A

A. JANARDHANA

v.

UNION OF INDIA AND OTHERS

April 26, 1983

[D.A. DESAI AND V. BALAKRISHNA ERADI, JJ.]

Service Jurisprudence—Anomaly in recruitment Rules—Inter-se-seniority of Direct Recruits and promotees in the Military Engineer Services Class I—Seniority Lists drawn up in 1963 and 1967/68, on the principle of length of service—Continuous officiation, altered to one based on quota between direct recruits and promotees leading to rota for confirmation, tretaing many earlier promotees as surplus and out of the list—Validity of the revised 1974 inter-se Seniority List and the panal of promotion prepared and published on January 13, 1975, based thereon—Military Engineer Services, Class I, (Recruitment Promotion and Seniority) Rules, 1949, which became statutory with effect from 1.2.69—Rules 3 and 4 read with Rule 23 of Part III, para 3 of Appendix V and Army Instruction 241 of 1950, scope of—Constitution of India, Article 14.

Appellant joined service as supervisor in the year 1953 in what is styled as Military Engineering Service. He came to be promoted as Assistant Executive Engineer in 1962. In the seniority list of AEE drawn up in the year 1963, he was shown at serial no. 357. In the seniority list of 1967, the appellant's name was found at serial no. 234. But as a result of the decision in *Bachan Singh's case*, the Union Government set aside the seniority lists of 1963 and 1967/68 and drew up a fresh list on the criteria drawn from the decision in *Bachan Singh's case*. In the seniority list so drawn, the appellant's name did not find a place at all because he was pushed down, treating still as surplus, after applying the quota from the date of the constitution of the service itself in 1951, applying the ratio of 9:1 between the direct recruits and the promotees. If he were to be treated as surplus in this manner the appellant cannot be adjusted and treated as a member till 1989 by which he may retire, of the service within the definition of that expression found in the Military Engineers Services Rules (Recruitment, Promotion and Seniority) Rules 1949 as amended from time to time. The Union of India understood the decision in *Bachan Singh's case* to mean that there was a quota for recruitment in the cadre of AEE in MES Class I of 9 direct recruits to one promotee (9:1) since 1951 and that the quota must lead to *rota* for confirmation and thus redrew the seniority list with the startling result of the appellant and several others similarly situated unable to get a berth at all.

The appellant therefore, filed a writ petition no. 4293/79 questioning the validity and legality of the revised seniority list Ex. 'D' circulated with letter dated June 14, 1974 and to cancel the panel of promotion prepared and communicated in E,E.C's proceedings no. 65020/EE/74/EIR/dt January 13, 1975

drawn up on the basis of the impugned revised seniority list. The writ petition having been dismissed, the appellant has come up in appeal by special leave. A

Allowing the appeal, the Court

HELD : 1. The seniority lists of 1963 and 1967/68 were quite legal and valid and hold the field till 1969 having been drawn up on the basis of the principle which satisfies the test of Article 16. Their revision can be made in respect of members who joined service after 1969 and the period subsequent to 1969. [963 E-F] B

2:1 The seniority list "Ex. D" circulated with the letter dated June 4, 1974 and the panel for promotion included in E-E-C's proceedings no. 65020/EE/74/EIR dated January 13, 1975 drawn up on the basis of that list are incorrect and stem from a misunderstanding and misinterpretation or the Supreme Court's decision in *Bachan Singh and Anr.* v. *Union of India and Ors.* [1972] 3 SCR 898. [965 H, 966 A-C] C

2:2 There was no justification for redrawing the seniority list in 1974 affected persons recruited or promoted prior to 1969 when the rules acquired statutory character. No doubt, it is open to the Government to prescribe principles for determining *inter-se* seniority of persons belonging to the same service or cadre except that any such principle must meet the test of Article 16. It is equally open to the Government to retrospectively revise service rules, if the same does not adversely affect vested rights. But if the rule for determining *inter se* seniority is revised or a fresh rule is framed, it must be constitutionally valid. The criterion adopted is illegal and invalid. It overlooks the character of the appointments made during the period 1959 to 1969. It treats valid appointments as of doubtful validity. It pushes down persons validly appointed below those who were never in service and for reasons unknown with retrospective effect i.e. from 1951. [965 G-H, 966 B-C] D E

3. In *Bachan Singh's case*, the Supreme Court, after reviewing the history of the MES rules from 1949 to 1969 held as follows : F

(i) The '1949 Rules' and the subsequent amendments acquired statutory character in 1969 because as a result of 1969 amendment, the entire body of rules of Class I became statutory rules by incorporation and till then they were mere administrative instructions. [952 A]

(ii) Under rules 3 and 4 of the 1949 Rules, the recruitment to MES Class I could be made from two sources only, namely, by competitive examination held in India in accordance with Part II of the Rules, which makes extensive provisions for holding examination including the eligibility for admission to the same, and by promotion in accordance with Part II of the Rules. [952 B] G

H

(iii) 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 quota rule being 9:1 as per Rule 4. [953 A B, D]

(iv) In 1962, there was a state of emergency. Engineers were immediately required to fill the temporary posts in Class I service. To meet the emergency the Union Government in consultation with the Union Public Service Commission decided to directly recruit candidates by advertisement and selection by interview only by the Union Public Service Commission. The Government with the aid of selection and interview by the UPSC directly recruited some respondents to Class I service in the years 1962, 1963 and 1964. [953 D-E]

(v) In respect of the vacancies that occurred between 1951 and 1971, because of the emergency, the quota rule for filling them was ignored both for departmental promotees and direct recruitment; and [953 E-G]

(vi) Therefore, the appointment of those direct recruits who were appointed after interview by the Union Public Service Commission, that is by a method not permitted by the rules was valid and legal in as much as that was done in relaxation of the rules both as to competitive examination and the promotions were given after relaxing the quota rule. The direct recruits who were appointed by interview did fall within the class of direct recruits. [954 B-C]

(vii) Rule 24 which was introduced in 1967 conferred power on the Union Government for the reasons to be recorded in writing and after consultation with the Union Public Service Commission to relax all or any of the rules with respect to class or category of persons/posts. As the 1949 rules were non-statutory in character till 1969, the Government did make the recruitments from both sources after exercising the said power to relax the rules. [954 G, 955 A, B]

4.1 If Rule 3 of M.E.S. (R.P.S.) Rules provided methods of recruitment indicating the sources from which recruitment could be made and if rule confers discretion on Government to make recruitment from either source because Rule 4 opens with a limitation, namely, that it is subject to Rule 3, now, if as held in *Bachan Singh's* case, "1949 Rules", while prescribing the quota conferred power on the Union Government to make recruitment in relaxation of the rules, it is implicit in this power to make recruitment in relaxation of the quota rule and it is admitted that because of the emergency and because of the exigencies of service, recruitment was made in relaxation of the rules, in this case. It is this emergency 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. Petitioners and similarly situated persons were thous promoted to meet the dire need of service in relaxation of the quota rule. [955 F-G]

4.2 It is true that where the rule provides for recruitment from two sources and simultaneously prescribes quota, unless there is power to relax the rule any recruitment in excess of the quota from either of the sources could

be illegal and the excess recruits unless they find their place by adjustment in subsequent years in the quota, would not be members of the service. [955 G, H, 956 A]

S. G. Jaisinghani v. *Union of India*, [1967] 2 SCR 703 at p. 718; *B. S. Gupta* v. *Union of India* (Ist Gupta's case), [1975] Suppl. SCR 491; *B. S. Gupta* v. *Union of India* (2nd Gupta's case) [1975] 1 SCR 104; referred to.

4.3 But, 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 the quota rules would not be invalid, unless it is shown that the power of relaxation was exercised, *malafide*, that is not the contention in this case nor voiced in *Bachan Singh's* case. [957 C-E]

N.K. Chauhan & Others v. *State of Gujarat and Others*, [1977] 1 SCR 1037; referred to.

4:4. Now, if recruitment contrary to Rule 3, namely, by interview by the Union Public Service Commission, which is not the recognised mode of recruitment, is held valid in *Bachan Singh's case* on the ground that it was done in relaxation of the rules, it must follow as a corollary that the same emergency compelled the Government to recruit by promotion engineers to the post of AEE class I in exeess of the quota by exercising the power of relaxation and such recruitment *ipso facto* would be valid. The promotees being validly promoted as the quota rule was relaxed would become the members of the service. [957 G-H, 958 A]

4:5 The '1949 Rules' do not throw any light on the composition of the service, except the fact that the expression "service" has been defined to mean Military Engineering Service, Class I. If the recruitment is made from either of the sources and is otherwise legal and valid, persons recruited to temporary posts would nonetheless be members of the service. Keeping in view the exigencies of service and the requirements of the State, temporary posts would be a temporary addition to the strength of the cadre, unless it is made clear to the contrary that the temporary posts are for a certain duration or the appointments to temporary posts are of an ad hoc nature till such time as recruitment according to rules is made. In the absence of any such provision, persons holding permanent and temporary posts would become the members of the service provided the recruitment to the temporary posts is legal and valid. Once the recruitment is legal and valid, there is no difference between the holders of permanent posts and temporary posts in so far as it relates to all the members of the service. [958 B-D]

In the instant case, the question whether the vacancies were in the permanent strengh or in the temporary cadre is irrelevant because none of the appellants and others similarly situated is reverted on the ground that no more vacancy is available. [958 A]

S. B. Patwardhan & Ors v. *State of Maharashtra & Ors*, [1977] 3 SCR 775 @ 795 followed.

5:1 It is well recognised principle of service jurisprudence that any rule of seniority has to satisfy the test of equality of opportunity in public service as enshrined in Article 16. Equally yet well recognised canon is that in the absence of any other valid rule for determining *inter se* seniority of members *belonging to the same service*, the rule of continuous uninterrupted service since the entry would be valid and would satisfy the test of Article 16. Apart from this general principle for determining *inter se* seniority in the instant case, there is a specific rule namely para 3(iii) of Appendix V of 1949 Rules, governing *inter se* seniority between direct recruits and promotees in MES, Class I Service and it was in force till 1974 when the impugned list was drawn up. [960 F-H]

5:2 In para 3(iii) of Appendix V of 1949 Rules, it was provided that a roster shall be maintained indicating the order in which appointments are to be made by direct recruitment and promotion in accordance with the percentages fixed for each method of recruitment in the recruitment rules. The relative seniority of promotees and direct recruits shall be determined by the dates on which the vacancies reserved for the directs and the promotees occur. This rule was related to the quota of 9:1 between direct recruits and promotees prescribed in Rule 4. [961 A-C]

5:3 A combined reading of Rule 4 and para 3(iii) of Appendix V would clearly show that a roster has to be maintained consistent with the quota so that the relative *inter se* seniority of promotees and direct recruits to be determined by the date on which vacancy occurred and the vacancy is for the direct recruit or for the promotee. If quota prescribed by rule 4 was adhered to or was inviolable, the rule of seniority enunciated in para 3(iii) of Appendix V will have to be given full play and the seniority list has to be drawn in accordance with it. But 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. [961 C-E]

It is 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, inequitous and improper. In the instant case, therefore, once the quota rule was wholly relaxed between 1959 and 1969 to suit the requirement of service and the recruitment made in relaxation of the quota rule and the minimum qualification rule for direct recruits is held to be valid, no effect can be given to the seniority rule enunciated in para 3(iii), which was wholly inter-linked with the quota rule and cannot exist apart from it on its own strength. Further, this position is impliedly accepted by the Union Government and is implicit in the seniority lists prepared in 1963 and 1967-68 in respect of AEES, because both these seniority lists were drawn up in accordance with the rule of seniority enunciated in Annexure 'A' to Army Instruction no. 241 of 1950 dated September 1, 1949 and not in compliance with para 3(iii) of Appendix V. [961 E-H, 962 A-B]

B. S. Gupta v. *Union of India* (1st Gupta's case) [1975] Suppl. SCR 491 referred to.

5:4 The principle of seniority enunciated in Army Instruction 241 of 1950 is that the rule for determining *inter se* seniority in the cadre of Assistants should generally be taken as the model in framing the rules of seniority for other services and in respect of persons employed in any particular grade seniority should as a general rule be determined on the basis of the length of service in that grade as well as service in an equivalent grade irrespective of whether the latter was under the Central or provincial government in India or Pakistan. This was the rule of seniority which would be applicable in the absence of any other rule specifically enacted for MES class I service. Even a plausible contention that the seniority rule enunciated in para 3(iii) of Appendix V of 1949 Rules was the one specifically enacted for MES class I service and this special rule would prevail over the general rule issued in Army Instruction 241 would be of no avail in as much as (i) the rule in para 3(iii) gave way when the quota rule was relaxed and (ii) in all the subsequent rules of 1953, 1961 and 1962, it was clearly stated that the "principles for determining seniority are under consideration". [962 C-A]

6:1 The two fundamental basic assumptions on which the impugned seniority list was drawn up are wholly untenable and contrary to the relevant rules. The first assumption that there was a rigid quota rule and that the recruitment in excess of the quota would be invalid and the excess recruits from either source will have to be adjusted and regularised in succeeding years, was probably due to the authorities having been influenced by the observations in *Jai Singhani's case* and the two successive *B. S. Gupta's cases*, all of which have no application to the facts of the present case. The second assumption that there was an inviolable quota rule which could not be relaxed was due to overlooking the position that once the quota rule was relaxed, the rota for confirmation disappeared. In the absence of any other rule coupled with the Army Instructions, upto 1968 continuous officiation would be the only available rule for determining the *inter se* seniority. Further as far as the minimum educational qualification is concerned promotees and direct recruits are on par and the promotees cannot be looked upon as persons belonging to an inferior breed. [963 D-H, 964 A]

7. The contention that the individuals likely to be affected by the decision not being impleaded, the writ petition should fail cannot be accepted. Factually it is incorrect because by order of the High Court, names of respondents 3 to 419 were deleted and in the Supreme Court submissions were made by a counsel for them. In the petition as well as in the appeal the relief is claimed against the Union of India and the concerned Ministry and not against any individual nor any seniority is claimed by anyone individual against another particular individual. The contention is that the criteria adopted by the Union Government in drawing up the impugned seniority list are illegal and invalid. Therefore, even if technically the direct recruits were not before the Court, the petition is not likely to fail on that ground. [966 G-H, 967 A-B]

Vade Mecum

It is unfortunate that a very unjust, unfair and inequitable situation having a demoralising effect on public services probably ensuing from certain

rules framed by the Government and the decisions of this Court has emerged. Even where the recruitment to a service is from more than one source and a quota is fixed for each source yet more often the appointing authority to meet its exigencies of service exceeds the quota from the easily available source of promotees because the procedure for making recruitment from the market by direct recruitment is long prolix and time consuming. The Government for exigencies of service, for needs of public services and for efficient administration, promotee person easily available because in a hierarchical service one hopes to move upward. After the promotee is promoted, continuously renders service and is neither found wanting nor inefficient and is discharging his duty to the satisfaction of all, a fresh recruit from the market years after promotee was inducted the service comes and challenges all the past recruitments made before he was born in service and some decisions especially the ratio in *Jai Singhani's case* as interpretted in two *B. S. Gupta's cases* gives him an advantage to the extent of the promotee being preceded in seniority by direct recruit who enters service long after the promotee was promoted. When the promotee was promoted and was rendering service, the direct recruit may be a schoolian or college going boy. He emerges from the educational institution, appears at a competitive examination and starts challenging everthing that had happened during the period when he has had nothing to do with service. A mandamus issued in *Jaisinghani's case* led to a situation where promotees of the year 1962 has to yield place to direct recruits of 1966 and the position worsened thereafter. In the case in hand, appellant a promotee of September 27, 1962 is put below N. K. Prinza who appeared at competitive examination in April 1976 i.e. one who came 14 years after the appellant, and it does not require an intelligent exercise to reach a conclusion that 14 years prior to 1976 Mr. Prinza who is shown to be born on July 20, 1950 must be aged about 12 years and must have been studying in a primary school. Shorn of all service jurisprudence jargon one can bluntly notice the situation that a primary school student when the promotee was a member of the service, barged in and claimed and got seniority over the promotee. If this has not a demoralising effect on service one fails to see what other inequitous approach would be more damaging. 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 an principle of seniority to score a march over a promotee because that itself being arbitrary would be violative of Arts. 14 and 16.

[968 D-H, 959 A-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 360 of 1980.

From the Judgment and Order dated the 15th and 17th May, 1979 of the High Court of Karnataka at Bangalore in Civil Writ Petition No. 4293 of 1975.

G. L. Sanghi and *A. K. Sanghi* for the Appellant.

Abdul Khader, N. C. Talukdar and *Miss A. Subhashini* for Respondent Nos. 1 and 2.

P. R. Mridul and *H. K. Puri* for Respondent Nos. 3 to 11. A

M. K. Ramamurthi and *Jatindra Sharma* for Respondent No. 12.

Dr. Y. S. Chitale and *A.K Sanghi* for intervener.

The Judgment of the Court was delivered by B

DESAI, J. Appellant A. Janardhana filed Writ Petition No. 4293 of 1979 questioning the validity and legality of the revised seniority list Ex. 'D' circulated with the letter dated June 14, 1974 to which the revised seniority list Ex. 'C' was annexed and as a consequence to cancel the panel of promotion dated January 13, 1975, drawn-up in respect of 102 officers. A mandamus was sought directing the respondents to give effect to the 1963 Seniority List drawn-up on the principle of length of service-continuous officiation as set out in the notification memorandum dated March 11, 1965. A cognate Writ Petition No. 4273 of 1979 by one Manjunatha was also heard and disposed of by the Court along with the writ petition filed by the appellant. C D

The factual matrix in juxtaposition with the relevant rules may be set out in details because the very narration of chronology of events would illumine the contours of controversy. E

Appellant joined service as Supervisor in the year 1953 in what is styled as Military Engineering Services (MES' for short). He came to be promoted as Assistant Executive Engineer (AEE) in 1962. In the seniority list of 'AEE' drawn up in the year 1963 the appellant was shown at Serial No. 357. In the revised seniority list dated June 14, 1974 impugned in the petition, the appellant did not find a place because consistent with the quota rule on the basis of which the impugned revised seniority list of 1974 was prepared, the appellant was surplus and could not find his berth in the seniority list. It is necessary to note an intervening event. One Bachan Singh and Anr., the two promotees to the post of 'AEE' in the years 1958 and 1959 respectively, filed a writ petition in the High Court of Delhi challenging the appointment of several direct recruits to 'MES' on the ground that their appointment was contrary to and in violation of the rules of recruitment and they were not validly appointed and, therefore, could not become members of the service. The writ petition was dismissed by the High Court of Delhi and the F G H

matter was carried in appeal in this Court. The decision rendered by a Constitution Bench of this Court in *Bachan Singh & Anr. v. Union of India & Ors.*(1) was interpreted by the first respondent to mean that the direct recruitment, not by competitive examination but by interview and *viva voce* test, was valid and such appointments being in consonance with the rules, the confirmation of said direct recruits was within the quota of direct recruits in permanent vacancies and was hence valid. The first respondent understood the decision to mean that there was a quota for recruitment in the cadre of 'AEE' in 'MES' Class I of 9 direct recruits to 1 promotee (9:1) since 1951 and the quota must lead to *rota* for confirmation and proceeded to redraw the seniority list in 1974 with the startling result in respect of the appellant and several persons similarly situated as hereinabove set out. The appellant in his writ petition questioned the criteria adopted for preparing revised seniority list of June 1974 on diverse grounds based on the ratio of the decision in Bachan Singh's case. Criteria may be extracted from the memoranda covering the seniority list dated June 14, 1974 :

"(a) The *inter se* seniority of direct recruits and departmental promotees is to be fixed in accordance with the quota laid down in ME (RPS) Rules 1951 from time to time. The same quota is to apply both in the matter of confirmation and fixation of seniority.

(b) Seniority List of Assistant Executive Engineers is to be prepared upto 1968 and excess departmental promotees who cannot be brought into the cadre have to be shown separately and brought in the cadre on the basis of quota as and when vacancies become available.

(c) From 1.2.1969, the date on which the rules became statutory, the seniority of excess departmental promotees (Approx 'B') of the list is to be regulated as under :

(i) The seniority of departmental promotees who are brought into cadre from 1969 onwards will count along with direct recruits of the year in

(1) [1972] 3 SCR 898.

which the promotees are brought into the cadre and any service for further promotion to higher posts. For example a departmental promotee of 1966, if brought on the incadred list in 1970 will count only the service in the grade of AEE after 1970 for seniority in that grade for further promotion as EE.

(ii) All excess promotees who are holding higher appointment will be eligible for consideration for further promotion on completion of the requisite service after their adjustment in the cadre.

(d) The revised seniority list based on the above decisions will be subject to the out-come of the writ petition pending in the Andhra Pradesh High Court and any other legal pronouncement that may be made in this behalf. All promotions based on this seniority list will also be subject to revision on the availability of the judgment in the writ petition. While making promotions therefore, it may be made clear that these promotions will be subject to any further decision of the Court."

It would be advantageous to mention that the criteria had the flavour emanating from the reading and understanding of the decision in *Bachan Singh's case*. If the understanding or interpretation of the ratio *Bachan Singh's* decision is incorrect or contrary to what is laid down, the unavoidable consequence would be that the seniority list drawn up on such incorrect or misinterpreted ratio would not only fall but it would have to be quashed. Let us therefore first refer to the various stages through which relevant rules have moved leading to the decision in *Bachan Singh's* case. There is a glut and mass of rules bearing on the subject and we may briefly weave through them.

By notification dated September 17, 1949, the Ministry of Defence published Rules styled as Military Engineer Services, Class I (Recruitment, Promotion and Seniority) Rules (1949 Rules for short). 'Service' was defined to mean Military Engineer Services,

Class I. Rules 3 and 4 have provided the cornerstone for all contentions canvassed in this appeal and may be extracted :

> "3. The service (other than the Architect's Service and the Barrack and Stores Service) shall be recruited by the following methods :
>
> (i) By competitive examination held in India in accordance with part II of these Rules.
>
> (ii) By promotion in accordance with Part III of these Rules.
>
> 4. Subject to the provisions of Rule 3, Government shall determine the method or methods to be employed for the purpose of filling any particular vacancies or such vacancies as may require to be filled during any particular period, and the number of candidates to be recruited by each method provided that not more than 10 per cent, of the vacancies in the service (not being vacancies filled by promotion from one grade to another within the service) shall be filled by the method specified in clause (ii) of Rule 3 above.

The recruitment was to be from two sources: (i) direct recruitment by competitive examination; and (ii) by promotion in accordance with Part III of the Rules. Rule 4 confers discretion on the Government circumscribed by the provision of Rule 3 enabling the Government to determine the method or methods to be employed for the purpose of filling in particular vacancies or such vacancies as may be required to be filled during any particular period, and the number of candidates to be recruited by each method. There is a proviso to Rule 4 and it is the subject matter of acrimonious debate in the Court. One submission of Mr. P. R. Mridul, learned counsel for direct recruits was that the proviso is the proviso to sub-rule (ii) of Rule 3 and it fixes the quota of 9 to 1 between direct recruits and promotees. At the other end of the spectrum, the submission was that it merely provides a ceiling and not an inviolable quota rule. We would examine both the submissions a little while after. Part II of the Rules makes detailed provision for the competitive examination to be held in India for selecting direct recruits. Rule 21 to 23 in Part III of the 1949 Rules, prescribe qualification and method

for recruitment by promotion. One worth noticing is Rule 23 which prescribes that no individual shall be eligible for promotion to the service unless, he would, but for age, be qualified for admission to the competitive examination under Part II. This would mean that except for age all other qualifications including educational qualification for direct recruits and promotees are the same. There are 5 Appendices to 1949 Rules. Para 3 in Appendix V provides for *inter se* seniority between direct recruits and promotees. Sub para (iii) of para 3 is relevant and may be extracted :

> "(iii) A roster shall be maintained indicating the order in which appointments are to be made by recruitment and promotion in accordance with the percentages fixed for each method of recruitment in the recruitment rules. The relative seniority of promotees and direct recruits shall be determined by the dates on which the vacancies reserved for the direct recruits and the promotees occur....."

Though the 1949 Rules were published on September 17, 1949, they were brought into operation by a notification of the Ministry of Defence dated July 29, 1950 with effect from April 1st, 1951. 1949 Rules when enacted were admittedly non-statutory in character.

By the notification dated July 18, 1953 of the Ministry of Defence, the Rules styled as Military Engineer Service Class I Recruitment Rules were promulgated. Rules 3 and 4 are in *pari materia* with Rules 3 and 4 of the 1949 Rules. Part II of the Rules makes detailed provision for the competitive examination and the Rules in Part III deal with appointment by promotion. It was not made clear whether the 1953 Rules superseded the 1949 Rules. They are almost identical save and except for a provision in Appendix V. Para 3 in Appendix V of 1949 Rules provided for *inter se* seniority of direct recruits and promotees, while para 3 in Appendix V of 1953 Rules recited that 'the principles for determining seniority are under consideration.' It is, therefore, suggested that para 3 in Appendix V of 1949 Rules was abrogated and fresh principles for determining seniority were yet to be devised. The contention arising from these two sets of Rules occupying the same field would in course of time become worst confounded by what has been done in 1969 but that would come later on.

Moving to the next stage, the Ministry of Defence by its notification dated January 7, 1961 promulgated statutory Rules enacted in exercise of the power conferred by the proviso to Article 309. These Rules were to regulate the recruitment to the Military Engineer Services, Class I, (1961 Rules for short). These Rules largely relate to the method to be adopted for direct recruitment, the manner of holding examination and the persons eligible for entrance to the examination. In a way 1961 Rules left rules 3 and 4 of 1949 Rules and rules 3 and 4 of 1953 untouched, except to the extent provided in para 8 of appendix IV wherein it is stated that promotions to the Superior and Administrative posts are dependent on occurrence of vacancies in the sanctioned establishment and are made wholly by selection in consultation with the Departmental Promotion Committee and Commission as laid down in the Home Department office memorandum No. 33/46-Ests(R) dated June 17th, 1946; mere seniority is considered to confer no claim to promotion. Though these Rules are styled as Rules for recruitment to Military Engineer Services, Class I, omits any reference to recruitment by promotion is wholly absent yet Rule 3 in Appendix IV restated the position that the principles for determining seniority are under consideration. 1961 Rules do not even refer to 1949 Rules, but it may be mentioned that 1961 Rules were superseded by 1962 rules.

In 1962, the Ministry of Defence by its notification dated April 27, 1962 in exercise of the power conferred by the proviso to Article 309 framed Rules regulating the recruitment to the Military Engineer Services Class I in supersession of 1961 Rules. Both the 1961 and 1962 Rules neither refer to Rule 3 and Rule 4 of 1949 Rules permitting recruitment by promotion and the permissible limit of recruitment by promotion. 1962 Rules restated in Rule 3 in Appendix IV that the principles for determining seniority are under consideration. Further para 8 in Appendix IV was repeated at the same place as in 1961 Rules.

By the notification of Ministry of Defence dated April 17, 1965 Rule 7 of 1962 Rules was amended. But it has no relevance to the point under consideration. Then comes a noteworthy provision. Rule 3 in Appendix IV of 1962 Rules which provided that 'the principles for determining seniority were under consideration' was substituted as under :

"3. Relative seniority of officers appointed to service on the basis of the combined Engineering Services

Examination or otherwise will be determined in accordance with the orders issued by Government from time to time." A

By the notification of the Ministry of Defence dated February 18, 1967, a further amendment was introduced in 1962 Rules with with regard to the eligibility of persons who can offer themselves as candidates for the competitive examination. B

By the Ministry of Defence notification dated February 25, 1967, non-statutory in character sub-rule (h) was added to Rule 20 in Part III of 1949 Rules providing reservation of 50% of the permanent vacancies to be filled through direct recruitment after 17th May, 1963 of graduate engineers who are commissioned in the Armed Forces on a temporary basis during the Emergency and are later released subject to certain conditions therein prescribed. C

Then comes the land-mark change of 1969. On February 1, 1969, the President in exercise of the power conferred by the proviso to Article 309 framed and promulgated amendments to 1949 Rules styled as Military Engineer Service Class I (Recruitment, Promotion and Seniority) Amendment Rules, 1969 which came into force on February 1, 1969. Rule 4 was amended by substituting '25% of the vacancies' in place of '10% of the vacancies.' In other words, the quota between direct recruits and promotees was modified from 9:1 to 3:1. D E

We may at this stage notice Army Instruction 241 of 1950. It provided for seniority of civilian employees in lower cadre. The instruction refers to the order contained in para 2 of the Ministry of Defence Office Memorandum No. 0240/6362/0-12 dated 1st September 1949 which was published as an annexure to the instruction. The instruction is that the rule for determining seniority amongst Assistants recently devised must be followed as a model. The model was that in any particular grade seniority as a general rule, be determined on the basis of the length of service in that grade as well as service in an equivalent grade irrespective of whether the letter was under the Central or Provincial Government in India or Pakistan. F G H

Having journeyed through the maze of Rules, we may turn to the primary contention raised in this appeal. Before we do so, let

it be remembered that the appellant is a promotee to AEE in MES cl. I of the year 1962 and by the impugned seniority list of June 14, 1974, he does not find his place in the seniority list and is still in the surplus list to be accommodated at a future date and Mr. Sanghi learned counsel for the appellant asserted with some vehemence that he cannot come into the service till 1989 when it may be time for him to retire from the service. In other words after having rendered service in a post included in the class I, he is hanging outside the service, without finding a berth in service, whereas direct recruits of 1976 have found their place and berth in the service. This is the situation that stares into one's face while interpreting the quota-rota rule and its impact on the service of an individual. But avoiding any humanitarian approach to the problem, we shall strictly go by the relevant rules and precedents and the impact of the Rules on the members of the service and determine whether the impugned seniority list is valid or not. 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 contentions canvassed before the High Court at the time of hearing this group of petitions are (i) what is the character of '1949 Rules' when they were enacted and whether and when they acquired statutory character ?; (ii) In making recruitment in the manner it was done till '1949 Rules' acquired statutory character, was there a violation of quota rule assuming that there was quota prescribed in Rule 4 of '1949 rules' ?; (iii) If Rule 4 of '1949 Rules' prescribed a quota of 9:1 between direct recruits and promotees, had the Government the power to relax the quota rule when necessary or under certain circumstances ?; (iv) What if any, is the effect on the status of the promotees promoted to the service in relaxation of the quota rule ?; (v) whether such promotees became the members of the service so as to be assigned a place in the seniority list ?; (vi) If prior to '1949 Rules' acquiring statutory character in 1969 promotions were made in excess of the quota, which principle

governed determination of *inter se* seniority of later direct recruits with earlier promotees ?; (vii) If 1963 Seniority List when drawn-up was according to the Rules then in force, could it be rendered ineffective by a revised rule for determining *inter se* seniority devised in 1974 and given retrospective effect. These and the connected questions call for answer in this appeal.

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We were often reminded in the course of hearing that the Court is not scribbling on a clean slate and that some of the contentions canvassed in this appeal are concluded by a decision of the Constitution Bench of this Court in *Bachan Singh & Anr.* v. *Union of India & Ors.*[1] It must be confessed that in *Bachan Singh's* case (supra), various rules to which we have drawn attention in the earlier part of the judgment came in for consideration by the Constitution Bench. Therefore, both the sides extensively referred to the various observations and conclusions recorded in the decision and it is incontrovertible that this decision is binding on us and therefore, the contentions canvassed before us will have to be answered within the parameters of the decision of the Constitution Bench. To steer clear of a possible unintended transgression of this binding decision, it is necessary to set out in some details the ratio of the decision of the Constitution Bench in that case ?

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Bachan Singh and Anr. were promoted in the years 1958 and 1959 respectively to AEE in MES Class I. Some of the respondents in that case were appointed by direct recruitment after they had appeared in the competitive examination, but all the respondents were appointed to the service in the years 1962, 1963 and 1964. The first contention raised on behalf of the promotee-appellants was that the recruitment of some respondents as direct recrults not as the result of competitive examination as provided in the Rules but by mere interview by the Union Public Service Commission was contrary to and in violation of the relevant Rules and thus the recruitment being invalid they did not become members of the service. It was said that if they are not members of the service, they cannot claim seniority over promotees the petitioners in that case. The second contention was that such of the respondents who were recruited by interview and as a result of the competitive examination after the appellants had been promoted to the service, are not entitled to be confirmed in permanent posts before the appellants.

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(1) [1972] 3 SCR 898.

These contentions necessitated focussing attention on the character of '1949 Rules'. After briefly reviewing the history of the rules from 1949 to 1969, the first important conclusion of the Court is that the '1949 Rules' acquired statutory character in 1969 because as a result of 1969 amendment, the entire body of rules of Class I became statutory rules by incorporation. The Court then referred to rules 3 and 4 of '1949 Rules' when they came into force in 1951 and noticed that the recruitment to MES Class I could be made from two sources only, namely, by competitive examination held in India in accordance with Part II of the Rules and by promotion in accordance with Part III of the Rules. As set out in earlier portion of the Judgment, Part II makes extensive provisions for holding examination including the eligibility for admission to the same. It was conceded in *Bachan Singh's* case that some of the respondents were directly recruited by interview by the Union Public Service Commission. In other words, some of the respondents in that case had not appeared at competitive examination ar required by Rule 3. The rules did not permit direct recruitment by mere interview by the Union Public Service Commission. The question arose : What was the status of such direct recruits recruited in utter violation of Rule 3 ? Promotee-petitioners contended that such direct recruits had not become members of the service. Repelling this contention, the Constitution Bench held as under :

> "The appointments to Class I Service by interview were made by the Government in consultation with the Union Public Service Commission. The selection was made by the Union Public Service Commission. The appointments by competitive examination proved fruitless. The country was in a state of emergency. Appointment and selection by interview was the only course possible. It could not be said that all appointments should have been made by promotion. That would be not in the interest of the service. The service Rules were administrative in character. The Government relaxed the Rules. The amendments of the rules in 1967 recognised the reality of the situation of appointment by interview. That is why the 1967 amendment recognised that 50 per cent of "the direct recruits by competitive/ ad hoc appointment were to be reserved for graduate engineers who were commissioned in the Armed Forces on a temporary basis."

At an earlier stage, the Court held that 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. Keeping in view the contention raised on behalf of the appellants before us that Rule 4 does not prescribe a quota to be invariably followed, but merely a ceiling and the contention of Mr. P. R. Mridul for some of the direct recruits that rule 4 prescribes an invariable quota any violation of which would render the appointees in excess of quota invalid, we would proceed as held in *Bachan Singh's case* that rule 4 prescribes the quota. If the contention was open to consideration by us, we have our own reservations about the same. However, as it has been held in a binding decision that Rule 4 did prescribe a quota rule of 9:1 between direct recruits and promotees, we would proceed on that basis. The Court then noticed that in 1962, there was a state of emergency. Engineers were immediately required to fill the temporary posts in Class I Service. To meet the emergency the Union Government in consultation with the Union Public Service Commission decided to recruit candidates by advertisement and selection by interview only by the Union Public Service Commission. The Government with the aid of selection and interview by the Union Public Service Commission directly recruited some respondents to Class I Service in the years 1962, 1963 and 1964. The candidates were selected after viva-voce examination.' The Court then proceeded to notice the vacancies that occurred between 1951 and 1971 and concluded that it is because of the conditions of emergency that the quota for filling the temporary posts was ignored both for departmental promotees and direct recruitment. After taking this view, the Court proceeded to answer the contention whether the recruitment of some of the respondents in that case by a method not permitted by rules was legal and valid which necessitated the Court considering and answering the question as to whether the Government had the power to make recruitment in relaxation of the Rules ? In this connection, the Court categorically concluded as under :

> "It is apparent that during the years 1959 to 1969, there was a relaxation in the observance of rules in the case of appellants and the other departmental promotees. The Union Government all throughout acted in consultation with the Union Public Service Commission. The

A departmental promotees gained considerable advantage by relaxation of the rules. The direct recruits were not shown any preference at all, The proportion of confirmation of departmental promotees and of direct recruits by interview was 1:1."

B The Court then upheld the appointment of those direct recruits who were appointed after interview by the Union Public Service Commission by holding that that was done in relaxation of the rules both as to competitive examination and the promotions were given after relaxing the quota rule. The Court held that direct recruits who were appointed by interview fall within the class of C direct recruits.

What emerges from the decision in *Bachan Singh's case*? '1949 Rules' and the subsequent amendments thereto acquired statutory flavour in 1969 and '1949 Rules became statutory in D character by incorporation only in 1969 and till then they were mere administrative instructions. Rule 3 of '1949 Rules' permitted recruitment only from two sources i.e. by competitive examination and by promotion. Rule 4 permitted the Government to fill in any particular vacancies or such vacancies as may require to be filled E during any particular period, the method or methods to be employed for the purpose of filling any particular vacancy and the number of candidates recruited by each method. Rule 3 provides for the sources of recruitment, namely, direct recruitment and promotion. Rule 4 confers discretion on the Government either to fill the vacancies and from which service subject to the proviso to Rule 4 F which prescribes, according to *Bachan Singh's case*. a quota, Rule 4 which was introduced in 1967 conferred power on the Union Government for the reasons to be recorded in writing and after consultation with the Union Public Service Commission to relax all or any of the rules with respect to class or category of persons/ posts. As the '1949 Rules' were non statutory in character till 1969 G and this Court read power of relaxation is in '1949 Rules' till 1969, the power of relaxation was exercised during 1961-1962-1963 because there was emergency during this period. The Government was in need of large number of Engineers and therefore, had to make recruitment by a method not prescribed by the rules H in relaxation of the rules, and large number of persons had to be given departmental promotion with the same end in view which would amount to relaxation of the quota rule. This Court in terms

held that the Government had the power to relax 1949 Rules till they acquired statutory character in 1969 and Government did make recruitment from both sources after exercising the power to relax rules. This ratio of the decision is binding on us. A

Even apart from this, in the statement of case filed in this case on behalf of the Union of India, it is conceded that in view of the exigencies of service relaxation was made in the matter of promotion to the cadre of Assistant Executive Engineers between 1951 and 1963. Rule 24 enabled the Government to make recruitment in relaxation of the rule by making an order to that effect in writing and after consulting the Union Public Service Commission. Strictly speaking Rule 24 is hardly helpful as the rule was introduced in 1967 and we are concerned with years 1959-61-62-63. We asked Mr. Abdul Khader, learned counsel for the Union of India whether orders were made at the time of each recruitment for making recruitment by relaxing the rules and if such orders were made after consulting the Union Public Service Commission and if there are such orders in existence, same may be produced. Pursuant to this querry, an affidavit was filed by Lt. Col. S. C. Sethi, Staff Officer Grade I (Personnel) dated December 7, 1982. This affidavit does not satisfy the query and hardly illumines the blurred area. It merely refers to the variation in the quota, namely, it was raised from 9:1 to 1:1 upto the end of 1963 and it was again restored to 9:1 after 1964 and the statutory rules of 1969 revised the quota. To this affidavit, some correspondence is annexed which hardly throws any light on the question raised by the Court. B C D E

If rule 3 provided methods of recruitment indicating the sources from which recruitment could be made and if rule confers discretion on Government to make recruitment from either source because Rule 4 opens with a limitation, namely, that it is subject to Rule 3, now if as held in *Bachan Singh's case* '1949 Rules' while prescribing the quota conferred power on the Union Government to make recruitment in relaxation of the rules, it is implicit in this power to make recruitment in relaxation of the quota rules and it is admitted that because of the emergency and because of the exigencies of service, recruitment was made in relaxation of the rules. Now, where the rule provides for recruitment from two sources and simultaneously prescribes quota, unless there is power to relax the rule as has been held in a catena decisions, any recruitment in excess of the quota from either of the sources would be illegal and the excess recruits unless they find their place by adjustment in subsequent F G H

years in the quota, would not be members of the service. In *S. G. Jaisinghani* v. *Union of India & Ors.*(1) a Constitution Bench of this Court held as under :

> "We are accordingly of the opinion that promotees from Class II, Grade III, to class I Grade II Service in excess of the prescribed quotas for each of the years 1951 to 1956 and onwards have been illegally promoted and the appellant is entitled to a writ in the nature of mandamus commanding respondents 1 to 3 to adjust the seniority of the appellant and other officers similarly placed like him and to prepare a fresh seniority list in accordance with law after adjusting the recruitment for the period 1951 to 1956 and onwards in accordance with the quota rule prescribed . ..."

In reaching this conclusion, the Court held that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. The Court observed that in a system, governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The view was to some extent re-affirmed in *B. S. Gupta* v. *Union of India & Ors.*(2) and *B. S. Gupta etc. etc.* v. *Union of India & Ors. etc. etc.*(3) But this result will not follow where even though the rules prescribe sources of recruitment, methods of recruitment and quota, if the very rules simultaneously confer power on the Government to make recruitment in relaxation of the rules, unless mala fides are alleged and attributed. Where rules thus confer a discretion on the Government to relax the rules to meet with the exigencies of service, any recruitment made in relaxation of the rules would not be invalid. This is no more *res integra* in view of the decision of this Court in *N. K. Chauhan & Ors.* v. *State of Gujarat & Ors.*(4) In that case, a resolution of the Government of Bombay dated July 30, 1959 'directing that, as far as practicable, 50 percent of the substantive vacancies occuring in the cadre with effect from 1st January 1959 should be filled in by nomination of candidates to be selected in accordance with the Rules appended

(1) [1967] 2 S.C.R. 703 at 718.
(2) [1975] Suppl. S.C.R. 491.
(3) [1975] 1 S.C.R. 104.
(4) [1977] 1 SCR 1037.

herewith, came in for consideration of this Court. "The contention was that the Resolution prescribed a quota and the Government had no discretion to make recruitment in relaxation of the quota and therefore, any recruitment made in excess of the quota in view of the decision in *Jaisinghani's case* and *2 B.S. Gupta's cases* would be invalid. Repelling this contention and distinguishing both the decisions in *Jaisinghani's case* and *2 B.S. Gupta's cases*, the Court observed that the sense of the rule is that as far as possible the quota system must be kept up and if not practicable promotees in place of direct recruits or direct recruits in place of promotees may be inducted applying the regular procedures without suffering the seats to lie indefinitely vacant.' After examining the facts of the case, the Court held that the State had tried as far as practicable to fill 50% of the substantive vacancies from the open market, but failed during the years 1960-1962 and that therefore it was within its powers under the relevant rule to promote mamlatdars who, otherwise, complied with the requirement of efficiency. It thus becomes crystal clear 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. That is not the contention here, nor any such contention was voiced in *Bachan Singh's case*. In *Bachan Singh's case* the Court has extensively referred to the emergency situation in the market of recruitment of engineers between 1959 and 1969 and that fact situation not only was not controverted but conceded before us. It is this emergency and the dire need of urgently recruiting engineers, which led the Government to make recruitment in relaxation of quota rule by fore-going the competitive examination and promoting subordinate ranks to Class I service. Petitioners and similarly situated persons were thus promoted to meet the dire need of service in relaxation of the quota rule.

Now if recruiment contrary to Rule 3, namely, by interview by the Union Public Service Commission, which is not the recognised mode of recruitment, is held valid in *Bachan Singh's case* on the ground that it was done in relaxation of the rules, it must follow as a corollary that the same emergency compelled the Government to recruit by promotion engineers to the post of AEE Class I in excess of the quota by exercising the power of relaxation and such recruitment *ipso facto* would be valid. The promotees being validly

promoted as the quota rule was relaxed, would become the members of the service. Whether the vacancies were in the permanent strength or in the temporary cadre is irrelevant because none of them is reverted on the ground that no more vacancy is available. Appellant and those similarly situated were recruited by promotion as provided in Rule 3(ii) and it must be conceded that the recruitment by promotion during these years was in excess of the quota as provided in Rule 4. But the recruitment having been done for meeting the exigencies of service by relaxing the rules including the quota rule, the promotion in excess of quota would be valid. In this connection, it may be recalled that the expression 'service' has been defined to mean Military Engineering Service Class I. The rules are silent on the question of the strength of the service. Keeping in view the exigencies of service and the requirements of the State, temporary posts would be a temporary addition to the strength of the cadre, unless it is made clear to the contrary that the temporary posts are for a certain duration or the appointments to temporary posts are of an ad hoc nature till such time as recruitment according to rules is made. In the absence of any such provision, persons holding permanent posts and temporary posts would become the members of the service provided the recruitment to the temporary posts is legal and valid. Once the recruitment is legal and valid, there is no difference between the holders of permanent posts and temporary posts in so far as it relates to all the members of the service. This clearly follows from the decision of this Court in *S. B. Patwardhan & Ors. etc. etc.* v. *State of Maharashtra Ors.*,(1) that there is no universal rule, either that a cadre cannot consist of both permanent and temporary employees or that it must consist of both. That is primarily a matter of rules and regulations governing the particular service in relation to which the question regarding the composition of a cadre arises. '1949 Rules' throw no light on this aspect and therefore, if the recruitment is made from either of the sources and is otherwise legal and valid, persons recruited to temporary posts would nonetheless be members of the service.

The High Court while rendering the judgment under appeal unfortunately did not examine this aspect even though vehemently argued, with the result that the petitions were again set down for decision on a memo filed by the learned counsel on behalf of the

(1) [1977] 3 S.C.R. 775 at 793.

present appellants in the High Court on the very next day of the judgment informing the Court that several important contentions urged by him during the course of arguments at the hearing of the writ petitions, have not been noticed by the Court in its judgment dated May 15, 1979. One such contention was that Union of India in its statement of case had conceded that as direct recruits were not available during that period, even though the qualification of competitive examination for direct recruits was completely relaxed and a mere interview by the Union Public Service Commission was considered sufficient, large number of persons from subordinate ranks had to be given promotion but this aspect was not examined by the Court. Repelling this submission, the High Court observed that the learned counsel was not able to point out any express admission to that effect in the statement of objections filed on behalf of the Union Government and the averment in Exhibit 'F' that there has been a relaxation from time to time in the observance of the said rules by the Government in consultation with Union Public Service Commission to meet the emergent requirements of the Service, was not sufficient to permit an inference sought to be drawn as desired by the learned counsel. With respect, the High Court was in error in approaching the matter from this angle. In fact, before the High Court rendered its decision, the Judgment of the Constitution Bench in *Bachan Singh's case* was reported and as pointed out by us, this Court specifically held that the recruitment from both the services was made in relaxation of the rules. And in the statement of case filed in this Court, there is a specific admission to that effect. We are therefore of the view that the High Court was in error in rejecting this contention.

The next question is, on what principle then in force *inter se* seniority of promotees and direct recruits recruited to service in relaxation of 1949 Rules including the quota rule was to be determined and how they were to be integrated in the cadre of AEE for further promotion to the cadre of Executive Engineers.

The appellant has impugned the seniority list prepared by the Union Government on June 14, 1974. Prior to the impugned seniority list, a seniority list of AEE was drawn up in the year 1963 in which the place of the present appellant was at serial No. 357. There was another seniority list drawn up in the year 1967 in which the appellant found his place at serial No. 234. Then came the decision of the Constitution Bench in *Bachan Singh's case* whereupon

A the Union Government set aside the two aforementioned seniority list and drew up a fresh list on the criteria drawn from the decision in *Bachan Singh's case* as set out in the earlier portion of this Judgment. In this seniority list, appellant did not find his place because he was still surplus in 1974 seniority list and he was hanging out of the service (Trishanku) because he was pushed down after B applying the quota from the date of the constitution of the service itself in 1951. The traumatic effect of this approach can be gauged by merely pointing out that the appellant who was promoted in the year 1962 as AEE and has held the post un-interruptedly till today would be junior to the direct recruits of 1976, 1977 and 1978. If unfortunately, the law is to that effect, nothing can be done. Could C the law be that unjust ? Law being no respector a person must take its own course. But is that the law ? Or the approach overlooks a vital aspect which has a bearing on the point.

D The contention of the Union Government is that the earlier seniority lists of 1963 and 1967/68 were not drawn up according to any particular principle. In para 4 of the statement of the case of the Union Government it is averred that 'seniority list drawn before 1973 were not based on any set rules but were prepared E provisionally on the basis of the then available rules to regulate the functioning of department.' This statement apart from being self contradictory to some extent, is misleading and would not be borne out by reference to the relevant rules on the subject.

F It is a well recognised principle of service jurisprudence that any rule of seniority has to satisfy the test of equality of opportunity in public service as enshrined in Article 16. It is an equally well recognised canon of service jurisprudence that in the absence of any other valid rule for determining *inter se* seniority of members G belonging to the same service, the rule of continuous officiation or the length of service or the date of entering in service and continuous uninterrupted service thereafter would be valid and would satisfy the tests of Art. 16. However, as we would presently point out we need not fall back upon this general principle for determining *inter* H *se* seniority because in our view there is a specific rule governing *inter se* seniority between direct recruits and promotees in MES Class I Service, and it was in force till 1974 when the impugned seniority list was drawn up.

In the '1949 Rules' which came into force on April 1, 1951, a provision was made for determining *inter se* seniority between direct recruits and promotees. In para 3(iii) of Appendix-V of '1949 Rules' it was provided that a roster shall be maintained indicating the order in which appointments are to be made by direct recruitment and promotion in accordance with the percentages fixed for each method of recruitment in the recruitment rules. The relative seniority of promotees and direct recruits shall be determined by the dates on which the vacancies reserved by the direct recruits and the promotees occur. It would appear at a glance that this rule was related to the quota of 9:1 between direct recruits and promotees prescribed in rule 4. A combined reading of rule 4 and para 3(iii) of Appendix V would clearly show that a roster has to be maintained consistent with the quota so that the relative *inter se* seniority of promotees and direct recruit be determined by the date on which vacancy occured and the vacancy is for the direct recruit or for the promotee. If quota prescribed by rule 4 was adhered to or was inviolable, the rule of seniority enunciated in para 3(iii) of Appendix V will have to be given full play and the seniority list has to be drawn in accordance with it. But as pointed out by this Court in *Bachan Singh's case* during the years 1959, 1969 and especially during 1962, 1963 and 1964 on account of adverse market conditions for recruitment of engineers, the Government had to be make recruitment in complete relaxation of rules 3 and 4 including the relaxation of the quota rule. As quota rule was directly inter-related 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, inequitous and improper. An identical situation was noticed by this Court in *First B. S. Gupta's case* wherein this Court while rejecting the contention of the promotees that the quota rule and the seniority rule deserved to be independent of each other held that with the upgrading of the large number of posts and the appointments to them of promotees, the quota rule collapsed and with that the seniority rule also. Therefore, once the quota rule was wholly 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 is held to be valid, no effect can be given to the seniority rule enunciated in para 3(iii), which was wholly inter-linked with the quota rule and cannot

exist apart from it on its own strength. This is impliedly accepted by the Union Government and is 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 enunciated in Annexure 'A' to Army Instruction No. 241 of 1950 dated September 1, 1949, and not in compliance with para 3(iii) of Appendix V.

The Ministry of Defence issued Army Instruction No. 241 of 1950 styled as 'Seniority of civilian employees in lower formations', which provides that in accordance with the orders contained in para 2 of Ministry of Defence O.M.No. 0240/6362/D-12 dated September 1, 1949 published as Annexure 'A' to this Instruction, seniority of persons employed in a particular grade is to be determined as indicated herein. Annexure 'A' reproduced the rule of seniority which was then followed as a model in the grade of Assistant which had been adopted by the Ministry of Defence. The principle of seniority therein enunciated is that the rule for determining *inter se* seniority in the cadre of Astistants should generally been taken as the model in framing the rules of seniority for other services and in respect of persons employed in any particular grade seniority should as a general rule, be determined on the basis of the length of service in that grade as well as service in an equivalent grade irrespective of whether the latter was under the Central or Provincial Government in India or Pakistan. This was the rule of seniority which would be applicable in the absence of any other rule specifically enacted for MES class I service. It could have been urged with confidence that the seniority rule enunciated in part 3(iii) of Appendix V of '1949 Rules' was the one specifically enacted for MES Class I service and the special rule would prevail over the general rule issued in Army Instruction No. A.I. 241 of 1950. But as pointed out earlier, the rule in para 3(iii) of Appendix V gave way when the quota rule was relaxed. This is recognised by the Ministry of Defence when while enacting '1953 Lules', a provision was made in para 3 of Appendix V that the principles for determining seniority are under consideration. Assuming that the rule of seniority of para 3(iii) of Appendix V of '1949 Rules' held the field, it appears to have been abrogated by the '1953 Rules' because a clear provision is made that principles for determining seniority are under consideration. Similar situation is recognised in '1961 Rules' which to some extent imparted a statutory flavour to '1949 Rules'. In para 3 of Appendix IV of '1961 Rules' it was stated that principles for determining seniority of

members of the service meaning Military Engineer Services Class I are under consideration. This position was reiterated when '1962 Rules' were enacted in relation to the service. In Para 3 of Appendix IV of '1962 Rules' it is reiterated that the principles for determining seniority are under consideration. It is nowhere suggested that till the decision in *Bachan Singh's case,* any other rule for determining *inter se* seniority was prescribed.

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That takes us to the impugned seniority list of 1974. On June 14, 1974, seniority list of AEE was circulated. The preamble to the seniority list sets out the criteria on which *inter se* seniority of members is determined. Amongst other things, it states that the *inter se* seniority of direct recruits and departmental promotees is to be fixed in accordance with the quota laid down in '1949 Rules' which came into force on April 1, 1951. It further recites that the same rule for determining seniority list is to be applied in both the matter of confirmation and fixation of seniority. Therefore, it clearly transpires that the seniority list is drawn up on the basis of fixed quota as enunciated in rule 4, that is, 9:1 direct recruit, promotee, revised between 1959 and 1963 to 1:1 and again restored to 9:1 from 1964. The 1974 seniority list would be without anything more invalid, as it proceeds on the assumption that there was a rigid quota rule and that the recruitment in excess of the quota would be invalid and the excess recruits from either source will have to be adjusted and regularised in succeeding years. Probably, the authorities concerned while drawing up the seniority list were influenced by some of the observations in *Jaisinghani's case* and the *two successive B. S. Gupta's cases,* all of which were clearly distinguishable and will have no application to the facts of the present case. Another error that has crept in prescribing the criteria on which the impugned 1974 seniority list is founded, is the assumption that there was an inviolable quota rule which could not be relaxed. The second criterion recites that seniority list of Assistant Executive Engineers is to be prepared upto 1968 and excess departmental promotees who cannot be brought into the cadre have to be shown separately and brought into the cadre on the basis of quota as and when vacancies become available. As clearly brought out hereinbefore, the recruitment was made in relaxation of the quota. Once the quota rule was relaxed, the rota for confirmation disappeared. In the absence of any other rule coupled with the Army Instruction upto 1968 continuous officiation would be the only available rule for determining the *inter se* seniority. And it may be recalled that

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both the 1963 and 1967 seniority lists were drawn up in accordance with that principle. Thus the two fundamental basic assumptions on which the impugned seniority list was drawn up are wholly invalid and contrary to the relevant rules, and any seniority list based thereon must fail. But this conclusion alone would leave the matter again in the hands of the first respondent with a fresh exercise. It is therefore necessary to proceed further and determine on what basis the seniority list of AEE was to be drawn up upto 1969, when the '1949 Rules' became statutory according to the decision in *Bachan Singh's case*.

Between 1959 and 1969 and especially during the years 1962, 1963 and 1964 and some subsequent years, the Government consistent with its requirements and exigencies of service made recruitment including recruitment by promotion in relaxation of the '1949 & subsequent rules' which the Government undoubtedly had the power to do. A good number of persons were so promoted. The direct recruits enjoyed comparatively greater benefit in that they entered service avoiding a competitive examination, which the required to be held and through which alone direct recruits could enter service. Equally a good number of persons entered MES Class I through the comparatively easy and highly subjective test, namely, interview. Therefore, it cannot be gainsaid that a considerable number of direct recruits derived the advantage of the power of relaxation of rules exercised by the Union Government. In *Bachan Singh's case*, this Court also has rightly observed that some departmental promotees also obtained advantage of the same. It is not necessary for us to consider comparative advantage. The supervening consideration was the exigencies of service of which the best judge, as recognised in *Bachan Singh's case*, is the Government. It may also be made clear that the promotees were not less qualified then direct recruits. They have to meet the same rigorous test of qualifications save and except the qualification as to age. This becomes abundantly clear from para 3 of rule 23 of '1949 Rules' which provided for appointment by promotion. Rule 23 provided that 'no individual shall be eligible for promotion to the service unless he would, but for age, be qualified for admission to the competitive examination under Part II of these Rules, and satisfies the Commission that he is in every respect suitable for appointment to the service.' Part II contains provisions prescribing eligibility criteria for taking the competitive examination. Amongst others, it provided minimum educational qualification of an Engineering degree,

Therefore, as for as the minimum educational qualification is concerned, promotees and direct recruits are on par. One need not therefore, look upon promotees as persons belonging to an inferior breed. The promotees were promoted by the Government to man its services keeping in view the exigencies of service and non-availability of direct recruits as held in *Bachan Singh's case* and as admitted before us. And while giving promotion, it was not even for a moment suggested that the promotions are ad hoc or till such time as direct recruits are available or for a limited period. Therefore, the promotions were regular promotions, may be to the temporary posts which was a temporary addition to the strength of the service. But to all intents and purposes, the promotion of the promotees during this period was a regular promotion and the promotees have held the posts uninterruptedly for all these years meaning thereby that it could never be said that posts were not available. Even then by the impugned seniority list, 1962 promotee is hanging, outside the cadre and the list drawn up on such an illegal and invalid criteria has led to such a startling result that is 1962 promotee does not find his berth in service even in 1974.

The next question is whether 1963 seniority list and 1967 seniority list were valid when drawn up. As pointed out earlier, the rule of quota enunciated by para 3(iii) of Appendix V of '1949 Rules' has ceased to be of any legal efficiency till 1969. The Army Instructions of September 1, 1949 directed seniority list to be drawn up in accordance with the principle of continuous officiation. In the absence of any other valid principle, seniority determined on the basis of continuous officiation is valid because it satisfies the test of Art. 16. There is nothing to suggest that 1963 and 1967 seniority lists were provisional or were likely to be re-drawn. Therefore till the 1949 Rules acquired statutory character in 1969, the seniority lists of 1963 and 1967 in respect of AEE were quite legal and valid and were drawn up on the basis of the principle which satisfies the test of Article 16.

The question is whether a new principle for determining *inter se* seniority evolved in 1974 could be retrospectively applied from 1951 thereby setting at naught all previous seniority lists validly drawn up. It is open to the Government to prescribe principles for determining *inter se* seniority of persons belonging to the same service or cadre except that any such principle must meet the test of Art. 16. It is equally open to the Government to retrospectively

revise service rules, if the same does not adversely affect vested rights. But if the rule for determining *inter se* seniority is revised or a fresh rule is framed, it must be constitutionally valid. The criteria on which 1974 seniority list is founded are clearly illegal and invalid and this stems from a misunderstanding and misinterpretation of the decision of this Court in *Bachan Singh's case*. It also overlooks the character of the appointments made during the period 1959 to 1969. It treats valid appointments as of doubtful validity. It pushes down persons validly appointed below those who were never in service and for reasons which we cannot apprcciate, it is being made effective from 1951. In our opinion, 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 is liable to be quashed and the two 1963 and 1967 seniority lists must hold the field.

At this stage, we must briefly deal with some technical contentions of minor importance.

It was contended that those members who have scored a march over the appellant in 1974 seniority list having not been impleaded as respondents, no relief can be given to the appellants. In the writ petition filed in the High Court, there were in all 418 respondents. Amongst them, first two were Union of India and Engineer-in-Chief, Army Headquarters, and the rest presumably must be those shown senior to the appellants. By an order made by the High Court, the names of respondents 3 to 418 were deleted since notices could not be served on them on account of the difficulty in ascertaining their present addresses on their transfers subsequent to the filing of these petitions. However, it clearly appears that some direct recruits led by Mr. Chitkara appeared through counsel Shri Murlidhar Rao and had made the submissions on behalf of the directs. Further any application was made to this Court by 9 direct recruits led by Shri T. Sudhakar for being impleaded as parties, which application was granted and Mr. P. R. Mridul, learned senior counsel appeared for them. Therefore, the case of direct recruits has not gone unrepresented and the contention can be negatived on the short ground. However, there is a more cogent reason why we would not countenance this contention. In this case, appellant does not claim seniority over particular individual in the background of any particular fact controverted by that person against whom the claim is made. The contention is that criteria adopt

ed by the Union Government in drawing-up the impugned seniority list are invalid and illegal and the relief is claimed against the Union Government restraining it from upsetting or quashing the already drawn up valid list and for quashing the impugned seniority list. Thus the relief is claimed against the Union Government and not against any particular individual. In this background, we consider it unnecessary to have all direct recruits to be impleaded as respondents. We may in this connection refer to *General Manager, South Central Railway, Secunderabad & Anr. etc.* v. *A.V.R. Sidhanti and Ors. etc.*(1) Repelling a contention on behalf of the appellant that the writ petitioners did not implead about 120 employees who were likely to be affected by the decision in this case, this Court observed that the respondents (original petitioners) are impeaching the validity of those policy decisions on the ground of their being violative of Arts. 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating the seniority of government servants is assailed. In such proceedings, the necessary parties to be impleaded are these against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. Approaching the matter from this angle, it may be noticed that relief is sought only against the Union of India and the concerned Ministry and not against any individual nor any seniority is claimed by anyone individual against another particular individual and therefore, even if technically the direct recruits were not before the Court, the petition is not likely to fail on that ground. The contention of the respondents for this additional reason must also be negatived.

Appellant had also sought a discretion for quashing the penal for promotion dated January 13, 1975 of 102 officers included in E-in-Cs Proceedings No. 65020/EE/74/EIR on the ground that the panel for promotion is drawn up on the basis of impugned seniority list, in which the appellant and several similarly situated AEE promoted way back in 1962 onwards did not find their place and were therefore not treated as being within the zone of selection. This relief must follow as a necessary corollary because once 1974 seniority list is quashed and consequently a declaration is being made that 1963 and 1967 seniority lists were valid and cannot be set at naught by principles of seniority determined in 1974, any panel drawn up on the basis of the invalid seniority must fall and must be quashed.

(1) [1974] 3 S.C.R. 207 at 212.

Pursuant to an integrated reading of Judgment in *Bachan Singh's case* and this case a fresh panel for promotion will have to be drawn up consistent with the seniority list of 1963 & 1967 because it was not disputed that promotion from the cadre of AEE to Executive Engineer is on the principle of seniority-cum-merit. It may be mentioned that the appellant had sought interim relief by way of injunction restraining the respondents not to promote anyone on the basis of the panel. This Court declined to grant such relief because exigencies of service do demand that the vacancies have to be filled. But in order to protect the interest of the appellant and those similarly situated, it was made abundantly clear that any promotion given subsequent to the date of the filing of the petition in the High Court must be temporary and must abide by the decision in this appeal. Therefore, consequent upon the relief being given in this appeal, the promotions will have to be readjusted and the case of appellant and those similarly situated will have to be examined for being brought on the panel for promotion.

Before we conclude this judgment, we will have qualm of conscience if we do not draw attention to a very unjust, unfair and inequitable situation having a demoralising effect on public services probably ensuing from certain rules framed by the Government and the decisions of this Court. Even where the recruitment to a service is from more than one source and a quota is fixed for each service, yet more often the appointing authority to meet its exigencies of service exceeds the quota from the easily available source of promotees because the procedure for making recruitment from the market by direct recruitment is long prolix and time consuming. The Government for exigencies of service, for needs of public services and for efficient administration, promotees person easily available because in a hierarchical service one hopes to move upward. After the promotee is promoted, continuously renders service and is neither found wanting nor inefficient and is discharging his duty to the satisfaction of all, a fresh recruit from the market years after promotee was inducted in the service comes and challenges all the past recruitments made before he was born in service and some decisions especially the ratio in *Jaisinghani's case* as interpretted in two *B. S. Gupta's cases* gives him an advantage to the extent of the promotee being preceded in seniority by direct recruit who enters service long after the promotee was promoted. When the promotee was promoted and was rendering service, the direct recruit may be a schoolian or college going boy. He emerges from the educational insti-

tution, appears at a competitive examination and starts challenging everything that had happened during the period when he has had nothing to do with service. A mandamus issued in *Jaisinghani's case* led to a situation where promotees of the year 1962 had to yield place to direct recruits of 1966 and the position worsoned thereafter. In the case in hand, appellant a promotee of September 27, 1962 is put below N. K. Prinza who appeared at competitive examination in April 1976 i.e. one who came 14 years after the appellant, and it does not require an intelligent exercise to reach a conclusion that 14 years prior to 1976 Mr. Prinza who is shown to be born on July 20, 1950 must be aged about 12 years and must have been studying in a primary school. Shorn of all service jurisprudence jargon one can bluntly notice the situation that a primary school student when the promotee was a member of the service, barged in and claimed and got seniority over the promotee. If this has not a demoralising effect on service one fails to see what other inequitous approach would be more damaging. 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 Arts. 14 and 16. Mr. Ramamurthi, learned counsel for some of the direct recruits in this connection urged that if at the time when the promotee was recruited by promotion, his appointment/promotion was irregular or illegal and which is required to be regularised, any subsequent direct recruits coming in at a later date can seek relief and score a march over such irregular and illegal entrant. We find it difficult to subscribe to this view. Though we have dwelt at some length on this aspect any enunciation of general principle on the lines indicated by us would require a reconsideration of some of the decisions of this Court. We say no more save that we have solved the riddle in this case in accordance with the decisions of this Court and interpretation of relevant rules.

A B C D E F G

Accordingly, this appeal must succeed and is hereby allowed. The judgment of the High Court dated May 15/17, 1979 is set aside and the writ petition filed by the appellant in the High Court to the extent herein indicated is accepted. Let a writ of certiorari be issued quashing and setting aside the seniority list dated June 14, 1974. It is further hereby declared that the seniority lists of 1963 and

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A 1967/68 were valid and hold the field till 1969 and their revision can be made in respect of members who joined service after 1969 and the period subsequent to 1969. The Panel for promotion in respect of 102 officers included in E-in-C's proceedings No. 65020/EE/74/ EIR dated January 13, 1975 is quashed and set aside. All the promotions given subsequent to the filing of the petition in the High B Court are subject to this decision and must be readjusted by drawing up a fresh panel for promotion keeping in view the 1963 and 1967/68 seniority list of AEE in the light of the observations contained in this judgment.

C In the circumstances of the case, there will be no order as to costs.

S.R. *Appeal allowed.*