

G. S. Lamba and Others

Vs

Union of India and Others

Writ Petition (Civil) No. 13248 to 13257 of 1983

(D. A. Desai, V. Khalid JJ)

22.03.1985

JUDGMENT

D. A. DESAI, J. -

1. We are back to square one. The same rigmarole of unending disputes as to inter se seniority between promotees, direct recruits and recruits as per the result of the limited competitive examination with quota-rota as the guiding star for determining inter se seniority are put in the lap of the Court.
2. This time the service is the Indian Foreign Service Branch 'B' (IFS 'B' for short). This service was constituted by the memorandum of Government of India, Ministry of External Affairs dated July 16, 1956. The service consisted of two cadres; a general cadre and two sub-cadres (1) Stenographer sub-cadre and (2) Cypher sub-cadre forming what is styled as special cadre. The general cadre comprises 6 grades. Various grades. Para V provided for general conditions of eligibility for appointment in the service at the initial constitution. Para VI provided that recruitment to grades I, II and III of the general cadre will be made on the recommendations of the Senior Selection Board of which the Chairman will be the Chairman of the Union Public Service Commission or his nominee. Selection to other grades will be made by the Junior Selection Board in consultation with Union Public Service Commission. Para VIII provided for inter se seniority of persons selected for grades I, II and III of the general cadre. Appendix to the memorandum sets out sanctioned strength of posts in various grades of IFS 'B' and the scales of pay attached to each grade.
3. Petitioners were selected by the Union Public Service Commission according to the merits obtained at the examination conducted for the purpose in 1955 for appointment to the post of Assistant, and were allocated to the Ministry of External Affairs. After the initial constitution of the service in 1956 petitioners were offered an option whether they would like to join IFS 'B' in grade IV at the time of its initial constitution. The memorandum constitution the service provided that future maintenance of the service would be governed by the rules to be promulgated for the purpose by the Central Government. Accordingly by is notification dated May 6, 1964, the Government of India, Ministry of External Affairs in exercise of all the powers conferred by Article 309, promulgated Indian Foreign Service Branch 'B' (Recruitment, Cadre, Seniority and Promotion) Rules, 1964 ('1964 Rules for short). By the aforementioned rules, grades II and III were integrated and the grade was styled ads integrated grade II and III in general cadre.
4. Petitioners came to be promoted between 1976-1979 from grade IV to integrated grade II and III. The Government of India published a seniority list of officers in the integrated grade II and III of the general cadre of IFS 'B' as on June 25, 1979. Petitioners contend that the seniority list is

violative of the constitutionally guaranteed equality of opportunity in the matter of public service inasmuch as equality of opportunity in the matter of public service inasmuch as direct recruits who came into service long after the departmental promotees were regularly promoted to the aforementioned grade have been assigned seniority over the earlier promoted departmental promotees.

Before objections taken by the petitioners to the seniority list were dealt with the Central Government in suppression of seniority list dated June 25, 1979 published another seniority list of the officers in integrated grade II and III of IFS 'B' as on June 30, 1983. Petitioners contend that the seniority list dated June 30, 1983 suffers from the same vice and is all the more objectionable inasmuch as it leaves blank spaces for future recruits either as direct recruits or by limited departmental examination and who are yet to come into service to be placed over promotees like the petitioners who have already been in service for a long time. The petitioners contend that the impugned seniority list appears to have been drawn up on the principle of quorum and that in the facts of this case and the relevant rules it is violative of Articles 14 and 16 of the Constitution. Petitioners also assert that if Rule 25(1)(ii) is not construed harmoniously with Rule 21 of the 1964 Rules, Rule 25(1)(ii) would be violative of the guarantee of equality enshrined in Article 16. To be precise, the contention is that where there is recruitment to a cadre from more than one source and the recruitment has to conform to the quota prescribed for each source, simultaneously interlinking the inter se seniority in respect of recruits entering service from different sources to the quota for each source, if the quota reserved for any source is not filled in for a long time and the vacancies allotted to the source are carried forward and the later day recruits from that source are given deemed seniority over the earlier recruits from the other sources, it has the pernicious tendency to give an underserved advantage to a later recruit over the earlier recruit and it would be violative of Articles 14 and 16. If it held that Rule 25(1)(ii) has precedence over Rule 21, then Rule 25(1)(ii) is unconstitutional inasmuch as failure to recruit enough number of persons to the extent of the quota reserved for the source in a reasonable time, in the absence of any power to carry forward vacancies available to that source, the rota rule of seniority would be discriminatory in character and lead to denial of equality in the matter of appointment to public service. It was submitted in such a situation the rota rule would break down under the weight of massive departure from the quota rule, and the seniority rule being inextricably intertwined with the quota rule if given effect to would be unjust, unfair and inequitable and would be violative of Article 14.

5. The Under-Secretary in the Ministry of External Affairs filed an affidavit-in-opposition. Averment in Para II of the petition that petitioners were working as permanent Section Officers in the integrated grade II and III in the general cadre of the IFS 'B' was not controverted. After referring to Rule 13 of the 1964 Rules, it was stated that both the impugned seniority lists were drawn up in accordance with the principles governing seniority in the grade as per Rule 25. It was stated that where recruitment to a services or cadre is from more than one source and each source is assigned a quota of vacancies, in order to do justice to recruits from all sources, the seniority is to be determined according to rota keeping in view the available vacancies to each source. It was conceded that in integrated grade II and III, the recruitment is done from three different channels and quotas have been fixed for all these channels, but the recruitment is not done at the same time. While the departmental promotion is made after departmental promotion committee makes recommendations, the recruitment through examination is time-consuming because there is a time gap between publication of results and joining of candidates. It was further stated that it is not practically possible to strictly adhere to the quota in any particular financial year because candidates nominated by the Union Public Service Commission may even decline to join service and additional candidates can be taken from subsequent examinations only. It was further submitted that

the administration overcomes this difficulty by adhering to the quota by rotation of vacancies ensuring that over a period of time, the quota the quota requirement is fully met. The two impugned seniority lists were sought to be sustained on the footing that by and large quota was adhered to and a slight delay or variation in time schedule would not permit an inference that as the quota rule was not adhered to, the rota rule of seniority cannot be given effect. Replying to the averments made in the petition that vacancies allotted to each source and not filled in at the relevant time were being carried forward for years and that when the carried forward vacancies were filled, the recruits were given retrospective deemed date for seniority relatable to the coming into existence of the vacancy for that source without such a provision being found in the relevant rules, it was stated that vacancies have been carried forward, if at all because of the nonavailability of the candidates and in the absence of a stipulation in the relevant rules permitting diversion of vacancies from one quota to another, it was inevitable that the quota of vacancies allotted to a source have to be carried forward. Replying to the averments that in the impugned seniority list blank spaces have been left open for giving seniority to persons who have still not joined the service and are likely to join at some uncertain date, it was submitted that this process would not push down the seniority of the petitioners as they would occupy the same serial number in the seniority list.

6. When the matter was being heard in the Court, one Radhey Shyam Aggarwal, respondent 26 in the petition appeared and filed his affidavit. He was recruited to grade IV IFS 'B' in 1964 through the open competitive examination held by Union Public Service Commission. He was promoted to integrated grade II and III on the result of the limited departmental competitive examination held by the Union Public Service Commission in 1977. He stated that all Assistants in the grade IV who have put in the required number of years of service are eligible for participating in limited departmental examination and that as the equality in this behalf is guaranteed to all those similarly situated, such holding of examination and promotion based on the result of the examination would not violate Article 14. Referring to Rule 13, he stated that as the recruitment to the integrated grade II and III is from three independent sources with quota of vacancies assigned to each, the quota should be more or less adhered to so as not to give any unintended benefit to individuals entering through the source of recruitment over others. It was stated that accepting the contention of the petitioner would tantamount to giving unintended benefit to the promotees promoted in excess of the quota temporarily. It was further stated that delay in holding of the examination cannot work to the disadvantage of those who have taken the examination and qualified for promotion and therefore they should be accommodated in the vacancies which have come into existence and were available for the quota from the date the vacancies came into existence notwithstanding the fact that the examination was held at a later date and the results were published still later and appointment was made thereafter, In short, he submitted that the two seniority lists were valid and in consonance with the statutory rules.

7. Before we proceed to examine the contention of the petitioners on merits, it is necessary to refer to the rules of recruitment and seniority relevant to integrated grade II and III. Rule 13 which provides for recruitment to posts in the integrated grade II and III of the general cadre reads as under :

13. Recruitment to posts in the integrated grades II and III of the general cadre. -
(1)(a) One-sixth of the substantive vacancies, in the integrated grades II and III of the general cadre shall be filled by direct recruitment on the result of competitive examinations held by the Commission for this purpose from time to time. The remaining vacancies shall be filled by the substantive appointment of persons included in the select list for the integrated grades II and III of the general cadre.

Such appointments shall be made in order of seniority in the select list except when, for reasons to be recorded in writing, a person is not considered fit for such appointment in his turn.

(b) Temporary vacancies in the integrated grades II and III of the general cadre shall be filled by the appointment of persons included in the select list for the integrated grades II and III of the general cadre. Any vacancies remaining unfilled thereafter shall be filled first from among the persons approved for inclusion in the select list and thereafter by the temporary promotion on the basis of seniority subject to the rejection of the unfit of permanent officers of grade IV of the general grade and grade II of the Cypher sub-cadre who have rendered not less than eight years of approved service in any one grade or the two grades within the range of seniority. Such promotions shall when persons included in the select list for the grades II and III of the general cadre become available to fill vacancies.

(2) The select list referred to in clauses (a) and (b) of sub-rule (1) shall be prepared in the following manner :

(i) $33 \frac{1}{3}$ per cent of the quota for inclusion in the select list shall consist of persons to be promoted on the basis of a limited competitive examination to be held by the Commission for this purpose from time to time; and (ii) rest of the promotion quota for inclusion in the select list shall consist of persons to be promoted on the basis of seniority subject to the rejection of the unfit of the officers of the grade IV of the general cadre and grade II of the Cypher sub-cadre who have rendered not less than eight years of approved service in any one grade or both the grades :

Provided that if any person appointed to such a grade is considered for promotion to the integrated grades II and III of the general cadre in accordance with the provisions of this sub-rule, all persons senior to him in that grade shall also be considered notwithstanding that they may not have rendered eight years of approved service in that grade or grades, as the case may be.

(3) The controlling authority shall, from time to time lay down the ratio in which the available vacancies in the integrated grades II and III of the general cadre shall be filled from grade IV of the general cadre and Cypher Assistants of the Cypher sub-cadre. This ratio shall be fixed, as far as possible, on the basis of the relative strength of the respective cadre posts.

Illustration. - If the strength of grade IV of the general cadre is 720 and that of the Cypher Assistants of the Cypher sub-cadre 120, the ratio for promotion shall be 6 : 1.

Chapter III contains provisions for fixation of seniority in different grades. Rule 21 lays down a general provision for fixing of seniority Sub-rule 4 is relevant, which reads as under :

21. (4) Subject to the other provisions of this rule, persons promoted or recruited earlier on the basis of earlier selection or recruitment shall be senior to those promoted or recruited on the basis of subsequent selection or recruitment.

Rules 22, 23, and 24 provide for seniority inter se of direct recruits, seniority inter se of officers promoted on the results of limited competitive examination and seniority

inter se of officers promoted to a grade on the recommendations of a departmental promotion committee respectively but amongst themselves. Then comes Rule 25 which provides for seniority inter se of the officers appointed to a grade from different sources. It reads as under :

25. Seniority inter se of the officers appointed to a grade from different sources. - (1) Integrated grades II and III of the general cadre :

(i) The eligible persons in grade IV of the general cadre and Cypher Assistants of the Cypher sub-cadre shall be arranged in separate lists in the order of their relative seniority in their respective grades. Thereafter their Departmental Promotion Committee shall select persons for promotion from each list up to the prescribed quota as indicated in Rule 13 and arrange all the persons selected from the two lists in a consolidated order of merit which will determine the seniority of persons on promotion to integrated grades II and III of the general cadre.

(ii) Direct recruits to a grade and persons substantively appointed to the grade from the select list for the grade shall be assigned seniority inter se according to the quotas of substantive vacancies in the grade reserved for direct recruitment and the appointment of persons included in the select list, respectively.

1964 Rules have been enacted of power conferred by the proviso to Article 309 of the Constitution and are thus indisputably statutory in character. Recruitment to integrated grade II and III of the general cadre is from two independent sources namely (i) direct recruitment on the result of a competitive examination held by the Union Public Service Commission for this purpose from time to time and (ii) by the substantive appointment of persons included in the select list for integrated grade II and III of the general cadre. The select list for the purpose of filling vacancies by substantive appointment has to be prepared from persons coming from two independent sources as required by Rule 13(2) namely persons to be promoted on the basis of a limited competitive examination to be held by the Commission for this purpose and promotion from grade IV for inclusion in the select list on the basis of seniority in grade IV of the general cadre and grade II of Cypher sub-cadre, who have rendered not less than 8 years of approved service in any grade or both the grades. In short, recruitment to integrated grade II and III will be from three sources : (i) one-sixth of the substantive vacancies to be filled in by direct recruitment on the result of a competitive examination to be held by the Union Public Service Commission, (ii) 33 1/3% of the remaining five-sixth of the vacancies had to be in by bringing them on the select list on the basis of the results of a limited competitive examination and the remaining vacancies to be filled in by promotion on the basis of seniority from grade IV of general cadre or grade II of Cypher cadre who have rendered less than 8 years of approved service. There is thus recruitment to integrated grade II and III from three independent sources and a quota is fixed for recruitment from each source. The quota as hereinabove set out was introduced by amending Rule 13 as per notification dated February 12, 1975. Earlier the quota for direct recruits is 25% of the vacancies for a period of 5 years and then 33 1/3% of the vacancies. The quota for the other two sources was 25% of the remaining vacancies on the result of limited competitive examination and the balance to be filled in by promotion according to seniority in the feeder grade. Thus the quota for direct recruits was raised from 25% to 33 1/3% and reduced to one-sixth of the vacancies i.e. 16.3%. The impugned seniority lists have been drawn up rotating vacancies for each source and if no recruitment is made from that source in a given year, the place in the list available to the source as per rotation is kept open and a later recruit at any distance of time from that source will be assigned that place over persons who are already

recruited from other sources and would be working in substantive vacancies. The net effect of a drawn-up seniority list in this manner is that a promotee in a given year even within its quota may go down to a much later direct recruit as the place in rotation is kept open for him without limitation of time. This is the crux of the matter.

8. A bird's-eye view of the relative position of the petitioners who are all departmental promotees in the two impugned seniority lists would bring into focus the contours of controversy.

#S. No. of the seniority list 1983	Name of the petitioners	Place in the 1979 seniority list	Place in the petitioners seniority list
1	G.S. Lamba	397	163
2	S.K. Chibber	380	147
3	Kul Bhushan	375	144
4	I.S. Ailawadi	398	164
5	K.D. Avdhani	379	146
6	Q.L. Khanijow	387	153
7	Ranvir Chawla	---	244
8	N.D. Kharbanda	422	181
9	V.N. Sharma	483	222
10	M. Jayaraman	463	208

-----##

9. It will be presently pointed out that the petitioners whose placements are indicated here and who have entered the service would be junior to those who enter later into service and would be placed at the vacant places in the list which are for purpose of charity enumerated hereunder. It will show that those who are yet to come would become senior to those in service and have entered service number of years ahead to them. And one is not sure at what length of time the new entrants will enter service.

10. The inequity, if it can be so called may be demonstrably points at this stage with reference to the seniority list of 1979. Placements in this list at Sr. Nos. 294, 300, 305, 312, 318, 324, 330, 336, 342, 348, 354, 360, 366, 372, 378, 384, 390, 396, 402, 408, 414, 420, 426, 432, 438, 444, 456, 462, 468, 474, 480 and 486 have been kept open or vacant and are to be filled in at a inter date by assigning seniority to direct recruits who would be recruited to they service for the first time after June 25, 1979 relevant to which seniority list was drawn up. These later recruits at some unknown future date would score a march by nearly a hundred steps over the one at No. 486 already in service by regular promotion. Similarly placements at Sr. Nos. 377, 381, 385, 389, 392, 395, 399, 403, 406, 410, 413, 417, 421, 424, 428, 431, 435, 439, 442, 446, 449, 453, 457, 460, 464, 467, 471, 475, 478, 482, 485 and 489 have been kept vacant for recruits who would be recruited to the grade on the result of a limited departmental examination which would be held after June 25, 1979. In other words, those who would come into service after June 25, 1979 either from the source of direct recruitment or from the source of limited competitive examination would fill in the above vacant places in the seniority list and thereby score a march over others who have not only been in service on June 25, 1979 and have been substantively promoted and have become members of the service and wise have been included in the seniority list for the service.

11. Turning now to the impugned seniority list of June 30, 1983 which for all practical purpose supersedes the seniority list of June 25, 1979, placements at Sr. Nos. 170, 175, 179, 184, 189, 193, 197 203, 209, 215, 221, 227, 233, 239 have been kept vacant and these places would be filled in by direct recruits who would join at some future date not specified after June 30, 1983. Then disturbing future is that when direct recruitment will be made at some future that June 30, 1983 the first vacant place at Sr. No. 170 would be assigned to the first in the list of direct and recruit and even though he would enter the service for the first time somewhere after June 30, 1983, he could be senior to the departmental promote holding a substantive post at Sr. No. 171 Shri D. R. Goel from February 2, 1978 and he would also be senior to a recruit from the source of limited competitive examination

recruited on November 13, 1979 and placed in the seniority list at Sr. No. 172, one Shri Gurcharan S. Singh. It would be advantageous to recall here that the eligibility criterion for appearing at a competitive examination to be held by Union Public Service Commission for direct recruitment as per Rule 20 of 1964 Rules be in accordance with the regulations made from time to time by the Government in consultation with Union Public Service Commission wherever such consultation is necessary. The regulations were not referred to in the course of hearing of these petitions. But if the criterion was to be a graduate's degree then anyone appearing at a competitive examination after June 1983 soon after graduation may not have passed HSC examination in 1976 or 1978 and yet the departmental promotees of that year would be junior to such a schoolian. This is the net outcome of seniority rule being based on rotation of vacancies available to each source and the quota not being filled in from time to time when the vacancies occur. The unfortunate outcome is the same as was noticed by this Court in *A. Janardhana v. Union Of India* ((1983) 2 SCR 936 : (1983) 3 SCC 601 : 1983 SCC (L&S) 467). However, while keeping aside this unjust and inequitable outcome and uninfluenced by it, we may first look at the relevant rules for determining inter se seniority of persons recruited from three independent sources.

12. The service was constituted in 1956. However the statutory rules came into force on May 5, 1964. The Constitution of the service by a memorandum of the Government of India in 1956 was in exercise of the executive powers of the Government of India. The statutory rules came into force from May 6, 1964 and since then the service is governed by the 1964 Rules. Commencing from the advent of 1964 Rules, the recruitment from three sources as actually made may be noticed. Information in this chart is according to averments in Para 16 of the petition :

#-----	Year	Departmental	Direct
Limited departmental promotees	recruits	examination	appointees-----
-----	1964	7	-- -- 1965 6 10 -- 1966 -- -- -- 1967 -- -- --
1968 -- -- 3	1969 -- -- 8	1970 -- -- --	1971 -- -- -- 1972 34 -- 25 1973 29 -- 10 1974 5 -
- 14	1975 39 11 2	1976 26 5 16	1977 -- 11 4 1978 47 7 2 1979 36 6 2 1980 27 3 5
1981 24 6 --	1982 24 2 --	1983 24 2	-----
-----	360	63	91-----##

With reference to Para 16 and the chart in the petition, in the return filed on behalf of the first respondent Government of India it is stated that the chart does not true and correct picture and was denied. It is stated that the exact figures are given in the chart annexed as Annexure 'A' to the return. It reads as under :

ANNEXURE 'A'##

Para 16 : - The figures of recruitment through the different channel given by the petitioners are incorrect and misleading. The correct figures are as given below :

#Year	DPs	LDE	DRs	Remarks	
1964	15	- 11	1965	1966	1967 40 9 -1968
1969	1970	- - -	1971 33 19	-1972 - 7 -1973 35 18 12(18*)	*Indent. Candidates joined in 1975.1974 -
5 5(6*)	*Indent. Joined in 1976.	1975 35 15 8	Joined in 1977.	1976 30 5 7*	
Indent	1977 - 5 5	*Indent	1978 55 19 4*	*Indent	1979 36 18 14* *Indent
1980	44 15	4*	*Indent	1981 24 12 7*	*Indent
1982	24 12 8*	*Indent	##		

As far as the figures of direct recruits given for the years 1973 to 1982, the last column recites that the figures therein mentioned are of the indent sent by the Union Public Service Commission for

making direct recruitment but there is nothing to show how many joined as direct recruit. Accepting the information as supplied by the respondent Union of India, what strikes one at a glance is that the recruitment from three sources was never according to quota nor according to available vacancies for each source. Record as disclosed does not indicate that the vacancies available to a particular source but not filled in during the relevant period were carried forward. No attempt was made to undertake direct recruitment in the years 1965, 1966, 1968, 1969, 1970, 1972, 1974 and 1977. Similarly limited competitive examination was not even held in the years 1964, 1965, 1966, 1968, 1969 and 1970. Indisputably there was large scale departure from quota rule.

13. It may also be mentioned that in the counter-affidavit, no attempt has been made to give information about the vacancies available in each year and their splitting up according to the quota for each source and to point out whether in any given year there was a shortfall in the recruitment from a particular source and/or there was excess recruitment from some other source.

14. The first thing to be noticed is that the statutory rules do not provide for carry forward of vacancies occurring in a given year to the next recruitment. The feeble and inaudible plea to justify carry forward of vacancies was non-availability of candidates for filling in vacancies available to a source.

15. It is of some importance to note that the petitioners are members of the service and belong to integrated grade II and III in the general cadre of IFS 'B'. They hold substantive posts and there is nothing to show that their promotions when made were either temporary or ad hoc or till such time as a regular recruit is available from the other source according to quota, though their promotions appear to be in excess of the quota available for the source. The quota is related to vacancies. Rule 13 (1) which provides for quota clearly recites that one-sixth of the substantive vacancies in the integrated grade II and III of the general cadre shall be filled in by direct recruitment etc. Therefore, it is undeniable that quota is related to vacancies. If the quota has to be scientifically implemented it would be incumbent upon the first respondent to satisfactorily establish the number of vacancies available every year since the constitution of service; the number of vacancies available according to quota reserved for each source; the recruitment done during the year from that particular source and to state whether all the vacancies allocable to each source were filled in from the concerned source and if not so filled in, whether any recruitment in excess of the quota was made from other sources. It must further be shown whether such excess recruits were given temporary, stopgap or ad hoc promotion subject to availability of candidates from other sources who were entitled to fill in those vacancies and that this was done for a short period and till the candidates, regularly recruited from the sources to which vacancies were allocated were available to fill in the vacancies held by the recruits in excess of the quota from the other sources. No such information was forthcoming. The only justification offered for not filling in vacancies by recruits from each source according to its quota is that then procedure for direct recruitment as also the procedure for holding limited competitive examination is prolix, timeconsuming and dilatory and therefore the recruitment made at a later date from such source could not work to the disadvantage of such recruits by pushing them down below those who were promoted in excess of the quota available to that source.

16. If Rule 25(1)(ii) which provides for inter se seniority of direct recruits to a grade and persons substantively appointed to the grade from the select list for the grade, upon its true construction, permits leaving open placement in the seniority list to be filled in at a later date by recruits coming from the source for whom placements according to rotation are kept open, would such rule or such implementation of the rule of seniority be violative of Article 16 ?

17. It is too late in the day to dispute that it would be open to the Government, while constituting a service, to provide for recruitment to it from more than one source and also to reserve quota for each source. As a logical corollary, it would equally be open to the Government to provide for seniority rule related to rotation of vacancies. Shortly this is called quota rule of recruitment and rota rule of seniority interlinking them. So far there is no controversy. The contention of the petitioners is that in implementing this rule there has been such large scale deviation that it results in denial of equality to the members of the service similarly circumstances. It will be presently demonstrably established that where rota rule of seniority is interlinked with quota rule of recruitment, and if the latter is unreasonably departed from and breaks down under its own weight, it would be unfair and unjust to give effect to the rota rule of seniority. To some extent this is not res integra. Though some advance has been made on this proposition in later decisions.

18. In *Bishan Sarup Gupta v. Union of India* (1975 Supp SCR 491 : (1973) 3 SCC 1 : 1973 SCC (L&S) 1) a Constitution Bench of this Court after taking note of the fact that 214 posts were upgraded from Income Tax Officers grade II to Income Tax Officers grade I, held that with the upgrading of a large number of posts and the appointment to them of promotees, the quota rule collapsed and the seniority rule having a link with the quota rule would meet the same fate. In *A. K. Subraman v. Union of India* ((1975) 2 SCR 979 : (1975) 1 SCC 319 : 1975 SCC (L&S) 36) it was observed that : (SCC p. 333, para 28)

When recruitment is from two or several sources it should be observed that there is no inherent invalidity in introduction of quota system and to work it out by a rule of rotation. The existence of a quota and rotational rule, by itself, will not violate Article 14 or Article 16 of the Constitution. It is the unreasonable implementation of the same which may, in a given case, attract the frown of the equality clauses.

19. In *P. S. Mahal v. Union of India* (AIR 1984 SC 1291 : (1984) 4 SCC 545 : 1985 SCC (L&S) 61) the Court after reiterating the afore-quoted observations in *A. K. Subraman* case ((1975) 2 SCR 979 : (1975) 1 SCC 319 : 1975 SCC (L&S) 36) observed as under : (SCC p. 600, para 32)

The rotational rule of seniority is inextricably linked with the quota rule and if the quota rule is not strictly implemented and there is large deviation from it regularly from year to year, it would be grossly discriminatory and unjust to give effect to the rotational rule of seniority.

In the period between the decisions in *Bishan Sarup Gupta* case (1975 Supp SCR 491 : (1973) 3 SCC 1 : 1973 SCC (L&S) 1) and *A. K. Subraman* Case ((1975) 2 SCR 979 : (1975) 1 SCC 319 : 1975 SCC (L&S) 36), this Court theradbare examined the legal position in relation to quota-rota rule and a large scale deviation from it with its consequent effect on the seniority rule. In *A. Janardhana* case ((1983) 2 SCR 936 : (1983) 3 SCC 601 : 1983 SCC (L&S) 467) this Court in terms held that : (SCC p. 621, para 29)

As quota rule was directly interrelated with the seniority rule, and once the quota rule gave way, the seniority rule enunciated in para 3(iii) of Appendix V became wholly otiose and ineffective. It is equally well recognised that where the quota rule is linked with the seniority rule if the first breaks down or is illegally not adhered to giving effect to the second would be unjust, inequitable and improper.

It may incidentally be mentioned that this view was approved and reiterated in *P. S. Mahal* case (AIR 1984 SC 1291 : (1984) 4 SCC 545 : 1985 SCC (L&S) 61).

20. In *O. P. Singla v. Union of India* (AIR 1984 SC 1595 : (1984) 4 SCC 450 : 1984 SCC (L&S) 657) Chandrachud, C.J. speaking for the majority after taking note of the proviso to Rule 7 and Rule 8 of the Delhi Higher Judicial Service Rules, 1979 held that upon its true interpretation, the proviso prescribed a quota and Rule 8(2) provided for rotational system of giving seniority according to the quota. After taking note of the earlier decisions it was held of where recruitment is from two independent sources, the rule of seniority on a rational basis could not be held to be unconstitutional or violate of Article 16. The Court then proceeded to examine the effect of enormous departure in the matter of recruitment according to quota and its shadow over the interlinked seniority. Says the learned Chief Justice : (SCC p. 465, para 25)

However, instances are not unknown wherein, though the provision of a rule or a section is not invalid, the manner in which that provision is implemented in practice leads to the creation of disparities between persons who being similarly circumstances are entitled to equal treatment.

After taking note of Rules 16 and 17 of the same rules, it was observed as under : (SCC p. 467. para 30)

Promotes who were appointed under Rule 16 have been officiating continuously, without a break, as Additional District and Sessions Judges for a long number of years. It is both unrealistic and unjust to treat them as aliens to the Service merely because the authorities did not wake up to the necessity of converting the temporary posts into permanent ones, even after some of the promotees had worked in those posts from five to twelve years.

It was found as a fact that the provision prescribing the quota of direct recruitment and promotees was put in cold storage for a long time. After noticing this ugly fact, the majority proceeded to observe as under : (SCC p. 467, para 30)

In these circumstances, it will be wholly unjust to penalise the promotees for the dilatory and unmindful attitude of the authorities. It is not fair to tell the promotees that they will rank as juniors to direct recruits who were appointed five to ten years after they have officiated continuously in the posts created in the Service and held by them, though such posts may be temporary. This Court, at least must fail them not.

The Court after taking note of the fact that large number of persons were promoted to temporary posts and such temporary promotees officiated on substantive posts held that the proviso to Rule 7 which prescribes a quota for direct recruits and provides for rotational system of vacancies between them and the promotees who were appointed to the service, the rule of seniority according to rotation of vacancies between promotees and direct recruits according to quota must inevitably break down when promotions of promotees are made to the service under Rules 16 and 17. The majority quoted with approval the following passage from the judgment in *A. Janardhana* case ((1983) 2 SCR 936 : (1983) 3 SCC 601 : 1983 SCC (L&S) 467) : (SCC p. 610, para 15)

But, having done that we do propose to examine and expose an extremely undesirable, unjust and inequitable situation emerging in service jurisprudence from the precedents namely, that a person already rendering service as a promotee has to go down below a person who comes into service decades after the promotee enters the service and who may be a schoolian, if not in embryo, when the promotee on being promoted on account of the exigencies of service as required by the Government started rendering service. A time has come to recast service jurisprudence on more just and equitable foundation by examining all precedents on the subject to retrieve this situation.

The learned Chief Justice made a pertinent observation that the observations in the extracted passage are not without relevant to the case before his and lent considerable support to the conclusion which has been recorded in the judgment. Thus the ratio in Janardhana case ((1983) 2 SCR 936 : (1983) 3 SCC 601 : 1983 SCC (L&S) 467) has stood the scrutiny of two later decisions of different benches of this Court. It may incidentally be mentioned that the minority view also affirmed the approach and the observations in A. Janardhana case ((1983) 2 SCR 936 : (1983) 3 SCC 601 : 1983 SCC (L&S) 467).

21. The sum total of the aforementioned three judgments may be freely restated in the telling expression in A. Janardhana case ((1983) 2 SCR 936 : (1983) 3 SCC 601 : 1983 SCC(L&S) 467) which reads as under :

It is therefore, time to clearly initiate a proposition that a direct recruit who comes into service after the promotee was already unconditionally and without reservation promoted and whose promotion is not shown to be invalid or illegal according to relevant statutory or non-statutory rules should not be permitted by any principle of seniority to score a march over a promotee because that itself being arbitrary would be violative of Articles 14 and 16.

Now proceeding on the assumption that Rule 25(1)(ii) is valid and therefore seniority inter se between recruits from three different sources has to be computed according to the quota by rotating substantive vacancies in the grade reserved for each source, if in actual implementation it creates disparities between persons who are similarly circumstanced and thereby deny equal treatment, the rule would be violative of Article 16. The outcome is not on account of an invidious implementation of the rule but non-implementation of a part of rule for years. The end product as will be demonstrably established is unjust and unfair and yet this unjust and unfair action is being supported by the Union of India which was responsible for utter inaction in implementation the rule in its letter and spirit and for unreasonably long intervals. As pointed out earlier, direct recruitment has not been made for years. Limited competitive examination has also not been held for years. Promotions from the select list have been presumably in excess of the quota but they were appointed to substantive vacancies in the service and have been holding the posts as in the case of petitioners for over 6 to 8 years. The promotions were not styled as temporary, ad hoc or stopgap. Blanks related to allocated vacancies kept open for future direct recruits and candidates qualifying at limited competitive examination in the seniority list indicate that if the next direct recruitment is made, say in 1990 and the limited competitive examination is held in 1988, the recruits from the aforementioned two sources will have to be placed at Sr. No. 170 in the case of direct recruits and little down below in case of a candidate qualifying at the limited competitive examination. The direct recruit already placed at Sr. No. 170 of 1990 would score a march over departmental promotees of 1978 and persons in service after qualifying at the limited competitive examination in 1988. The emerging situation would be in pari materia with what was found by this Court in A. Janardhana case ((1983) 2 SCR 936 : (1983) 3 SCC 601 : 1983 SCC (L&S) 467) and O. P. Singla case (AIR 1984 SC 1595 : (1984) 4 SCC 450 : 1984 SCC (L&S) 657) and the reasons therein mentioned will mutatis mutandis apply for quashing the seniority list for the selfsame reason.

22. Approaching the matter from a slightly different angle, in our opinion, Rule 21(4) and Rule 25(1)(ii) both can be harmoniously read because they operate in two different areas. Rule 21 (4) provides that subject to other provisions of this rule (not all rules) persons promoted or recruited earlier on the basis of earlier selection or recruitment shall be senior to those promoted or recruited on the basis of subsequent selection or recruitment. If the expression 'selection' refers to those

promoted via the select list and the express in 'recruitment' refers to those entering service by direct recruitment, in view of Rule 21 (4) those who enter service by 'recruitment' or 'selection' at any time will always necessarily be senior to those promoted or recruited on the basis of a subsequent selection or recruitment. This is what Rule 21(4) provides. In terms it caters to a situation where recruitment or selection is at intervals with a time lag. Vacancies in the cadre or the grade arise every year. Normally the substantive vacancies in the cadre have to be filled in as they occur or within a reasonable time. The process of selection and recruitment must continuously be in operation roughly from year to year. By the impact of Rule 21(4), the selection or recruitment of one year shall have precedence over selection or recruitment of the next year and this is what is known in service jurisprudence as seniority according to continuous officiation in the cadre or the grade which has been statutorily recognised in sub-rule (4) of Rule 21. This is in tune with fair play and justice and ensures equality as mandated by Article 16. Now Rule 25(1)(ii) provides for integrating direct recruits and persons entering via the select list to a grade. It is implicit in sub-clause (ii) of Rule 25(1) that it would operate at a time when in a given year almost simultaneously or within a measurable distance from each other recruitment is made from all the other sources. To illustrate if in a given year candidates are selected for appointment to the grade by direct recruitment also by holding the limited competitive examination and giving promotion and if all the three enter the service or the grade at or almost same time or within the year and within a reasonable time from each other, a question is bound to arise how to integrate of them service from different sources in the common service. Rule 25(1)(ii) caters to this situation and helps in integrating appointees from three sources to be integrated into common seniority list according to quota. Now contrast Rule 25(1)(ii) with Rule 21(4) and the meaning of Rule 25(1)(ii) reveals itself and becomes clear and understandable. A block of recruits in a given year coming from three independent sources may be integrated inter se according to quota and rota. The block in subsequent year would be always junior to the block of recruits in the earlier years. This is how Rules 21(4) and 25(1) (ii) can be harmoniously read and it is unquestionable that they operate in two different situations and both have to be given effect to.

23. Now turning to the impugned seniority lists, what the Union of India appears to have done is that it has applied the quota and rotated the vacancies but where candidates from a particular source were not available, the vacancies were deemed to be kept open (some kind of carry forward) to be filled in by later recruitment from the same source years after the vacancy occurred, but in the mean time the vacancy was filled in presumably by excess recruitment from the other sources. That is clearly either non-implementation of the quota rule or mal-functioning of the quota rule and yet the rota rule is adhered to which is both impermissible under the Rules as well as unjust, unfair and inequitable being violative of Articles 14 and 16.

24. It was however contended on behalf of the respondents that the quota prescribed by Rule 13(1) being mandatory in character, any appointment in excess of the quota in any year would render the excess appointees as irregularly appointed and they would not become members of the service and hang outside the service, and can be demoted. It was said that once recruits are available from the source for which quota was prescribed, the promotees in excess of their quota can and must be replaced by later entrants. It was submitted that such excess promotees has to be demoted but to save them from this harsh situation, the courts have evolved a rule that they may be pushed down and regularised in subsequent years. This indulgence, it was said, cannot be claimed as a matter of right and therefor such excess promotees cannot claim seniority over recruits from other sources who may have come at a later date. Reliance was placed on two decisions of this Court in *S. G. Jaisinghani v. Union of India* ((1967) 2 SCR 703 : AIR 1967 SC 1427 : 65 ITR 34) and *Bishan Sarup Gupta v. Union of India* (1975) 1 SCR 104 : (1975) 3 SCC 116 : 1974 SCC (L&S) 506).

These two decisions are of little help in view of the later decisions directly on the point and discussed hereinabove.

25. The language of Rule 13(1) appears to be mandatory in character. Where recruitment to a service or a cadre is from more than one source, the controlling authority can prescribe quota for each source. It is equally correct that where the quota is prescribed, a rule of seniority by rotating the vacancies can be a valid rule for seniority. But as pointed out earlier if the rule of seniority is inextricably intertwined with the quota rule and there is enormous deviation from the quota rule, it would be unjust, inequitable and unfair to give effect to the quota rule. In fact as held in O. P. Singla case (AIR 1984 SC 1595 : (1984) 4 SCC 450 : 1984 SCC (L&S) 657), giving effect to the rota rule after noticing the enormous departure from the quota rule would be violative of Article 14. Therefore assuming that quota rule was mandatory in character as pointed out earlier, its departure must permit rejection of rota rule as a valid principle of seniority.

26. The matter can be viewed from a different perspective. The question that may be posted is "Was the quota rule mandatory in character ? "Rule 29(a) confers power on the controlling authority to relax any of the provisions of the 1964 Rules. It reads thus :

29(a) Where the controlling authority is of opinion that it is necessary or expedient so to do, it may be ordered, for reasons to be recorded in writing to relax any of the provisions of these rules with category of persons or posts :

Provided that in relation to post falling within the purview of the Commission, no order in respect of a class or category of persons or posts shall be made except after consultation with the Commission.

The controlling authority is defined in Rule 2-F to mean the Government of India in the Ministry of External Affairs. Therefore the Government of India in the Ministry of External Affairs enjoys the power, if it is necessary or expedient so to do, to relax any of the provisions of these rules, with respect to any class or category of persons or posts. The proviso carves out an exception that in relation to posts falling within the purview of the Union Public Service Commission no order in respect of a class or a category of persons or posts shall be made except after consultation with the Commission. We will presently deal with the effect of non-consultation of the Commission in a given situation. However, Rule 29(a) indisputably confers power to relax any of the provisions of the 1964 Rules which shall also comprehend Rule 13(1) which prescribes the quota. Undoubtedly, when the power to relax any of the provisions of the rules is exercised, the controlling authority must be of the opinion that it is necessary or expedient so to do for reasons to be recorded in writing before exercising the power. It is well-settled that failure to record reasons will not invalidate the exercise of power. Once the power to relax is given, mandatory rule exists and an action in derogation of the rule has been repeatedly taken year after the year, it would be a permissible inference that the action was taken in relaxation of the rule for which the power exists and in this case in located in Rule 29(a). To hold otherwise would be to come to a rather disconcerting conclusion that a body like the Government of India acted deliberately in contravention of the mandatory rule from year to year. It would as far as possible be proper to avoid such an inference unless it is inescapable. In this case as pointed out earlier for years 1965 to 1972 there was no direct recruitment and even for the later years only an indent was placed and not recruitment done, and during all these years large number of persons from grade IV were promoted as departmental promotees to the integrated grade II and III. A body like the Government of India presumably knew that there is a statutory quota for recruitment but it also presumably knew that it had power to relax

and for exigency of service repeatedly acted in derogation of the quota rule, and therefore it would be permissible to infer that the action was taken in relaxation of the mandatory quota rule. This view which we are taking is in accord with the decision of the Constitution Bench in *Bachan Singh v. Union of India* ((1972) 3 SCR 898 : (1972) 3 SCC 489 : 1973 Lab IC 315) wherein this Court held that though the direct recruitment was made in consultation with the Union Public Service Commission though not in accordance with the prescribed procedure namely on the result of a competitive examination, as the country was in a state of emergency, the appointment and selection was made by interview only and that such appointment by direct recruitment was made by relaxation of the relevant rules and the power was located in the Government of India to relax the rules. No specific order was shown in that case vouchsafing that the appointments were made in relaxation of the rule but the Court inferred from various relevant circumstances then prevailing that the appointments not in consonance with the prescribed procedure for direct recruitment must have been made in relaxation of the rules. When the question again came up in *A. Janardhana case* ((1983) 2 SCR 936 : (1983) 3 SCC 601 : 1983 SCC (L&S) 467) the Court held that if direct recruitment was made in relaxation of the relevant rules, the same reasons will *mutatis mutandis* apply to hold that promotions in excess of quota were given by relaxing the rules. It is therefore reasonable to believe in this case that though the quota was mandatory it was not adhered to by exercising the power of relaxation both qua persons and posts.

27. It was however contended that it is not permissible to infer that promotions in excess of quota were given by relaxing the quota rule because the posts in integrated grade II and III were within the purview of the Union Public Service Commission and the proviso to Rule 29(a) mandates that the power to relax is hedged in with a condition that it can be done after consultation with the Commission, and there is nothing to show that the Commission was ever consulted. Undoubtedly, the proviso to Rule 29(a) requires that the controlling authority cannot relax any of the provisions of the rules in respect of posts which are within the purview of the Union Public Service Commission unless after consultation with the Commission. It was submitted that nothing is placed on the record by the petitioners to show that power to relax the quota rule was exercised after consultation with the Union Public Service Commission. Assuming that there was no consultation, would the exercise of power to relax be vitiated and the appointments made in relaxation of the mandatory quota rule would be *ab initio* invalid? Commencing from the decision of the Privy Council in *Montreal Street Railway Company v. Normandin* (AIR 1917 PC 142), it is well-settled that :

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void this duty would work serious general inconvenience or injustice persons who have no control over those entrusted with the duty and at the same time would not promote the main of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

The view was expressed in the context of the failure to revise list of Jurors by the Sheriff according to the revised statutes of Quebec and conviction was challenge don the ground of mistrial held by selecting Jurors from unrevised lists. The challenge failed. Coming home in *State of U.P. v. Mambpdjam Lal Srivastava* ((1958 SCR 533 : AIR 1957 SC 912 : (1958) 2 LLJ 273) a Constitution Bench of this Court specifically held that with the Public Service Commission is provided as required by Article 320(3)(c) of the Constitution such provision is not mandatory and they do not confer any rights on public servants so absence of consultation or irregularity in consultation does not afford him a cause of action in a court of law. There are number of subsequent decisions to which our attention was called reiterating the same principle. Therefore assuming there was failure

consult the Union Public Service Commission before exercising the power to relax the mandatory quota rule and further assuming that the posts in integrated grade II and III were within the purview of the Commission and accepting for the time being that the Commission was not consulted before the power to relax the rule was exercised yet the action taken would not be vitiated nor would it furnish any help to Union of India which itself cannot take any advantage of its failure to consult the Commission. Therefore it can be safely stated that the enormous departure from the quota rule year to year permits an inference that the departure was in exercise of the power of relaxing the quota rule conferred on the controlling authority. Once there is power to relax the mandatory quota rule, the appointments made in excess of the quota from any given source would not be illegal or invalid but would be valid and legal as held by this Court in *N. K. Chauhan v. State of Gujarat* ((1977) 1 SCR 1037 : (1977) 1 SCC 308 : 1977 SCC (L&S) 127). Therefore the promotion of the promotees was regular and legal both on account of the fact that it was made to meet the exigencies of service in relaxation of the mandatory quota rule and to substantive vacancies in service.

28. Once the promotees were promoted regularly to substantive vacancies even if temporary unless there was a chance of their demotion to the lower cadre, their continuous officiation confers on them an advantage of being senior to the later recruits under Rule 21(4). If as stated earlier by the enormous departure or by the power to relax, the quota rule was not adhered to, the rota rule for inter se seniority as prescribed in Section 25(1)(ii) cannot be given effect to. In the absence of any other valid principle of seniority it is well-established that the continuous officiation in the cadre, grade or service will provide a valid principle of seniority. The seniority lists having not been prepared on this principle are liable to be quashed and set aside.

29. Accordingly these writ petitions succeed and the rule is made absolute. The impugned seniority lists challenged by the petitioners have been drawn up in violation of the provisions of Articles 14 and 16 of the Constitution and therefore they are quashed. The first respondent is directed to draw up fresh seniority list in the light of the observations made in this judgment within a period of three months from today. All promotions granted since the filing of the petitions are subject to the decision herein given and they must be readjusted to be brought in consonance with this judgment. In the circumstances of the case, there will be no order as to costs.

</html