

Bishan Sarup Gupta

Vs

Union of India and Others

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Vs

M. C. Joshi and Others

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Vs

Union of India and Others

Shri E. D. Helms And Others

Vs

Shri Mohan Chandra Joshi and Others

Civil Appeal Nos. 2060(N) of 1971 and 67(N), 139 and 393 of 1972

(CJI S. M. Sikri, A. N. Ray, M. H. Beg, D. G. Palekar, I.D. Dua JJ)

16.08.1972

JUDGMENT

PALEKAR, J. -

1. 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 of 1965 and 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 I, 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 Others ([1967] 2 SCR 703 : AIR 1967 SC 1427 : (1967) 2 SCJ 102). For the purposes of the present appeals, we shall set out below the order passed in Jaisinghani's case (supra), (p. 718) :

"We are accordingly of the opinion that promotees from Class II, Grade III to Class I, Grade II 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 Government of India in the Ministry of Finance and (3) Central Board of Revenue to adjust the seniority of the applicant (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."

2. 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 proceedings against the Government in this Court. Thereupon, Government assured this Court that the list would be prepared before the court re-opens after the summer vacation and, accordingly, on July 15, 1968, Government prepared the seniority list and filed the same in court. Objections were filed by officers affected by the list. This Court, however, ruled on November 6, 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.

3. Thereupon two Writ Petitions were filed in the Delhi High Court. Writ Petition No. 196 of 1970, was filed on February 23, 1970, by one Bishan Swarup Gupta - a promotee of 1962. The other one was filed by Mohan Chander Joshi being Writ Petition No. 550 of 1970. Joshi, as already stated, was a direct recruit. In both these petitions the seniority list, dated July 15, 1968, came in for attack for different reasons. The dispute was essentially between the direct recruits to Class I, Grade II of the Service and the promotees to that cadre. The two petitions came before two separate benches. Writ Petition No. 196 of 1970, was dismissed on September 29, 1970, whereas Writ Petition No. 550 of 1970, 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 No. 196 of 1970. From the Order passed in the other Writ Petition namely No. 550 of 1970, the other three appeals have been filed to this Court. Civil Appeal No. 67 of 1972 is filed by the Government, Civil Appeal No. 139 of 1972 is filed by Mohan Chander Joshi and Civil Appeal No. 393 of 1972, is filed by one Helms and four other promotees who were some of the respondents in Writ Petition No. 550 of 1970.

4. In all these appeals the only question for consideration was whether the seniority list prepared on July 15, 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.

5. As we were principally concerned with the mandamus issued in Jaisinghani's case (supra), 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 direction 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 in the official report - *S. G. Jaisinghani v. Union of India and Others* (supra). Jaisinghani was directly recruited to Class I, Grade II 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 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 promotee officers who have been promoted to the cadre of Class I, 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 promotee 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 promotee of 1951 but also to the promotee 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 promotees who were shown as seniors, were not really entitled to that rank and be considered for promotion in preference to the petitioners.

6. 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 Departmental Promotional Committee. At the time of the promotion from Class II, Grade III to Class I, Grade II, the promotees had to put in at least five years of service in Class II, Grade III of which two years were for probation and three 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 I(f)(iii) (seniority rule) therefore is that three years of outstanding work in Class II is equated to two years of probation in Class I service and on consideration of this aspect of this 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 I, Grade II service the recruitment was from two different sources, there was no question of an infringement of Article 14 or 16(1); and since the promotees had experience of assessment work at the time of the promotion and the direct recruits, had none when they completed their two years of 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 II service in excess of the quota laid down in the rule prescribed in Government letter, dated October 18, 1951. The quota was relate-able 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 those 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% of permanent vacancies available to promotees. Accordingly the mandamus was issued in the above terms.

7. 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 up to 1967. We are clearly of the view that this court could not possibly have

in mind a seniority list which took promotees after 1956. The quota rule had been specifically noticed by this Court as being for the duration of five 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 the service in 1951 and Joshi had joined service 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 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 could not be so regarded. That was also the reason why in the petitions in 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 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 of the purposes of giving relief to the petitioners - Jaisinghani and Joshi. On a comparison of the relative position of those 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 66 2/3% and 33 1/3% was to be in operation only for five years in the first instance that is to say up to 1956, it will be wrong to say that this Court could or would perpetuate the quota for the years after 1956. It was for the Government under rule 4 of the Income-tax Officers, Class I, Grade II Service Recruitment Rules to determine the method or methods to be employed for the purpose of filling any particular vacancies and the number of candidates to be recruited by such 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 that 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 the 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 valid for all the 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.

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

9. The Government have, however, prepared a seniority list up to 1967 and evidently want to support the promotion to the post of Assistant Commissioner from 1962 onwards on that basis. In the letter, dated July 15, 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 challenge; 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 II Officers promoted to Class I, 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 I, Grade II, made in 1951. The officers promoted to Class I, Grade II in 1952 have either been confirmed as Assistant Commissioners or they have left service. Their seniority as Income-tax Officer's Class I therefore, has not been disturbed.

(iii) The list begins with the promotes of January 1, 1952. The names of the January 1, 1952, promotes and the direct recruits 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 January 1, 1953 and subsequent batches.

(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 II officers promoted to Class I, 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  $66 \frac{2}{3}\%$  :  $33 \frac{1}{2}\%$  respectively since 1951. The calculations have been 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 found to be in excess of the quota. (This excess has arisen because in 1959-60, 214 Class II posts were upgraded to Class I and these were exclusively filled up by promotions from Class II). The names of those 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. Those 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.

10. 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 I, Grade II prior to 1951.

11. Principles (ii) and (iii) deal with promotions made in the years 1951 and 1952. In 1951, there were no promotions to Class I, Grade II from Class II, 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 January 1, 1952. Their names and also the names of direct recruits who finish the probation in that year 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 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 confirmed 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 insofar 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.

12. 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 (supra), was 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 showing 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 revised 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 five years in the first instance, 66 2/3% of the vacancies in Class I, Grade II will be filled by direct recruitment, viz., the combined competitive examination and the remaining 33 1/3% by promotion on the basis of selection from Grade III, Class II 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 I, Grade II 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.

13. It will be apparent from the rules referred to above that the percentage of 66 2/3% and 33 1/3% is related to vacancies. That was also how it was understood in Jaisinghani's case (supra). 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 I, Grade II 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.

14. 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 the 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 July 15, 1968, has been set aside directions given for preparing a fresh one. What was however, over-looked is 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 I, Grade II 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 one-third 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 one-third of the vacancies in any particular year whether or not there was direct recruitment by competitive examination in that year.

15. 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 co-ordination between the several officers 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 1951-56 (on the basis of admitted figures)". This chart is principally based on the deposition list 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 II 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 one-third 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 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 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.

16. 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.

17. 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 on 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 of 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 with the year 1952 and not 1953. Indeed the five year period starts from 1951 and ends with 1956 but since there was no promotion in 1951 the question of excess in the year does not arise. For the purposes of the mandamus the seniority list will have to be re-settled 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.

18. It is feebly contended 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 Rules 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 Mr. Dutt, in his affidavit filed in Jaisinghani's case (supra), 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 January 31, 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 the permanent posts.

19. Principle V is obviously correct. Class II officers promoted to Class I, Grade II have been allowed weightage in accordance with Rule 1(f)(iii) of the Seniority Rules. That rule, in effect, provides that a promotee 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 October 18, 1951, was to be in force for five years in the first instance.

20. 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 five 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 down a ratio 4 : 1 would automatically revive. As a matter of fact, this 1951 rule had been made in supersession of the old 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 Government the guideline of the quota prescribed was followed even after the expiry of five years except in two instances once in 1959, and at another time in 1960. In these two years in all 214 Grade III posts were upgraded to Grade II posts and an equal number of Grade III officers were appointed to Class I by promotion on an ad hoc basis. (See : Annexure J, page 216 in Vol. I of Civil Appeal No. 2060(N) of 1971). It appears to us that if the Government 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 and 1960. It cannot be doubted that the Government 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 Government would be entitled to prepare the seniority list till the end of 1958, in accordance with the quota rule of 1951.

21. What is then the position with regard to the seniority list after the year 1958 ? It appears that for sometime before 1959 Government was considering upgrading a large number of Class II, Grade III posts to Class I, Grade II posts. Direct recruits who, after probation, started working in the department had naturally no experience of assessment work. On the other hand, Class II, Grade III officers had at least three years experience of assessment work. The department thought that it would be expedient and just to increase the number of Class I, Grade II posts and to appoint to them on selective merit Class II, 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 II, 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 II to Class I, Class II 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 II officers will have no posts in Class II after 100 posts are upgraded to Class I. Then again a second time on December 9, 1960, Government sanctioned further upgrading of 114 posts from Class II to Class I. 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 four years. But the point is that the cadre of Class I, Grade II as it stood in 1958 enormously increased by this addition of 214 upgraded posts. If the same seniority rule applied to three promotees filling the upgraded posts, then they would not only be senior to the direct recruits appointed in those years but also to those appointed in the previous two years. Two contentions were put forward on behalf of the direct recruits. One was that by the upgrading of the posts 214 new vacancies were created in Class I, Grade II and these vacancies must be filled in accordance with the quota rule, i.e., to say two-third of these vacancies must go to the direct recruits and one-third to promotees. Since, however, all these upgraded posts are filled by promotions, excess appointments to the extent of two-third would be invalid. The second contention was that the seniority rule had collapsed by a colossal departure from the quota rule. In Jaisinghani's case (supra) it was pointed out by this Court at p. 718 that "the quota rule was linked up with the seniority rule and unless the quota rule is strictly observed in practice it will be difficult to uphold that the seniority rule i.e., Rule 1(f)(iii) and (iv) is not unreasonable and does not offend Article 16 of the Constitution". It was contended that Class I, Grade II was now flooded by an enormously large number of promotees and, therefore, with the breakdown of the quota rule there was a breakdown in the seniority rule itself.

22. So far as the first contention referred to above is concerned, there is no substance. There was no quota rule as such in existence in 1959. Only the old quota rule of 1951 was being followed as a guideline. Rule 4 of the Recruitment Rules, 1945, permitted Government to determine the method

to be employed for the purpose of filling any particular vacancies and the number of candidates to be recruited by each of the two methods described in Rule 3. So if the Government takes a decision that 214 posts must be upgraded to Class I and all these upgraded posts must be filled by promotees from Class II which is one of the two methods described in Rule 3 of the Recruitment Rules, there can possibly be no objection. Rule 4 permitted the Government to fill the vacancies either by direct recruitment or by promotion or both. Therefore, it cannot be contended that these 214 upgraded posts must be divided between the direct recruits and promotees in the ratio of 2 : 1.

23. But there is considerable substance in the second contention on behalf of the direct results. This court in Jaisinghani's case (supra) has clearly expressed that the quota rule was linked with the seniority rule and If the quota rule was not strictly adhered to it would be difficult to uphold the seniority rule as reasonable. It was contended by Mr. Tarkunde that the basis of giving seniority to the promotees over those who were recruited in any particular year or in the previous two years was based upon a reasonable ground viz. that, whereas the promotee was conversant with the assessment work those direct recruits to whom he was considered senior had hardly any knowledge of assessment work. Then again it was not the case that these 214 Class II officers were just moved up to Class I on the upgrading of the posts. The cadre of Class II posts was a large one and from this cadre, 214 II officers were selected in the course of three or four years. All of them were selected on merit and there is no dispute that this was so. In these circumstances, Mr. Tarkunde for the promotees, contends that it would be reasonable to give all these promotees seniority over direct recruits not only 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 deserve to be considered independently of each other. That is, however, contrary to the view which had already been taken in Jaisinghani's case (supra) 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 remaining 114 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.

24. It would, therefore, follow that the seniority list to the extent that it was prepared on the basis of the quota rule, dated October 18, 1951 read with Seniority Rule 1(f)(iii) already referred to above would be valid with regard to promotions made up to January 15, 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 January 15, 1959 but that excess number can be absorbed on a priority basis on or after January 16, 1959.

25. But if the Seniority Rule 1(f)(iii) ceased to be operative from January 16, 1959 how is the inter se seniority between the direct recruits and the promotees to be fixed therein ? Several suggestions were made with a view to persuade us that some fair and just seniority rule may evolve. 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 February 17, 1960, to the Union Public Service Commission wherein 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 promotees 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 January 15, 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 January 16, 1959. It follows, therefore, that the seniority list of July 15, 1968 will have to be set aside and the department will have to prepare a fresh seniority list in the light of the observations made in this judgment. Broadly speaking the seniority list from 1951 to January 15, 1959 will be prepared in accordance with the quota rule of 1951, read with Seniority Rule 1(f)(iii). The seniority list from January 16, 1959 will be prepared in accordance with the rule to be freshly made by the Government in that behalf.

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

27. After the fresh seniority list is made in accordance with the above directions it will be open to any direct recruit or promotee 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 promotee Assistant commissioners who had been confirmed prior to February 22, 1967 - the date on which the Jaisinghani's case (supra) was disposed of by this Court.

28. As already shown these proceedings before us arise out of the mandamus issued by this Court in Jaisinghani's case (supra). 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. Those 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.

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