



2025:DHC:6630-DB



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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Reserved on: 10.07.2025*

*Date of Decision: 08.08. 2025*

+ **W.P.(C) 14156/2009**

**BHUPINDER KUMAR MALIK.** .....Petitioner  
Through: Mr. A.K. Behera, Sr. Adv.,  
with Mr. Amarendra P. Singh, Adv.

versus

**UNION OF INDIA & ANR.** .....Respondents  
Through: Mr. Bhagwan Swaroop Shukla,  
CGSC, with Mr. Sarvan Kumar,  
Mr. Mukesh K. M. Pandey, Mr. Satyam  
Singh, Advs.  
Mr. P.R. Rajhans, Mr. Vivek Singh,  
Mr. Shubham Gupta, Mr. Lajpat Rai, and  
Mr. Tarun Kumar, Advs. for R-6.

**CORAM:**  
**HON'BLE MR. JUSTICE C. HARI SHANKAR**  
**HON'BLE MR. JUSTICE AJAY DIGPAUL**

### **J U D G M E N T**

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**AJAY DIGPAUL, J.**

1. The petitioner<sup>1</sup>, Bhupinder Kumar Malik, is before us in challenge against Order dated 3 November 2009, whereby he was promoted to the post of Deputy Judge Attorney General/ Deputy

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<sup>1</sup> "Bhupinder", hereinafter.



Commandant<sup>2</sup> *with immediate effect* – to the extent that he seeks seniority in the post with effect from 2002.

2. Thereafter, he prays to be declared as being in service as Judge Attorney/ Assistant Commandant<sup>3</sup> with effect from 10 July 1995, and in the capacity of Deputy JAG / DC with effect from 2002.

3. Subsequently, Bhupinder prays for directions to Respondent 2/ Director General<sup>4</sup> Indo Tibetan Border Police Force<sup>5</sup> to convene a Department Promotion Committee<sup>6</sup> to assess his suitability for promotion to the post of Additional Judge Attorney General/ Commandant<sup>7</sup>, along with a plea for the grant of relaxation of certain eligibility criteria according to relevant Office Memoranda.

4. Lastly, he wishes for his seniority in the post of Additional JAG to be calculated as accruing from January 2009, with consequential service benefits.

5. Bhupinder commenced his career with the ITBPF on 1 September 1978, with his initial appointment as Jamadar/General Duty (presently equivalent to Sub-Inspector/General Duty). He was subsequently promoted to the rank of Subedar/General Duty in 1985 (presently equivalent to Inspector/General Duty).

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<sup>2</sup> “Dy. JAG/ DC”, hereinafter

<sup>3</sup> “JA/AC”, hereinafter

<sup>4</sup> “DG”, hereinafter

<sup>5</sup> “ITBP”, hereinafter

<sup>6</sup> “DPC”, hereinafter

<sup>7</sup> “Addl. JAG/ Comm”, hereinafter



6. Bhupinder obtained his Law Degree from Choudhary Charan Singh University, Meerut, Uttar Pradesh, in 1994.

7. On 10 July 1995, he was promoted to and assumed charge as Assistant Commandant/General Duty<sup>8</sup>. This promotion placed him in the pay scale of ₹ 2200-75-2800-EB-100-4000, which has since been revised to Pay Band-3, ₹ 15,600-39,100, with a Grade Pay of ₹ 5,400.

8. The recruitment rules applicable to the post of Judge Attorney were notified on 14 September 1999 and subsequently amended in 2001. The said rules, provided for filling up of posts through deputation or absorption,*inter alia*, and the portion relevant to Bhupinder's case has been reproduced below for ready reference:

(1)	(2)	(3)
4. Judge Attorney (Assistant Commandant )	General Central Service Group "A" Gazetted (Non-Ministerial)	Rs. 8000-275-13500/-
(4)	(5)	(6)
Selection by merit	Not applicable	Not applicable
(7)	(8)	(9)
Not applicable	Not applicable	Not applicable
	(10)	

<sup>8</sup> "AC / GD", hereinafter



By deputation/absorption failing which by re-employment.		
	(11)	
<p>By Deputation/Absorption</p> <p>By deputation/absorption of a person who:</p> <p>i) Is or has been an officer of Central/State Government holding the analogous post and is having the degree in law of a recognized University or equivalent; or</p> <p>ii) Is or has been an officer holding the post of Assistant Commandant or equivalent in the pay scale of Rs. 8000-275-13500 in the Central Police Organizations having degree in law of a recognized university or equivalent; or</p> <p>iii) Is or has been an officer of the rank of Captain or equivalent in the department of the Judge Advocate General in Army/Navy/Air Force.</p> <p>By Re-employment</p> <p>By re-employment of person who is or has been an officer of the rank of Captain in the Department of Judge Advocate General in Army/Navy/Air Force.</p> <p>Note – ( Period of deputation including of deputation from another Ex-Cadre post held immediately proceeding of this appointment in the same or other organization/department of central Government shall ordinarily not exceed three years. The maximum age limit for eligibility for deputation shall be fifty-six years on the date of receipt of application.</p>		
(12)		
<p>Group “A” Departmental Promotion Committee for confirmation consisting of:</p> <p>1. Director General Indo Tibetan Border Police Force – Chairman</p> <p>2. Inspector General, Indo Tibetan Border Police Force – Member</p> <p>3. Director /Deputy Secretary, Ministry of Home Affairs –</p>		



Member 4. Deputy Inspector General/Chief Administrative Officer Indo-Tibetan Border Police Force – Member
(13)
Exempted from the purview of the Union Public Service Commission consultation.  (F. No. I-12012/01/94/ORG/Pers-I)

9. *Vide* order dated 13 March 2000 by the Inspector General ITBPF, Bhupinder was appointed as Judge Attorney in a General Force Court. This was followed by his attachment to the Judge Attorney Branch, Directorate General, ITBP, *vide* DG ITBPF order dated 10 April 2000, to perform the duties of Judge Attorney (Assistant Commandant).

10. The recruitment/appointment to JA (AC), per relevant recruitment rules<sup>9</sup>, is conducted through two channels, i.e., deputation/absorption, and re-employment.

11. *Vide* order dated 22 August 2000, the appointment of Bhupinder to the post of Judge Attorney (Assistant Commandant) on deputation basis for a period of three years, effective 16 August 2000, was confirmed with the concurrence of the Ministry of Home Affairs.

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<sup>9</sup> “RRs”, hereinafter



This deputation was the consequence of an application against an advertisement published by the ITBP for the year 2000, concerning JAG cadre posts, wherein he satisfied clause (i) *supra*, given his existing rank as Assistant Commandant/General Duty, coupled with his law degree.

**12.** During his tenure on deputation in the Judge Attorney General (JAG) cadre, while holding the post of Assistant Commandant in his parent cadre, Bhupinder received a financial upgradation to senior time scale in 2001, which elevated his pay to the grade of ₹ 10,000-325-15,200/- (presently Pay Scale ₹ 15,600 - 39,100, Grade Pay ₹ 6600).

**13.** On 23 April 2003, he was found eligible by a DPC for promotion in his parent cadre to the post of Deputy Commandant/General Duty (Deputy Commandant/GD) in the pay scale of ₹ 10,000-325-15,200/-.

**14.** However, Bhupinder opted for absorption into the lowest rung of the Judge Advocate General (JAG) cadre instead, i.e., as JA (AC).

**15.** This request for absorption was accepted, in public interest, *vide* order dated 3 October 2003, issued with the approval of the Ministry of Home Affairs,

**16.** Following such absorption, the petitioner became the only cadre officer of the Force to be serving in the JAG cadre as Judge Attorney (Assistant Commandant), with no other feeder cadre officers available



for promotion to the post of Deputy Judge Attorney General (Deputy Commandant), apart from deputationists.

**17.** The Recruitment Rules of 1999, amended in 2001, governing the promotion from Judge Attorney (Assistant Commandant) to Deputy Judge Attorney General (Deputy Commandant), stipulated an eligibility criterion of "*six years regular service in the grade*".

**18.** Bhupinder alleges that he became eligible for promotion to the post of Deputy Judge Attorney General (Deputy Commandant) in the year 2002, having completed six years of regular service accruing from the year 1995 (considering that he held the analogous post of AC/ GD from 10 July 1995) and remaining in medical category SHAPE-1, in accordance with the Recruitment Rules of 1999 as amended in 2001.

**19.** However, it is his claim that, despite fulfilling the requisite eligibility criteria, his case for promotion and seniority was not processed in a timely manner.

**20.** Bhupinder was not considered for promotion during the routine cases of 2007, and consequently submitted a representation dated 2 June 2007, asserting that his eligibility for promotion ought to be computed as accruing since 1995. Additional representations were submitted on 7 August 2007 and 16 October 2007. A reply dated 7 November 2007 stated that the matter was under process, with no subsequent follow-up.



**21.** Further representations were made, including one dated 12 August 2008, which remained unanswered for nearly a year.

**22.** In March 2009, Bhupinder was transferred to the Northern Frontier Headquarters, Seemadwar, ITBP, Dehradun. A subsequent representation was submitted on 2 June 2009, aggrieved by the continued inaction regarding his non-consideration for promotion. This was forwarded on 4 June 2009, along with his application for a personal hearing.

**23.** The Senior Administrative Officer acknowledged his request on 19 June 2009, confirming that the matter was under examination by the JAG Branch. A request for a personal audience submitted on 30 June 2009 was approved on 3 July 2009, and Bhupinder accordingly met with Respondent 2/ DG ITBP on 28 July 2009, submitting a further representation highlighting his continuous service since 1995.

**24.** Thereafter, on 3 November 2009, Bhupinder was ultimately promoted to the post of Deputy JAG/Deputy Commandant with immediate effect, in the pay band of Rs. 15,600–39,100 with Grade Pay Rs. 6600.

**25.** During the pendency of this writ petition, Bhupinder superannuated on 31 May 2014.

**26.** The issue before us is an elementary one, reduceable to the question of what would constitute “*regular service in the grade*”,





specifically in the context of deputationists who have been subsequently absorbed in their target cadre, where they allege to have previously held an analogous post in their parent cadre.

**27.** The answer to this question, inevitably possessing a cascading effect, ought to be applied to the calculation of Bhupinder's seniority on three fronts.

**28.** Firstly – to his seniority as JA / AC, secondly – to his seniority as Dy. JAG / DC, and lastly, while considering his eligibility for promotion to the post of Additional JAG / Commandant and his plea for relaxation of eligibility criteria in connection thereof.

**29.** On these points, arguments were advanced on behalf of Bhupinder by Mr. A.K. Behera, learned Senior Counsel, and on behalf of the respondents by Mr. Bhagvan Swaroop Shukla, learned CGSC.

#### Contentions on behalf of the Petitioner

**30.** Mr. A.K. Behera, learned Senior Counsel, advanced his arguments on four fronts – first arguing to establish the analogous nature of Bhupinder's post of AC in his parent cadre, with that of JA / AC in the JAG cadre. Thereafter, he attempted to persuade the court that the phrase "service in the grade" ought to encompass service rendered in an analogous post of the petitioner's parent cadre. Thirdly, the argument of *mala fides* has been pressed through pleadings, with respect to the alleged delay in fixation of Bhupinder's seniority.



31. To substantiate his arguments, reliance was placed on relevant Office Memoranda of the DOPT and DOPAR, certain clarifications issued by the MHA, along with relevant judicial authorities.

32. Fourthly, before proceeding on his main line of argumentation, Mr. Behera sought to persuade the Court that in case of the existence of – i) a vacancy, ii) an eligible candidate, and iii) no conscious decision, nor valid reason, provided for keeping such a post unfilled, that - where an eligible candidate is promoted later, such candidate is entitled to ante-dating of promotion with effect from the date of attaining eligibility to the relevant post.

33. In support of this claim, reliance was placed on para 12 of *UOI v N.R Bannerjee*<sup>10</sup>, as well as para 51 of *Praveen Srivastava v UPSC*<sup>11</sup>, both of which stand reproduced below:

“12. Considered from that perspective, the question arises whether the view taken by the Tribunal is justified in law. It is true that filling up of the posts are for clear or anticipated vacancies arising in the year. It is settled law that mere inclusion of one's name in the list does not confer any right on him/her to appointment. It is not incumbent that all posts may be filled up. But the authority must act reasonably, fairly and in public interest and omission thereof should not be arbitrary. In *Shankarsan Dash v. Union of India* [(1991) 3 SCC 47 : 1991 SCC (L&S) 800 : (1991) 17 ATC 95 : (1991) 2 SCR 567] the Constitution Bench had held that inclusion of the name of a candidate in a merit list does not confer any right to be selected unless the relevant recruitment rules so indicate. The State is under no legal duty to fill up all or any of the vacancies even though the State acts in an arbitrary manner. In *Babita Prasad v. State of Bihar* [1993 Supp (3) SCC 268 : 1993 SCC (L&S) 1076 : (1993) 25 ATC 598] it was held that mere inclusion of one's name in the panel does not confer on him/her any indefeasible right to appointment. It was further held that the purpose of making a

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<sup>10</sup> (1997) 9 SCC 287

<sup>11</sup> 2017 SCC OnLine Del 8710



panel was to finalise the list of eligible candidates for appointment. The preparation of the panel should be to the extent of the notified or anticipated vacancies. Unduly wrong panel should not be operated. In *Union Territory of Chandigarh v. Dilbagh Singh* [(1993) 1 SCC 154 : 1993 SCC (L&S) 144 : (1993) 23 ATC 431] it was held that the mere fact that a candidate's name finds a place in the select list as a selected candidate for appointment to a post, does not confer on him/her an indefeasible right to be appointed in such post in the absence of any specific rule entitling him to such appointment. In *State of Bihar v. Secretariat Asstt. Successful Examinees Union 1986* [(1994) 1 SCC 126 : 1994 SCC (L&S) 274 : (1994) 26 ATC 500] it was held that a person who is selected and empanelled does not on account of empanelment alone acquire any indefeasible right to appointment. Empanelment is, at the best, a condition of eligibility for the purposes of appointment and that by itself does not amount to selection or creation of a vested right to appointment unless relevant rules state to the contrary. However, in the light of the above principles and in the light of the clear rules extracted hereinbefore, it is seen that the exercise of preparation of the panel is undertaken well in advance to fill up the clear vacancies or anticipated vacancies. The preparation and finalisation of the yearly panel, unless duly certified by the appointing authority that no vacancy would arise or no suitable candidate was available, is a mandatory requirement. If the annual panel could not be prepared for any justifiable reason, yearwise panel of all the eligible candidates within the zone of consideration for filling up the vacancies each year should be prepared and appointment made in accordance therewith. In *Nagar Mahapalika v. Vinod Kumar Srivastava* [(1987) 1 SCC 602 : (1987) 3 ATC 25 : AIR 1987 SC 847] this Court had pointed out with respect to the prescription of the limitation of one year of the waiting list thus:

“The reason underlying the limitation of the period of a list for one year is obviously to ensure that other qualified persons are not deprived of their chances of applying for the posts in the succeeding years and being selected for appointment.”

51. For the same reason, the contention of the respondents that the petitioners have no right or claim for appointment is misconceived for the petitioners do not claim any such right. The petitioners claim right to be considered for appointment, which cannot be denied by the State acting in an arbitrary manner. Constitution Bench in *Shankarsan Dash v. Union of India*, (1991) 3 SCC 47, has held that it is not necessary for the State to fill up the notified vacancies even when adequate number of candidates are found fit, for the candidates have no indefeasible right to appointment. The notification or advertisement is only an invitation to qualified candidates to apply for selection.



However, this does not mean that the State has a licence to whimsically deny appointment by not filling up vacancies. The decision not to fill up a vacancy should be for appropriate and good reasons. It has to be taken bonafidely. We have followed and applied the aforesaid ratio and find that the case of the respondents would falter and fail, as the power of relaxation has not been exercised in accordance with law. Thus, the foundation and basis for non-appointment collapses. The petitioners would be covered by the said ratio and are entitled to be considered for appointment as DLAs.”

**34.** Resuming his main line of argumentation, Mr. Behera drew our attention to DOPAR OM dated 7 March 1984, prescribing criteria for the determination of analogous posts. We deem it appropriate to reproduce the OM for ready reference:

“No. 14017/27/75-Estt.(D)(Pt)  
Government of India/Bharat Sarkar  
Ministry of Home Affairs/Grih Mantralaya  
Department of Personnel & Administrative Reforms  
(Karmik Aur Prashasnik Sudhar Vibhag)

New Delhi, the 7<sup>th</sup> March, 1984

OFFICE MEMORANDUM

Subject: Criteria for determining analogous posts.

Whenever the recruitment rules for a post prescribe ‘transfer on deputation/transfer’ as a method of filling up the post, it generally contains an entry in column 12 of the standard form of schedule stating inter-alia that the transfer on deputation/transfer shall be made from the officers holding analogous posts under the Central/State Governments. This Department has been receiving references from various Ministries /Departments asking for the definition of the words analogous posts. It has, therefore, been considered appropriate to lay down the following criteria for determining whether the posts in question could be treated as analogous to each other or not in so far as posts under the Central Government are concerned:—

(i) Though the scales of pay of the two posts which are being compared not be identical, they should be such as to be an extension of



or a segment of each other, e.g. for a post carrying the pay scale of Rs. 1200–1600, persons holding posts in the pay scale of Rs. 1100–1600 will be eligible and for a post in the scale of Rs. 1500–2000, persons working in posts carrying pay scales of Rs. 1500–1800 and 1800–2000.

(ii) Both the posts should be falling in the same group of posts as defined in the same group of posts as defined in the Department of Personnel and Administrative Reforms Notification No. 21/2/74-Estt.(D) dated the 11<sup>th</sup> November 1975.

(iii) The levels of the responsibility and the duties of the two posts should also be comparable.

(iv)(a) Where specific qualification for transfer on deputation/transfer have not been prescribed the qualifications and experience of the officers to be selected should be comparable to those prescribed for direct recruits to the post where direct recruitment has also been prescribed as one of the methods of appointment in the recruitment rules.

(b) Where promotion is the method of filling up such posts, only those persons from other Departments may be brought on transfer on deputation whose qualifications and experience are comparable to those prescribed for direct recruitment for the feeder grade / post from which the promotion has been made.

2. As far as the posts under the State Government Public Undertakings, etc. are concerned, it is quite likely that even posts with identical designations may not have comparable scales of pay and they may also differ with reference to the extent and stage of merger of D.A. with pay. The levels in the hierarchy and the nature of duties, may not also be comparable. These posts may not also be classified into 4 groups as has been done under the Central Government. Taking these factors into consideration the selecting authorities may have to be guided more by the nature of duties performed by the candidates in their parent organization vis-a-vis, those in the posts under selection, and qualifications and experience required for the post under the Central Government for making selection for appointments by transfer/deputation (including short-term contract) from outside the Central Government service. Since details of recruitment rules for the posts under State Government/Public undertaking etc. may not be available, bio-data sheets, signed by the officers themselves and certified / countersigned by their employer indicating their qualification, experience, assignments held in the past, contributions



made by them in the field of research, publications to their credit and any other information which the officers might consider relevant for assessing their suitability for the post in question may be obtained in the Performa (enclosed) prescribed vide the Department of personnel and A.R.'s O.M. No. 3911/8/81/Estt. (B) dated the 18th July, 1981.

3. The Ministries / Departments are requested to keep the above guidelines in mind in examining the applications from officers holding analogous posts for making selection by the process of transfer on deputation transfer (including short-term contract).

(K.S.R. Krishna Rao)

Under Secretary to Government of India

Tele: 373180

To

All Ministry/Departments of the Govt. of India.”

**35.** Mr. Behera contended that there is no provision for direct recruitment in the post structure of the JAG cadre, and that deputation/absorption and re-employment are only provided for at the lowest rung of the cadre, being the post of JA / AC, and that the duties that Bhupinder was discharging in the post of AC (GD) from 10 July 1995 were analogous to that of JA / AC, for the following reasons:

- a.** The post of AC / GD corresponded to the pay scale of ₹ 8,000-275-13,500, which is equivalent to that of the post of JA / AC.
- b.** Considering the ITBPF Act, 1992, and its 1994 Rules, all officers of the rank of AC and above dealt with matters concerning disciplinary cases, drafting of charges, conducting prosecution, Courts of inquiry, preparing Records of Evidence, and awarding punishments to defaulters, and



that these were similar duties / responsibilities as those performed by officers in the JAG cadre.

c. Rule 7 of the JAG Cadre RRs and Conditions of Service dated 14 September 1999 provides that officers of the cadre hold corresponding ranks/ status to the other officers of the ITBP.

d. Bhupinder was appointed JA / AC in a General Force Court *vide* order dated 13 March 2000 and was also subsequently appointed to perform the duties of JA / AC to prepare a Record of Evidence *vide* order dated 12 June 2000.

**36.** After attempting to satisfy the Court on the analogous nature of the posts in question, Mr. Behera proceeded to advance his submissions on the interpretation of the phrase “*regular service in the grade*”.

**37.** It was submitted that this phrase ought to be construed in a manner encompassing service rendered from the date of Bhupinder’s holding of the allegedly analogous post of AC / GD (10 July 1995), and not from his date of absorption into the JAG cadre (3 October 2003).

**38.** For this purpose, Mr. Behera placed reliance on the following judgments, which shall be discussed during our evaluation of the merits of this argument:



- a. *SI Rooplal v Lt. Governor through Chief Secretary, Delhi*<sup>12</sup>(para 23).
- b. *K. Madhavan v UOI*<sup>13</sup>(para 21).
- c. *UOI v Pankaj Agnihotri*<sup>14</sup> (paras 34-36).

39. Reliance has also been placed on the following OMs:

- a. DOPT OM dated 3 July 1986.
- b. DOPT OM dated 27 March 2001.

40. It was also argued that Bhupinder's absorption into the JAG cadre, *vide* order dated 3 October 2003, was not accompanied with caveat as to the non-counting of past service rendered by him as AC / GD for the purpose of determination of his seniority in the JAG cadre.

41. On the argument of *mala fides*, it has been pleaded that the DG ITBP sought clarification regarding the seniority of various cadres within the same department / organisation *vide* Letter dated 10 March 2008, followed by a note dated 16 May 2008 seeking the same clarifications, relevant portions of which stand extracted below:

**“DIRECTORATE GENERAL, ITBP**  
**(Ministry of Home Affairs)**

Subject: Clarification regarding seniority and framing the recruitment Rules of various cadres within the same department/organization.

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<sup>12</sup> (2000) 1 SCC 644

<sup>13</sup> (1987) 4 SCC 566

<sup>14</sup> 2010 SCC OnLine Del 2435





1. As per the Recruitment Rules for the post of Inspector (Accountant) notified vide GSR No- 833 (E) dated 24th Oct., 2000, the post is filled up by absorption failing which by deputation as follows:—

2.

**By Absorption**

From amongst Inspector (Combatant Ministerial) of Indo-Tibetan-border Police Force, who have successfully undergone Cash and Accounts Course conducted by Institution of Secretariat Training and Management or any other recognized institute and being in medical category SHAPE-1.

**By Deputation**

From amongst Sub-Inspector (Combatant Ministerial) in the pay scale of Rs. 5500-9000/- having at least three years regular service in the grade and have undergone Cash and Accounts Course conducted by Institute and subject to passing Departmental Test and being in medical category SHAPE-1.

3. The post of Judge Attorney (Assistant Commandant) as per the recruitment Rules notified vide GSR No- 636 dated 14<sup>th</sup> Sept. 1999 is filled up by promotion failing which by deputation/failing both by re-employment as follows:

4.

**By deputation/Absorption:**

By deputation/absorption of a person who;

- i. is or has been an officer of Central/State Government holding the analogous post and is having the degree in law of a recognized University or equivalent; or
- ii. is or has been an officer holding the post of Assistant Commandant or equivalent in the pay scale of Rs. 8000-275-13500 in the Central Police Organisations having degree in law of a recognized University or equivalent or.
- iii. is or has been an officer of the rank of Captain or equivalent in the department of Judge Advocate General in Army/Navy/Air Force.

5. In terms of DOP&T OM No- 22034/5/2004-Estt. (D) Dated 15-12-2004 (copy placed at F-Y), normally, seniority of Deputationist absorbed subsequently, will be from the date of absorption. However, if he had been holding the same or equivalent grade in the department, seniority will be from the date of deputation or the



date of his regular appointment in the grade in his previous department, whichever is earlier.

6. It may be noted from the above that in the case of category mentioned at Para-1, Inspector (Accountant) on absorption basis are denied the benefit of service rendered in the same grade in their parent cadre/department for determination of their seniority, whereas in the case of Judge Attorney (Assistant Commandant) referred to at Para-2 above, who are taken on deputation initially and absorption subsequently, such person may be ...allowed seniority from the date of deputation or the date of his regular appointment in the grade in his previous department, whichever is earlier as per the DOP&T instructions envisaged in Para-3 above.

7. The copies of Recruitment Rules for both the above mentioned posts are placed in the file for perusal & ready reference.

8. MHA are therefore, requested to refer the file to DOP&T for following clarifications:

i. Whether two sets of Recruitment Rules can be made applicable within the same Organisation for two different posts for counting the services for fixation of seniority i.e. for persons being taken directly on absorption basis and persons initially taken on deputation with subsequent absorption

AND

ii. Whether the benefit of service rendered in the same grade in the case of an Assistant Commandant (GD) in ITBP on his appointment as Judge Attorney (Assistant Commandant) who was taken on deputation initially and absorbed subsequently, will be admissible from the date of his deputation or the date of his regular appointment in the same grade in his previous cadre/department, whichever is earlier.

iii. Whether Inspector (Combatant Ministerial) who are appointed as Inspector (Accountant) directly on absorption basis can be allowed seniority from the date of absorption or the date of their regular appointment in the same grade in his parent cadre, whichever is earlier, as applicable in the case Deputationist absorbed subsequently or otherwise.

SD/-

(R.K. Saini)

Additional Dy Inspector General (Admn)

MHA, Shri Shyam Jindal, Director (Pers. I)

ITBP UO No-1.12022/01/2005-Org-153

Dated the: 10th Mar., 2008.”



“MHA Pers

7. Why different norms are being followed for fixing seniority of Insp/CM is not clear, Point at issue may kindly be discussed.

DIRECTORATE GENERAL, ITBP  
(Ministry of Home Affairs)

Subject: Clarification regarding determination of seniority and framing of Recruitment Rules for different post within the same department/organization.

MHA may kindly refer to this office UO No. 1.12022/01/2005-org-153 dated 10th March, 2008 the note of MHA dated 11/03/2008 and discussion held with Shri Shyam Jindal, Director (Pers-I), MHA by the undersigned.

2. As discussed, the following issues involved in seeking clarifications vide UO dated 11/03/2008n placed at Para-6/N on Page-2/N ante.

i. In the case of Judge Attorney (Assistant Commandant) who were initially in GD cadre or any other cadre in the same grade i.e. in same pay scale of Rs. 8000-275-13500/- in ITBP or any other department and taken on deputation initially and observed subsequently in the same grade, how the seniority in the rank of Judge Attorney (Assistant Commandant) will be allowed:—

a. Whether from the date of his regular appointment in GD cadre or any other came in ITBP or any other department in the same grade i.e. in the pay scale of Rs. 8000-275-13500/- ; or

b. From the date of his deputation as Judge Attorney (Assistant Commandant) in ITBP; or.

c. From the date of his absorption as Judge Attorney (Assistant Commandant) in ITBP.

ii. Whether the provision referred to at para-2 (i) above applicable for Deputationist absorbed subsequently, shall also be applicable for determination of seniority of Inspector (Accountant) who are appointed directly by absorption from amongst Inspector (Combatant



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Ministerial) of ITBP. In other words, whether the service rendered by Inspector (Combatant Ministerial) in the same grade i.e. in the same pay scale of Rs. 6500-200-10500/- in ITBP shall also count for determination of his seniority as Inspector (Accountant)?

3. MHA are therefore, requested to clarify above two points at the earliest for our guidance and further necessary action accordingly.

SD/-  
(R.K. Saini)  
DIG (LKO)/ADIG(Admn)

MHA/ Shri Shyam Jindal, Director (Pers.I)  
ITBP UO No.1.12022/01/2005-Org-295

Dated the: 16-05-2008”

**42.** Referencing the UOI’s response to the same to the extent relevant to Bhupinder’s case, our attention has been drawn to UOI’s Clarification dated 2 June 2008, reproduced below:

**“MHA/Pers-1**

Note of ITBP on pages 4-5/ante refers.

2. The policy of the Government is very clear which allows fixation of seniority of a deputationist absorbed subsequently from the date he has been holding the post in the same or equivalent grade in the Department irrespective of the date of his deputation/absorption.

3. If there is any doubt kindly discuss the issue.

SD/-  
(SHYAM JINDAL)  
DIRECTOR (PERS-1)  
2-6-2008”



**43.** It has also been pleaded that, subsequent to the abovementioned clarification dated 2 June 2008, a subsequent clarification dated 16 June 2008 was issued, the content of which merits reproduction:

**“MHA/Pers-1**

Note of ITBP on pre pages refers.

2. This matter was further discussed with representatives of ITBP who desired that we may seek clarification from DO&T on “A” (P.5/N)
3. As per existing instructions of DOP&T on fixation of seniority, provision exists for fixation of seniority of “deputationists absorbed subsequently”, but there is no instruction on fixation of seniority of those who are directly appointed on absorption basis.
4. We may seek clarification from DOP&T as to how the seniority of an absorbee shall be fixed and whether they will be allowed to get their seniority fixed from the date they have been holding the same or equivalent grade in the Dptt. before their absorption, as in the case “deputationist absorbed subsequently”

**SD/-  
(SHYAM JINDAL)  
DIRECTOR (PERS-1)  
16-6-2008”**

**44.** Following this communication, it was pleaded that the DOPT rendered its advice in response on 13 August 2008, referring to the applicability of its OM dated 27 March 2001 (*supra*). The relevant communication stands reproduced below:

**“Department of Personnel & Training  
Establishment (D)**

Reference notes on pre-page.

Fixation of seniority of persons on deputation who are absorbed subsequently, is governed by this Department’s O.M. No-



20020/7/80-Estt. (D) Dated 29-05-1986 and No- 20011/1/2000-Estt. (D) Dated 27-03-2001. The question of seniority in the case of persons, who are appointed on direct absorption basis in a *post/service*, without being on deputation, was looked into in this Department earlier while handling such cases. Accordingly, it was decided that, extending the provisions of this Department's O.M. dated 27-03-2001, the seniority in the post of absorption may be fixed by counting the service rendered on regular basis in equivalent grade in the parent Department held at the time of absorption.

SD/-  
(R.D. Talukdar)  
Under Secretary  
13/8/2008"

**45.** The plea of *mala fides* has been extended through pleadings, specifically accusing DIG / JAG, and the signatory of the respondents' counter affidavit (then senior A.O – Pers-1). With reference to the above-reproduced clarifications, it has been contended that although the mode of calculation of Bhupinder's seniority was spelt out, in no uncertain terms, these individuals delayed redressing his grievances.

**46.** Lastly, as to Bhupinder's plea for relaxation of relevant eligibility criteria for promotion to the post of Addl. JAG / Commandant, attention has been drawn to the alleged mass expansion of the ITBP, coupled with blanket relaxations stated to have been granted to officers for further promotion. In this context, Bhupinder being the only officer eligible in the feeder cadre for promotion in 2009 to the post of Addl. JAAG / Com., was aggrieved by his order of promotion to the post of Dy. JAG / DC in 2009, which has been stated to have the effect of "wiping out" his seniority from the year 2002.



47. The relevance of this has been explained by pleading that, if seniority were to accrue from 2002, Bhupinder would have only required a relaxation of one year as a candidate for promotion to the post of Addl. JAG/ Comm. in 2009 – having possessed both, six years regular service in the grade, and being in SHAPE I, relaxation of one year was only sought regarding the third pre-requisite of 15 years’ service in a Group A post.

48. Pleadings go on to name other individuals in different posts/ cadres, who had been granted relaxation by the DG ITBP. We don’t deem it necessary to record the details of these persons in our adjudication of the present matter.

49. Completing the argument alleging *mala fides*, pleadings go on to argue that retrospective promotion ought to be granted where *mala fides* have been argued and proven, as the same must be viewed as tainting any exercise of power in terms of acts or omissions. For this, reliance is placed on para 21 of *UOI v K.L Taneja*<sup>15</sup>, reproduced below:

“21. The cornucopia of case law above noted brings out the position:–

(i) Service Jurisprudence does not recognize retrospective promotion i.e. a promotion from a back date.

(ii) If there exists a rule authorizing the Executive to accord promotion from a retrospective date, a decision to grant promotion from a retrospective date would be valid because of a power existing to do so.

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<sup>15</sup> 2013 SCC OnLine Del 142



(iii) Since mala fides taints any exercise of power or an act done, requiring the person wronged to be placed in the position the person would find himself but for the mala fide and tainted exercise of power or the act, promotion from a retrospective date can be granted if delay in promotion is found attributable to a mala fide act i.e. deliberately delaying holding DPC, depriving eligible candidates the right to be promoted causing prejudice.

(iv) If due to administrative reasons DPC cannot be held in a year and there is no taint of malice, no retrospective promotion can be made.”

**50.** Along with *K.L Taneja*, reliance is placed on DOPT OM's dated 13 April 1998 and 12 October 1998 to contend that in case it is found that a DPC convened suffers from grave errors, a review DPC ought to be convened to rectify this, and the procedure to be followed during a DPC convened to assess suitability for promotion of retired employees have been laid down too. The OM of 13 April 1998 stands reproduced below, for ready reference:

“No. 22013/1/97-Estt(D)  
Government Of India  
Ministry of Personnel, Public Grievances and Pension  
(Department of Personnel and Training)  
North Block, New Delhi-110001  
April 13, 1998

#### OFFICE MEMORANDUM

Subject: Procedure to be observed by the Departmental Promotion Committee (DPC) – Holding of Review DPC.

The undersigned is directed to invite reference to the Department of Personnel and Training (DOP&T) Office Memorandum No. 22011/5/86-Estt(D) dated April 10, 1998 containing the consolidated instruction on DPC. The provision made in para 6.4.2 and para 18.1 of





the aforesaid Office Memorandum enumerate some of the situations in which Review DPC is required to be held. These situations are:—

- (a) Non-reporting of vacancies due to error or omission (i.e. though the vacancies were available at the time of holding of DPC meeting, these were not reported to the DPC). This leads to injustice to the officers concerned by artificially restricting the zone of consideration; or
- (b) Where eligible persons were omitted to be considered; or
- (c) Where ineligible persons were considered by mistake; or
- (d) Where the seniority of a person was revised with retrospective effect resulting in a variance of seniority list placed before the DPC; or
- (e) Where some procedural irregularities was omitted by a DPC; or
- (f) Where adverse remarks in the CRs were toned down or expunged after the DPC had considered the case of the officer.

2. The Union Public Service Commission has expressed a doubt as to whether it is necessary to hold review DPC in cases where excess number of vacancies were reported to DPC which resulted in an inflated Zone of consideration leading to consideration/empanelment of employees who would not have been covered by the zone of consideration, if the vacancies had been reported accurately. The basis of doubt is that the situation has not been specifically enumerated in para 6.4.2 or para 18.1 of the Office Memorandum dated April 10, 1998.

3. In this connection, it is clarified that the situations enumerated in the aforesaid paras (6.4.2 and 18.1) are only illustrative and not exhaustive. As already mentioned in para 18.1 of the said Office Memorandum, the primary objective of holding a review DPC is to rectify any mistake that took place at the time of holding of the original DPC. Over-reporting of vacancies is also one of the mistakes which needs to be rectified by holding a review DPC. Therefore, the provision made in para 18.1 was/is required to be read to cover this situation also. However, it is directed that in the case of over-reporting of vacancies, a review DPC may be held only if the change in the number of vacancies would result in exclusion of any person(s) empanelled by the original DPC, on account of over-reporting of vacancies which led to inflated zone of consideration. As such, no review DPC need be convened where it may prove to be an infructuous exercise.



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Sd/-  
(K.K. JHA)  
Director  
(Establishment)

To  
All Ministries / Departments of the Government of India.”

### Contentions on behalf of the Respondents

**51.** Mr. Bhagvan Swaroop Shukla, learned CGSC, refutes Bhupinder’s case. He argues, *au contraire*, that the posts of AC / GD and JA / AC are not analogous in nature, and that Bhupinder’s seniority in the JAG cadre has been, and ought to have been, calculated as accruing from the date of his absorption into the cadre.

**52.** Therefore, he argues, that consequential pleas for relaxation of criteria for promotion to the post of Addl. JAG / Com. for the year 2009 cannot arise, as Bhupinder did not possess even one year of service as Dy. JAG/ DC at that point in time.

**53.** In support of his arguments, Mr. Shukla places reliance on the following judgments, which shall be discussed at a later point:

- a. ***Prabha Devi v UOI*<sup>16</sup>** (para 15).
- b. ***Mrigank Johri v UOI*<sup>17</sup>** (para 31).

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<sup>16</sup> AIR 1998 SC 902

<sup>17</sup> (2017) 8 SCC 256



**54.** On the subject of whether the posts in question may be termed as analogous to one another, Mr. Shukla was in vehement opposition to the idea even being proposed.

**55.** In a lighter vein, an analogy was attempted to be drawn by Mr. Shukla between the two posts, equating one with the milk of a cow, and the other with that of a buffalo, urging that the mere commonality of them both being milk could not possibly conceive the conclusion that they are equivalent, nor analogous.

**56.** In support of this, he attempted to persuade us that the nature and duties of the two posts are poles apart. It was argued that the judicial nature of responsibilities and duties in the JAG cadre were not to be found in Bhupinder's parent cadre, and that he was essentially starting afresh, which would require his seniority to reflect the same.

**57.** Building on this argument, it was contended that "regular service in the grade" would unequivocally refer to service rendered in the grade of Judge Attorney, which began to accrue only upon Bhupinder's absorption on 3 October 2003.

**58.** It was also argued that, upon Bhupinder's consent for absorption, there was implied consent on his part to forego, and extinguish, the seniority that had accrued to him owing to past service in his parent cadre.

**59.** Mr. Shukla drew our attention to the existence of 215 posts of AC / GD as of 1999, in contrast to only 3 posts of JA / AC as of 1999,



attempting to persuade us that the sheer difference in posts sanctioned was indicative of the distinguishable nature of the two posts. He also took us through the RRs for the post of JA / AC, pointing out the age limit criteria, disqualification criteria, and the ratio allocated to the avenues of filling up the post.

**60.** Heard learned Counsel for the parties at length.

**61.** Learned Counsel have met and engaged with each other at specific crossroads, which will be utilised as a roadmap to adjudicate the dispute before us. These crucial junctures will be addressed sequentially, as listed below:

- a. Whether a right to antedating promotion is created where a vacancy exists, along with an eligible candidate, who is promoted at a later point in time, and no reasoned decision has been made to keep the relevant post unfilled?
- b. The allegedly analogous nature of posts.
- c. The implication of the phrase “*regular service in the grade*”.
- d. The plea of *mala fides*.

Right to antedating of promotion?

**62.** At the outset, we reject the argument of Mr. Behera that a right to ante-dating of promotion arises in case a post that has remained



unfilled, without reason, where an eligible candidate exists, who is promoted at a later point in time.

**63.** The Hon'ble Supreme Court has held in countless judgments that an indefeasible right to promotion does not arise merely because a post lies vacant while an eligible candidate exists.

**64.** On this note, we deem it appropriate to reproduce the following extract from *Ajay Kumar Shukla v Arvind Rai*<sup>18</sup>:

“40. It is also admitted by the parties that the next promotion of Junior Engineers in the higher grade is to the post of Assistant Engineer. In the cadre of Assistant Engineer, there are no separate streams but only one cadre of Assistant Engineers. It is the seniority list of the cadre of Junior Engineers which would be the feeder cadre for the post of Assistant Engineers. The Junior Engineers of Agricultural stream of the selection of the year 2001, would have direct march over the Junior Engineers selected in the same selection of the Mechanical and Civil streams, even though the overall merit of some or many of Agricultural stream Junior Engineers could be lower than some or many of the Engineers of the Mechanical and Civil streams. The appointing authority ought to have prepared a combined merit list based upon the performance or the proficiency on the basis of the marks received in the selection test as prepared by the Commission. Otherwise, it would amount to denial of the right of consideration for promotion to a more meritorious candidate as against a candidate having lesser merit. Right to promotion is not considered to be a fundamental right but consideration for promotion has now been evolved as a fundamental right.

41. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by K. Ramaswamy, J., in *Lift Irrigation Corpn. Ltd. v. Pravat Kiran Mohanty* in para 4 of the report which is reproduced below: (SCC p. 299)

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<sup>18</sup> (2022) 12 SCC 579



“4. ... There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with relevant rules. From this perspective in our view, the conclusion of the High Court that the gradation list prepared by the corporation is in violation of the right of respondent-writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent-writ petitioner was unjustly denied of the same is obviously unjustified.””

**65.** Another important distinction to be drawn is that the scope of our jurisdiction under Article 226 is to only issue directions for an officer to be considered for promotion by holding of a DPC. It is not within our power to grant promotion itself. On this point, we deem it relevant to refer to the decision in *State Bank of India v. Mohd. Mynuddin*, reproduced below:

“5. Whenever promotion to a higher post is to be made on the basis of merit no officer can claim promotion to the higher post as a matter of right by virtue of seniority alone with effect from the date on which his juniors are promoted. It is not sufficient that in his confidential reports it is recorded that his services are “satisfactory”. An officer may be capable of discharging the duties of the post held by him satisfactorily but he may not be fit for the higher post. Before any such promotion can be effected it is the duty of the management to consider the case of the officer concerned on the basis of the relevant materials. **If promotion has been denied arbitrarily or without any reason ordinarily the court can issue a direction to the management to consider the case of the officer concerned for promotion but it cannot issue a direction to promote the officer concerned to the higher post without giving an opportunity to the management to consider the question of promotion. There is good reason for taking this view. The court is not by its very nature competent to appreciate the abilities, qualities or attributes necessary for the task, office or duty of every kind of post in the modern world and it would be hazardous for it to undertake the responsibility of assessing whether a person is fit for being promoted to a higher post which is to be filled up by selection. The duties of**



such posts may need skills of different kinds — scientific, technical, financial, industrial, commercial, administrative, educational etc. The methods of evaluation of the abilities or the competence of persons to be selected for such posts have also become nowadays very much refined and sophisticated and such evaluation should, therefore, in the public interest ordinarily be left to be done by the individual or a committee consisting of persons who have the knowledge of the requirements of a given post, to be nominated by the employer. Of course, the process of selection adopted by them should always be honest and fair. It is only when the process of selection is vitiated on the ground of bias, mala fides or any other similar vitiating circumstances other considerations will arise....**The ratio of the above decision is that where the State Government or a statutory authority is under an obligation to promote an employee to a higher post which has to be filled up by selection the State Government or the statutory authority alone should be directed to consider the question whether the employee is entitled to be so promoted and that the court should not ordinarily issue a writ to the government or the statutory authority to promote an officer straightway.** The principle enunciated in the above decision is equally applicable to the case in hand.”

(emphasis supplied)

### Posts : Whether Analogous?

**66.** In our exercise of determining whether the posts of AC / GD (ITBP cadre) and JA / AC (JAG cadre) are analogous, we deem it appropriate to begin by reproducing the schedule attached to the RRs for the post of AC / GD and JA / AC:

(1)	(2)	(3)	(4)	(5)	(6)	(7)
7. Assistant Commandant (General Duty)	<b>215*</b> (1999)	General Central Service, Group 'A', Gazetted (Non-	Rs. 8000-275-13500/	Selection by merit.	Not applicable.	<b>Between 20 to 25 years.</b> <i>(Relaxable in the case of Scheduled Castes/Scheduled Tribes/Other</i>



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		Ministerial).				<p><i>Backward Classes candidates and certain other categories of personnel in accordance with the orders issued by the Central Government from time to time.)</i></p> <p><b>NOTE:</b> The crucial date for determining the age limit shall be the closing date for receipt of applications from candidates except for those in the Armed Forces, personnel from Assam, Meghalaya, Arunachal Pradesh, Mizoram, Manipur, Nagaland, Tripura, Sikkim, Lahaul &amp; Spiti District and Pangi Sub-Division of Chamba District of Himachal Pradesh, the Union Territory of Andaman and Nicobar Islands and Lakshadweep.</p>
(8)			(9)	(10)	(11)	
Degree of the recognised University or			Not applicable.	Two years.	50% of the post by promotion. 50% by direct	





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equivalent.					recruitment failing which by deputation and failing both by re-employment.	
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(1)	(2)	(3)	(4)	(5)	(6)	(7)
4.Judge Attorney (Assistant Commandant)	03*(1999)	(3) <b>General Central Service Group 'A', Gazetted (Non-Ministerial).</b> <i>Subject to variation dependent on workload.</i>	Rs. 8000-275-13500/-	Selection by merit.	Not applicable.	<b>Not applicable.</b>
(8)	(9)		(10)		(11)	
Not applicable.	Not applicable		Not applicable		By promotion failing which by deputation/ failing both by re-employment.	
(12)						

**(12) By deputation/absorption:****By deputation/absorption of a person who:**

- i) is or has been an officer of Central/State Government holding an analogous post and has a degree in law of a recognized University or equivalent; or
- ii) is or has been an officer holding the post of Assistant Commandant or equivalent in the pay scale of Rs. 8000-275-13500 in the Central Police Organizations having a degree in law of a recognized University or equivalent; or
- iii) is or has been an officer of the rank of Captain or equivalent in the department of the Judge Advocate General in Army/Navy/Air Force.

**67.** It is undisputed, presently, that Bhupinder's deputation to the JAG cadre was neither illegal nor irregular. Therefore, considering clauses "i)" and "ii)" under the heading "By deputation/ Absorption", he satisfies clause ii), and may even satisfy clause i), in the event that the two posts are established as analogous.

**68.** Upon a holistic reading of the GOI OM dated 7 March 1984 (*supra* at para 34), we observe that from the criteria mentioned in sub clauses "(i)" to "3", points (i) to (iii) are relevant to Bhupinder's case.

**69.** A plain reading of the RRs to both posts confirms the identical nature of pay scales, thereby satisfying a threshold higher than that which is established at clause (i) of the GOI OM (*supra*).

**70.** Moving to the criteria laid down in clause (ii), we see that as per classification of posts in the relevant RRs, both these posts are Group 'A' posts.

**71.** Clause (iii) requires a comparison of duties and responsibilities of the two posts. For clarity on this, we shall examine Mr. Behera's



reliance upon Rule 7 of the JAG Cadre RRs and Conditions of service, dated 14 September 1999. We also deem it appropriate to reproduce Rule 4 for additional context:

**“4. General:** (i) Service rendered as Judge Attorney General (Additional Deputy Inspector General), Additional Judge Attorney General (Commandant), Deputy Judge Attorney General (Deputy Commandant) and Judge Attorney (Assistant Commandant) shall be deemed to be judicial service and shall reckon as such for all purpose.”

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**“7. Other conditions of Service:–** The conditions of service of the Judge Attorney General (Additional Deputy Inspector General) Additional Judge Attorney General (Commandant) Deputy Judge Attorney General (Deputy Commandant) and Judge Attorney (Assistant Commandant) in respect of matters for which no provision or insufficient provision has been made under these rules, shall unless the Central Government by an order in writing otherwise directs be the same as are applicable from time to time to other officers of the Indo-Tibetan Border Police Force holding the corresponding ranks or status.”

**72.** On a holistic reading of the rules, we note that there is no explicit mention of the exact description of duties and responsibilities of officers of the cadre, except for saying that an officer’s service within the cadre shall be deemed judicial service for all purposes.

**73.** This harmonises arguments advanced by Mr. Behera that Bhupinder, in his service as AC/ GD, dealt with matters relating to disciplinary cases, drafting of charges, conducting prosecution, *inter alia*, as recorded exhaustively in our account of submissions (*supra*).

**74.** Despite factoring in Mr. Shukla’s outright rejection of these claims, Rule 7 as extracted *supra*, in no uncertain terms, equates the conditions of service of officers in the JAG cadre to that of those in



the ITBP cadre – *holding corresponding ranks*. A complete reading of Rules 4 and 7, along with the Bhupinder's rank in his parent cadre being "Assistant Commandant / General Duty" and the same in his target cadre upon deputation being "Judge Attorney / Assistant Commandant", we are satisfied that the posts are to be deemed analogous in nature.

**75.** In order to cement this conclusion, we deem it appropriate to reproduce relevant portions from *SI Rooplal* (*supra*) for ready reference:

"15. We will now take up the question whether the appellants are entitled to count their service rendered by them as Sub-Inspectors in BSF for the purpose of their seniority after absorption as Sub-Inspectors (Executive) in the Delhi Police or not. We have already noticed the fact that it is pursuant to the needs of the Delhi Police that these officials were deputed to the Delhi Police from BSF following the procedure laid down in Rule 5(h) of the rules and subsequently absorbed as contemplated under the said rules. It is also not in dispute that at some point of time in BSF, the appellants' services were regularised in the post of Sub-Inspector and they were transferred as regularly appointed Sub-Inspectors to the Delhi Police Force. Therefore, on being absorbed in an equivalent cadre in the transferred post, we find no reason why these transferred officials should not be permitted to count their service in the parent department. At any rate, this question is not *res integra* and is squarely covered by the ratio of judgments of this Court in more than one case. Since the earlier Bench of the Tribunal relied upon *Madhavan case*. This Court in that case while considering a similar question, came to the following conclusion:

"21. 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.”*

(emphasis supplied)

16. Similar is the view taken by this Court in the cases of **R.S. Makashi** [(1982) 1 SCC 379] which judgments have been followed by this Court in **Madhavan** case . Hence, we do not think it is necessary for us to deal in detail with the view taken by this Court in those judgments. Applying the principles laid down in the above-referred cases, we hold the appellants are entitled to count the substantive service rendered by them in the post of Sub-Inspector in BSF while counting their service in the post of Sub-Inspector (Executive) in the Delhi Police Force.

17. In law, it is necessary that if the previous service of a transferred official is to be counted for seniority in the transferred post then the two posts should be equivalent. One of the objections raised by the respondents in this case as well as in the earlier case of Antony Mathew is that the post of Sub-Inspector in BSF is not equivalent to the post of Sub-Inspector (Executive) in the Delhi Police. This argument is solely based on the fact that the pay scales of the two posts are not equal. Though the original Bench of the Tribunal rejected this argument of the respondent, which was confirmed at the stage of SLP by this Court, this argument found favour with the subsequent Bench of the same Tribunal whose order is in appeal before us in these cases. Hence, we will proceed to deal with this argument now. Equivalency of two posts is not judged by the sole fact of equal pay. While determining the equation of two posts many factors other than “pay” will have to be taken into consideration, like the nature of duties, responsibilities, minimum qualification etc. It is so held by this Court as far back as in the year 1968 in the case of **Union of India v. P.K. Roy** [AIR 1968 SC 850] . In the said judgment, this Court accepted the factors laid down by the Committee of Chief Secretaries which was constituted for settling the disputes regarding equation of posts



arising out of the States Reorganisation Act, 1956. These four factors are: (i) the nature and duties of a post; (ii) the responsibilities and powers exercised by the officer holding a post, the extent of territorial or other charge held or responsibilities discharged; (iii) the minimum qualifications, if any, prescribed for recruitment to the post; and (iv) the salary of the post. It is seen that the salary of a post for the purpose of finding out the equivalency of posts is the last of the criteria. If the earlier three criteria mentioned above are fulfilled then the fact that the salaries of the two posts are different would not in any way make the post “not equivalent”. In the instant case, it is not the case of the respondents that the first three criteria mentioned hereinabove are in any manner different between the two posts concerned. Therefore, it should be held that the view taken by the Tribunal in the impugned order that the two posts of Sub-Inspector in BSF and Sub-Inspector (Executive) in the Delhi Police are not equivalent merely on the ground that the two posts did not carry the same pay scale, is necessarily to be rejected. We are further supported in this view of ours by another judgment of this Court in the case of **Vice-Chancellor, L.N. Mithila University v. Dayanand Jha** [(1986) 3 SCC 7] wherein at SCC para 8 of the judgment, this Court held:

“Learned counsel for the respondent is therefore right in contending that equivalence of the pay scale is not the only factor in judging whether the post of Principal and that of Reader are equivalent posts. We are inclined to agree with him that the real criterion to adopt is whether they could be regarded of equal status and responsibility. ... The true criterion for equivalence is the status and the nature and responsibility of the duties attached to the two posts.”

#### “Regular service in the Grade”

**76.** Owing to our acceptance of Mr. Behera’s submission that the posts of AC / GD and JA / AC are analogous, we now move to the next critical juncture requiring adjudication.

**77.** Given that the circumstances surrounding Bhupinder’s deputation at JA / AC have not been disputed, save for a statement that he was appointed as JA, and not JA / AC in a General Force Court



*vide* order dated 13 March 2000- a contention we accept, yet hold immaterial to the crux of the present dispute. This is especially so given that his attachment to the JAG cadre as JA / AC less than a month later, *vide* order dated 10 April 2000, stands undisputed.

**78.** Fortunately, the Hon'ble Supreme Court has been unequivocal on its stance of what the phrase in contention ought to mean. For this purpose, we shall now discuss decisions interpreting the same.

**79.** While discussing the computation of regular service in the grade concerning promotion from the post of DSP (CBI) to SP (CBI), the following observations were made in paras 6, 10, and 21 of **K. Madhavan** (*supra*), which merit reproduction:

“6. The petitioners have, in the first instance, challenged that Respondent 5 was not even eligible for appointment to the post of SP, CBI. Respondent 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 Respondent 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 Respondent 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 expression, 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 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. Respondent 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 Respondent 5 O.P. Sharma are all now holding the post of DIG. By an order dated 6-10-1983, this Court directed that no selection list would be prepared for the post of DIG in the CBT/SPE, but it would be open to the respondents to make ad hoc appointments which would be subject to the result of the writ petitions. As a result of that order, Respondent 5 was promoted to the post of DIG on 13-10-1983 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 24-4-1985. Thus the petitioners and Respondent 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 Respondent 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.”

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“10. 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 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 contradistinction to appointment on ad hoc or stopgap or purely temporary basis. Respondent 5, 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 Respondent 5 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-à-vis Respondent 5 in the post of DIG. That again will depend upon the decision on the question as to the seniority of the petitioners and Respondent 5 in the post of SP.”

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“21. 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.”



**80.** A plain reading of the reproduced portions of ***K. Madhavan***, applied to the facts before us, conceives the following sequitur:

**a.** “*Six years regular service in the grade*” cannot be substituted with an interpretation of “*Six years regular service in the grade of JA / AC*”.

**b.** Regular service rendered in an analogous grade in a different cadre, in case of deputationists, ought to be computed in assessing a candidate’s meeting of this threshold.

**c.** Deputation may be regarded as transfer from one cadre to another. Therefore, such an act cannot be construed to wipe out the seniority of a serviceman in his previous cadre.

**d.** Bhupinder’s seniority in the post of JA / AC ought to accrue from the date of him being appointed to the post of AC / GD in his parent cadre, i.e., 10 July 1995.

**81.** This view has been reiterated in a catena of judgments, even besides those relied upon *supra* in the portions of ***K. Madhavan*** that have been extracted.

**82.** Reference is made also to ***SI Rooplal*** and ***Pankaj Agnihotri***, whose relevant portions stand extracted below:

“23. It is clear from the ratio laid down in the above case that any rule, regulation or executive instruction which has the effect of taking away the service rendered by a deputationist in an equivalent cadre in the parent department while counting his



seniority in the deputed post would be violative of Articles 14 and 16 of the Constitution. Hence, liable to be struck down. Since the impugned memorandum in its entirety does not take away the above right of the deputationists and by striking down the offending part of the memorandum, as has been prayed in the writ petition, the rights of the appellants could be preserved, we agree with the prayer of the appellant-petitioners and the offending words in the memorandum “whichever is later” are held to be violative of Articles 14 and 16 of the Constitution, hence, those words are quashed from the text of the impugned memorandum. Consequently, the right of the appellant-petitioners to count their service from the date of their regular appointment in the post of Sub-Inspector in BSF, while computing their seniority in the cadre of Sub-Inspector (Executive) in the Delhi Police, is restored.”

34. From the afore-noted decisions, the legal principle which can be deduced is: (i) where one of the sources of appointment to a post in a cadre is deputation, service rendered by a deputationist on an equivalent post in his parent department shall be taken into consideration while computing his period of service in the deputed post for the purposes of determination of his seniority and eligibility for promotion in the transferred department; (ii) in cases where deputation is not the source of appointment in a cadre under the recruitment rules and a deputationist is absorbed in the transferred department by the government in exercise of its residuary powers, whether service rendered by a deputationist in his parent department shall be taken into consideration while computing his period of service in deputed post for the purposes of determination of his seniority and eligibility for promotion in transferred department would be dependent upon terms and conditions of deputation or absorption of deputationists in transferred department.

35. No strait jacket formula of universal application can be evolved in respect of said cases. Each case would have to be examined independently on its own facts and the statutory framework.

36. The reason behind the aforesaid principle is obvious. Where one of the source of appointment in a cadre in the transferred department is deputation, no employee in said cadre can have any legitimate expectation of non-disturbance of his seniority and promotional prospects by deputationists, for they are well cognizant of the fact that a deputationist can be appointed in the cadre at any time and that said appointment would have an effect on their seniority and promotional prospects.”



**83.** We have now held that, given the analogous nature of the two posts of AC / GD (ITBP cadre) and JA / AC (JAG cadre), Bhupinder's seniority in the grade of JA/ AC ought to accrue from his date of appointment as AC / GD on 10 July 1995.

**84.** Given that these cases establish the law in clear and definite terms, we do not deem it necessary to venture into the content of OM's, clarifications and other documents relied upon by Mr. Behera and extracted *supra*, for the simple reason that they echo the observations made in the judgments discussed.

**85.** It is on this note that we shall now address Mr. Shukla's reliance on *Mrigank Johri* (*supra*), whose relevant portion stands extracted below for ready reference:

“29. The contentions may be elaborate but the crux of the issue is whether the OM's referred to aforesaid which generally provide for the benefit of service rendered in the previous cadre in an equivalent post on being absorbed in another department would apply to a case where the absorption is on specified terms and conditions with the benefit of such past service in the previous cadre as well as the period of service rendered on deputation being denied?

30. Our answer to this query is in the negative for which we proceed to pen down reasons.

31. It is no doubt true that the OM dated 29-5-1986 as modified by OM dated 27-3-2001 did provide for the benefit of the previous service rendered in the cadre. This is in effect also the ratio of the judgment in *Sub-Inspector Rooplal case* [*Sub-Inspector Rooplal v. Lt. Governor*, (2000) 1 SCC 644 : 2000 SCC (L&S) 213] . This would also be in conformity with the normal service jurisprudential view. However, it would be a different position if



the absorbing department clearly stipulates a condition of giving willingness to sacrifice the seniority while preserving all other benefits for the absorbee (which are accepted) failing which the option was available to the absorbee to get himself repatriated to the parent department. The terms and conditions are categorical in their wording that the absorbees would be “deemed to be new recruits” and the previous service would be counted for all purposes “except his/her seniority in the cadre”. The appellant accepted this with open eyes and never even challenged the same. Their representations to give them the benefit of their past seniority was also turned down and thereafter also they did not agitate the matter in any judicial forum. The controversy was thus not alive and it was not open for them to challenge the same after a long lapse of period of time. In fact on the day of filing of the OM, any prayer to set aside the terms and conditions of absorption would have been clearly barred by time under Section 21 of the Administrative Tribunals Act, 1985.

32. The appellants sought to rake up the issue only when the seniority list was finalised. This was preceded by the draft seniority list. Whatever may be the dispute of seniority qua other persons, insofar as the appellants were concerned, their seniority was based on the terms and conditions of their absorption. The position of the appellants in the seniority list was thus a sequitur to the terms and conditions of their absorption. We are of the view that it is precisely for this reason, anticipating that their claim would be time-barred, that a challenge was laid only to the seniority list without challenging the terms and conditions of absorption though in the grounds, a plea was raised against the terms and conditions of absorption. Unless the terms and conditions of absorption were to be set aside, the seniority list prepared was in conformity with the same.”

**86.** A plain reading of the reproduced portions of *Mrigank Johri* distinguishes its findings from that which would be applicable to the facts before us. *Mrigank Johri* dealt with a case where the absorbing cadre clearly stipulated a condition of consent to sacrifice seniority accrued from service in the parent cadre, on the part of the absorbee,



failing which, the officer could get himself to be repatriated with his parent cadre.

**87.** Due such caveats to absorption in the target cadre, we see that ***Mrigank Joshi*** only refused the extension of seniority of officers accruing to them owing to service in their parent cadres on the basis of their consent of the same, along with their delay in agitating their grievance and failure to challenge the terms and conditions of their absorption to which they consented.

**88.** Lastly, on this point, Mr. Shukla's reliance on ***R. Prabha Devi*** (*supra*) appears misplaced. It is not in dispute that seniority in a cadre does not entitle promotion and cannot be confused with eligibility. The present dispute, however, pertains to the computation of seniority and from when it ought to be deemed to accrue.

**89.** Owing to the above discussion, we are of the opinion that the posts in question are analogous, and that the phrase "*regular service in the grade*" ought to encompass service in Bhupinder's analogous post of AC / GD in his parent cadre.

#### On Mala Fides

**90.** A plea of *mala fides* is a heavy burden to discharge, resting on the shoulders of one who raises it.



91. This reminds us of the oft-cited portion of *E.P Royappa v State of T.N*<sup>19</sup>, reiterating the high threshold to be satisfied in case an argument of mala fides ought to be accepted. We deem it appropriate, given the facts of the present case, to reproduce para 92 of the judgment below:

“92. Secondly, we must not also overlook that **the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility.** Here the petitioner, who was himself once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof. **In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration.** Such is the judicial perspective in evaluating charge of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up—these considerations are wholly irrelevant in judicial approach—but because otherwise, functioning effectively would become difficult in a democracy. It is from this standpoint that we must assess the merits of the allegations of mala fides made by the petitioner against the second respondent.”

92. Presently, the facts indicate to a certain degree of inaction of the Respondents’, despite numerous representations by Bhupinder for

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<sup>19</sup> (1974) 4 SCC 3



consideration of his seniority from 1995, as well as in the face of numerous clarifications by the MHA and relevant Office Memoranda answering the issue of whether service in an analogous post within one's parent cadre ought to be counted.

**93.** To our understanding, though one of two individuals against whom Bhupinder has alleged *mala fides* have been impleaded as parties to the present writ petition, a mere non consideration of his representations, *prima facie*, have not discharged the lofty burden of establishing *mala fides*.

**94.** There have been no allegations of *mala fides* in any of Bhupinder's representations, nor has there been a complaint made to this effect. In the absence of these, as well as a thorough inquiry into the circumstances conceiving these allegations and opportunities for involved parties to present their individual cases, there cannot be a positive finding on the plea of *mala fides*.

**95.** In passing we would also like to make reference to the decision in *State of Bihar v P.P. Sharma*<sup>20</sup>:

**“50. Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of**

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<sup>20</sup> 1992 Supp (1) SCC 222





**a plea of mala fide involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.**

**51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand.”**

(emphasis supplied)

### Concluding Remarks

**96.** To reiterate our stance, we have confirmed that Bhupinder has held the post of AC / GD (ITBP cadre) from 10 July 1995, a post analogous to that of JA / AC (JAG cadre). Therefore, his seniority in the post of JA / AC ought to be computed from 10 July 1995.

**97.** Since we have also held that, for the purposes of determining eligibility for promotion, Bhupinder’s service and seniority in the grade of JA / AC ought to accrue from the year 1995 – making him eligible to be considered for promotion to the post of Dy. JAG / DC from the year 2002 onwards.

**98.** We emphasise, however, that it is the right to be considered for promotion that is recognised, not an indefeasible right to be promoted.



**99.** It is on this note that we direct the convening of a review DPC for the year 2002, to assess Bhupinder's suitability for promotion to the post of Dy. JAG / DC.

**100.** In the event that he is found suitable for promotion to the post of Dy. JAG / DC in the year 2002, order dated 3 November 2009 shall stand quashed and set aside.

**101.** In the event that he is found suitable in the review DPC, another review DPC shall be convened for the year 2009 to assess his suitability for promotion from Dy. JAG / DC to Addl. JAG / Com. In order to do so, we direct that the respondent's consider relaxation of requisite eligibility criteria to the extent permissible as per existing guidelines.

**102.** We clarify that any promotions and consequential benefits granted to Bhupinder shall be notional in nature.

**103.** Pending applications, if any, do not survive, and are disposed of accordingly.

**104.** No orders as to costs.

**AJAY DIGPAUL, J.**

**C. HARI SHANKAR, J.**

**AUGUST 8, 2025/gs**