

PETITIONER:
AWADH PRASAD SINGH AND ORS.

Vs.

RESPONDENT:
STATE OF BIHAR AND ORS.

DATE OF JUDGMENT 27/03/1990

BENCH:
RAY, B.C. (J)
BENCH:
RAY, B.C. (J)
SAIKIA, K.N. (J)

CITATION:
1990 AIR 1256 1990 SCR (2) 193
1990 SCC (3) 294 JT 1990 (3) 483
1990 SCALE (1) 587

ACT:

Excise Recruitment Rules 1936: Rule 1(3)(2)--Bihar State--Excise Department--Excise Inspectors promoted from Upper Division Assistants in Excise Department and Excise Inspectors promoted Sub-Inspectors--Gradation list--Challenge to--Whether valid.

HEADNOTE:

The subject matter of the Writ Petition is the gradation list dated 9.1.1986 of the Inspectors of Excise by which the Government of Bihar has finally fixed the inter se seniority of the Petitioners who were promoted vis-a-vis the appellants in the present appeal who were promoted to posts of Inspectors of Excise in 5% quota reserved for promotion from the posts of Upper Division Assistants of Excise Department.

In the gradation list the appellants who joined as Inspectors of Excise on 7.5.76 were shown as senior to the Excise Inspectors who were promoted from Sub-Inspectors on 24.4.74 in the vacancies of direct recruits.

The gradation list was challenged in the High Court by the Respondents on two grounds i.e., (1) the State Government has no jurisdiction to determine the seniority or gradation list of the Excise Inspectors, the competent authority is the Excise Commissioner (2) The Respondents in the present appeal have been continuously officiated for years together in the vacancies of direct recruits and thus could not be pushed down for determining the seniority and shown as juniors to the contesting appellants.

The High Court allowed the Writ Petition in part. It was held that 5% quota to be filled up by promotion from Upper Division Assistants of Excise Department was notified only on 31st March 1975, whereas the appellants have been promoted in the 5% quota of vacancies of the year 1974-75. Hence they have not been promoted in the 5% quota. The Respondents in the present appeal were promoted as Excise Inspectors on 24.4.74 in the quota of direct recruits and thus they could not be shown as juniors to those who were promoted and joined on 7.5.76 from 5% quota of the 1974-75 year vacancies. The High Court quashed the

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gradation list and directed the State Government to draw up

a fresh list in the light of the observations made. Further it held that State Government is the competent authority to determine inter se seniority because where in any provisions of Bihar Excise Act 1915 government has vested the Excise Commissioner with the power of determining the seniority of the Excise Inspectors. Hence the gradation list prepared by the State Government is legal and valid.

The appellants filed Special Leave petition in this Court against the High Court Judgment and Order.

Allowing the Special Leave Petition, this Court,

HELD: The appellants claimed to be promoted to the posts of Inspectors in the 5% quota set apart for promotion from the Upper Division Assistants against the vacancies of the year 1974-75. Since under Bihar Excise Act 1915 vide notification No. 417 of 15.1.1919 clause (iv) the Excise Commissioner was given only the powers to appoint Excise Inspectors by promotions but not to determine inter se seniority etc. Hence vide Excise Recruitment Rules 1936, Rule No. I vide notification No. 411 dated 31.3.75, after clause (2) clause (3) was added making provision for promotion from selected confirmed Upper Division Assistants and Head Clerks of the District Excise Office and also added at the end of the Rule 1 that at least 5% of the total vacancies shall be filled up by promotion from among the above notified staff. In this rule the provision for relaxation of direct recruitment quota was made but there was no relaxation of the quota of promotees. [197G; 198C; 199E]

The State Government made this decision and order on 20.3.74 regarding reservation of 5% of the total vacancies to be filled by promotion for the year 1974-75 but the notification to that effect was published on 31.3.75. The promotion could not have been given unless the decision was confirmed by notification. It was only after the notification of 31.3.75, that the Upper Division Assistants were promoted as Excise Inspectors for the first time out of the 5% quota created in the vacancies of 1974-75, in the year 1976. [205G-H; 206B]

The Government has rightly promoted the appellants within their quota in the vacancies occurred in 1974 by its orders. [211D]

When there is no relaxation in the quota vacancies as between the direct recruitment and promotees, the determination of inter se

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seniority shall be determined in the order of rotation of vacancies reserved for both categories, the direct recruits made within their quota would always deemed to be senior to those promotees recruited in excess of their quota. [210H; 211A]

V.B. Badami v. State of Mysore, AIR 1980 SC 1561; A. Janardhana v. Union of India & Ors., AIR 1983 SC 769 and O. Singla & Anr. v. Union of India & Ors., AIR 1984 SC 1595, relied on.

It is only when the quota rule was not adhered to or followed for a long time and the promotees are allowed to officiate in the quota of direct recruits for a period of 15 to 20 years, in such circumstances Government is empowered to relax the quota rule and the promotees will have seniority from the date of the continuous officiations in the cadre, grade or service. [210F]

Narendra Chadha v. Union of India, AIR 1986 SC 638 and G.S. Lamba & Ors. v. Union of India & Ors., [1985] 3 SCR 431

Quotas are fixed under the relevant rules of recruitments and can be altered only by fresh determination of quotas under the relevant rules of recruitments. [201 C]

In the instant case, there was no rule for relaxation of the quota. The respondent Nos. 3 & 4 who were promoted from selected Excise Sub-Inspectors to the Inspectors of Excise in 1974, officiated till 7.5. 1976 when the appellants joined as Inspectors of Excise from their 5% quota. It cannot be said in such circumstances that the quota was not filled up for a long period nor can it be said that the respondents 3 & 4 who were promoted in excess of their quota have worked as inspectors of Excise for long time and as such the respondents 3 & 4 cannot claim to be seniors to the appellants. [210G-H; 211A]

The appellants being promoted as Inspectors of Excise from the 5% quota of vacancies of the year 1974-75, were rightly shown as seniors in the gradation list prepared by the Government on 9.1.1986 which is legal and valid. [21 1D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 16 13 of 1990.

From the Judgment and Order dated 1.4. 1987 of Patna High Court in Civil Writ Jurisdiction Case No. 4097 of 1985. 196

R.K. Garg, Praveen Swarup and Pramod Swarup for the Appellants.

M.K. Ramamurthi, L.R. Singh, B.B. Singh, D.P. Mukherjee and M.P. Jha for the Respondents.

The Judgment of the Court was delivered by RAY, J. Arguments heard. Special Leave granted.

This appeal on Special Leave is directed against the Judgment and Order dated April 1, 1987 passed by the High Court, Patna m C.W.J.C. No. 4097/1985 allowing the writ petition in part. The subject matter of the writ petition is the gradation list dated 9.1. 1986 of the Inspectors of Excise by which the Government of Bihar has finally fixed the inter se seniority of the petitioners (respondents in this Appeal) who were promoted vis-a-vis the respondents Nos. 3 and 4 (appellants in this appeal) who are promoted to posts of Inspectors of Excise in 5% quota for promotion from the posts of Upper Division Assistants of Excise Department in the said Civil Writ Petition.

The matrix of this case in short is that the appellants Nos. 1 and 2 who were respondents 3 and 4 of the writ petition were promoted to the posts of Excise Inspectors from among the Upper Division Assistants of the Excise Department against the vacancies of the year 1974-75 and they joined as Inspectors of Excise on May 7, 1976. The respondent Nos. 3 and 4 who were Sub-Inspectors of Excise were promoted on 24.4.74 in the vacancy of the year 1974-75 by the Commissioner of Excise, Bihar. In the gradation list prepared by the Government on January 9, 1986 the appellants were shown as seniors to the respondents even though the respondents were promoted from selected Sub-Inspectors of Excise and they joined the posts of Excise Inspectors earlier than the date when the appellants were promoted as Excise Inspectors. This has been challenged by the respondents on the ground that there is an apparent error committed by the State in showing the respondents juniors to the appellants in the gradation list. The gradation list was challenged mainly on two grounds namely:

(1) the State Government has no jurisdiction to determine the seniority of Excise Inspectors and the only competent authority for determining the same was the Excise Commissioner who has neither determined the seniority nor prepared

the gradation list.

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(2) The respondents (petitioners of the writ petition) have continuously officiated for years together in the vacancy of direct recruits and merely because the respondents were appointed against the vacancy of direct recruits they could not be pushed down for determining the seniority and shown junior to the contesting appellants. The writ petition was allowed by the High Court holding that the respondents were not appointed in the 5% quota set apart for being filled up by promotion from the posts of Upper Division Assistants in the Excise Department inasmuch as this quota was notified by the Government on March 31, 1975 even though the Government passed order providing 5% of the total vacancies to be filled by the promotion from among the selected Upper Division Assistants and selected Head Clerks. It has, therefore, been contended that the petitioners Nos. 3 and 4 (respondents Nos. 3 and 4 in this appeal) cannot be shown as juniors to the appellants. Moreover it has been alternatively urged that these respondents having been promoted to the posts of Inspectors of Excise in the quota of direct recruitment for several years, they could not be pushed down and the appellants who joined on promotion to the posts of Inspectors of Excise subsequently cannot be shown as senior to the respondents Nos. 3 and 4 in the said gradation list. The High Court, Patna after hearing the parties held that the respondents Nos. 3 and 4 who were appointed in the vacancies of the promotees of the year 1974-75 and who joined as Inspectors on 24.4.1974 cannot be made juniors to appellants Nos. 1 and 2 who were promoted and joined two years later on 7.5. 1976. The High Court allowed the writ petition in part by quashing the gradation list (Annexure 15) and directed the Government to draw up a fresh gradation list in the light of observations made therein.

It is against this judgment and order passed in C.W.J.C. No. 4097/85, the instant appeal on special leave has been filed by the appellants.

The only question that falls for consideration in this appeal is whether the appellants who claim to be promoted to the posts of Inspectors of Excise in the 5% quota set apart for promotion to the posts of Inspector of Excise from among the Upper Division Assistants of the Excise Department against the vacancies of the year 1974-75 had been promoted in this quota. In order to decide this question, it is relevant to refer to certain provisions of the Bihar Excise Act, 1915 as well as Rules 1 & 4 of the Inspectors of Excise Recruitment Rules, 1936.

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Section 2(7) of the Bihar Excise Act, 1915 (hereinafter referred to as Act) defines Excise Commissioner "as the Officer appointed under Section 7 sub-section 2 clause (a) of the said Act". Section 7 Sub-Section (2)(a) provides that the State Government may appoint an officer who shall subject to such control as the State Government may direct, have the control of the administration of the Excise Department and the collection of the excise revenue. Section 7(2)(a) further provides that the State Government may delegate to the Board, the Commissioner of a Division or the Excise Commissioner all or any of the powers conferred upon the State Government by or under this Act except the powers conferred by Section 89 to make Rules. Section 7(2)(f) provides that the State Government may withdraw from any officer or person all or any of the powers of duties conferred or imposed upon him by or under this Act.. By Notification No. 417 dated January 15. 1919, in exercise of the

powers conferred under the Act, the Lt. Governor in Council was pleased to make clause (ii) of the Notification order to the effect that there shall be an Excise Commissioner who shall subject to the control of the Board will have throughout the province of Bihar the control of the administration of the Excise Department and the collection of excise revenue. It has also been provided in clause (iv) of the Notification that the power to appoint by promotion Inspector of Excise was delegated to the Excise Commissioner by the Government.

Thus, it is clear and apparent that the Excise Commissioner has been delegated the powers by the State Government to appoint by promotion from selected Sub-Inspectors of Excise, but no here it has been mentioned in any of those provisions that the Excise Commissioner has been vested with the power of determining the seniority of the Inspectors of Excise. Therefore, the submission that the seniority list or the gradation list prepared by the State Government is unauthorised being beyond the powers of the State Government is unsustainable and the gradation list that has been prepared on January 9, 1986 by the State Government is legal and valid as upheld by the High Court.

It is necessary to refer to the recruitment rules to determine seniority. Rule 1 of Excise Recruitment Rules, 1936 reads as follows:

"1. Inspectors of Excise and Salt shall be appointed:

(i) by direct recruitment by the Board of Revenue, or,
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(ii) by promotion of selected Sub-Inspectors by the Commissioner of Excise and salt.

Not more than 25 per cent of the vacancies shall ordinarily be filled by direct recruitment; but with the approval of the Board of Revenue on the recommendation of the Commissioner of Excise this proportion may on any occasion, be increased to 50 per cent".

Later on by Notification No. 1451 dated 2.3. 1945 published in the Bihar Gazette on March 7, 1945, the expression "not more than" in the last paragraph of Rule 1 has been deleted. Subsequently by Government Notification S.O. 411, dated 31st March, 1975 published in the Bihar Gazette, Extraordinary Issue on that day, after clause (2) or rule 1 clause (3) has been added and it reads as follows:

"by promotion from among selected confirmed Upper Division Assistants of the Excise Commissioner's office and selected confirmed Head Clerks of the District Excise Offices".

By the said notification the following has been added at the end of rule 1 "Atleast 5 per cent of the total vacancies shall be filled by promotion from among the selected Upper Division Assistants and selected Head Clerks."

Thus on a perusal of the said rule as amended clearly it indicates that 25% of the total vacancies for the post of Inspectors of Excise shall be filled by direct recruitment, 70% shall be filled by promotion from among the selected Sub-Inspectors and 5% shall be filled by promotion from among the confirmed Upper Division Assistants of the Excise Commissioner's Office and confirmed Head Clerks of the District Excise Offices. The 25% quota of direct recruits can be relaxed and increased to 50 per cent. It is significant to note in this connection that no provision has been made in the said rules for relaxation of the quota of promotees. The necessary question arises if the promotion from Sub-Inspectors of Excise to the post of Inspectors of Excise have been made in excess of the quota of the promotees in the vacancy of direct recruits and later on direct recruitment has been made the promotees can in such circumstances

be treated to be juniors to the direct recruits or not. This question was under consideration before this Court in the case of V.B. Badami v. State of Mysore, A.I.R. 1980 SC 1561. In this case The Mysore Administrative Service

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(Recruitment) Rules, 1957 classified class 1 posts into two categories: senior scale posts and the junior scale posts. Two-thirds of the junior class I posts were filled by promotion from Class II officers and the balance one-third by direct recruitment by the Public Service Commission. By the Mysore Recruitment of Gazetted Probationers Rules, 1959, the quota for direct recruitment to the Mysore Administrative Service was increased from one-third to two-thirds for a period of five years as a consequence of which the quota for promotees had been reduced to one third, Rule 17(b) of the 1957 Recruitment Rules empowered the Government to fill up posts temporarily by promotion against vacancies for direct recruits but such promotees were liable to be reverted after the appointment of direct recruits.

In January 1972, a Gradation List was published in which the direct recruits (respondents) were shown as senior to the appellants. The appellants challenged the seniority of the respondents in writ petitions on the ground mainly that the respondents were recruited only to the 20 temporary posts created and that the appellants and 51 others were appointed to 59 permanent vacancies. The appeal was dismissed by this Court and it has been observed as follows:

"The principles generally followed in working out the quota rule are, (i) Where rules prescribe quota between direct recruits and promotees confirmation or substantive appointment can only be in respect of clear vacancies in the permanent strength of the cadre; (ii) confirmed persons are senior to those who are officiating; (iii) as between persons appointed in officiating capacity, seniority is to be counted on the length of continuous service; (iv) direct recruitment is possible only by competitive examination which is the prescribed procedure under the rules. In promotional vacancies, the promotion is either by selection or on the principle of Seniority-cum-merit. A promotion could be made in respect of a temporary post or for a specified period, but direct recruitment has generally to be made only in respect of a clear permanent vacancy, either existing or anticipated to arise at or about the period of probation is expected to be completed; (v) if promotions are made to vacancies in excess of the promotional quota, the promotions may not be totally illegal but would be irregular. The promotees can not claim any right to hold promotional posts unless the vacancies fall within their quota. If the promotees occupy any vacancies which are within the

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quota of direct recruits, when the direct recruitment takes place, the direct recruits will occupy the vacancies within their quota. Promotees who are occupying the vacancies within the quota of direct recruits will either be reverted or they will be absorbed in the vacancies within their quota in the facts and circumstances of the case; and (vi) as long as the quota rule remains, neither promotees can be allotted to any of the substantive vacancies of the quota of direct recruits nor direct recruits can be allotted to promotional vacancies; and (vii) quotas which are fixed are unalterable according to exigencies of the situation. They can only be altered by fresh determination of quotas under the relevant rules. One group either on the ground that the quotas are not filled up or that because there had been a number in excess of the quota the same should be absorbed depriving

the other group of quota."

It thus emanates from the said Judgment of this Court that when promotion has been made in excess of the quota the promotees who have been promoted in the quota of direct recruits will be pushed down and will be absorbed in the quota of promotees of subsequent years and the direct recruits made within their quota would be deemed to be senior to those promotees recruited in excess of their quota.

In the case of A. Janardhana v. Union of India & Ors., AIR 1983 SC 769 the question of determination of seniority between the direct recruits to the post of Assistant Executive Engineer (AEE) and the promotees from the post of Assistant Engineer fell for consideration. The Military Engineer Services Class I (Recruitment, Promotion and Seniority) Rules (1949 Rules for Short) were brought into operation on or from 1.4. 1951. Under Rule 3 and 4 of 1949 Rules the recruitment to MES Class I was to be made from two sources, namely, by competitive examination in accordance with Part II of the Rules and by promotion in accordance with Part III of the Rules. Rule 4 prescribed a quota of 9:1 between direct recruits and promotees. During the years 1962, 1963 and 1964 particularly and until the year 1969, the Class I Service Rules were not statutory in character. The Union Government relaxed the Rules both in regard to recruitment by interview and in regard to the quotas fixed by the Rules for direct recruitment and recruitment by promotion to Class I Service. The 1949 Rules and the subsequent amendments thereto acquired statutory flavour in character by incorporation only in 1969 and till then they were mere administrative instructions.

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It was due to emergency situation in the market of recruitment of engineers between 1959 and 1969 and the dire need of urgently recruiting engineers which led the Government to make recruitment in relaxation of quota rule by foregoing the competitive examination and promoting subordinate ranks to Class I Service. Appellant and similarly situated persons were thus promoted to meet the dire need of service in relaxation of the quota rule.

It has been observed by this Court that when recruitment is from two independent sources, subject to prescribed quota, but the power is conferred on the Government to make recruitment in relaxation of the rules any recruitment made contrary to quota rule would not be invalid unless it is shown that the power of relaxation was exercised mala fide. It was also observed that the recruitment made to meet the exigencies of service by relaxing the quota rule the promotion in excess of quota would be valid. It had further been observed that once the quota rule was fully relaxed between 1959 and 1969 to suit the requirements of service and the recruitment made in relaxation of the quota rule and the minimum qualification rule for direct recruits was held to be valid, no effect could be given to the seniority rule enunciated in Para 3(iii) of Appendix V of the 1949 Rules, which was wholly interlinked with the quota rule and could not exist apart from it on its own strength. This was impliedly accepted by the Union Government and was implicit in the seniority lists prepared in 1963 and 1967-68 in respect of AEE, because both those seniority lists were drawn up in accordance with the rule of seniority provided in Army Instruction No. 241 of 1950.

It has been further held that there was no justification for redrawing the seniority list affecting persons recruited or promoted prior to 1969 when the rules acquired statutory character. Therefore, the 1974 seniority list was liable to

be quashed and the two 1963 and 1967 seniority lists must hold the field.

In *Shri O.P. Singla and another v. Union of India & Ors.*, AIR 1984 SC 1595 the question of inter se seniority between promotees and direct recruits came up for consideration before this Court. Delhi Higher Judicial Service was constituted on May 15, 1971. It was governed by the Delhi Higher Judicial Service Rules, 1970. Rule 7 provides that the recruitment to the service will be made from two sources i.e. by promotion on the basis of selection from members of the Delhi Judicial Service, who have completed not less than ten years of service in the Delhi Judicial Service and by direct Recruitment from the Bar

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provided that not more than 1/3rd of the substantive posts in the service shall be held by direct recruits. The seniority of direct recruits vis-a-vis promotees shall be determined in the order of rotation of vacancies between the direct recruit and promotees based on the quota of vacancies reserved for both categories. Rule 7 provided that the first available vacancy will be filled by a direct recruit and the next two vacancies by promotees and so on.

It has been observed that persons who are appointed or promoted on an ad hoc basis or for fortuitous reasons or by way of a stop-gap arrangement cannot rank for purposes of seniority with those who are appointed to their posts in strict conformity with the rules of recruitment, whether such latter class of posts are permanent or temporary.

It has also been observed that persons belonging to the Delhi Judicial Service who are appointed to temporary posts of Additional District and Sessions Judges on an ad hoc basis or for fortuitous reasons or by way of a stop-gap arrangement, constitute a class which is separate and distinct from those who are appointed to posts in the Service in strict conformity with the rules of recruitment. In view of this, the former class or promotees cannot be included in the list of seniority of officers belonging to the Service.

It has, therefore, been held that those who are appointed to the post of Additional District and Sessions Judges on ad hoc basis for fortuitous reasons cannot be taken into consideration in determining the seniority of the members of the Service.

In the case of *G.S. Lamba & Ors. v. Union of India & Ors.*, [1985] 3 SCR 431 the question of inter se seniority between direct recruits and promotees cropped up for consideration before this Court. The Indian Foreign Service Branch 'B' was constituted in 1956. The statutory rules Indian Foreign Service Branch 'B' (Recruitment, Cadre, Seniority and Promotion) Rules, 1964 were enforced on or from May 6, 1964. It provided for recruitment from three sources:-

(1) direct recruitment on the result of a competitive examination held by the Union Public Service Commission
(2) substantive appointment of persons included in the selective list promoted on the basis of a limited competitive examination held by the Union Public Service Commission and

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(3) Promotion on the basis of seniority

By a notification dated February 12, 1975, Rule 13 was amended to provide that recruitment to the three different sources of integrated Grades II and III to be:

(1) 1/6th of the substantive vacancies to be filled in by direct recruitment

(2) 331/3 % of the remaining 5/6 of the vacancies to be filled on the basis of results of the limited competitive

examination and

(3) the remaining vacancies to be filled in by promotion on the basis of seniority.

The petitioners were selected by the Union Public Service Commission on the basis of the merit obtained at the examination of Assistants conducted for the purpose for appointment to the post and allocated to the Ministry of External Affairs. After the initial constitution of the service of 1956, they were offered an option whether they would like to join the I.F.S. Branch 'B' in grade IV. They opted and were inducted into the service. Later they were promoted between 1976 and 1979 from Grade IV to the integrated Grades II and III. The Government of India published a seniority list of the integrated Grades II and III as on June 25, 1979 and before objections taken by the petitioners to the seniority list were dealt with, another seniority list was published on June 30, 1983. This list was assailed by the petitioners on the ground that it is discriminatory and is consequently violative of Article 14 and 16 of the Constitution. This Court upheld their contention and quashed the seniority list. The Union Government was directed to prepare a fresh seniority list. In the instant case direct recruitment had not been presumably made in excess of the quota and the promotees were appointed to substantive vacancies in the service and they had been holding the posts for over 6 to 8 years. In the seniority list that was prepared the direct recruits who were promoted much later to the promotees in excess of their quota were shown senior to the promotees, it has been held that once the promotees were promoted regularly and they have been officiating for a number of years the continuous officiation confers on them an advantage of being senior to the later recruits under Rule 21(4). It has been further observed that if there has been an enormous departure from the quota fixed by exercising the powers to relax, the quota rule was not adhered to, the rota rule for inter se seniority as prescribed in 205

Rule 25(i) and (ii) cannot be given effect. In the absence of any other valid principle of seniority it has been held that continuous officiation in the cadre, grade or service will provide a valid principle of seniority.

It has been held that where the direct recruitment had not been made according to the quota for years and promotions have been made in excess of the quota and the promotees were appointed in the vacancies of the direct recruits and work for a number of years, the quota rule cannot be given effect to and the promotees cannot be shown as junior to the direct recruits in the seniority list. Continuous officiation in the cadre, grade or service will provide a valid principle of seniority. Seniority List was, therefore, quashed and set aside.

In the case of Narendra Chadha v. Union of India, AIR 1986 SC 638 there was a quota rule for filling up the vacancies from two sources--by direct recruitment as well as by promotion. The direct recruitment was not made for number of years and the posts of direct recruits were filled up by promotion. The promotees were allowed to function in the promoted posts for 15 to 20 years. Thereafter direct recruitment was made. There was a rule which empowers the Government to relax the quota. It was held that whenever a person is appointed in a post without following the rules prescribed for that appointment to the post, he should not be treated as a person regularly appointed to that post. Such a person may be reverted from that post but in a case where persons have been allowed to function in higher posts

for 15 to 20 years without due deliberation it would be unjust to hold that they had no claim to such posts and could be reverted unceremoniously or treated as persons not belonging to the service at all particularly where government is endowed with the power to relax the rules to avoid injustice. It has been held by this Court that continuous officiation of the promotees could be justified on the basis of the rule 16 on the presumption that the Government had relaxed the rules and appointed the promotees to the posts in question to meet the administrative requirements.

In the instant case undoubtedly, the Government made an order on 20.3.1974 for reservation of 5% of the posts for recruitment by promotion from among selected confirmed Upper Division Assistants of the Commissioner's Office and the selected confirmed Head Clerks of the District Excise Offices. Pursuant to that order, the Government later on published a Notification S.O. 411 in the Bihar Gazette on March 31, 1975 stating therein about the quota of 5% of total vacancies reserved for the promotion of the selected Upper Division

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Assistants to the post of Inspectors of Excise. It has been urged by the learned counsel appearing on behalf of the respondents that the respondent Nos. 3 and 4 being promoted and appointed as Inspectors of Excise from the 75% quota for promotion from selected SubInspectors of Excise in April, 1974 they cannot be shown as junior to the appellants, in the seniority list inasmuch as the appellants were appointed on 7.5.1976. It has been further submitted in this connection that the appointment of the appellants on promotion from the 5% quota of the vacancies available in 1974 cannot be made. It has also been submitted that the Notification referring to the 5% quota for promotion of Upper Division Assistants cannot be deemed to be a quota in respect of vacancies for the year 1974-75. As such quota cannot be enforced unless and until the reservation of 5% quota of vacancies is published in the official gazette for information of the public. In support of this submission the decision in *Harla v. State of Rajasthan*, [1952] SCR 110 was cited at the Bar. In this case on 11.12.1923 the counsel passed a resolution which purported to enact a law called The Jaipur Opium Act and the only question was whether the mere passing of the resolution without promulgation or publication in the Gazette or by other means to make the Act known to the public was sufficient to make it a law and enforce the same. There was an amendment of Section 1 of the Jaipur Opium Act to the effect that it shall come into force from 1.9.1924. The Act was never published in the Gazette. It was held that the Jaipur Laws Act 1923 which required the whole of the Act to be published instead of publication of only one section, will not validate the same. In the instant case, the Government made an order reserving 5% of the total vacancies in a year for being filled in by promotion from the selected Upper Division Assistants and Notification to that effect was published in the Gazette in March, 1975. This Notification related to the vacancies for the year 1974-75 i.e. the year ends on March 31, 1975. It is pertinent to refer to the specific averments made by Excise Commissioners, Government of Bihar, on behalf of the respondent Nos. 1 and 2--The State of Bihar and Commissioner-cum-Secretary, Excise and Prohibition, Government of Bihar. It has been stated in paragraph 3 of the Counter Affidavit: "That the promotion of the petitioners were caused in the Quota of 5% which was given to the petitioner by a Notification dated 31.3.1975 which is annexed in the petition as

Annexure-A but due to the noting given in the File, firstly by the Member of Board of Revenue on 20.3. 1974 and the 207

same has caused promotion to the petitioner which should not have been done unless there is a notification in effect to the noting given by the State Government."

Noting given by the Board is reproduced herein below:

quota in the cadre of Excise-Inspector is given from the cadre of confirmed Upper Division Clerks, Excise Commissioner's office and confirmed Head Clerks of District offices."

It has been further stated that in the year 1976 the Secretary of the Commission, Excise Department gave a note whose English translation is given below:

"As stated at page 22 of the notesheet that the pay scale of Upper Division Assistants is more than the Head Clerks and therefore they will rank senior on that basis. So first of all the question of promoting Sarvasri Awadh Prasad Singh and Ram Vriksh Pd. Singh's against the vacancy at Roster 67 and 68 has to be considered. The question of promotion of Sarvasri Vidyadhar Ghatwari and Devendra Narain Pd. would be considered against future vacancies and therefore it is proposed to keep their names in the waiting list

Sd/-Ravikishore Narain

26.4. 1976"

It has been further stated in paragraph 5 of the said affidavit that the Excise Commissioner accordingly passed an order in the year 1976, which is dated 5.5. 1976, promoting the petitioner in accordance with the quota. The English translation of the same is as follows:

" So far the question of promotion of Assistants/Head Clerks is concerned the rule has been framed in 1974 and for the first time promotion is being given on this account. I have carefully gone through the above rules and from perusal of the file it would appear that only 5% of the total vacancies shall be filled in by the promotion. In the rule, the word 2% at least" has come perhaps inadvertantly in at least 5%." There is no such mention in the file. On this basis, as has been mentioned in the note of the Secretary only two posts have to be filled up from the quota of 208

Assistants. So far as the persons by whom the filling up of the vacancies are concerned, I agree with the note of the Secretary marked 'Kh' in the notesheet i.e. at present Awadh Prasad Singh and Ram Brikh Pd. Singh should be promoted. The name of Vidyadhar Pd. and Devendra Narayan Pd. should be kept in the waiting list."

It has been further stated that the Notification giving 5% quota which is annexed in the petition as Annexure-A from the grade of Assistant/Head Clerks came into picture only on 31.3.1975 on the basis of order made by Government in March, 1974. However, the petitioners were promoted on the vacancies caused in the year 1974-75, because the decision was taken in the year 1974 itself and accordingly the Department carried out the same and accordingly a Gradation List was prepared.

A counter affidavit has also been filed on behalf of the respondent Nos. 6 & 7, that is, promotees, Inspectors of Excise. It has been stated in paragraph 6 that the rules of recruitment of Inspectors of Excise were modified by Notification No. 411 dated 31.3. 1975. There was no provision in the Excise Act and Rules for appointment of Inspectors of Excise from among selected Assistants of Commissioner's office and Head Clerks of the District Excise offices prior to this Notification. This Notification for the first time

required the Department of Excise to fill at least 5% of the total vacancies by promotion from among the confirmed Upper Division Assistants and selected Head Clerks. The respondents were promoted as Inspectors of Excise from Sub-Inspectors of Excise vide Order 2091 dated 24.4.1974 in their own quota and joined the promotional posts on 1.5. 1974. It has also been stated that the appellants were appointed Inspectors of Excise in the year 1976 and joined on 7.5. 1976. Apparently there was no quota for appointment of Inspectors of Excise from among Assistants and Head Clerks in the year 1974 and the averments made by the respondent State or appellants to this effect is mala fide, ridiculous and false. The appellants being appointed in the year 1976 by virtue of the Notification which came into existence on 31.3. 1975 cannot claim this vacancy of 1974 and hence seniority allotted to them by the respondent-State was in flagrant violation of law laid down by the Supreme Court and hence the High Court rightly allowed the C.W.J.C. No. 4097/85 against the appellants herein.

In the supplementary rejoinder affidavit on behalf of the appellants it has been stated in paragraph 4 that the State of Bihar has

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proved the appellants, right to promotion on a vacancy that occurred in 1974 by the following clear admissions made by the State of Bihar in its counter affidavit.

"So far the question of promotion of Assistants or Head Clerks is concerned, the rule has been framed in 1974 and for the first time promotion is being given on this account."

"However, the petitioners were promoted on the vacancies caused in the year 1974-75, because the decision was taken in the year 1974 itself and accordingly the Department carried out the same."

It has also been stated in paragraph 5 of the said Rejoinder:

"That the Government who was clearly conscious of the rights created by the decision to amend the Rules taken in 1974 and in accordance with the decision a Notification was issued later in March 1975. But the ministerial failure to make the Notification conformed to the decisions taken in 1974 is no more than a clerical error and the Government therefore rightly promoted the petitioner within their quota against the vacancies occurred in 1974 by its Order."

It has been further stated in paragraph 10 of the said rejoinder:

"That there is a provision of seniority of Excise Inspector in Rule 6 of Recruitment Rules vide notification no. 54 dated 3.1.1936 for Excise Inspector. It is clearly stated that the seniority of all Inspectors on confirmation will be determined in accordance with Government Order No. 6509/A dated 12.12.1934 which is still in force. Besides there are also Government instructions with regard to seniority such as letter No. 15784 dated 26.8.1972. The High Court ought to have considered the Rules of seniority when the case related to the seniority of Excise Inspector."

In paragraph 11 it has been further averred:

"That in view of the clear admission of the Government the petitioners are entitled to the benefit of promotion with effect from as against the vacancies of 1974 as fixed by the Government and the High Court order is liable to be set aside and the appeal may be allowed."

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It thus appears from a perusal of the Affidavit-in-counter sworn by the Commissioner of Excise on behalf of the

State of Bihar, the respondent Nos. 1 and 2, that the order creating 5% of the vacancies for promotion from the posts of confirmed Upper Division Assistants and selected Head Clerks have been made by the Notification dated 31.3. 1975, though according to the noting given in the File by the Member, Board of Revenue on 20.3. 1974 on the basis of the Government Order the petitioners (appellants of this appeal) were promoted in the vacancies of the year 1974-75 by order of the Excise Commissioner dated 5.5.1976. Therefore, the argument on behalf of the respondents in this appeal that the appellants were promoted against the 5% quota in respect of the vacancies of the year 1975-76 is not sustainable. The appellants having been appointed in the quota of 5% out of the vacancies of 1974-75 are entitled to be shown as senior in the gradation list prepared by the Government on 9.1. 1986. We have already mentioned hereinbefore that the respondent Nos. 3 and 4 were promoted from the selected Sub-Inspectors Excise, that is, in the 5% quota reserved for promotion from the Upper Division Assistants of the Excise Department. In accordance with the decisions rendered by this Court in the case of V.R. Badami v. State of Mysore, (supra) the respondent Nos. 3 and 5 who were promoted to officiate in the 5% quota of Upper Division Assistants and confirmed Head Clerks are to be pushed down as soon as the appellants have been recruited in the said quota to the posts of Inspectors of Excise in 1976 inasmuch as the promotion though not illegal is irregular and the promotees are to be accommodated in the vacancies of subsequent years in their quota. It is only in the case of Narendra Chandha v. Union of India, (supra) exception was made by this Court to the aforesaid decision on the ground that the quota was broken down or not adhered to as there was no recruitment from the quota of direct recruits for a period of 15 to 20 years and the promotees were allowed to officiate in the quota of direct recruits for a long period of 15 to 20 years, in such circumstances, it was held that in view of Rule 16 empowering the Government to relax the quota rules, the promotees officiating in the vacancies of direct recruits were presumable permitted to do so in relaxation of the quota as such the seniority will be determined from the date of their continuous officiating in the said posts. Similar view has been expressed in G.S. Lamba's case (supra). In the instant case there was no rule for relaxation of the quota nor the respondent Nos. 3 and 4 who were promoted from selected Excise Sub-Inspectors to the Inspectors of Excise in the 5% quota of Upper Division Assistants in 1974 officiated till 7.5.1976 when the appellants joined as Inspectors of Excise from their 5% quota. It cannot be said in such circumstances

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that the quota has not been filled up for a long period nor can it be said that the respondents 3 and 4 who were promoted in excess of their quota have worked as Inspectors of Excise for long time and as such the respondents Nos. 3 and 4 cannot claim to be seniors to the appellants. Moreover, it is evident from the affidavit of the Commissioner of Excise on behalf of the State of Bihar that the 5% quota of vacancies were brought into being by the Board of Revenue of March 20, 1974 though there was delay in notifying the same in the Gazette till 31.3. 1975. Nevertheless, it has been subsequently averred that the appellants were promoted from the said 5% quota of vacancies of the year 1974-75.

In these circumstances on a conspectus of the decisions referred to hereinbefore as well as of the Government Order reserving 5% quota of vacancies on 20.3. 1974 and subsequent

Notification of the same on 31.3. 1975 the only conclusion that follows is that the appellants being promoted as Inspectors of Excise from the 5% quota of vacancies of the year 1974-75, they were rightly shown as seniors in the gradation list prepared by the Government on 9.1. 1986. The findings of the High Court to the effect that the appellants were not promoted in the 5% quota of vacancies for the year 1974-75 is wholly wrong. Accordingly, the gradation list prepared by the Government on 9.1. 1986 showing the appellants as seniors to the respondents are quite legal and valid and so the same is upheld. We, therefore, set aside the judgment and order passed by the High Court in C.W.J.C. No. 4097/ 85. In the facts and circumstances of the case, there will be no order as to costs.

S.B.
allowed.
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Petition