

Union of India and Others

Vs

Majji Jangamayya and Others

Civil Appeal No. 1837 of 1974

(CJI A.N. Ray, M.H. Beg, P.N. Shinghal JJ)

05.11.1976

JUDGMENT

RAY, C.J. –

1. The principal question in these appeals is whether the selection list for promotion of Income Tax Officer Class I Service to the post of Assistant Commissioners of Income Tax is correct or not.
2. The selection list was prepared by the Departmental Promotion Committee on July 23, 24 and 25, 1974.
3. It may be stated here that on August 16, 1972 this Court set aside the seniority list which had been impugned in Civil Appeal 2060(N) of 1971 and gave directions on which the seniority list was to be prepared. (See *Bishan Sarup Gupta v. Union of India* [1975 Supp SCR 491 : (1973) 3 SCC 1 : 1973 SCC (L & S) 1].)
4. This selection list was prepared on the basis of the seniority list approved by this Court on April 16, 1974 in *Bishan Sarup Gupta v. Union of India* [(1975) 1 SCR 104 : (1975) 3 SCC 116 : 1974 SCC (L & S) 506].
5. The basis of the preparation of the selection list is the field of choice. The principles for promotion to selection posts are set out in a memorandum dated May 16, 1957 issued by the Central Board of Revenue. The principles are these : First, greater emphasis should be placed on merit as criterion for promotion. Appointments to selection posts and selection grades should be made on the basis of merit having regard to seniority only to the extent indicated there. Second, the Departmental Promotion Committee or other selection authority should first decide the field of choice, namely, the number of eligible officers awaiting promotion who should be considered for inclusion in the selection list provided, however, that an officer of outstanding merit may be included in the list of eligible persons even if he is outside the normal field of choice. Third, the field of choice wherever possible should extend to five or six times the number of vacancies expected within a year. Fourth, from among such officers those who are considered unfit for promotion should be excluded. The remaining officers should be classified as "outstanding", "very good", and "good" on the basis of merit as determined by their respective records of service. The selection list should then be prepared by placing the names in the order of these three categories without disturbing the seniority inter se within each category. Fifth, promotions should strictly be made from the selection list in the order in which their names are finally arranged. The selection list should be periodically reviewed. The names of those officers who have already been promoted otherwise than on a local or purely temporary basis and continue to officiate should be removed from the list and the rest of the names

along with others who may now be included in the field of choice should be considered for the selection list for the subsequent period.

6. Several persons, mainly promotees from Class II to Class I as Income Tax Officers challenged in writ petitions filed before several High Courts the correctness of the field of choice so determined by the Departmental Promotion Committee hereinafter referred to as the Committee on the basis of which the said selection list was prepared. The Gujarat and the Andhra Pradesh High Courts delivered judgments. The other High Courts gave interim orders staying the operation of the selection list. There are two appeals by social leave from the judgments of the Gujarat and the Andhra Pradesh High Courts. There are also appeals by special leave from the interim orders of the High Courts because the questions involved are the same.

7. There were 112 vacancies of Assistant Commissioners. The Government of India sent 336 names in the running order of seniority for consideration of the field of choice. Out of those 336 names the committee took 276 names in the running order of seniority.

8. The principal question for consideration is whether the field of choice determined by the committee on the basis of which the committee prepared the selection list is correct or not.

9. The Gujarat High Court held that the requirement of 10 years' experience as Income Tax Officer for Promotion to the post of Assistant Commissioner as laid down in the Government of India letter C. 33(17) Admn., I.T./49 dated January 16, 1950 prevailed while the committee determined the field of choice and this requirement was violated because the committee considered persons with 8 years' experience for the field of choice. The High Court further held that even if the requirement of 10 years' experience was not a statutory rule the requirement was to be complied with in determining the field of choice unless people with such experience were not available in the seniority list of Class I Income Tax Officers. What the High Court said was that if such people with 10 years' experience were available in the seniority list only such people should be considered in the field of choice ignoring those in the seniority list who are senior to such persons but have less than 10 years' experience as Income Tax Officers. The second reason given by the High Court for holding the selection list to be incorrect is that under that letter dated May 16, 1957 the field of choice would have been 5 times the number of vacancies whereas the actual field of choice contained a much lesser number. The third ground given by the High Court for holding the selection list to be incorrect is that in the field of choice the committee did not properly evaluate the merit of persons in the field of choice. The selection of persons in the selection list was to be selection on merit only and not seniority cum merit. The fourth reason given by the High Courts is that the date for determining the eligibility of officers for promotions to the post Assistant Commissioner of Income Tax should be decided by the committee by bearing in mind the two dates, namely, December 21, 1972 when this Court permitted provisional promotions and November 29, 1973 when Government made the second batch of ad hoc promotions, as the two terminals.

10. The principal contentions on behalf of the respondents are these. First, promotions from amongst Income Tax Officers Class I Service to the post of Assistant Commissioner of Income Tax have to be made solely on the basis of merit. The respondents relied on Rule 18 of Chapter II(c) Section 1 Volume II of the Office Manual in support of their contention. Broadly stated Rule 18 is that the promotion shall be strictly on merit and further that no one should ordinarily be considered for promotion unless he has completed at least 10 years' service as Income Tax Officer. The respondents amplified their contention to mean that promotion to a selection post is to be made solely on the basis of merit and not on the basis of seniority cum merit.

11. The second contention of the respondents is that only such of the Income Tax Officers in Class I Service who had put in at least 10 years' service as Income tax Officers are eligible for being considered for promotion to the post of Assistant Commissioners. This contention is also based on Rule 18 and according to the respondents Rule 18 means that the condition precedent for eligibility to be considered for promotion to the post of Assistant Commissioner is that an Income Tax Officer in Class I Service must have put in at least 10 years' service as Income Tax Officer.

12. The respondents further contended that Rule 18 was framed on January 16, 1950 and the letter dated July 21, 1950 addressed by the Central Board of Revenue to all Commissioners of Income Tax shows that the Government of India framed the rule with the approval of the Union Public Service Commission and the Ministry of Home Affairs. The government case is that the rule was abrogated. The respondents' answer to the government contention is that the entire correspondence relied on by the Government shows that the Ministry of Finance wanted to frame new rules of seniority. The respondents also contend that the Ministry of Home Affairs gave approval to the framing of new rules of seniority but gave no direction with regard to the rule relating to the recruitment except stating that the said rule might be appropriately included in the relevant recruitment rules. Therefore the respondents contend that the recruitment rule regarding 10 years' experience continued whereas the seniority rule stood modified in terms of the letter of M. G. Thomas dated April 4, 1964. The respondents also rely on the affidavit dated March 8, 1968 filed by M. G. Thomas in the Gujarat High Court in application 1365 of 1965, and affidavit of M. G. Thomas dated May 21, 1970 filed in the Delhi High Court in Writ Petition 196 of 1970, an affidavit of the respondents dated August 5, 1974 filed in the Gujarat High Court in support of the contention that the rule relating to 10 years' service was in force at least from May 21, 1970. The respondents further contend that promotions to the post of Assistant Commissioners in the year 1964 and 1970 show that all promotees except 2 had completed at least 10 years' service before being selected for promotion. Even with regard to those two promotees the respondents submitted that both of them joined on October 24, 1960 but they had been selected along with others in May 1960. Therefore, those two officers were promoted along with their batch mates of May, 1960.

13. The third contention of the respondents is that Rule 18 has the force of law. It is said that under Section 241 of the Government of India Act, 1935 the Government was empowered to make rules. Pursuant to that power the Government of India made the rule. The letters dated January 16, 1950 and July 21, 1950 written by the Government to the Commissioners of Income Tax referring to Rule 18 were relied on by the respondents in support of their contention. In the alternative, the respondents contended that the decision of the Government contained in the letter dated January 16, 1950 was made by the Government of India in exercise of executive powers under Section 8 of the Government of India Act, 1935 read with Item 8 of List I of the Seventh Schedule. This order which had the backing of law was an existing law within the meaning of clause (10) of Article 366 of the Constitution. In the further alternative the respondents contended that the rule contained in the letter dated January 16, 1950 was incorporated in the office manual issued by the Government of India in exercise of its executive power under Article 53 of the Constitution and therefore these instructions have the force of law. It is also said by the respondents that the rule which effects promotions of the persons constitutes the conditions of service.

14. The fourth contention on the part of the respondents is that the use of the word "ordinarily" in Rule 18 imposes an obligation on the Union Government not to consider and Income Tax Officer Class I who has not completed at least 10 years' service as Income Tax Officer for promotions as Assistant Commissioner unless there are extraordinary circumstances. It is said that the word "ordinarily" does not vest in the Government unfettered condition to follow or not to follow the

rule. It is also said that the use of the word "at least 10 years' service" shows that the word "ordinarily" has been used to enable the Government to consider such of the Income Tax Officers who have put in more than 10 years' service. The respondents also contend that the Government proceeded on the basis that the rule relating to 10 years' service did not exist after April 1964, and, therefore, it cannot be said that the Government departed from Rule 18 because of extraordinary circumstances.

15. The fifth contention is that the selection has been made in complete violation of the rule framed by the Government of India for promotion to selection post as contained in the office memorandum of the Ministry of Home Affairs dated May 16, 1957. This contention is expanded by submitting that the list should have contained names of at least 5 or 6 times the number of vacancies existing within a year and in view of the fact that there were 112 existing and 10 anticipated vacancies the Government of India should have sent to the committee names of at least 560 officers. The committee should then have removed such names which were unfit for promotion and thereafter have classified the rest as outstanding, very good, and good on the basis of merit. The respondents contend that the Government sent only 336 names for consideration when the vacancies were more than 120 and the Government also ignored the rule of 10 years' experience. It is also said that the committee ignored the names of 59 officers from consideration and classified only 144 officers out of the remaining 277 and prepared the list of 122 out of 144 officers. The respondents further contend that though respondents 2 and 3 in Civil Appeal 2041 of 1974, namely, R. K. Desai and B. Srinivasan completed 10 years' experience they were not included within the field of choice as officers senior to them had not completed 8 years of service as Income Tax Officers. Therefore, Rule 18 was violated.

16. The sixth contention of the respondents is that the entire selection was arbitrary and in violation of Article 16 of the Constitution. It is said that if the rule requiring 10 years' experience had been followed only such of the persons who had put in 10 years' service would have been in the field for selection. It is said that the Government included Income Tax Officers who were direct recruits and who had put in less than 8 years' service in the list but excluded promotee Income Tax Officers who had put in more than 8 years' service as Income Tax Officers. It is further said by the respondents that out of 122 persons selected 111 are direct recruits and only 11 are promotees. Reference was made to the juniormost person in the selection list Madan Mohan Joshi. It is said that Madan Mohan Joshi was appointed as Income Tax Officer Class I on July 5, 1965, and, therefore, he completed 9 years' service at the time of selection. The last person considered by the committee is a direct recruit Rajeshwar Rao Gautam who was appointed on July 8, 1966. Again, it is said that from amongst the promotees Raghubir Singh the promotee who joined Class I Service on May 1, 1964 and had more than 10 years' service was not placed in the field of choice. The respondents, therefore, contend that promotee officers who had put in more than 8 years' service as Income Tax officers were not included in the field of choice whereas direct recruits who had not completed 8 years' service were included in the field of choice.

17. The seventh contention of the respondents is that the eligibility of Income Tax Officers for the purpose of promotion to the post of Assistant Commissioner should be considered either as on December 21, 1972 or March 21, 1973 or November 29, 1973. In support of that contention it is said that when the Government of India made an application for filling up certain posts this Court by order dated December 21, 1972 permitted the Government to fill in the posts on ad hoc basis from amongst the eligible officers on the basis of continuous length of service in Class I. Accordingly, by orders dated March 21, 1973 and November 29, 1973, 59 and 48 officers respectively were promoted on ad hoc basis. These officers were to be replaced by regular selection.

The seniority list was confirmed by this Court by judgment dated April 16, 1974. The respondents, therefore, contend that the committee had to regularise the aforesaid 107 promotions, and the regularization had necessarily to be done from the dates of original promotions on ad hoc basis. It is said in this context that the eligibility of officers for the purpose of promotion must be considered either on December 21, 1972 or on March 21, 1973 or on November 29, 1973. The respondents also submit that the eligibility has reference to the date of vacancy and therefore only such of the persons who had the qualified service on the date of vacancy ought to be considered by the committee. Reliance was placed on the observations of this Court in Bishan Sarup Gupta's case [1975 Supp SCR 491, 506 : (1973) 3 SCC 1 : 1973 SCC (L & S) 1] that after the finalisation of the seniority list the department should consider the cases of all eligible officers for promotion on the basis of their records as on the date when they ought to have been considered for selection but who were not so considered.

18. The first question for consideration is whether the rule of 10 years' experience was modified to 8 years' experience. The correspondence between the Central Government and the Union Public Service Commission between January 30, 1963 and June 26, 1969 shows that the principal for promotion as Assistant Commissioner is that no Income Tax Officer should ordinarily be considered unless he has completed 8 years' service as Income Tax Officer. The proposal for this change from 10 years to 8 years emanated from the Finance Ministry. The Home Ministry stated that the rule does not strictly relate to the seniority rules in respect of Assistant Commissioners of Income Tax and should thus be included in the relevant Recruitment Rules, that is, rules for selection for the post of Assistant Commissioner of Income Tax. The Union Public Service Commission as will appear from the letter dated May 31, 1963 agreed subject to a proposed modification regarding the seniority of Assistant Commissioners of Income Tax. It thus appears that the Finance Ministry, the Home Ministry and the Union Public Service Commission concurred with the change from the requirement of experience for 10 years to that of 8 years. The requirement of 10 years' experience as laid down in the letter dated January 16, 1950 and the office manual published in 1955 thus came to be modified. The only thing which is to be noticed is that no rules under Article 309 were made. The change from 10 years to 8 years' experience was recorded by means of correspondence as an administrative instruction. It is explicable that the letter dated January 16, 1950 as well as the office manual published in 1955 was an administrative instruction.

19. The change from 10 years to 8 years' experience was not only given effect to in the field of the choice but also recognized in the committee meetings of September 1968, April/May 1970 and February 1972. In September 1968, 16 persons were over 9 years' experience but less than 10 years' experience. None of these persons was however selected to be placed on the selection list. In April/May 1970, 14 persons were over 9 years' experience but less than 10 years' experience, and 24 persons were over 8 years' experience only. Out of those only 7 who were all over 9 years' experience were selected to be placed in the selection list. In 1972 the committee considered 25 persons over 9 years' experience but less than 10 years in experience, and 27 persons over 8 years' experience. Out of these only 10 persons who were all over 9 years' experience were selected to be placed in the selection list.

20. In the committee meeting of July, 1974 the selection list prepared did not have any person except 4 emergency commissioned officers who had less than 9 years' experience. The last person in the seniority list selected was M. M. Joshi was bearing no. 967 in the seniority list.

21. Eight years' experience as a working rule for promotion was publicly announced by the minister in Parliament on June 11, 1971. It is rightly said by the Attorney General that administrative

instructions are allowed as a guideline on the basis of executive policy. It is not necessary to put the same on record in so many words. In *Bishan Sarup Gupta v. Union of India* [1975 Supp SCR 491 : (1973) 3 SCC 1 : 1973 SCC (L & S) 1] when the quota rule which was statutory ceased to have statutory effect after 5 years but the Government followed the principles as a guideline it was upheld by this Court in the application of the principle from 1957 to January 15, 1959. In the present case the requirement of 8 years was not only followed as a guideline in practice but was also recorded in the correspondence between the Finance and the Home Ministries.

22. The High Court said that the requirement of 8 years' experience was to be included in the appropriate recruitment rules and until that was done the High Court held that 10 years' experience held the field. The High Court failed to consider the true effect of the correspondence between the Finance and the Home Ministries and the Union Public Service Commission. The Ministry of Finance by its letter dated January 30, 1963 stated that the condition of 8 years' service for promotion was proposed to be retained. The Home Ministry by its letter dated February 20, 1963 pointed out that the requirement of 8 years' experience for promotion did not strictly relating to seniority rules relating to Assistant Commissioners of Income Tax and should be delinked from such rules and should be appropriately included in the relevant recruitment rules. Thus the Home Ministry and the Union Public Service Commission agreed in principle to the requirement of 8 years' experience and the Finance Ministry in practice changed the requirement of 10 years' to 8 years' experience. The letter of the Finance Ministry proposing the retention of the requirement of 8 years' experience was only Grade I. The minimum experience in Grade I proposed by the Board was approved by the Secretary as well as the Minister.

23. The High Court referred to the affidavits filed by M. G. Thomas in other proceedings. In one of the affidavits affirmed by Thomas on March 8, 1968 and referred to by the High Court in Special Civil Application 1365 of 1965 in the Gujarat High Court in paragraph 5 thereof Thomas said as follows :

The Departmental Promotion Committee which met sometime in August, 1949 recommended that no officer should be promoted as Assistant Commissioner of Income Tax until he had worked for not less than 10 years as Income Tax Officer. The Government of India agreed with the recommendation of the Departmental Promotion Committee that it was necessary in the interest of the efficiency that the Assistant Commissioner of Income Tax should at least have 10 years of service as Income Tax Officer so that for the post of Assistant Commissioner of Income Tax matured and seasoned officer may be obtained. For arriving at the decision, the Government of India was also influenced by the recommendation of Income Tax Investigations Commission.

The High Court also referred to paragraph 9 in the said affidavit of Thomas where he said as follows :

It can thus be seen that the seniority rules for Assistant Commissioner of Income Tax were mainly framed due to the situation created by the introduction of Income Tax Service Class I on an all-India basis and the requirement of a minimum period of 10 years of service (later on reduced to 8 years' service) as a requisite condition for promotion - this requirement of minimum service - resulted in a senior Income Tax Officer who had not completed the required length of service being passed over by a junior Income Tax Officer, who had completed the required service. To safeguard the

interest of such senior Income Tax Officer Rule 1(iii)(b) meaning thereby 10 years' rule was introduced which enabled the senior officers to regain their seniority on subsequent promotion.

24. The High Court also referred to the affidavits of Thomas in Civil Writ Petition 196 of 1970 in the Delhi High Court. M. G. Thomas was an Under Secretary in the Ministry of Finance in 1964. In the affidavit affirmed by Thomas in Writ Petition 196 of 1970 in the Delhi High Court he dealt with paragraph 39 of the petition of Bishan Sarup Gupta where it was said that paragraph 18, of Section 1, Volume 1 of the Office Manual clause (b) mentioned about the eligibility of 10 years of minimum service before an Income Tax Officer would be considered for promotion to the post of Assistant Commissioner. The High Court said that Thomas in his affidavit in reply had admitted the said statements and concluded that if 8 years' rule had been introduced Thomas would not have missed to mention the same in his affidavit.

25. The High Court also referred to two features. First, that it was not a proposal of a new rule of 8 years in place of existing rule of 10 years; secondly, it was an assumption that the existing rule prescribed the minimum period of 8 years' service. The High Court further referred to the Delhi High Court proceedings in Writ Petition 196 of 1970 where counsel for the Union said that the Government excepts new rules to be framed under Article 309 to limit the field of choice to those who had 8 years' service to their credit as Income tax Officers. The High Court read this argument of counsel for the Union in the High Court to concede that no change in the rule of 10 years' service as Income Tax Officer was made so as to reduce the period from 10 years to 8 years.

26. The Central Board of Revenue as appears in No. F. 1/19/60-Ad. II at a meeting on May 2, 1959 approved the idea of laying down the minimum period of service uniformly for the three wings of the Central Board of Revenue for purposes of determining the eligibility of officers for promotion. It was decided that before an officer was promoted to a higher post he must have put in a period of minimum service as follows. For promotion to Deputy Collector/Assistant Commissioner (Grade Rs. 1000-1400) - minimum service prescribed was 8 years' service in Class I posts. For promotion to Collector (Grade Rs. 1300-1600) - the minimum service prescribed was 12 years in Class I post out of which at least two years should be in the grade of Deputy Collector. For promotion to the post of Collector (Grade 1600-1800) - minimum service prescribed was 14 years in Class I posts provided that for promotion as Collector of Central Excise (scale Rs. 1600-1800) the officer should have worked at least two years in the scale of Rs. 1300-1600. For promotion to Collector Grade I/Commissioner Grade I (scale Rs. 1800-2000) the minimum service prescribed was 16 years in Class I posts. For promotion to selection grade posts of Collectors/Commissioners the minimum service prescribed was 20 years in Class I posts.

27. The Secretary in the note mentioned that he would prefer the alternative of keeping the rule and relaxing it in suitable cases. This note of the Secretary shows that he preferred the retention of the rule in the other 4 grades, namely, Collector Grade Rs. 1300-1600, Collector Grade Rs. 1600-1800, Collector Grade I/Commissioner Grade I Grade Rs. 1800-2000 and selection grade posts of Collectors/Commissioners. That is apparent from the fact that the Board suggested the retention of minimum service in Grade I (Assistant Commissioners) but not in the other four grades including the selection grade. The minister preferred the deletion of the rule about selection grade. Thus the minimum experience in Grade I proposed by the Board was approved by the Secretary as well as the minister.

28. The minutes of the meeting of the Central Board of Revenue of October 22, 1960 show that the

Board of Revenue decided that the minimum service of 8 years in Class I Service may be prescribed in the case of Deputy Collectors/Assistant Commissioners (Grade Rs. 1100-1400).

29. The affidavit evidence of Thomas shows that the minimum period of 10 years was later reduced to 8 years. The affidavit does not show that the requirement of 10 years' service was maintained. In the Delhi High Court proceedings Bishan Sarup Gupta in his petition made reference to certain administrative instructions. Thomas in answer to those paragraphs did not have any occasion to say anything otherwise. Further, counsel for the Union in the Delhi High Court merely stated that the Government was expecting rules to be framed under Article 309. This does not mean that the requirement of 8 years' experience as an administrative practice did not prevail. The High Court was in error in treating the affidavit evidence of Thomas in other proceedings as a statement of fact that 8 years' rule had not been introduced. This affidavit evidence in other proceedings is torn out of context and is misread by the High Court without going into the question as to whether such affidavit evidence is admissible in evidence. It is apparent that the entire affidavit evidence as well as the submission on behalf of the Union is that the requirement of 10 years' experience be replaced by 8 years. Administrative practice as indicated in the Departmental Promotion Committee meetings and the minister's statement in Parliament supported that contention of the Union. It is the question of construction of correspondence as to whether 10 years' rule was replaced by 8 years' rule. The fact that no rules under Article 309 were framed does not detract from the position that the previous administrative instruction of 10 years' experience was modified to 8 years' experience.

30. It was suggested on behalf of the respondents that the various affidavits and documents asserted that the requirement of 10 years' experience had been abrogated and it was not open to the Government to take the stand that the requirement of 10 years' rule was modified or changed. This contention is without any substance because the consistent position on behalf of the Union has always been that the requirement of 10 years' experience was modified to 8 years and the Gujarat High Court considered the question whether 10 years' experience was abrogated or modified.

31. The second question is whether the requirement of 10 years' experience was a statutory rule. The High Court held that the requirement of 10 years' experience is not a statutory rule. Counsel for the respondents contended that the requirement of 10 years' experience is statutory because the letter dated January 16, 1950 is by the Government of India and the Government of India has authority to frame rules and one of the letters dated July 21, 1950 referred to it as a formal rule. The contention is erroneous because there is a distinction between statutory orders and administrative instructions of the Government. This Court has held that in the absence of statutory rules executive orders or administrative instructions may be made. (See Commissioner of Income Tax, Gujarat v. A. Raman & Company [(1968) 1 SCR 10 : AIR 1968 SC 49 : 67 ITR 11].)

32. The letter dated January 16, 1950 written by an Under Secretary in the Ministry of Finance does not prove that the requirement of 10 years' experience for promotion to the post of Assistant Commissioner was a rule made by the Governor General or any person authorised by him under Section 241(2) of the Government of India Act, 1935. Furthermore, there is no basis for any authentication under Section 17 of the 1935 Act in the letter on January 16, 1950. In the preface of the manual published in 1955 it is specifically stated that Volume I of the manual contains statutory rules and Volume II contains administrative instructions. The requirement of 10 years' experience is in Volume II of the manual.

33. In S. G. Jaisinghani v. Union of India [(1967) 2 SCR 703 : AIR 1967 SC 1427 : 65 ITR 34] it is stated at pp. 717-718 that the quota fixed by the Government in its letter dated October 18, 1951

must be deemed to be fixed in exercise of the statutory power under Rule 4 of the Requirement Rules. There is no such statutory rule under which the letter of January 16, 1950 was written.

34. Counsel on behalf of the respondents contended that the requirement of 10 years' experience laid down in the letter dated January 16, 1950 had the force of law because of Article 313. Article 313 does not change the legal character of a document. Article 313 refers to laws in force which mean statutory laws. An administrative instruction or order is not a statutory rule. The administrative instructions can be changed by the Government by reason of Article 73(1)(a) itself.

35. The High Court said that even if the requirement of 10 years' service is not statutory, it is binding on the Government and is a condition of service. Counsel for the respondents contended that the word "ordinarily" in the rule imposes an obligation on the Government not to consider any Income Tax Officer with less than 10 years' experience for promotion except in extraordinary circumstances. The requirement of 10 years' experience on the face of it confers a discretion on the authorities to consider Income Tax Officers if according to the authorities the circumstances so require. What the circumstances are or should be are left entirely to the decision of the authorities. The Central Board of Revenue by a letter dated July 21, 1950 a few months after the letter dated January 16, 1950 which spoke of 10 years' experience stated that the insistence on a minimum period of experience cannot be regarded as affecting the conditions of service. In the letter dated July 21, 1950 it was said that the requirement as to 10 years' experience is sufficiently elastic and all Income Tax Officers with more than 9 years' experience could be considered for promotion. The letter dated July 21, 1950 was referred to by this Court in *Union of India v. Vasant Jayaram Karnik* [(1970) 3 SCC 658]. It appears in that case that in November, 1951 the case of officers who had completed 9 years' gazetted service were considered and the committee further decided to consider for promotion in the near future officers who had completed 8 years of service before December 31, 1951. In 1953 officers who had completed 8 years' service were considered for promotion.

36. The expression "ordinarily" in the requirement of 10 years' experience shows that there can be a deviation from the requirement and such deviation can be justified by reasons. Administrative instructions if not carried into effect for good reasons cannot confer a right. (See *P. C. Sethi v. Union of India* [(1975) 3 SCR 201 : (1975) 4 SCC 67 : 1975 SCC (L & S) 203].) The requirement of 10 years' experience cannot be considered by itself. It is to be read along with administrative instructions on May 16, 1957. The reason is that the requirement 10 years' experience is for being considered for promotion. In a paragraph 2 of the letter of May 16, 1957 containing the said instructions it is said that the committee should first decide the field of choice, namely, the number of eligible officers awaiting promotion who should be considered to be included in the seniority list provided that an officer of outstanding merit may be included in the list even if he is outside the normal list.

37. For the foregoing reasons our conclusions are these : First 10 years' experience was modified to 8 years' experience. Second there was no statutory rule requiring 10 years' experience. Third the facts and the circumstances merited the exercise of discretion which was bona fide exercised by determining the field the choice. Fourth there was no deviation from 10 years' experience because of the modification to 8 years' experience. Fifth there could not be insistence on 10 years' experience as conditions of service

38. The next question is what should have been the field of choice. The two groups of Income Tax Officers in Class I, namely, the direct recruits and the promotees have always found that the field of choice has been prepared strictly on the basis of running seniority in the seniority list of Income Tax

Officers Class I. In the three decisions of this Court relating to these officers Jaisinghani's case, Bishan Sarup Gupta's case [1975 Supp SCR 491 : (1973) 3 SCC 1 : 1973 SCC (L & S) 1] and Bishan Sarup Gupta's case [(1975) 1 SCR 104 : (1975) 3 SCC 116 : 1974 SCC (L & S) 506] it will be seen that since 1962 there has been a long fight between direct recruit and promotees mainly in respect of seniority list of Income Tax Officers Class I. This struggle regarding seniority would have hardly any meaning unless the two groups fought to gain higher positions in the seniority list only for the purpose of being in the field of choice for consideration for promotion to the post of Assistant Commissioner. If this was not so and if only a certain number of years' requirement was the only consideration for being in the field of choice, this requirement would have been fulfilled in any case without a higher place in the seniority list. From 1963 the field of choice has always been in a running order of seniority. This has been the administrative practice for over 10 years.

39. There were 112 vacancies and 10 anticipated vacancies in 1974. The committee was to make a select panel of 122 officers. If the field of choice has to be prepared on the basis of running seniority, and if 10 years' experience had been adhered to, there would not have been more than 95 officers in the field of choice although the number of vacancies was 122. This fact alone will entitle the authorities to deviate from the rule of 10 years' experience.

40. By reason of the violation of the quota rule since 1952 benefiting the promotees this Court issued the mandamus in Jaisinghani's case. The collapse of the quota rule and seniority rule from January 16, 1959 led to the judgment of this Court dated August 16, 1972 in Bishan Sarup Gupta's case [1975 Supp SCR 491 : (1973) 3 SCC 1 : 1973 SCC (L & S) 1]. The introduction of the roster system of 1 direct recruit and 1 promotee being placed alternately in the order of seniority with effect from January 16, 1959 was upheld by this Court in the judgment dated April 16, 1974 in Bishan Sarup Gupta's case [(1975) 1 SCR 104 : (1975) 3 SCC 116 : 1974 SCC (L & S) 506]. As a result of the seniority list being upheld by this Court by the decision dated April 16, 1974 many promotees lost their earlier places in the seniority list. This Court On August 16, 1972 in Bishan Sarup Gupta's case at page 114 of the report said :

In the case before us in the absence of a rule determining inter se seniority between the two classes of Income Tax Officers, there is really no integration of the service, which is unavoidably necessary for the purpose of effective promotions. One cannot speak of promotions from a cadre it is fully integrated.

There was a change in the seniority list from what prevailed at least in 1952. The requirement of 10 years' experience could not be given effect to in such a changed situation and the expression "ordinarily" would hardly apply to such a changed situation without destroying the integration and restoring to the promotees the position which they had enjoyed in the past with the quota rule and the seniority rule and which they lost as a result of the last decision of this Court dated April 16, 1974.

41. If the respondents' contention that the field of choice shall be restricted to 10 years' experience only and the field of choice should have been at least five times the number of vacancies, the result would have been that out of 560 persons in the field of choice, 474 persons would have been promotees and 86 persons would have been direct recruits and the last direct recruit in the seniority list would have been no. 873 and no. 874 to no. 1922 would have been all promotees. If the above basis suggested by the respondents were followed 429 persons all direct recruits and all senior officers in the seniority list would have been ignored in the field of choice. That would be unjust, unfair and upsetting the decision of this Court dated April 16, 1974.

42. In the letter of May 16, 1957 it is stated that the field of choice of wherever possible should extend to 5 to 6 times the number of vacancies expected within a year. The letter contained administrative instructions from the Home Ministry generally to all ministries and was not meant specially for the Board of Revenue. These administrative instruction have been changed in the matter of promotions from Income Tax Officers to Assistant Commissioners at least from 1963 by the administrative practice of having in the field of choice generally three times the number of vacancies. In the committee meeting held on March 16, 1963 the committee considered the names of first 33 eligible Income Tax Officers in order of existing seniority for 11 vacancies. In the meeting of the committee held on August 26 and 27, 1963 the committee decided to consider the cases of 30 officers in order of seniority for 10 vacancies. In the committee meeting held on March 3, 1964 the committee considered for 21 vacancies the names of 60 persons in order of seniority. At the committee meeting held on December 5 and 7, 1964 for 18 vacancies the committee decided to consider the cases of 60 officers in order of seniority. At the meeting held on July 4, 1965 the committee considered 60 Income Tax Officers in order of seniority for promotion to 20 vacancies. At the committee meeting held on December 4 and 6, 1965 the committee considered 122 persons in order of seniority for 45 vacancies. In December, 1965 the committee considered 114 seniormost Income Tax Officers and 48 were promoted as Assistant Commissioners. At the meeting held on May 17, 1966 the committee considered the case of 65 officers and approved the promotion of 48 officers. At the meeting held on September 16 and 17, 1968 the committee considered 240 persons for promotion to 90 posts. In September, 1968 the committee considered the cases of 16 officers who had less than 10 years' experience. The committee in February, 1969 considered 61 persons for 20 posts. In September, 1969 the committee considered 105 persons for promotion to 35 posts.

43. There is a note made by Thomas in the month of February, 1970 in F. No. 20/2170-Ad. VI to the effect that if officers with less than 8 years' service and their juniors are excluded from the list of officers to be considered by the committee for 90 vacancies arising during the year only 193 officers will be available. This is said to be less than three times the number of vacancies but this could not be helped unless junior officers are considered over the head of their seniors. The number of such junior officers with 8 years' service is also limited, namely, 11. In the circumstances, the selection was made from the 193 officers. In April, 1970 the committee had to select 80 persons for promotion. They desired that 240 names should normally be considered. The members however stated that the ministry had already furnished the names of 193 eligible officers and there were no more eligible officers who could be considered. The committee accordingly considered those 193 officers in order of seniority. In April and May 1970 the committee considered the cases of 38 persons with less than 10 years' experience. In 1972 there were 84 vacancies and 10 more vacancies were likely to arise. Therefore for 94 selection posts the field of choice should normally have been 3 to 5 times the number of vacancies. It was found that there should have been at least 300 officers. There were 213 officers with 8 years' experience. There were some promotees with more than 8 years' experience but they were junior to the direct recruits. As the direct recruits had not completed 8 years' service their juniors were not considered for promotion over them.

44. In the background of these facts and circumstances it was not possible to have 5 or 6 times the number of vacancies in the field of choice for the simple reason that the committee required 8 years' experience for promotion to the post of Assistant Commissioner. If the field of choice had to be based on running seniority the committee could rightly only have 276 officers in the field of choice in the present case.

45. The next question is whether the committee evaluated the merit of persons in the field of choice. The High Court held that in the field of choice the evaluation of merit of persons was not properly

done. The decision of the High Court is wrong for the following reasons. The letter dated May 16, 1957 indicates that the committee was first to decide the field of choice. The cardinal feature which is to be kept in the forefront is that the field of choice is based on running seniority in the seniority list and evaluation of merit does not come into picture for deciding the field of choice. Paragraph 3 of the said letter states that those in the field of choice who are considered unfit should be excluded from consideration. Under paragraph 4 of the letter evaluation of the remaining officers on the basis of merit has to be done by classifying the officers under three different categories, namely, 'outstanding', 'very good' and 'good'. Paragraph 4 of the letter states that the selection list is to be prepared by placing the names of officers in the said three categories, without disturbing the seniority inter se within each category.

46. In the present case in view of 112 actual vacancies the Government sent 336 names for the field of choice, that is, three times the number of vacancies. Since 1963 the committee has been receiving from the Government the names of persons forming three times the number of vacancies. The 336 names sent by the Government were in the running order of seniority between S. M. Islam no. 155 in the seniority list and R. N. Dave No. 1186 in the seniority list. Under paragraph 2 of the letter dated May 16, 1957 it is the function of the committee to decide the field of choice. The committee proceeded on the basis of 8 years' experience and thus could not possibly have in the field of choice any name from no. 1131 onwards because every alternate number thereafter had less than 8 years' experience. The committee stopped at no. 1123.

47. The committee at the meeting held on July 23, 24 and 25, 1974 assessed the merits of 145 persons in order of seniority first. After such assessment the committee found three officers' nos. 1, 30 and 109 in the list as not yet fit and excluded them. The committee also excluded 4 officers whose findings were in sealed cover or whose reports were not yet complete (nos. 2, 3, 6 and 138 in the committee list). These 7 officers were excluded from further consideration for the selection list. In accordance with paragraph 3 of the letter of May 16, 1957 the committee considered the remaining 138 officers and assessed their merits and put them in three categories. The committee found only one officer "outstanding", namely no. 16 in the list, 114 officer "very good" and 7 scheduled castes/scheduled tribes officers were 'good'. These 7 scheduled castes and scheduled tribes officers were nos. 21, 24, 26, 90, 91, 93 and 94 in the list. The respondents contended that these 7 scheduled castes/scheduled tribes officers should have been given a grade higher than the grade assessed by the committee because of the Home Ministry instructions dated July 11, 1968. The respondents' contentions are incorrect for these reasons. In paragraph 2 of the Home Ministry instructions dated March 26, 1970 on the subject "Concessions to Scheduled Castes and Scheduled Tribes in posts filled by promotion - Class I Services/Posts" it was laid down inter alia that the scheduled castes/scheduled tribes officers, who were senior enough in the zone of consideration for promotion so as to be within the number of vacancies for which the selection list has to be drawn, would be included in that list provided they are not considered unfit for promotion. In paragraph 1 of these instructions, reference was made to the Home Ministry instructions dated July 11, 1968. It would be found from those instructions as also the Home Ministry instructions dated March 26, 1970 that the July, 1968 instructions applied in the case of promotions from Class III to Class II and within Class II and from Class II to the lowest rank or category to Class I but had no application in respect of promotion within Class I.

48. The committee found no. 16 to be 'outstanding', 114 (nos. 2 to 115) 'very good' and 7 scheduled castes/scheduled tribes officers 'good' and they were to be included in the selection list vide Home Ministry instructions dated March 26, 1970. The committee next assessed the merit of the rest of the 276 officers to ascertain whether any of them was 'outstanding'. If any one among these remaining

officers was not found 'outstanding' but was only 'very good' he would not come within the selection list because the selection list was prepared, after evaluating the merits of the officers on the basis of seniority in the seniority list in accordance with the letter dated May 16, 1957. Paragraph 4 of that letter was followed by the committee along with the Home Ministry instructions. It would not be necessary for the committee after having considered 145 to put the others in the category of 'very good' when the committee assessed their merits and found them to be not 'outstanding'. After 122 senior officers were assessed and the committee found that no other officers junior to them could be assessed to the higher category, namely, 'outstanding' it would be fruitless exercise to find out who among these officers were 'very good' or 'good' or 'not yet fit'. The reason is obvious. Those in the selection list of 122 who had been found to be 'very good' could not be supplanted by others who were 'very good'. Only 'outstanding' persons who would be junior to the category of 122 'very good' would surpass the category of 'very good'. Therefore the committee rightly considered the cases only to find out whether there was anyone outstanding and the committee found none of them to be 'outstanding'.

49. The Government sent the names of 336 officers in the running order of seniority. Out of 336 the committee found 276 to be fit for the field of choice. The committee found 1 'outstanding', 114 'very good' and 7 scheduled castes/tribes 'good'. The respondents contended that the rest 59 were not at all considered by the committee. This contention is not acceptable for these reasons. From no. 1131 in the seniority list every alternate number was an officer with less than 8 years' experience. Under the letter of May 16, 1957 it is the committee and not the Government which decides the field of choice. When the committee found according to the running seniority no. 1131 onwards could not be in the field of choice committee did not put the names of the 59 officers in the field of choice. The question of the evaluation of the merits of these 59 officers did not, therefore, arise because first the seniority list was considered by the committee and second the committee took into consideration only those who were in the seniority list and fulfilled 8 years' experience.

50. It is wrong to hold that because the Government sent the names of 336 persons for consideration by the committee the field of choice consisted of 336 persons. The field of choice is to be determined by the committee. The committee considered 276 names as fit to be included in the field of choice. It is erroneous to suggest that there were 336 names in the field of choice. The field of choice consisted of 276 names as determined by the committee whose jurisdiction it was to determine. The committee considered upto no. 1123 in the seniority list to be in the field of choice. Officers from 1124 to 1130 were not included by the committee either because they had retired or joined the Indian Administrative Service and in any event no complaint has been made on their behalf. The committee found that from no. 1131 onwards every alternate officer had not completed 8 years' service and therefore they could not be put in the field of choice according to the committee. The contention of the respondents that there were 336 officers in the field of choice and the committee did not consider all the 336 persons is unmeritorious.

51. The respondents next contended that persons bearing nos. 877, 879, 881 and 883 in the seniority list had been put on the selection list although they had less than 8 years' experience. There is no substance in the contention for the following reason. These 4 officers were taken on the ground that they were ex-military officers recruited to the Income Tax Department in 1968 and were deemed to have been recruited in 1964 by virtue of the Ministry of Home Affairs notification dated October 4, 1967.

52. Another submission was made on behalf of the respondents that after the committee had put different persons in three categories 'outstanding', 'very good' and 'good' the committee should have

further evaluated the merit of all officers inter se within each of the said three categories. This submission is contrary to the specific provision of paragraph 4 of the letter dated May 16, 1957. Further within the category of 'very good' there could not be any further intra-specific assessment of those who were 'very good'.

53. A criticism was made by the respondents that the assessment was to be only on merit and not seniority-cum-merit. This contention is wrong. Paragraph 2 of the letter of May 16, 1957 states that the field of choice is to be decided by the committee. No question of merit arises in deciding the field of choice. The field of choice is only on the basis of running seniority. The question of merit arises after the field of choice is decided. The selection was correctly done strictly on merit in accordance with paragraphs 3 and 4 of the letter dated May 16, 1957. The committee decides the field of choice in the running order of seniority. The committee excludes names from the field of choice who are considered unfit for promotion. The remaining officers are classified as 'outstanding', 'very good' and 'good' on the basis of merit. The selection list is prepared by placing the names in the order of these three categories. The inter se seniority of officers in the selection list under each category is not disturbed. These are the instructions in the aforesaid letter. It will thus be seen that seniority is the sole criterion for determining the field of choice in the running order of seniority and merit is the sole criterion for putting the officers in the selection list in each category according to merit.

54. Finally the contention of the respondents is that the date for determining the eligibility of officers for promotion to the posts as Assistant Commissioners should have been decided by the committee by bearing in mind the two dates, namely, December 21, 1972 and November 29, 1973. December 21, 1972 is the date when this Court permitted the Union Government to make ad hoc promotions. March 21, 1973 and November 29, 1973 are the two dates when the Central Board of Direct Taxes promoted 59 and 48 officers respectively. This Court in the order dated December 21, 1972 stated that the Government would be entitled to appoint people in order of seniority determined according to the date of continuous officiating appointment in Class I subject to the suitability which would be decided by the Central Board of Direct Taxes. This order was made without prejudice to the contentions of the parties or their rights in the appeals. Pursuant to the interim order of this Court the Government made two orders dated March 21, 1973 and November 29, 1973 provisionally promoting 59 and 48 officers respectively. In each of the government orders it is specifically stated as follows :

The above promotions are purely ad hoc and have been made on the basis of the suitability as decided by the Central Board of Direct Taxes in terms of directions issued by this Court in its order December 21, 1972. These promotions will not confer any claim for continued "officiation" (sic) in the grade of Assistant Commissioner of Income Tax or for seniority in that grade. Appointments against these posts will eventually be made on the basis of the revised list of seniority of Income Tax Officers Class I as finally approved by this Court and on selection by a duly constituted Departmental Promotion Committee to be convened in accordance with the prescribed procedure. The promotions ordered will not establish any claim for eligibility or for selection on merit by a properly constituted Departmental Promotion Committee when the same is convened.

55. It is manifest from the order of this Court and the two orders made by the Government pursuant to this Court's order that these 107 promotions were purely provisional or ad hoc and were made by the Central Board of Direct Taxes and not by the committee which is the authority for determining

promotions. Further these provisional promotions were not made in conformity with the letter of May 16, 1957. It is distinctly stated in the aforesaid two government orders that appointments against these posts will eventually be made on the basis of revised seniority of Income Tax Officers Class I as finally approved by this Court and on selection by a duly constituted Departmental Promotion Committee to be convened in accordance with the prescribed procedure.

56. On February 9, 1973 the Income Tax Officers (Class I) Service (Regulation of Seniority) Rules, 1973 were made under Article 309 (See Bishan Sarup Gupta's case [(1975) 1 SCR 104 : (1975) 3 SCC 116 : 1974 SCC (L & S) 506]). The revised seniority list of Income Tax Officers Class I was made on the basis of the Income Tax Officers (Class I) Service (Regulation of Seniority) Rules, 1973 and was approved by this Court on April 16, 1974. See Bishan Sarup Gupta's case (supra). The selection list was made by the committee after it met on July 23, 24 and 25, 1974. Under paragraph 2 of the letter dated May 16, 1957 the committee was to decide the field of choice by including therein eligible officers awaiting promotion. This means that whether an officer is eligible or not should be decided with reference to the date of the committee meeting. This has always been done at all the committee meetings.

57. The respondents contended that the regularisation of 107 promotees had to be done from the date of original promotions on ad hoc basis. In this connection, the respondents relied on the observations of this Court in Bishan Sarup Gupta's case at p. 506 of the report. The observations relied on are that after the fresh seniority list is made in accordance with the directions given by this Court in Bishan Sarup Gupta's case (supra) it would be open to any direct recruit or promotee to point out to the department that in the selection made to the post of Assistant Commissioner from 1962 onwards he, being otherwise eligible, is entitled on account of the new seniority given to him to be considered for promotion to the post of Assistant Commissioner.

58. The observations of this Court in Bishan Sarup Gupta's case (supra) are that if as a result of the fresh seniority list it is found that any officer was eligible for promotion to the post of Assistant Commissioner on account of his place in the new seniority list, the department might have to consider his case for promotion on his record as on the date when he ought to have been considered, and if he would be selected his position will be adjusted in the seniority list of Assistant Commissioners. The object is to see that the position of such a person is not affected in the seniority list of Assistant Commissioners because he is actually promoted later pursuant to the new seniority list, although according to the new seniority list itself he should have been promoted earlier. The observations do not mean that although the committee can meet for the selection of officers for promotion to the post of Assistant Commissioner only after the seniority list is approved by this Court, the selection would be deemed to be made at the time when a vacancy in the post of Assistant Commissioner occurred and the eligibility of officers for selection will be determined by such deemed date of selection. No employee has any right to have a vacancy in the higher post filled as soon as the vacancy occurs. Government has the right to keep the vacancy unfilled as long as it chooses. In the present case, such a position does not arise because of the controversy between two groups of officers for these years. The seniority list which is the basis for the field of choice for promotion to the post of Assistant Commissioner was approved by this Court on April 16, 1974. Promotions to the post of Assistant Commissioners are on the basis of the selection list prepared by the committee and are to be made prospectively and not retrospectively.

59. For the foregoing reasons the judgments and orders appealed against are set aside. The selection list made by the Departmental Promotion Committee forming the subject-matter of these appeals is held to be correct, lawful and valid. Parties will pay and bear their own costs.

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