

PETITIONER:
BISHAN SARUP GUPTA

Vs.

RESPONDENT:
UNION OF INDIA AND ORS(With connected civil appeals)

DATE OF JUDGMENT 16/08/1972

BENCH:
PALEKAR, D.G.
BENCH:
PALEKAR, D.G.
SIKRI, S.M. (CJ)
RAY, A.N.
DUA, I.D.
BEG, M. HAMEEDULLAH

CITATION:
1972 AIR 2627 1975 SCR 491
1973 SCC (3) 1
CITATOR INFO :
F 1975 SC 483 (20, 24, 26)
R 1977 SC 251 (33, 36, 38)
E 1977 SC 757 (3, 17, 21, 38, 39, 40, 57, 58)
R 1977 SC 2051 (33)
RF 1980 SC 1561 (27)
RF 1980 SC 2056 (73)
D 1983 SC 769 (22, 29, 31, 38)
R 1984 SC 1291 (7, 13, 21, 22, 32)
D 1984 SC 1595 (66)
F 1985 SC 1019 (18)
E&D 1985 SC 1558 (26, 28)
RF 1985 SC 1605 (16)
RF 1987 SC 2359 (9)
R 1990 SC 1106 (26, 27, 28, 30)
D 1990 SC 1607 (26)
C&F 1991 SC 212 (2, 3)
D 1992 SC 2074 (7)

ACT:
Income-Tax Officers Class I, Grade II Service Recruitment Rules of 1945--Rule 4 of the Rules of Promotion for Direct recruits--When a statutory duty is cast on the Government to determine the method to be employed for the recruitment of candidates to vacancies in service and once the Government has fixed the quota Rules of 2 : 1, the promotees are entitled till January 16th, 1959 to 333 1/3 per cent of the vacancies both in Permanent and temporary posts, in any particular year irrespective of the fact whether there was any, direct recruitment by competitive examination in that year.

HEADNOTE:
The scope of Rule 1(f) (iii) and (iv) of the seniority Rules of the Income-Tax Officers (Class I Grade 11) service Recruitment Rules and also Rule 4 of the Rules of Promotion of the Board of Revenue Office Procedure Manual came to be considered in "Jaisinghani's case" [1967] (2) SCR 703 and the Supreme Court while rejecting the contention that the rule was violative of Art 14 and 16 of the Constitution

issued a mandamus to prepare a fresh seniority rule based on the "quota rule" of 2 : 1 between the direct recruits and the "Promotees" for the year 1952-56. The Government understood the mandamus as also for the years' upto 1967 and prepared a fresh seniority list dated 15-7-1968 and the appellants challenged the same as violative of the mandamus issued by the Court

HELD : It was for the Government under rule 4 of the Income-Tax Officers Class 1, Grade 11 Service Recruitment Rules to determine the method or methods to be employed for the purposes of filling any particular vacancies and the number of vacancies and the number of candidates to be recruited by each method. It is wrong to assume that this Court would take upon itself to do what the Government is required to do under rule 4. The mandamus was really confined to the period between 1951-1956. [495-H]

Rule 4 of the Income-Tax Class 1, Grade 11 Service Recruitment Rules also refers to recruitment of candidates to vacancies in the service. The vacancies for any particular year being ascertained not more than 1/3rd of the same were to go to the promotees and the rest to the direct recruits. The ratio was not made dependent on whether any direct recruit was appointed in any particular year or not. The promotees were entitled to 1/3rd of the vacancies in any particular year whether or not there was direct recruitment but competitive examination in that year. [499G-H]

It is true that the quota rule refers to vacancies but the vacancies are those vacancies which the Government wants to fill. It is the prerogative of the Government, reflected further in Rule 4, whether any vacancy may be filled or not. Therefore, when the quota rule refers to vacancies it is implicit in the rule that the vacancies are vacancies, which the Government want to fill, whatever may be the actual number of vacancies. [50D-F]

There is no sufficient warrant for the contention that the vacancies referred to in the quota rule are vacancies only in the permanent cadre. [502D-E]

S. G. Jaisinghani V. Union of India & Ors [1967] (2) SCR 703, nature of mandamus clarified.

10 SC/75-33

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JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2060(N) of 1971.

Appeal by certificate from the Judgment and Order dated the 22nd September 1970 of the Delhi High Court in Civil Writ No. 196 of 1970 and Civil Appeal Nos. 67, 1739 and 393 of 1972.

For the Appellants : Yogeshwar Prasad & Mrs. S. Bagga in C.A. 2060/71 and C.A. 393/72, S. P. Nayar in C.A. 67/72 and J. C. Tailwar & Bishamber Lal in C.A. 139/72.

For the Respondents : S. P. Nayar in C.A. 2060/71, C.A. 139/72 and C.A. 393/72, J. C. Talwar & Bishamber Lal in C.A. 2060/71 and C.A. 67/72, Yogeshwar Prasad & Mrs. S. Bagga in C.A. 67/72 and 139/72 and B-. R. Agarwala in C.A. 67/72 & C.A. 393/72.

The Judgment of the Court was delivered by

PALEKAR, J.-In these appeals the challenge is to the seniority list of Income-tax Officers prepared by the Central Board of Revenue in pursuance of the orders of this Court in Civil Appeal No. 1038 pursuance Writ Petition No. 5 of 1966. The appeal referred to was filed by one

Jaisinghani and the Writ Petition by one Mohan Chandra Joshi, both of whom had been directly recruited as Income-tax Officers, Class 1, Grade II. The two proceedings were heard together and were disposed of by a common judgment dated February 22, 1967 and a mandamus in similar terms was issued in the two proceedings. These cases have been reported as S. G. Jaisinghani v. Union of India and Ors.(1). For the purposes of the present appeals, we shall set out below the order passed in Jaisinghani's case (p. 718).

"We are accordingly of the opinion that promotes from Class 11, Grade- III to Class-1, Grade 11 Service in excess of the prescribed quotas for each of the years 1951 to 1956 and onwards have been illegally promoted and the appellant is entitled to a writ in the nature of mandamus commanding respondents 1 to 3 (1) Union of India, (2) Secretary to the Govt. of India in the Ministry of Finance and (3) Central

Board of

Revenue to adjust the seniority of the appellant (Jaisinghani) and other officers similarly placed like him and to prepare a fresh seniority list in accordance with law after adjusting the recruitment for the period 1951 to 1956 and onwards in accordance with the quota rule prescribed in the letter of the Government of India No. F. 24(2)-Admn. I.T/51 dated October 18, 1951. We, however, wish to make it clear that this order will not affect such Class II Officers who have been appointed permanently as Assistant Commissioners of Income Tax. But this order will apply to all other officers including those who have been appointed Assistant Commissioners of Income Tax provisionally pursuant to the orders of the High Court."

(1) [1967] 2 S.C.R. 703.

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For more than a year the Government failed to prepare the seniority list as directed. So in April, 1968 the said Jaisinghani and Joshi, started contempt proceeding against the Government in this Court. Thereupon, Government assured this Court that the list would be prepared before the Court reopens after the summer vacation and, accordingly, on 15-7-1968 Government prepared the seniority list Inc) filed the same in Court. Objections were filed by Officers affected by the list. This Court, however, ruled on 6-11-1968 that contempt proceedings were inappropriate and that if any of the Officers was aggrieved by the seniority list, it was open to him to take appropriate proceedings departmentally or otherwise.

Thereupon two Writ Petitions were filed in the Delhi High Court. Writ Petition No. 196/70 was filed on 23-2-1970 by one Bishan Swarup Gupta promotee of 1962. The other one was filed by Mohan Chander Joshi being Writ Petition No. 550/70. Joshi, as already stated, was a direct recruit. In both these petitions the seniority list dated 15-7-1968 came in for attack for different reasons. The dispute was essentially between the direct recruits to Class 1, Grade 11 of the Service and the promotees to that cadre. The two petitions came before two separate benches. Writ Petition No. 196/70 was dismissed on 29-9-1970, whereas Writ Petition No. 550/70 filed by Mohan Chander Joshi was substantially allowed. Directions were given in that Writ Petition for

preparing the seniority list afresh in the light of the observations made in the judgment. Civil Appeal No. 2060 of 1971 before us is by Bishan Sarup Gupta from the Order dismissing his Writ Petition (196/70). From the Order passed in the other Writ Petition namely 550/70 the other three appeals have been filed to this Court. Civil Appeal 67 of 1972 is filed by the Govt. Civil Appeal No. 139/72 is filed by Mohan Chander Joshi and Civil Appeal No. 393/72 is filed by one Helms and 4 other promotees who were some of the respondents in Writ Petition No. 550/70.

In all these appeals the only question for consideration was whether the seniority list prepared on 15-7-1968 was correct and in accordance with the mandamus issued as above. All these appeals were, therefore, heard together and will be disposed of by this judgment.

As we are principally concerned with the mandamus issued in Jaisinghani's case, we have to understand the precise nature and scope of the mandamus. The mandamus was issued on the facts brought to the notice of this Court at the time, and it is clear that the directions given in the mandamus must be construed against the background of those facts. It is not necessary to recount all the facts here because they are all there in the official report-Jaisinghani vs. Union of India [1967] (2) S.C.R. 703. Jaisinghani was directly recruited to class I. Grade 11 of the Income Tax Service in 1951 after he had passed the competitive examination held by the Union Public Service Commission in 1950. The other petitioner Joshi similarly had joined that service in 1953 after being selected in the competitive examination in 1952. In 1962 and thereafter some promotions were made from this class to the post of the Assistant Commissioner. The case of Jaisinghani and Joshi was that having joined service in 1951 and

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1953 respectively, they were entitled to be considered for being selected to the higher post of the Assistant Commissioner, but they were not so considered because in the seniority list then prepared they were shown much below some of the promote officers who had been promoted to the cadre of Class 1, Grade II service long after Jaisinghani and Joshi had joined the service. This was done on the basis of a seniority rule, also called the Weightage rule, the effect of which was to give seniority to a promote of any year not only over the direct recruits who joined the service in that year but also over those direct recruits who joined the service in the previous two years. For example, if a direct recruit was selected in the competitive examination of 1950 and joined the service in 1951 he will be not only junior to the promote of 1951 but also to the promote of 1952 and 1953. It was contended that such a rule was unjust and violative of the principle of equality embodied in Articles 14 and 16 of the Constitution. In the second place, it was contended, even assuming that the seniority rule was not violative of any constitutional guarantee, the seniority list which had been actually prepared in 1962 and on the basis of which promotion to the post of Assistant Commissioner had been made was not strictly in accordance with the quota rule and all those promoters who were shown as seniors, were not really entitled to that rank and be considered for promotion in preference to the petitioners. This Court did not accept the first contention. This Court held that the rule of seniority was just and reasonable having regard to the fact that only a small percentage of officers was promoted to the grade and those promotions were made out of experienced Income-tax officers by a rigid

selection made by the Department Promotional Committee. At the time of the promotion from Class 11, Grade III to Class 1, Grade 11, the promoters had to put in at least 5 years -of service in class 11, Grade III of which two years were for probation and 3 years of actual income-tax assessment work. On the other hand, the direct recruit after joining the service in any particular year had to undergo probation for two years in which they did not do any actual assessment work. Only after two years of probation, were they entrusted with assessment work. This Court pointed out (p. 712) "The net effect of rule 1(f)(iii) (seniority rule) therefore is that three years of outstanding work in Class 11 is equated to two years of probation in Class I service and on consideration of this aspect of the matter the promotee is given seniority over a direct recruit completing the period of probation in the same year." Since at the time of entering Class 1, Grade 11 service the recruitment was from two different sources, there was no question of an infringement of Articles 14 or 16(1); and since the promoters had experience of assessment work at the time of the promotion and the direct recruits had none when they completed their two years probation, it could not be said that the rule giving seniority to the promotees over such direct recruits was invalid. So far as the second contention was concerned this Court tried to ascertain, if in any particular year between 1951 to 1956 there had been promotions from class 11 service in excess of the quota laid down in the rule prescribed in

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Government letter dated October 18, 1951. The quota was relatable to permanent vacancies but the Secretary of the Finance Department Mr. Dutt was not able to enlighten this Court as to the number, of such vacancies in these years though he was able to give the figures of direct recruits and promotees appointed in those several years. In other words, there was no sufficient material before the Court to decide whether or not the appointments of promotees were or were not in excess of the quota of 33-1/3 per cent of permanent vacancies available to promotees. Accordingly the mandamus was issued in the above terms.

The Government understood the mandamus as covering the whole period from 1951 to 1967 the latter being the year in which the mandamus was issued. The seniority list, which is now challenged, covers direct recruits and promotees for the whole of this period. Government felt that the expression used in the mandamus "recruitment for the period 1951 to 1956 and onwards" contained a direction for the preparation of the seniority list not only for the years 1951 to 1956 but also for the succeeding years upto 1967. We are clearly of the view that this Court could not possibly have in mind a seniority list which took in promotees after 1956. The ,quota rule had been specifically noticed by this Court as being for the duration of 5 years in the first instance i.e. to say from 1951 to 1956. The two direct recruits who were before the Court namely Jaisinghani and Joshi had entered the service during this period. Jaisinghani had entered service in 1951 and Joshi had joined set-vice in 1953. Their complaint was that in 1962 and later they had not been considered for promotion to the post of the Assistant Commissioner though they thought they were eligible. Their complaint further was that some of the promotees who could not have found a place in those years had found a place above them and hence their chances of consideration for higher promotion had been postponed. Therefore, it was sufficient for the purpose of giving relief to Jaisinghani,

Joshi and other Officers similarly placed to consider which of the promotees during the period of 1951 to 1956 should be relatively regarded as being senior to them and which who could not be so regarded, That was also the reason why in the petitions before this Court only the promotees for the years 1951 to 1956 had been specifically made parties. It was not, therefore, necessary for the purpose of giving relief to Jaisinghani and Joshi and other direct recruits similarly placed to consider the position of the promotees of 1957 and later years vis-a-vis Jaisinghani and Joshi. It cannot be assumed that this Court made an Order which went far beyond the requirements of the case for the purposes of giving relief to the petitioners-Jaisinghani and Joshi. On a comparison of the relative position of these petitioners with the validly promoted officers for those years it would have been possible to say at once whether in the year 1962 and the succeeding years when promotions opened to the post of the Assistant Commissioners, promotees outside the quota had been considered for promotion ignoring the seniority of the petitioners. Secondly having specifically noted that the quota rule of 662/100 per cent and 331/3 per cent was to be in operation only for 5 years, in the first instance, that is to say upto 1956, it will be wrong to say that this Court could or would perpetuate the quota

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for the years after 1956. It was for the Government under rule 4 of the Income-tax Officers, Class I,, Grade 11 Service Recruitment Rules to determine the method or methods to be employed for the purposes of filling any particular vacancies and the number of candidates to be recruited by each method. It is wrong to assume that this Court would take upon itself to do what the Government is required to do under rule 4. In our view, therefore, the mandamus was really confined to the period between 1951-1956. It is true that the mandamus has also used the expression "and onwards" but the expression does not mean for all years to come. This Court had contemplated the possibility of some excess promotions being made in the years 1951 to 1956 on the basis of figures submitted to it. If there were promotions in any year in excess, of the quota, those promotions were merely invalid for that year but they were not invalid for all time. They could be regularised by being absorbed in the quota for the later years. That is the reason why this Court advisedly used the expression "and onwards" just to enable the Government to push down excess promotions to later years so that these promotions can be absorbed in the lawful quota for those years.

In our opinion, therefore, the true scope of the mandamus is limited to the promotions during the period from 1951 to 1956.

The Government have, however, prepared a seniority list upto 1967 and evidently want to support the promotions to the post of Asstt. Commissioner from 1962 onwards on that basis. In the letter dated 15-7-1968 they purport to have prepared this seniority list on the basis of certain principles. There is no dispute that if these principles are held to be correct, then the seniority list would be above challenged but the seniority list is challenged both by the promotees and the direct recruits for separate reasons and it will be necessary for us to consider those reasons, because those reasons apply not only to the promotees after 1956 but also the promotees from 1951 to 1956. The principles as enumerated in Government letter dated July 15, 1968 are as follows :

- (i) Class 11 Officers promoted to Class 1,

Grade II prior to 1951 have been left undisturbed as the mandamus covers the period 1951 to 1956 onwards.

(ii) There were no promotions to Class 1, Grade 11, made in 1951. The officers promoted to Class 1, Grade 11 in 1952 have either been confirmed as Assistant Commissioners or they have left service. Their seniority as Income-tax Officers Class I therefore, has not been disturbed.

(iii) The list begins with the promotees of 1-1-1952. The names of the 1-1-1952 promotees and the direct recruit-, of 1948 examination have been included only for technical compliance and to show the context. The revision of seniority has actually taken place only in respect of the promotees of 1-1-1953 and subsequent batches.

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(iv) In view of the difficulty in working out the vacancies arising in each year the total number of direct recruits and promotees in each year have been taken into account for the purpose of implementing the quota rule.

(v) Class 11 Officers promoted to Class 1, Grade II have been allowed weightage vide Rule 1 (f) (iii) of the seniority rules. Any excess promotions over the quota in a particular year have been carried forward to the subsequent year and taken against the promotions of that particular year and given weightage accordingly. The excess in that year has similarly been carried forward to the following year and so on.

(vi) The quota for direct recruitment and promotion has been $66\frac{2}{3}$ per cent: $33\frac{1}{3}$ per cent respectively since 1951. The calculations have accordingly been made on this basis.

(vii) As a result of the adjustment, 154 junior-most officiating Income-tax Officers, Class I (promotees) have been $66\frac{2}{3}$ per cent: $33\frac{1}{3}$ per cent respectively since cess has arisen because in 1959-60, 214 Class 11 posts were upgraded to Class I and these were exclusively filled up by promotions from Class II). The names of these officers appear at the bottom of this list. These promotees have not been given any weightage. They will be adjusted against the vacancies falling in the promotion quota in future years. These officers will, however, continue to work as Class I Officers.

Since the whole argument before us was based on the correctness or otherwise of these principles, it will be more convenient to deal with these principles one after another, noting in the appropriate place the several contentions of the parties.

Principle (i) is correct and no possible objection can be raised to it because the mandamus covers only the period from 1951 to 1956 and does not affect promotions made to Class 1, Grade 11 prior to 1951.

Principles (ii) and (iii) deal with promotions made in the years 1951 and 1952. In 1951, there were no promotions to Class I, Grade 11 from Class 11, Grade III. Therefore,

there could be no question of any excess promotions in that year. But, objection is raised to the list pertaining to the year 1952. It is true that the list begins with the promotees of 1-1-1952. Their names and also the names of direct recruits who finish the probation in- that year have been included in the list but this, it is stated, had been done for technical compliance and to show the context. The promotees of 1952, it is stated, have been either confirmed as Assistant Commissioners or have left service and since under the mandamus promotees confirmed as Assistant Commissioners are not to be affected, it is said, their seniority as Income-tax Officer, Class I has not been disturbed. If on an examination of the position of each one of the promotees of 1952 it is found that they have either left service or were confirmed

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as Assistant Commissioners, it may well be that their position cannot be disturbed. But it will not be correct to say that these promotions are not to be taken into consideration at all. The whole object of the mandamus was to ascertain what was the excess promotion in any particular year having regard to the permanent vacancies which occurred in that year. There may or may not be any excess but when preparing the seniority list with a view to see whether there is any excess or not, it would not be a correct answer that even if they are in excess they would not be affected as they are either confined Assistant Commissioners or have left service. If an excess number of promotions is found for the year 1952 that number shall have to be pushed down to the year 1953 and so on, and absorbed in the quota of promotees for the succeeding years. In our opinion, therefore, principles (ii) and (iii) are partially incorrect in so far as they excuse reference to all the promotees of 1952. The promotees of 1952 should be referred to in the seniority list, whether they are affected or not, the object being the ascertainment of excess promotions.

Principle (iv) would require some detailed consideration. It has been consistently represented to this Court by the department that it is impossible for them to give the correct number of permanent vacancies in any particular year. When Jaisinghani's case heard and this Court called upon the department to give the number of vacancies, Mr. R. C. Dutt, who was the Secretary of the Finance Ministry, said in his affidavit that he was not able to work out. In spite of his best endeavours, the number of vacancies arising in any particular year. All that he could do was to furnish a statement however the number of officers recruited either by promotion or direct recruitment in any particular year. It was also represented that these appointments were in substantial compliance with the quota rule. The received quota rule dated October 18, 1951 showed that the Government had decided in consultation with the Union Public Service Commission and in modification of the previous order in this respect dated September 19, 1944 that for a period of 5 years in the first instance, 66 2/3 per cent of the vacancies in Class 1, Grade 11 will be filled by direct recruitment viz. the combined competitive examination and the remaining 33 1/3 per cent by promotion on the basis of select from Grade III Class 11 service. It further provided that any surplus vacancies which could not be filled by promotion for want of suitable candidates were to be added to the quota of vacancies to be filled by direct recruitment. This quota rule is substantially in compliance with rule 4 of the Income-tax Officers, Class 1, Grade I Service Recruitment Rules, 1945 which authorised the Government to determine the

method or methods to be employed for the purpose of filling any particular vacancies or such vacancies as required to be filled in during any particular period or the number of candidates to be recruited by each method. The methods of recruitment have been specifically referred to in the preceding rule 3 of these Rules and they are only two in number. One is to directly recruit the candidates by competitive examination and the other is by promotion on the basis of selection from Grade III.

It will be apparent from the rules referred to above that the percentage of 66-1/3 per cent and 33-1/3 per cent is related to vacancies. That

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was also how it was understood in Jaisinghani's case. This Court directed Mr. Dutt to furnish the number of vacancies which had arisen from year to year. But Mr. Dutt informed the Court that in spite of his best endeavours he could not state what was the number of vacancies arising in any particular year. However, he was able to give the number of appointments made in every year and wanted the Court to accept that that number represented substantially the vacancies which occurred in that year. That was the line of argument also adopted by the Solicitor General who said that on the basis of the figures of appointments given there was a substantial compliance with the quota rule. This Court, however, does not appear to have been satisfied with that line of reasoning. It was observed. "But in the absence of figures, of permanent vacancies in Class 1, Grade 11 for the relevant years the Solicitor General was unable to say to what extent there, had been deviation from the rule." The whole object of asking Mr. Dutt to give the number of vacancies was to find out to what extent there was deviation from the quota rule, that is to say, how many promotees had been appointed in excess of the quota in any particular year. It is, therefore, implicit in the observation quoted above that in order to determine the excess of promotees in any particular year it is necessary for us to ascertain what was the number of vacancies in any particular year. Mr. Tarkunde, for the promotees, agrees that that is the proper construction of the rule and the learned Attorney General for the Union also accepts its correctness. The Attorney General, however, pleads that in spite of the Department's best endeavours it was not possible to determine the exact number of vacancies in any particular year and so he submits that for the purposes of the mandamus, the Court should proceed on the footing that the actual vacancies in any particular year were substantially the same as the number of appointments made in that year.

On the other hand, the contention on behalf of the direct recruits is that the real intention of the rule was to secure that at any given moment the service must consist of direct recruits and promotees in the proportion of 2: 1. If, for example, in any year 50 direct recruits were appointed, then not more than 25 promotees could be appointed in that year. If also no direct recruit was appointed in a year there could be no appointment of promotees. This line of argument has been accepted by the High Court and it was substantially on that ground that the seniority list prepared on 15th July, 1968 has been set aside and directions given for preparing a fresh list. What was, however, over-looked is one. That the rule dated October 18, 1951 was not concerned with the constitution of the cadre but was concerned as to how permanent vacancies were to be filled. Rule 4 of the Income-tax Class 1, Grade 11 Services Recruitment Rules also

refers to recruitment of candidates to vacancies in the service. The vacancies for any particular year being ascertained, not more than 1/3rd of the same were to go to the promotees and the rest to the direct recruits. The ratio was not made dependent on whether any direct recruit was appointed in any particular year or not. We are, therefore, unable to accept the construction put on the quota rule by the High Court. In our opinion, the promotees were entitled to 1/3rd of the vacancies in any particular

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year whether or not there was direct recruitment by competitive examination in that year.

It was, therefore, essential that actual vacancies should be determined in the cadre. Even now before us the Department is putting forward the plea that it is impossible for them to give the exact figure of vacancies in any particular year. We do see that there might be difficulties in ascertaining these figures but it is rather surprising that the department should not be able to determine permanent vacancies which occurred in the years gone by. One can appreciate that it might be difficult to say at any given moment how many vacancies would take place in a future year. Only a tentative estimate could be made and it is on such tentative estimates only that requisitions are made for recruitment by the Union Public Service Commission or by the Departmental Promotion Committee. If there is proper coordination between the several offices and the department and a proper exchange of information between them, it should not be really difficult to decide, say in the year 1968, how many actual vacancies had taken place in the previous years. But we are now concerned with the mandamus and we have to consider whether there has been substantial compliance with the mandamus. The learned Attorney General submits that the figures of appointments in any particular year may be taken as the most reasonable approximation of the actual vacancies in the absence of any material before the Court as to the actual vacancies. Mr. Tarkunde for the promotees, however, contends that he is in a position to give the correct number of vacancies in any particular year on the basis of the figures taken from the record. He has given a chart marked Annexure I at the time of the argument and that chart is styled as 'Vacancies position during the calendar year-1951-1956 on the basis of admitted figures. This chart is principally based on the deposition lists of officers issued by the Commissioners with reference to their charges. The argument of Mr. Tarkunde runs thus: We know the sanctioned strength of Grade 11 Officers at the beginning of any given year. We also know the number of appointments made during the course of that year. Further we know from the deposition lists what was the actual strength of the officers working at the end of the year. From these figures, he contends, it is possible to find out the vacancies in that particular year. For example, take the year 1952, the sanctioned strength of the cadre in the beginning of the year is 217. At the end of the year the working strength is found to be 121. Therefore, this would show that there would be 96 vacancies. But these 96 vacancies have taken place in spite of 51 new appointments made during that year. Therefore, the total vacancies in that year would be 96+51 i.e. 147. Mr. Tarkunde contends that the promotees are entitled to 1/3rd of these vacancies i.e. to say 49 vacancies and since only 49 persons were promoted in 1952 there has been no excess promotion. Thus goes on the chart for other years also. The learned Attorney General has serious objection to this manner of

calculating the actual vacancies and it appears to us that it is not possible to proceed on the figures given in the chart. It will be seen that from 1951 to 1958 the sanctioned strength of the cadre varies between 212 and 248 and if the chart is correct the total vacancies in each of 501

these years varies between 66 and 150. For example in 1951 the sanctioned strength is 212 in the beginning of the year and it is said that during the course of that year there were as many as 150 vacancies. In 1952 the sanctioned strength was 217 and by the end of the year it is supposed that 147 vacancies had occurred in the cadre. It is rather difficult to believe that in a cadre of this kind, there would be such a large proportion of vacancies either by death, retirement, resignation or promotion. Secondly, a serious gap would be noticed if we test the calculations in a slightly different way.

Ignore for the time being the figures given for the sanctioned strength in any particular year and go by the actual working strength from year to year. At the end of 1951 i.e. beginning of 1952 the working strength is 112 in the whole department. In the course of the year 1952, 51 new persons have been appointed. Therefore, at the end of the year 1952 the working strength should be 163. Actually it is 121. This would mean that there were only 42 vacancies in the actual working strength and not 147 as shown in the chart. Similarly in 1953 and 1954 the vacancies worked out would be 19 and 74 respectively instead of 112 and 95. We are not, therefore, satisfied that this chart has given a correct estimate of the figures of vacancies in any particular year.

In the absence of any material which gives us the actual vacancies in a year, we think that in order to implement the mandamus as far as it can possibly be done, it would be reasonable to accept the figures of appointments in those years as substantially representing the actual vacancies. There is also a subsidiary reason why those figures may reasonably be accepted. It is true that the quota rule refers to vacancies but the vacancies are those vacancies which the Government wants to fill. It is the prerogative of the Government, reflected further in Rule 4 referred to above, whether any vacancy may be filled at all or not. Even if there are 100 vacancies in a particular year the Government is not bound to fill all those vacancies. It may fill only 90 of them and no body can insist that the Government shall fill up all the vacancies. Therefore, when the quota rule refers to vacancies it is implicit in the rule that the vacancies are vacancies which the Government wants to fill, whatever may be the actual number of vacancies. The actual appointments are, therefore, in the absence of any evidence to the contrary, the correct measure of the vacancies which the Government wanted to fill. From that point of view also it will be permissible to proceed to the footing that the actual appointments represent the actual vacancies which the Government wanted to fill. For example, if in the year 1953, 53 posts were filled by direct recruits and 38 by promotees the total vacancies sought to be filled would be 91 in which case the promotees would be entitled to 30 vacancies. That is how the Government has proceeded to determine the excess for each year from 1953 to 1957 as shown at Annexure 'N' (p. 26 Vol. I in Civil Appeal No. 2060(N) 1971). In our opinion the procedure adopted by the department in determining the excess number of promotees appointed in the several years is substantially correct. Annexure 'N' begins with the year 1953. It should begin

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with the year 1952 and not 1953. Indeed the 5 year period starts from 1951 and ends with 1956 but since there-, was no promotion in 1951 the question of excess in that year does not arise. For the purposes of the mandamus the seniority list will have to be resettled from the year 1952 showing not merely the excess from the years 1953 to 1956 but from 1952 to 1956. At the end of 1956 the progressive total of the excess over the quota will be known and this excess, as already pointed out, is liable to be absorbed in the quota of the years succeeding 1956.

It is feebly con-tended on behalf of the direct recruits that the quota rule should relate to only vacancies in permanent posts and not temporary posts. This contention is not accepted either by the promotees or the department. There is nothing in the Rule., of 1945 or the quota rule of 1951 which says that the vacancies must be vacancies in permanent Posts. Indeed the vacancies must be permanent vacancies that is to say vacancies which are not for a few days or for a few months or are otherwise adventitious. The whole cadre has consisted of permanent and temporary posts for years. Permanent vacancies are, therefore, likely to take place both in the permanent posts and in the temporary posts. In fact Dutt, in his affidavit filed in Jaisinghani's case had clearly alleged in paras 25 and 26 of the affidavit that all the direct recruits from 1948 onwards were initially appointed against temporary posts and even at the time of the filing of the affidavit i.e. on 31st January, 1967 direct recruits were being appointed against temporary posts. We, therefore, find no sufficient warrant for the contention that the vacancies referred to in the quota rule are vacancies only in under permanent posts.

Principle V is obviously correct. Class If officers promoted to Class 1, Grade 11 have been allowed weightage in accordance with rule 1 (f) (iii) of the seniority Rules. That rule, in effect.. provides that a promote in any particular year not only gets seniority over a direct recruit appointed in that year but also in the two Previous years. Any promotions in excess of the quota have to be carried forward to the subsequent year and taken against the quota of promotions of that particular year and given weightage accordingly. That is how it should go on. That principle is fully available for the period 1951 to 1956, in view of the fact that the quota rule of 18-10-1951 was to be in force for 5 years in the first instance.

What is then the position for the years after 1956?

Does the quota rule apply? It is clear that, by its own force the quota rule will not apply because it was, indeed, to be in force for 5 years. There is no force also in the contention that if this quota rule of 1951 ceases to have effect, then the quota rule of 1944 which laid I down a ratio of 4:1 would automatically revive. As a matter of fact, this 1951 rule had been made in supersession of the void rule as a matter of policy. The old rule being superseded was dead, and could not be revived by the fact that the superseding rule ceases to have operation after a certain number of years. It is an admitted fact that the Government did not prescribe in writing any new quota rule after 1956 but as a matter of practice, it was stated by

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Government the guideline of the quota prescribed was followed even after the expiry of 5 years except in 2 instances once in 1958 and at another time in 1960. In these 2 years in all 214 Grade III posts were upgraded to

Grade 11 posts and an equal number of Grade III officers were appointed to class I by promotion on an ad hoc basis. [See: Annexure J p. 216 in Vol. I of Civil Appeal No. 2060 (N) of 1971. It appears to us that if the Govt. had decided to follow the old quota rule as a guideline that would be perfectly consistent with rule 4 of the Recruitment Rules of 1945 already referred to. We shall deal later with the question of the ad-hoc promotion of 214 vacancies in the years 1959 & 1960. It cannot be doubted that the Govt. was entitled by reason of rule 4 to follow the quota rule of 1951 as a rough guideline without going to the trouble of putting the same on record in so many words. When the rule is followed as a guideline and appointments made, a slight deviation from the quota would not be material. But if there is an enormous deviation, other considerations may arise. In the normal course, therefore, the Govt. would be entitled to prepare the seniority list till the end of 1958 in accordance with the quota rule of 1951.

What is then the position with regard to the seniority list after the year 1958? It appears that for sometime before 1959 Govt. was considering upgrading a large number of class II, Grade III posts to class 1, Grade I posts. Direct recruits who, after probation, started working, in the department had naturally no experience of assessment work. On the other hand, class 11, Grade III officers had at least 3 years experience of assessment work. The department thought that it would be expedient and just to increase the number of class 1, Grade II posts and to appoint to them on selective merit class 11, Grade III officers who had sufficient experience of the assessment. That is how a decision was taken at the end of 1958 to upgrade a number of posts in class 11, Grade III and appoint officers in Grade III in those upgraded posts. On January 16, 1959 Government in the Ministry of Finance wrote to all Commissioners of Income-tax that the President had sanctioned the upgrading to class I of 100 temporary posts of Income-tax officers, Class II. Upgrading of a post involves the transfer of a post from the lower grade to the higher grade and the promotion of one of the incumbents of that post to the upgraded post. If 100 posts are upgraded from class 11 to class 1, class 11 posts will dwindle by 100 posts and class I posts will increase by 100 posts. These extra upgraded posts are then filled by selection of 100 officers of class II. If that is not done, 100 class 11 officers will have no posts in class 11 after 100 posts are upgraded to class 1. Then again a second time on December 9, 1960, Govt. sanctioned further upgrading of 114 posts from class 11 to class 1. These 114 posts consisted of 80 permanent posts and 34 temporary posts. Thus in all between 1959-60 altogether 214 posts were upgraded and filled by promotees. Government's contention was that these promotions had been on an ad hoc basis. All these 214 promotions were not made in 1959-60 only. They were spaced over 3/4 years. But the point is that the cadre of class 1, Grade II as it stood in 1958 enormously increased by this addition of 214 upgraded posts. If

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promotees seniority over direct recruits not only of that year but also of the two previous years. In other words, Mr. Tarkunde's contention is that the quota rule and the seniority rule deserved to be considered independently of each other. That is, however, contrary to the view which had already been taken in Jaisinghani's case and, we do not think that there is sufficient ground for us to take a different view. In our opinion, with the upgrading of a

large number of posts and the appointments to them of promotees, the quota rule collapsed and with that the seniority rule also. The decision to upgrade 100 posts was taken in January, 1959 and the remaining 114 posts in the year 1960. In our opinion the quota rule came to an end on January 16, 1959 when sanction to upgrade 100 temporary posts was given by the President, and with that went the seniority rule.

It would therefore, follow that the seniority list to the extent that it was prepared on the basis of the quota rule dated 18-10-1951 r/w-seniority rule 1(f)(iii) already referred to above would be valid with regard to promotions made upto 15-1-1959 but would not be valid after that date. Indeed it might happen that there was a spill over or excess of promotees promoted before 15-1-1959 but that excess number can be absorbed on a priority basis on or after 16-1-1959.

But if the seniority rule 1 (f) (iii) ceased to be operative from 16-1-1959 how is the inter-se seniority between the direct recruits and the promotees to be fixed thereafter ? Several suggestions were made with a view to persuade us that some fair and just seniority rule may be evolved. One of them was that the quota rule may still hold the field and that those who came in by promotion to the upgraded posts may be ranked lower in seniority to the direct recruit who had finished his probation in that year. A second suggestion was the one put forward by the Government in the letter dated 17-2-1960 to the Union Public Service Commission wherein a package deal was suggested. The seniority list, as it stood, was to go and in its place the seniority rule should be that promoted officers in any calendar year should be senior to the direct recruits appointed that year only. Having made that concession in favour of the direct recruits in response to their demand it was suggested that the quota of departmental promotees should be raised from 33 1/3% to 50%. In other words, here was a package deal whereby every year the appointments should be divided equally between direct recruits and promotion and the promotees being already in the department should be given seniority over the new direct recruits. We do not think that we shall be justified in expressing our opinion as to how inter se seniority is to be fixed after 15-1-1959. Since the old seniority rule has ceased to operate by reason of the infringement of the quota rule it will be for the Government to devise, if necessary in consultation with the Union Public Service Commission, a just and fair seniority rule as between the direct recruits and the promotees for being given effect to from 16-1-1959. It follows, therefore, that the seniority list of 15-7-1968 will have to be set aside and the department will have to prepare a fresh seniority list in the light of the

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observations made in this judgment. Broadly speaking the seniority list from 1951 to 15-1-1959 will be prepared in accordance with the quota rule of 1951 r/w the seniority rule 1(f) (iii). The seniority list from 16-1-1959 will be prepared in accordance with the rule to be freshly made by the Government in that behalf.

In view of the above, principles VI and VII do not survive for further consideration separately.

After the fresh seniority list is made in accordance with the above directions it will be open to any direct recruit or promote to point out to the department that in the selections made to the post of Assistant Commissioner from 1962 onwards, he, being otherwise eligible, was entitled on

account of the new seniority given to him to be considered for promotion to the post of Assistant Commissioner. The department may have to consider his case for promotion on his record as on the date when he ought to have been considered for selection but not so considered. If he is selected, his position will be adjusted in the cadre of the Assistant Commissioners without affecting the promote Assistant Commissioners who had been confirmed prior to 22-2-1967-the date on which the Jaisinghani's case was disposed of by this Court. ,

As already shown these proceeding-, before us arise out of the mandamus issued by this Court in Jaisinghani's case. The seniority list was prepared by the Government in pursuance of the mandamus. We have found that the seniority list is not correct- and will have to be prepared afresh in accordance with the directions and observations made in this judgment. The demand made by the officers for the implementation of the mandamus is still unfulfilled and it can be achieved only after the Government files a proper list of seniority. These proceedings, therefore, will have to be kept pending till such, a, seniority list is prepared and filed in court. The respondents namely the Union of India. the Ministry of Finance and the Central Board of Direct Taxes are therefore directed to prepare a fresh seniority list and file it in Court. It will be appreciated that this dispute regarding seniority is pending before the Court for several years and it is very essential that it should be resolved without further delay. We are, therefore, of the view that the respondents charged with the preparation of the fresh list shall prepare it and file it in court within six months from the date of this order. After the same is filed, liberty to apply is given to the parties to the proceedings.*

S.R.

Case remanded

*See also [1975] 1 S.C.R. 104.

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