has arisen to refer these matters to a larger Bench.

9. Mr. P. Choudhury, learned counsel appearing for the private respondent at the outset raised the question of maintainability of both the first and second petition on ground of delay and laches. He submits that the seniority position of the private respondent was notified on 15.11.2002 giving effect from 13.06.94 and no explanation has been given for filing the writ petitions after a lapse or delay of about 7 years. The petitioners had nowhere stated in their writ petition that they were not aware of the publication of the notification dated 15.11.02. The publication of the said notification in the official gazette is deemed to be taken as public notice and the officers and others cannot claim ignorance of it and its contents. In the second petition, the writ petitioners tried to explain the delay in paragraphs 5 and 12 but they can hardly be regarded as explanation for delay. In the first petition, (paras 147 and 24) petitioners attempted to expain the delay stating that the Direct Recruits Association of Nagaland, P. W.D. made several representations. These explanations are far from being satisfactory, rather, from the representation (Annexure M to the writ petition) is is found that said Association including the writ petitioners were fully aware about the publication of the notification dated 15.11.2002 as soon as it was published. The petitioners have, therefore, made an attempt to disturb the already settled seniority position of the private respondent, as per the seniority list, without taking recourse to challenging the notification dated 15.11.2002. Mr. Choudhury further submits that there is no cause of action to disturb the seniority of the private respondent without challenging the seniority list prepared by the respondentauthorities. The fact that the absorption of the private respondent has remained unchallenged would automatically debar the writ petitioners from contesting the inclusion of private respondent in the cadre of Direct Recruits which, in turn, would prevent the writ petitioner from challenging the subsequent officiating promotion of the private respondent to the post of Executive Engineer.

10. Secondly, he submits that Article 320 of the Constitution of India defines the functions of the Public Service Commission like APSC/NPSC. The role of NPSC is confined only to the process of selection or recommendation based on selection on the basis of requisition made by the respondent/ State and the NPSC is required to adhere to the selection process and prepare the list of selected candidates in order of merit which would be in excess of the vacancies. It is up to the respondent/State to appoint persons from the said select list and even in case of nonappointment of any of the candidate from the list

furnished by the NPSC, it cannot question or interfere with the discretion of the respondent/State in the matter of appointment. In the present case, according to him, the role of the NPSC is only for the purpose of giving aproval to absorption of the private respondents by the respondent/State after consideration of the relevant materials placed before it and once the NPSC accorded approval to such absorption, the role of the NPSC comes to an end. It is the prerogative of the respondentState to determine the seniority of the petitioner by following decisions, guidelines and the NPSC cannot play the role of a watchdog to such exercise. But in the present case, the NPSC clearly exceeded its jurisdiction by entering into the arena of determination of seniority of the private respondent. The respondent/State has taken correct stand in not responding to the unwanted advice of the NPSC to cancel the notification dated 15.11.2002 whereby the private respondent''s service is directed to be counted from the date of appointment in the deputation post. In this regard, it is submitted that the Law Department also took the correct view in regard to seniority position of the private respondent which the petitioner did not challenge at any stage.

11. Thirdly, as per 1984 Rules, the posts of SDO/AE were Class II post and the same were upgraded to Class I post under the 1997 Rules. The post of SDO/AE became Class I Gazette post while the post of Junior Engineer held by the diploma holders became Class II Gazetted post. For appointment to the post of Lecturer in Civil Engineering, the basic qualification required is graduation in Engineering and they are required to be selected by the NPSC. This post was also Class II gazetted and private respondent was recruited to the said post of Lecturer on 07.05.93 prior to notification of the ROP Rules, 1993 on 25.11.93 which came into the effect from 01.06.90 providing that both the Lecturer as well as the SDO/AE are Class I Gazetted post with same pay scale. The State Law Department also gave opinion to the effect that post of Lecturer and SDO/AE are equivalent post. Moreover the post in the Polytechnic Institute and the Engineering Department are interchangeable and they are brought on transfer on deputation from the Institute to the Department viceversai This position is not disputed by the writ petitioners by producing any material. It is also argued that since both the posts of Lecturer and SDO/AE are equivalent carrying the same scale of pay the ratio of K. Madhavan and S.I. Rooplal (supra) as decided by the Apex Court are clearly applicable and as such, both the first and second petitions are liable to be dismissed.

12. Fourthly, the learned counsel for the private respondent submits that the notification dated 03.07.01 and 15.11.02 were issued for two different purposes. By virtue of notification dated 03.07.01 the private respondent was absorbed in the Nagaland Engineering Services as Asstt. Engineer with effect from 20.06.11 after obtaining clearance of P&ARD and NPSC with due approval of the Cabinet. It is well known position that an officer could not be absorbed twice in a particular department and it is only the seniority position which can be altered from time to time based on certain principles and guideliness. Moreover, the notification dated 03.07.01 was issued in compliance with OM dated 17.09.86. Subsequent notification dated 15.11.02 was issued

determining the seniority position of the private respondent in Nagaland Public Works Department (for short, "NPWD") with effect from 13.06.94 i.e. the date on which he was brought on deputation. This order was also issued with the clearance of P&ARD. The NPSC has no role in the matter of determination of seniority position. It is further argued that the private respondent was not absorbed in service by notification dated 15.11.02 in the NPWD since he had aleady been absorbed in NPWD as Asstt. Engineer prior to 15.11.2002 on the basis of notification dated 03.07.01.

13. At last Mr. Choudhury, learned counsel submits that there are conflicting views of two Division Benches of this Court in regard to legal questions involved and the matters at hand are required to be referred to a larger Bench. He has referred to the following judgments rendered by the learned Single Bench and Division Benches of this Court.

(1) Judgment and order dated 04.04.05 passed by the learned Single Bench in WP (C) No. 16 (K)/03 (Shri H.M. Rawther Vs. State of Nagaland & Ors.) and 113 (K)/02 (Shri Imkong Wati & Ors. Vs. State of Nagaland & Ors.) wherein it was held that OM dated 12.08.75 cannot deprive the deputationist of his past service in the deputation post striking down the offending portion of the OM dated 12.08.75.

(2) Judgment and order dated 23.8.07 passed by a Division Bench of this Court in WP (C) No. 4362 of 2002 (S. Hokato Swu & Ors. Vs. State of Nagaland & Ors.) whereby the writ petitioners were given benifit of their past services in the present department prior to bringing them to the deputation posts.

(3) Judgment and order dated 22.07.08 passed by a Division Bench of this Court in WANo. 40(K)/2007 (Shri M. Nakro Vs. State of Nagaland & Ors.) whereby the deputationist was not given the seniority based on the service in the parent department for the purpose of counting seniority. The said case pertains to OM dated 21.08.04 and not OM dated 12.08.75. The facts in that case and the present case as well as the legal issues are different.

(4) Judgment and order dated 15.07.10 passed by the Division Bench of this Court in WANo. 16 (K) of 2009 (Sri Toba Angami Vs. State of Nagaland & Ors.) another deputationist, whereby he was deprived of his past seniority in the deputation post quashing the notification dated 01.04.03. It is submitted by Mr. Choudhury that in the said matter, the judgment dated 04.04.05 rendered by the learned Single Bench in WP (C) No. 16(K)/03 and 133(K)/02 was not brought to the notice of the Division Bench. Even the aforesaid judgment of the Division Bench dated 23.08.07 in WP (C) No. 4362/02 was not brought to the notice of the Court. Besides, 1984 and 1997 service Rules and the R.O.P. Rules of 1993 were also not brought to the notice of the Court.

14. It has also been pointed out that against the judgment and order dated 22.07.08 passed by the Division Bench in WANo. 40 (K) 707, one SLP (C) No. 25308/08, was filed in the Apex Court and it was disposed of vide order dated 15.02.10 providing that the

State of Nagaland would pass necessary orders for sending the petitioner to his parent department within 2 months from the date of order. Another SLP (C) No. 26378/10 was filed against the judgment and order dated 15.07.10 passed in WANo. 16(K)/2009in which notice was issued on 24.09.10. The said SLP is still pending.

15. The submission of Mr. Choudhury, learned counsel that there is a conflict in the judgment of the learned Divison Benches of this Court requires examination. The first case is WP (C) 4362/02 (H. Hukato Swu Vs. State of Nagaland & Ors.). A Division Bench of this Court rendered a judgment on 23.09.07. Four petitioners in the said case were appointed as Assistant Public Prosecutors by the Government of Nagaland during 1979 and 1986 to 1989. Three of them were appointed as Judicial Magistrate 1st Class between the year 1990 to 1993 and one of them was appointed as Additional Deputy Commissioner (Judicial) in the year 1988 on deputation. There was no rule applicable to the judicial officers for making such appointments on deputation. Their appointments remained unchallenged. The petitioners were absorbed into judicial service in 2003 by an order dated 18.02.2003 and three of them were promoted as Additional Deputy Commissioner (Judicial) by an order dated 28.04.03. The seniority of the petitioner in the judicial service was fixed by the State on the basis of effective date given in the order of absorption. As observed in the said judgment, the grievance of the petitioners was that they have been functioning as judicial officers from various dates anterior to 20.01.2003. The benefit of such service rendered by them prior to 20.01.03 were denied. The learned Division Bench allowed the writ petition on the basis of views expressed by the Government Advocate on behalf of the learned Advocate General, Nagaland that the petitioners are entitled to the relief as prayed for in the writ petition. The learned Division Bench, therefore, rendered a consent order only without dealing with the merits and as such, the judgment in the said case has no bearing with the issues involved in the present case. This has no application to any of the parties to the present case in which the applicability or otherwise of the impugned OMs dated 12.08.75 and 17.09.86 has not been discussed and decided.

16. The second case relates to judgment dated 22.07.08 rendered by a Division Bench in WANo. 40 (K)/07 (Shri M. Nakaro Vs. State of Nagaland & Ors.). In that case, the appellant and the respondent/writ petitioners were Degree holders in Electrical Engineering. The respondent/writ petitioners were appointed as SDO (Electrical) in the Power Department of Nagaland as direct recruits through selection process conducted by the NPSC during the period from 25.01.94 to 16.03.2005. The appellants, though participated in such recruitment process in 1992 for the post of SDO (Electrical) could not come out successful. However, in the year 1993, he, on being recommended by the NPSC, was appointed to the post of Lecturer (Class II Gazetted) in Khelsho Polytechnic Atoizu vide Government order dated 06.10.93. He was subsequently appointed as SDO (Electrical) in the Department of Power on deputation by an order dated 05.12.88. Thereafter, he was absorbed in the post of SDO (Electrical) by The Government notification dated 29.09.05. The said notification provides that his seniority in the

Department of Power would be counted from the date of Cabinet decision i.e. 15.09.2005 in terms of OM dated 12.08.75. Then another notification was issued on 07.12.95 providing that his first seniority would be counted from the date of his appointment as Lecturer in the parent department i.e. with effect from 06.10.93. The appellant was thereafter, allowed to take the benefit of service rendered in the parent department i.e. the period prior to his coming to Power Department on deputation. But in the present case, the private respondent was alowedto count seniority with effect from the date of absorption on 13.06.94. The issue in the aforesaid Writ Appeal pertains to permissibility of counting the service rendered in the parent department before deputation. The learned Division Bench, in view of the settled position of law, in its judgment dated 22.07.08, denied to give seniority in the parent department. It considered OM date 21.08.04 which provides that 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 and officer with sepcific qualification for a specialized job or personnel with required qualification and seniority within the department, are not available for specific reasons. The said OM also provides certain procedures to be followed, including making advertisement through News papers and official circulars indicating therein qualification, experience etc., selection by a Screening Board, prior clearance of NPSC, P & ARD and the Cabinet, consent of the person concerned as well as the lending department before considering the permanent absorption. Besides the said OM specifically provides that the seniority to 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. In the aforesaid facts and premises, the learned Division Bench held as under :

"63. In view of the fact, the present appellant"s appointment has been found to be dehors 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 29.09.2005, this Court must ensure that the appellant is not allowed to reap the benefit of the illegal and arbitrary action of the Staterespondents. Viewed from the said 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 impugned notification dated 07.12.95."

17. This judgment of the learned Division Bench does not support the case of the private respondent (petitioner in third writ petition).

18. The third case relates to judgment dated 15.07.2010 passed by a learned Division Bench in WA No. 16(K) of 2009 (Shri Toba Angami Vs. State of Nagaland & Ors.). In that case the private respondents were the writ petitioners before the learned Single Judge. They being the Degree holders in Engineering were appointed as Assistant Engineers

(Class I Gazetted) in the Department of Works and Housing, Nagaland as direct recruits through a selection process conducted by the NPSC during the period between October 1995 and May 2001. The writ appellant who was private respondent No. 5 before the learned Single Judge was appointed as Lecturer (Class II Gazetted) in Civil Engineering Department at Khelsho Polytechnic Atoizu along with 3 others including Shri Kezholel Rhesto) petitioner in 3rd petition) WP (C) No. 113(K)/2010 vide a consent order dated 07.05.96. The grievance of Shri Toba Angami, appellant in WANo. 16(K)/2009 and Shri Kezholel Rhesto (3rd petitioner in 3rd petition) are similar inasmuch as both were brought on deputation on the same day by a common order dated 02.06.94 and absorbed in the department first as Asstt. Engineer w.e.f. 20.06.2001 i.e. date of taking Cabinet decision and then, in supersession of the earlier order, from the date of their joining in the deputation post as Asstt. Engineer. In the case of appellant Shri Toba Angami, the order is dated 01.04.2003 and the said order was set aside by the learned Division Bench. In the case of private respondent the order is dated 15.11.2002. The cases of Shri Toba Angami and Shri Kezholel Rhesto involve similar question. The question of dismissal of the writ petition on delay ground has been discussed elaborately by the learned Division Bench in paragraph 28 of the said judgment. I fully subscribe to the reasoning given therein and the conclusion arrived at by the learned Division Bench that there is no unreasonable delay in approaching the Court for relief. The learned Division Bench considered the entire aspects of the matter and dismissed the appeal on merit and set aside the notification dated 01.04.03 whereby the absorption was given effect from the date of joining in the deputation post. The question posed by the learned Division Bench is as to whether the appellant is entitled to get the benefit of service by way of weightage from the date he came on deputation to NPWD as Asstt. Engineer from 02.06.94 onwards. In paragraph 26 it has observed as under:

"26...

In our opinion, the issue of weightage was adequately looked into by the Personnel & Administrative Reforms Cell, as well as Nagaland Public Service Commission and it was decided particularly by the Nagaland Public Service Commission while granting approval of absorption to the appellant in the Nagaland Public Works Department, that is absorption would only take effect from the date a decision was taken by the Cabinet of the State Government. The matter was also looked into specifically by the Cabinet and it granted approval for absorption of the appellant only with effect from 20.06.2001. The matter was subsequently not referred back to the Cabinet for a change, either in the date of approval or the seniority of the appellant as Assistant Engineer in the Nagaland Public Works Department. We, therefore cannot override the decision taken by the Nagaland Public Service Commission as well as by the Cabinet of the State Government and give seniority to appellant from ante date."

19. It has been contended that the judgment dated 04.04.2005 of the learned Single Judge in WP (C) No. 16 (K)/03 and WP(C)No. 133(K)/92 and also the judgment dated 23.08.07 passed by the learned Division Bench in WP (C) No. 4362/02 were not brought

to the notice of the learned Division Bench at the time of hearing of the above writ appeal. It is also contended that the relevant Service Rules of 1984 and 1997 and the R.O.P Rules 1993, were not brought to the notice to the Court due to which the learned Division Bench could not come to a correct conclusion. This submission cannot impress the Court as because the private respondent contested the case and advanced argument. It is an admitted position that in the Service Rules of 1984 and 1997 there was no source of appointment by way of deputation but a practice was developing at the relevant point of time to fill up the post by inducting staff from other departments on deputation causing serious resentment amongst the departmental staff. To meet the situation, the State Government issued administrative instructions/circulars, including the OMs dated 12.08.75, 17.09.86 and 21.08.04. The legality and applicability of those OMs have been discussed in the judgment by the learned Single Bench as well as the Division Bench. I have, for obvious reason, referred to the decision of the learned Division Bench only to find out, if, in fact, there is any conflict in the said judgments as canvassed by Mr. Choudhury, learned counsel for the private respondent. I do not find any conflict in the said Division Bench''s judgment, rather it is found that the learned Division Benches are unanimous in holding that if the Service Rules do not provide appointment by way of deputation and in case a post is filled up on deputation, the seniority of such deputationist should be counted only from the date of taking decision by the State Cabinet to absorb him in the service and not from the date of his joining in the borrowing department on deputation.

20. I have gone through the cases cited and relied upon by the learned counsel for the parties, particularly the case of S.I. Rooplal, Kaushik, Madhavan(supra), Direct Recruits Class II Engineer Officers Association reported in (1990) 2SCC 715, The Union of India Vs. Harish Chander Bhatia, reported in (1995) 2 SCC 48 and Ramesh Prasad Vs. U.P. Rajakiya Nirman Nigam Ltd, reported in (1999) 8 SCC 381. Before making consideration on the applicability of the rules of the aforesaid cases it is considered necessary to point out the distinguishing feature in the pesent case. The most pertinent fact is that Shri Kezholel Rhesto, private respondent were appointed as Lecturer (ClassII Gazetted) like Shri Toba Angami by a common order dated 07.05.94 on probation for a period of 2 years. He, along with Toba Angami, by a common order dated 02.06.94, was appointed as Assistant Engineer (Class I Gazetted) under Nagaland Public Works Department on deputation for a period of 1 year w.e.f. the date of joining the department or till the vacant post for which they have been brought on deputation are filled up on regular basis through NPSC whichever is earlier. They were appointed as Asstt. Engineer on deputation before completion of prescribed probation period. As the officers on probation, they are not eligible for or entitled to appointment to a higher post and that too on deputation. None of the aforesaid cases bear similar facts inasmuch as the staff concerned in the said case are either permanent or temporary in their status and they were brought on deputation and absorbed in the service without giving any benefit of past service rendered in the parent department. In Madhavan''s case (supra) the relevant service rules provides for appointment on deputation but in the present case no such

appointment on deputation from other departments is provided in the service rules applicable at that point of time and as such, the aforesaid case has no relevance with the present case. In the said premises the Apex Court held that the just and proper order that could be passed would be to treat the date of officiating appointment of the respondents as the date of their regular appointment and then to place them in the seniority list as required under the relevant Rules i.e. to interpose the direct recruit in between two promotees as per their respective inter se seniority. The said case has also no relevancy to decision of the issues involved in the present case. In the case of Rameshwar Prasad (supra), the appellant Rameshwar Prasad was brought on deputation from one Government undertaking to another Government undertaking. He was denied absorption in the borrowing undertaking. Allowing the appeal, the Apex Court held that whether the deputationist should be absorbed in service or not is a policy matter and it is the discretion of the borrowing organization, but at the same time, once the policy is accepted and rules are framed for such absorption, the rejection must be on justifiable reason only. In the present case, although there is no rule providing appointment on deputation, the State Cabinet, as a matter of public policy, took decision to absorb the private respondent and one Toba Angami giving them benefit of counting seniority from the date of decision. The private respondent and similarly situated person, as a matter of rights, cannot claim absorption from a retrospective effect i.e. from the date of joining the borrowing department. Moreover, the decision taken by the State Cabinet for absorption w.e.f the date of taking decision cannot be termed as unreasonable or unjustified considering the undisputed fact that they were still under probation at the time of appointing them as Assistant Engineers on deputation. They were otherwise not entitled to appointment on deputation against the regular vacancy of Assistant Engineer before completion of their probation period. They are bound to accept the decision of the State Cabinet absorbing them from the date of taking the decision. The demand of respondent and other similarly situated persons for giving retrospective effect to their absorption from the date of joining in the deputation post is not tenable under the law unless the State Cabinet takes a decision modifying its earlier policy decision for absorbing the private respondent from the date of joining in the deputation post. The executive order for absorption of the deputationist with retrospective effect from the date of joining in the deputation post has no backing of the State Cabinet. Admittedly, it was not even placed before the State Cabinet for taking the appropriate decision. The decision taken by the respondentauthorities without the approval of the StateCabinet is as much unauthorized as illegal in the eye of law and such a decision of the respondentauthorities is liable to be cancelled and set aside. The private respondent is not entitled to take the benefit of an executive order issued without the sanction/approval of the State Cabinet.

21. In the case of Rooplal (supra), it is held, amongst others, that the service rendered on equivalent post in the parent department before absorption in the deputation post should be counted for seniority. However, it has been clarified that if the previous service of a transferred official is to be counted for seniority in the transferred post then two posts should be equivalent. The Apex Court also declared the expression "whichever is later

unconstitutional". In the present case, the facts and circumstances are largely different from the ones narrated in the said case. For applying the aforesaid law laid down by the Apex Court it is necessary to look at the status of the private respondent. He was initially appointed as Lecturer and his subsequent appointment as SDO/AE was on deputation. It is to find out whether he was holding the equivalent post before deputation in the parent department. It is stated already, that the private respondent was appointed as Lecturer on probation for 2 years. The post of Lecturer is a Class II Gazetted post with pay scale of Rs. 930351070451385EB451880502080/p.m. For the better appreciation, the notification dated 07.05.93 appointing the petitioner as Lecturer is quoted hereunder:

"GOVERNMENT OF NAG ALAND DEPARTMENT OF HIGHER TECHNICAL EDUCATION NOTIFICATION

Dated Kohima the 7ï¿½ May"93 No. EDS (A)47/82:: On the recommendation of the Nagaland Public Service Commission, the Governor of Nagaland is pleased to appoint the following person to the posts of Lecturers (Class II Gazetted) in the Khelhoshe Polytechnic Atoizu in the scale of payoff Rs.930351079451385EB451880502080/ P.M. plus Innerline Compensatory allowance @ 25% of the basic pay subject to a maximum of Rs. 400/ P.M. and all other allowances as are admissible under rules issue from time to time with effect from the date of taking over charge:

SL Name of the

Lecturer Department

1. Shri Toba Angami Department of Civil Engineering

2. Shri Kewzhalel do

Rhetso

3. Shri Longmentang Lecturer in Electrical Engineering.

4. Shri Razou Vizotang do

2. The appointment is made on temporary basis and may be terminated with one month"s notice from either side or after releasing one month"s pay by the Government in lieu of notice without assigning any reason.

3. The person as appointed shall be probation for a period of 2 (two) years. Head of the Institution will submit assessment report every year for a period of 2 years subsequent to their appointment. The regular appointed for confirmation will depend on satisfactory assessment reports of over all performance.

Sd/

K.N. Chadha Commissioner and Secretary to the Government of Nagaland."

22. It was also stated earlier that the private respondent and one Shri Toba Angami were appointed as Assistant Engineers (Class I Gazetted) under NP WD on deputation for a period of 1 (one) year by a common order dated 02.06.94. The pay scale of Assistant Engineer against which they were appointed on deputation was not indicated in the Notification (appointment letter). The said notification dated 02.06.94 is reproduced below:

GOVERNMENT OF N AGALAND WORKS AND HOUSING DEPARTMENT (ESTABLISHMENTBRANCH)

NOTIFICATION

Dated Kohima the 2nd June, 94. NHO. WH/EST/20/78(B):: On their services being placed at the disposal of Works and Housing Department, the Governor of Nagaland is pleased to appoint Sr/Shri Kewzhalel Rhetso and Toba Angami, both lecturers, Khelhoshe Polythechnic Atoizu as Assistant Engineers (Class I Gazetted) under Nagaland Public Works Department on deputation under the following terms and conditions:

(i) The term of deputation will be for a period of 1 (one year with effect from their date of joining the Department or till the vacant posts for which they have been brought on deputation are filled up on regular basis through NPSC whichever is earlier;

(ii) They will draw their grade scale of pay and all other allowances as are admissible under Rules in force in Nagaland.

(iii) No deputation allowances will be admissible to them;

(iv) They will be entitled to Government recommendation facilities as per entitlement or House Rent Allowances in lieu of the rates admissible under Rules in force in Nagaland.

(v) In the event of their services not longer required by the Department, they will be repatriated in their parent Department with one month''s notice on either side.

2. In the interest of public service, they are posted in the Department as indicated below:

(a) Sr/Shri Kewzhalel Rhesto is posted as SDO(TC) Phek Division against the existing vacancy.

(b) Shri Toba Angami is posted as SDO (TC) Construction Division Chiephonou against the existing vacancy.

Sd/

T. N Mannen Commissioner and Secretary to the Government of Nagaland."

23. The pay scale of Assistant Engineer (Class I Gazetted) was Rs. 2100602760703600804000 P.M. This can be gathered/found from the appoitment letter dated 25.10.95 issued by the Commissioner & Secretary to the Government of Nagaland Works and Housing Department in favour of the petitioner and others as Assistant Engineer. The relevant portion of the aforesaid appointment letter reads as under:

GOVERNMENT OF NAGALAND WORKS AND HOUSING DEPARTMENT (ESTABLISHMENT BRANCH)

NOTIFICATION

Dated Kohima the 25th October 95.

NHO. WH/EST/28/78 (PT)::On the recommendation of the Nagaland Public Service Commission, the Governor of Nagaland is pleased to appoint the following candidates in order of merit/seniority to the posts of Assistant Engineer (Class I Gazetted) under Nagaland Public Works Department in the scale of pay of Rs.2100602760703600804000 P.M plus Compensatory allowances @ Rs. 15% of the basic pay subject to minimum of Rs. 125/ P.M and maximum Rs. 1200/ P.M. and all other allowances as are admissible under rules in force in Nagaland from time to time with effect from the date of their taking over charge of the posts. Their place of posting are indicated against each of their names:

Sd/

Laihuma

Commissioner and Secretary to the Government of Nagaland."

From the aforesaid appointment letter/ order it is clearly found that the post of Lecturer is lower in status/grade with lower pay scale while the post of Assistant Engineer is higher in status as Class I gazetted post with higher pay scale during the period covered under 1984 Service Rules. The submission of the learned counsel for the private respondent that the post of Lecturer is equivalent to the post of Assistant Engineer at the relavant point of time is not supported by the record and the same is, therefore, rejected. It can be held that the ratio of Rooplal"s case (supra) is not applicable to the present case.

24. I may now come to the latest case of Director CBI & Anr. Vs. D.P. Singh, reported in (2010) 1SCC 64 7, which in my considered view has laid down the appropriate principles applicable to the present case. It was a case where the respondent D.P. Singh joined the U.P. Police service on 16.02.94 as S.I. and on 11.05.96 was sent on deputation to the CBI as S.I. While he was on deputation, he was appointed to the post of Inspector on 31.12.2000 against the deputation quota as per the Special Police Establishment (Executive Staff) Recruitment Rules, 1963. He continued to be on deputation with the CBI and was appointed to the post of D.S.P on adhoc basis by an order issued on 24.11.77. He was absorbed in the post of DSP in CBI in 1997 but no formal order was issued and it

was only vide an order dated 15.06.95 that he was absorbed in the service of CBI and appointed as DSP on transfer basis w.e.f 29.06.97 on the recommendation of the UPSC as per the relevant guidelines issued by the Department of Personnel & Training. The respondent D.P. Singh made representations claiming seniority w.e.f 24.11.97 i.e. the date on which he was initially appointed as DSP in CBI. As he received no response he approached the Central Adminsitrative Tribunal, Principal Bench at New Delhi by filing an original application which was dismissed on 03.02.98. The review application filed by him before the Central Administrative Tribunal was also dismissed on 10.09.99 compelling the petitioner to file writ petition before the High Court which was allowed. The C.B.I, approached the Apex Court and upon hearing the learned counsel for the parties held that a deputationist whose service are absorbed later would get his first seniority in the grade in which he is absorbed normally from the date of his absorption. However, in case of a person who has already been holding the same or equivalent grade in his parent department on regular basis his seniority is to be counted from the date he was holding the same or equivalent grade in his parent department. The respondent D.P. Singh did not hold the rank of DSP or equivalent post in his parent department on the date of his appointment as DSP on adhoc basis in 1977 or at the time of his absorption in 1987. Therefore, his seniority as DSP can only be counted from the date of his absorption i.e. from 29.06.87. In the case in hand, the private respondent Kezholel Rhesto was also not holding the equivalent post in the parent depatment as discussed earlier. His case is in the worse footing inasmuch as he was on probation in the post of Lecturer and he was brought on deputation against a higher post like Assistant Engineer with higher pay scale vide order dated 02.06.94 and he was admittedly absorbed in the service as Assistant Engineer w.e.f 20.06.2001 vide order dated 03.07.2001 as per the Cabinet decision taken on 20.06.2001. If the principle laid down in the D.P. Singh''s case (supra) is applied, the order dated 03.07.2001 absorbing the petitioner along with similarly situated persons including Toba Angami, the absorption should be given effect from the date of decision i.e. 20.06.2001. The subsequent order passed in supersession of the earlier order dated 03.07.2001, which was admittedly issued without the decision of the State Cabinet for such modification, is illegal and unauthorized. Applying the principle laid down in the said latest case, absorption of the private respondent should be given effect from and only from 20.06.2011 and not from 13.06.94.

25. In view of the above discussions and findings arrived at, first writ petition namely, WP(C) No. 76(K)/08 and second writ petition No. WP(C) No. 112(K)/09 stand allowed. The 3rd writ petition namely, WP (C) No. 113(K)/2010 stands dismissed. The State respondents are directed to make necessary correction to the seniority position of the deputationist including Shri Kezholel Rhesto counting their seniority w.e.f. 20.06.2001, the date of taking decision by the State Cabinet, forthwith preferably within a period of 45 days from the date of furnishing certified copy of this order. Consequently, it is directed that the officiating promotion of the deputationist Shri Kezholel Rhesto (respondent No. 6 in the first writ petition and respondent No. 5 in the 2nd writ petition) to the post of Executive Engineer vide impugned Notification No. WH Estt/22/90 dated 10.12.07 stands

quashed and set aside. Similarly, the officiating promotion to the post of Executive Engineer issued in favour of Mr. V. Vikheho Chishi, respondent No. 5 and Mr. K. Tosuho Sema, respondent No. 7 in the first writ petition, vide impugned Notification No. WHEST/73/05/(Pt) dated 19.09.2007 andNotificationNo. WH/EST/47/90 (PtIII) dated 19.12.07 stand quashed and set aside.

26. I have taken note of the statements made in paragraph 4 of the affidavitinopposition filed by the respondent No. 1 to 4 in the first petition that the officiating promotion to the post of Executive Engineer have been given to those employees who had served the department for a minimum period of 7 years in the lower cadre which is a purely temporary arrangement before the matter is taken by the DPC for regular promotion. Statements have also been made to the effect that the procedure of giving officiating promotion is delayed as sitting of DPC was not possible at regular interval or as and when vacancy arose, as the ACRs of all the officers who are within the zone of consideration for promotion to be scrutinized are required to be placed before the DPC after thorough scrutiny and checking their service records and reports on adverse remarks, if any. The above statements indicate that the authorities concerned are determined to hold the DPC to regularize the officiating promotion.

27. In view of the above, it is directed that the respondentauthorities concerned shall hold the DPC for regular promotion to the posts of Executive Engineer taking into consideration the cases of the petitioners, the private respondents and all other eligible officers who are in the zone of consideration for promotion to the aforesaid posts in accordance with the relevant Service Rules and in acordance with law and established procedures within a period of 3 (three) months from the date of furnishing a certified copy of this order and thereafter issue promotion order within a period of 30 (thirty) days in favour of the selected/recommended candidates. The entire process of promotion should be completed within 4 (four) months from the date of receipt of the certified copy of this order.

28. Needless to say that the private respondent''s officiating promotion in the post of Executive Engineer by virtue of the impugned notification (promotion order), which have been quashed and set aside by this order shall not be disturbed during this period of 4 (four) months or till the existing posts of Executive Engineer are filled up on regular process, whichever is earlier.

The parties are directed to bear their own costs.