

(2000) 01 SC CK 0070

In the Supreme Court Of India

Case No : Civil Appeal No. 7717 of 1994 (With I.A. No. 7 of 1997 and 8 of 1998)
With Civil Appeal No. 6316 of 1997

Maharashtra Vikrikar Karamchari Sangathan

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 12-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Constitution of India, 1950 — Article 14, 16, 309
Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 — Rule 4, 5, 6
Maharashtra Sales Tax Inspectors Recruitment Rules, 1971 — Rule 2

Citation : AIR 2000 SC 622 : (2000) AIRSCW 4943 : (2000) AIRSCW 138 :
(2000) 1 JT 132 : (2000) 1 SCALE 105 : (2000) 2 SCC 552 : (2000) SCC(L&S)
288 : (2000) 1 SCR 166 : (2000) 3 SLJ 1 : (2001) 4 Supreme 159 : (2000) 1
Supreme 225 : (2000) 1 UPLBEC 874

Hon'ble Judges : S. S. M. Quadri, J;S. P. Kurdukar, J

Bench : Division Bench

Advocate : Harish N. Salve, V.A. Mohta, P.P. RaoG.B. Sathe, M.S. Ganesh, A.K. Ganguli, K.K. Singhvi, S.P. Sharma, Joseph P. Verghese, A.S. Bhasme, Sajjad Hussain, R.B. Masodkar, K.L. Taneja, C.S. Ashri, M.K.D. Namboodiri, R.P. Wadhwani, L.J. Vadakara, Raju Ramachandran, S.M. Jadhav, D.M. Nargolkar, M.P. Raju, Mukul Mudgal, Urmila Sirur, K.S. Chauhan, Meeta Gond, Abraham Pattiyani, S.S. Shinde, Abraham M. Pattiyani, V.K. Sidhardhan, A.M. Khanwilkar, Vinay Kumar Garg, Sunil Kumar, B.N. Singhvi, Moti Lal Hemembran, Meetha Pras, B. Joshi Dinesh P.V. and M.L. Gond, for the Appellant;

Final Decision : Dismissed

Judgement

S.P. Kurdukar, J.

CIVIL APPEAL No. 7717 OF 1994

1. This is a third round of litigation whereby a challenge to the seniority list of the Sales Tax Inspectors in the Sales Tax Department, Maharashtra, was made by promotes/departmental candidates (for short the Promotes) against the direct recruits in respect of their placement in the seniority list. These two civil appeals

in strict sense cannot be said to be connected involving Identical questions of inter se seniority save and except that they relate to the fixation of seniority of the Sales Tax Inspectors in their cadre in the Sales Tax Department of Maharashtra. Civil Appeal No. 7717 of 1994 is filed by the Maharashtra Vikrikar Karamchari Sangathan, the appellant (for short the Promotes) assailing the legality and correctness of the judgment and order dated 23rd March, 1994 passed by the Maharashtra Administrative Tribunal, Bombay Bench in Original Application No. 690-A of 1993 (for short O.A.). This O.A. was filed by the promotes challenging the correctness of the final seniority list notified and published on 28th December, 1992 and amended on 29th October, 1993. This seniority list of Sales Tax Inspectors came to be prepared as on 31st of December, 1987. To be more precise, the dispute relates to the fixation of seniority of promotes and direct recruits for the block 1971 to 31st December, 1987. The Maharashtra Administrative Tribunal, Bombay Bench (for short MAT) dismissed the O.A. principally on the ground that the contentions raised therein are barred by principles of res judicata as well as constructive res judicata. However, with a view to avoid the remand, in case the higher Courts hold that the O.A. is not barred by the principles of res judicata or constructive res judicata, the MAT disposed of the controversy raised in O.A. on merits too.

2. Civil Appeal No. 6316 of 1997 is filed by the State of Maharashtra impugning the judgment and order dated 23rd February, 1989 rendered by the High Court of Bombay in Writ Petition No. 2742 of 1987. The dispute in this Civil Appeal pertains to the determination of seniority of Sales Tax Inspectors who were promoted (on absorption) from two different sources, namely, revenue department and Sales Tax Department, Bombay. The dispute thus in this civil appeal is confined to the inter se seniority of promotes from these two sources.

3. We may first deal with the Civil Appeal No. 7717 of 1994. The facts which are necessary for the disposal of the appeal may be stated briefly as under:

Prior to 6th September, 1971, the recruitment to the posts of Sales Tax Inspectors (for short STIs) was made through three sources, (1) by promotion from clerks, (2) by transfer from other departments and (3) by direct recruitment. Till this time, no quota was prescribed for these three different sources of recruitment. The seniority of all these three sets of STIs was determined pursuant to the general provisions relating to seniority contained in the government resolution dated July 29, 1963.

4. For the first, the State Government in exercise of powers conferred by provisions of Article 309 of the Constitution of India, framed the rules called Maharashtra Sales Tax Inspectors Recruitment Rules, 1971 (for short Rules 1971) which came into force w.e.f. September 6, 1971. Suffice it to refer to Rule 2 thereof. It deals with the appointments to the posts of Sales Tax Inspectors from two sources, namely, direct recruits and by promotion in the ratio of 60:40 as far as practicable.

Rule 2 reads thus:

2. Appointment to the posts of Sales Tax Inspectors shall be made either:

(a) by promotion of suitable clerks in the Sales Tax Department, who have passed at least Part. I of the Departmental Examination prescribed for the Sales Tax Inspectors or for the Higher Clerical staff in the Sales Tax Department or who have been exempted from passing the Departmental Examination prescribed for Sales Tax Inspectors or for the Higher Clerical Staff.

Provided that, the Clerks who have passed Part I of the Departmental Examination for Sales Tax Inspector and who have been promoted to the posts of Sales Tax Inspectors are required to pass Part II of the Departmental Examination for Sales Tax Inspectors also, according to the rules made in that behalf, failing which they shall be liable to be reverted.

The ratio of persons appointed by promotion as provided above and by nomination as provided below shall, as far as practicable, be 40:60. The ratio shall not apply to temporary vacancies not exceeding one year which may be filled by promotion. Such promotions shall, however, be treated as stop-gap promotions and will not entitle the promotes to seniority by virtue thereof.

Note: In the period from the date on which these rules come into force to the date on which the results of the first Departmental Examination of Sales Tax Inspectors under the unified Departmental Examination Rules are declared, promotions made to the post of Sales Tax Inspector shall be purely provisional and persons so promoted shall be required to pass the prescribed Departmental Examination within the prescribed period from the date the Departmental Examination rules come into force, failing which they shall be liable to be reverted: OR

(b) by nomination, on the result of a competitive examination held by the Maharashtra Public Service Commission, from among candidates who-

(i) possess a degree in Arts, Science, Commerce, Law or Agriculture of a recognised University or any recognised equivalent qualification; and

(ii) have attained the age of 18 years and have not attained the age of 24 years, on the first day of the month immediately following the month in which the posts are advertised by the Commission;

Provided that, the upper age limit shall be relaxed upto 30 years in the case of persons serving in the Sales Tax Department.

Thereafter, the State of Maharashtra in exercise of powers conferred under Article 309 of the Constitution of India, framed the Rules for regulating the seniority amongst Government employees. The said Rules were called Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 (for short Rules 1982). These rules came into force w.e.f. June 21, 1982. Rule 4 is relevant in the present controversy and it reads thus:

4. General Principles of Seniority: (1) Subject to the other provisions of these rules, the seniority of a Government servant in any post, cadre or service shall ordinarily be determined on the length of his continuous service there.

Provided that, for the purpose of computing such service, any period of absence from the post, cadre or service due to leave, deputation for training or otherwise or on foreign service or temporary officiation in any other post shall be taken into account, if the competent authority certified that the Government servant concerned would have continued in the said post cadre or service during such period, had he not proceeded on leave or deputation or been appointed temporarily to such other post.

Provided further that, the service, if any, rendered by him as a result of a fortuitous appointment shall be excluded in computing the length of service and for the purposes of seniority he shall be deemed to have been appointed to the post of in the cadre of service on the date on which his regular appointment is made in accordance with the provisions of the relevant recruitment rules.

(2) Notwithstanding anything- contained in sub rule (1):

(a) the inter se seniority of direct recruits selected in one batch for appointment to any post, cadre or service, shall be determined according to their ranks in the order of preference arranged by the Commission, Selection Board or in the case of recruitment by nomination directly made by the competent authority, the said authority, as the case may be, if the appointment is taken up by the person recruited within thirty days from the date of issue of the order of appointment or within such extended period as the competent authority may in its discretion allow.

(b) the inter se seniority of Government servants promoted from a Select List shall be in the same order in which their names appear in such Select List. If the select List is prepared in two parts, the first part, containing the names of those selected unconditionally and the second part containing the names of those selected provisionally. All persons included in the first part shall rank above those included in all second part.

Provided that, if the order in which the names are arranged in the Select List is changed following a subsequent review of it, the seniority of the Government servants involved shall be rearranged and determined afresh in conformity with their revised ranks.

(c) the seniority of a transferred Government servant vis-a-vis the Government servants in the posts, cadre of service to which he is transferred shall be determined by the competent authority with due regard to the class and pay scale of the post, cadre or service from which he is transferred, the length of his service therein and the circumstances leading to his transfer.

(3) Where the dates of appointment in posts, cadre or service of any two or more persons determined after assigning the deemed dates, if necessary, are identical

the person senior in age shall be considered as senior for the purpose of determining the seniority.

Rule 3 contains several definitions and we are concerned with four definitions.

3(D) "Deemed date" means the date assigned to a Government servant in accordance with the provisions of Rule 5;

3(E) "Direct recruit" means, in relation to any post, cadre or service, a person appointed by nomination thereto;

3(F) "Fortuitous appointment" means a temporary appointment made pending a regular appointment in accordance with the provisions of the relevant recruitment rules;

3(H) "promotes" means, In relation to any post, cadre or service, a Government servant appointed thereto by promotion from a lower post, cadre or service;

5. The State of Maharashtra again in exercise of its powers conferred by Article 309 of the Constitution of India carried out the amendments to the Rules 1982. We may reproduce the relevant amendments to Rules 4 and 6 which read as under:

2. In Rule 4 of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 (hereinafter referred to as "the principal rules), in Sub-rule (1) in the second proviso, after the words, "a fortuitous appointment" the following shall be inserted, namely:

except in a case where the competent authority certifies that, it was not expedient/possible or practicable to make a regular appointment strictly in accordance with the ratio of recruitment as prescribed in the relevant recruitment rules, with the brief reason recorded therefore.

3. xxxx xxxx xxxx xxxxx xxxxx 4. In Rule 6 of the principal rules, after the existing proviso, (he following proviso shall be added, namely:

Provided further that, appointment shall not be deemed to be fortuitous if the authority competent to make appointment certified while preparing the annual gradation list that the temporary appointment had to be made, as candidates for regular appointment by nomination or as the case may be, persons fit for promotion from the lower cadre, were not available at. all or in adequate numbers.

6. This is how the relevant rules were holding the field when the impugned seniority list as amended came to be published in the year 1992 and 1993. It is clear from the certificate of the Addl. Commissioner of Sales Tax dated 21st February, 1992 (Ex.K) that from 6th September, 197 i to 31st December, 1987, total 1 750 posts of Sales Tax Inspector became vacant. Under the Recruitment Rules, 1050 posts for the direct recruits were required to be filled in accordance with the ratio of 60:40. However, during the said period, only 346 direct recruits

were available and they were appointed. Balance of 704 posts of Sales Tax Inspector came to be filled by temporary promotions because no candidates were available for direct recruitment for the said posts. From this certificate, it is amply clear that between 6th of September, 1971 and 31st December, 1987, the quota rule was not observed and the departmental candidates came to be promoted as Sales Tax Inspectors beyond their prescribed quota of 40%. Obviously, these promotions were treated by the Government of Maharashtra as temporary promotions. The principal issue which needs to be considered in this appeal is how to determine the seniority amongst the promotes and direct recruits who were promoted and appointed as STIs during this block. The contention raised on behalf of the promotes (appellants) is that the quota rule was broken down and as a result thereof, the promotes were required to be appointed in view of the exigencies of service and if so appointed, their promotions cannot be termed as fortuitous/temporary/ad hoc and that they will be entitled to earn the seniority and placement in the impugned seniority list from the date they were so promoted and working as STIs. As against this, the contention raised on behalf of the direct recruits was that the promotes who were promoted / appointed in the vacancies falling in the quota of direct recruits (60%), such promotions of the promotes were fortuitous in excess of their quota and notwithstanding that they were so appointed and working as STIs in the vacancies reserved for direct recruits as per the quota rule, they cannot get the seniority from the date of promotion or officiation and that they will get their placement in the seniority list in accordance with their quota i.e. 40% and until they are accommodated in their quota (40%) as regular promotes, their date of promotion or officiation will not be counted for the purposes of fixing their seniority vis-a-vis direct recruits. The quota rule was never broken down. The direct recruits further prayed that the present O.A. is barred by principles of res judicata as also the constructive res judicata by virtue of the judgment dated 3rd September, 1992 rendered by MAT in T.P. No. 822 of 1991. The direct recruits, therefore, prayed that present O.A. has no substance and the same be dismissed,

7. It would be necessary to refer to the earlier proceedings which were finally disposed of by the MAT, Bombay Bench and this Court upheld the said judgment while dismissing the SLP filed by promotes/departmental candidates.

8. The first proceeding in point of time was filed by the promotes bearing Writ Petition No. 2742 of 1987 challenging the seniority list, of the STIs in Bombay High Court wherein the direct recruits were also arrayed as respondents. The Bombay High Court vide its judgment and order dated 23rd February, 1989 quashed the seniority list and directed the concerned authority to prepare a fresh seniority list.

9. Following the directions of the Bombay High Court in its order dated 23rd February, 1989, a fresh seniority list was prepared and issued on 12th April, 1989. The direct recruits were not satisfied with this seniority list prepared and issued on 12th April, 1989 as according to them, the same was prepared in

contravention of the statutory Rules 1971, framed by the State of Maharashtra in the years 1971, 1982 and 1988. To vindicate their grievances in respect of their erroneous placement in the seniority list issued on 12th April, 1989, two direct recruits petitioned the State of Maharashtra bearing Writ Petition No. 4852 of 1989 to which some of the promotes were also impleaded as respondents. Some similarly situated promotes filed the intervention application which was allowed. Writ Petition No. 4852 of 1989 was, then transferred to the MAT, Bombay Bench in view of the Constitution of the MAT. It came to be listed as T.P. No. 822 of 1991. The State of Maharashtra as well as the promotes filed their responses to the transferred petition. The State of Maharashtra pleaded that the seniority list Issued on 12th April, 1989 was in accordance with the statutory rules and the promotions given to the promotes in excess of their quota were required to be treated as fortuitous promotions and since they were not regularly appointed as STIs, they will be pushed down below the direct recruits for the respective unit years of appointments in accordance with quota rule. According to the State of Maharashtra, the promotions given to the promotes in excess of quota were temporary/ad hoc and or stop-gap arrangement without reckoning the period of their officiation as STIs for the purposes of fixing their seniority.

10. The promotes strongly relied upon circular issued by the Government on 2nd September 1989 regarding the seniority of the Sales Tax Inspectors with reference to the rules and principles of seniority between the promotes and direct recruits. In addition, they also relied upon a certificate dated 21st February, 1992 issued by the Government under the amended seniority rules declaring promotes in excess of quota as regular promotes. There is a dispute as regards the correct reading and interpretation of this certificate dated 21st February, 1992.

11. After hearing the parties, the MAT by its detailed reasoned order dated 3rd September 1992 quashed the seniority list dated 12th April, 1989 after setting/ concluding the Issues and directed the concerned authority to prepare a fresh seniority list in terms of its order as also in accordance with the rules notified from time to time. The promotes moved this Court in SLP (c) (C.C. No. 18427/92), but, however, this Court on 10th December, 1992 dismissed the same as under:

I.A. No. 1 for permission to file SLP is allowed. The SLP is dismissed on merits.

12. In view of the decision of the MAT dated 3rd September, 1992 and of SLP confirmed by this Court on 10th December, 1992, a fresh seniority list was issued on 28th December, 1992 and was finalised on 29th October, 1993. The appellants/ promotes who were aggrieved by the said seniority list filed O.A. No. 690-A of 1993 before the MAT, Bombay Bench. The direct recruits were also made parties to this O.A. MAT, Bombay Bench, vide its impugned judgment dated 23rd March 1994 dismissed the O.A. It is against this order passed by MAT, Bombay Bench, the appellants have filed this Civil Appeal No. 7717 of 1994,

13. The impugned judgment principally proceeded on the footing that the contentions raised by the appellants were barred by principles of res judicata in view of the earlier decision of the MAT, Bombay Bench rendered on 3rd September 1992 whereunder the seniority list dated April 12, 1989 came to be quashed. The MAT then directed concerned authority to prepare a fresh seniority list in terms of directions contained in its order dated September 3, 1992. The MAT also considered in its impugned judgment the merits of the claim set up by the appellants and while negating the same on merits issued certain directions contained in paragraph 50 thereof. The MAT gave the findings on merits in order to avoid the order of remand in the event the higher Court comes to the conclusion that the contentions raised by the appellants in O.A. No. 690-A of 1993 are not barred by res judicata or constructive res judicata. Before we deal with the rival contentions on merits, it would be appropriate to set out relevant contentions and the findings recorded thereof by the MAT, Bombay Bench in its judgment dated September 3, 1992 as to whether the contentions raised in the present proceedings are barred by res judicator/constructive res judicata.

14. The principle of res judicata is sought to be applied on the footing that the identical contentions were raised in Transfer Petition No. 822 of 1991 and, therefore, such contentions cannot be re-agitated in the present O.A. It may be true that the appellants have got a fresh cause of action because the seniority list was prepared in 1993 by following the decision in Transfer Petition Case No. 822 of 1991 but it will not alter the situation in view of the fact that identical contentions/issues were sought to be re-agitated in O.A. No. 690-A of 1993. All these contentions/issues were concluded not only by the MAT Bombay Bench, but by this Court also in SLP (C) No. (C.C. No. 188427 of 1992). Certainly findings on such issues must operate as res judicata in the present proceedings otherwise the very rule of res judicata will be defeated.

15. As stated earlier, Transfer Application No. 822 of 1991 (Writ Petition No. 4852 of 1989) was filed by two direct recruits against the State of Maharashtra, the Commissioner of Sales Tax and Rajak Daud Mapari who was a promotes. To this O.A., four more promotes got themselves impleaded as interveners and filed their counter affidavit opposing the said T.P. The contention raised on behalf of direct recruits was that the promotions given to the Promotes in excess of their quota as laid down in the Rules 1971 be treated as fortuitous beyond their prescribed quota. The appellants contended that since direct recruits were not adequately available for appointments in terms of the quota Rule, the promotions were required to be given during the respective years for administrative reasons as the Sales Tax Department could not be allowed to suffer because of non availability of direct recruits. This contention is based on the principle that quota rule was broken down and, therefore, the Government had to resort to departure from the quota rule due to administrative exigencies. If such promotions were given to the promotes they could not be said to be ibrtuitous/ad hoc/temporary or stop-gap arrangement. On this topic both the parties relied upon the Rules 1971, the Rules 1982 and various decisions of this Court. The MAT after

analysing the relevant rules and the decisions of this Court came to the following conclusions:

1. It cannot be held that the quota rule has not been followed continuously for number of years.
2. 1971 quota Rule has not been broken down.
3. Inter se seniority is to be guided by quota rule.
4. It is reasonable to implement the principles of pushing down.
5. Promotions in excess of quota are liable to be fortuitous.
6. Promotions in excess of quota in the year of promotion will not get seniority in that year.
7. promotes in excess of quota will get seniority in subsequent year when they can get place in their quota (Pushing down principle).
8. Year is taken as unit for deciding the quota.

16. The MAT while coming to the above conclusions noticed that (1) there was no material on record to indicate that the quota rule was broken down and, therefore, the promotions given to the promotes in excess of quota rule will have to be treated as regular promotions and not being fortuitous/ad hoc/temporary/stop-gap arrangement. The MAT also found that the Government had failed to show that despite their sincere efforts, they could not adhere to the quota rule because of non-availability of eligible candidates for direct recruitment. (2) The words as far as practicable appearing in Rule 2 of Rules 1971 could not be equated with impossible and for that the MAT had referred to the number of vacancies that fell to the share of direct recruits. It was noticed that during the period from 6th September, 1971 to 31st December, 1987, 1050 posts fell to the share of direct recruits as per the quota rule, but, however, only 346 direct recruits were appointed. Except for the year when recruitment was not permitted by the Government for the rest of the years either the requisitions were not sent on time or the number of candidates for direct recruits was restricted by the MPSC. For some years, no requisitions were sent to MPSC. (3) No material was produced on record to indicate that Government ever took a conscious decision to deviate from the quota rule as it was broken down and, therefore, promotes were required to be promoted in excess of their quota. The number of posts for direct recruits falling vacant were 704 for the said block. (4) The Government had taken no active steps in the direction of direct recruitment. The promotions given to the promotes in excess of their quota were either fortuitous/ad hoc/temporary or stop-gap arrangement and, therefore, notwithstanding that such promotes were officiating for long period, they will have to be pushed down in the seniority list below the direct recruits for the respective year/s of recruitment.

Consistent with these findings, the MAT concluded thus:

It has not been explained by the respondents whether the seniority list published by the Additional Commissioner, Sales Tax, vide his letter dated 12th April, 1989 is in accordance with the instructions issued by the Government vide Government letter dated 2nd September, 1989. Therefore, the Government will have to forthwith cancel the impugned seniority list published on 12th April, 1989 and to prepare a fresh seniority list of the Sales Tax Inspectors in accordance with the law. It is needless to say that the appointments made in excess of the quota will have to be treated as fortuitous. Therefore, the respondents are directed to revise the seniority list and republish it in accordance with the law laid down by the Supreme Court as well as the letter dated V1KRANT-1087/4 I/37/Administration-7 dated 2nd September, 1989 addressed to Additional Commissioner, Sales Tax, Bombay, within a period of six months, from the date of this order.

17. As stated earlier, promotes challenged this order in SLP bearing CC No. 18427 of 1992 and the same came to be dismissed on December 10, 1992. In view of the finality attained by the judgment and order dated September 8, 1992 passed by the MAT Bombay Bench, the Government issued a fresh seniority list on December 28, 1992 and was finalised on October 29, 1993. In this seniority list, the promoters were pushed down below the direct recruits as per the directions contained in the judgment of the MAT dated September 3, 1992. It is this seniority list which was challenged by the appellants before the MAT Bombay Bench, in Original Application No. 690-A of 1993. The MAT Bombay Bench, vide its judgment and order dated 23rd March, 1994 dismissed the said O.A.

18. Mr. Ganguly, the learned senior counsel appearing in support of this appeal urged that the phrase used in Rule 2 as far as practicable proves beyond any pale of doubt that there is no fix quota between promo tees and nominees and the said explanation as far as practicable cannot be given a restrictive interpretation and it cannot be gainsaid that no definite quota exists between the promotes and nominees and any departure thereof would amount to breach of quota rule. In support of this submission, he drew support from the decision of this Court in Direct Recruit Class II Engineering Officers' The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, , wherein the words as far as practicable has been interpreted as under (para 20 of AIR, Lab 1C):

The other Important feature was that the proviso fixing the ratio, far from being imperative, permitted the State Government to exercise its discretion according to the demand of the exigencies, by using the expression "as far as practicable." The ease of the appellants is that the said expression was inserted in the proviso with the object of avoiding fractions in arithmetical calculations of number of posts available to the two groups, and for no other purpose. We do not see any reason to so restrict the scope and meaning of the expression "as far as practicable." A similar expression in identical terms used in certain other rules came up for consideration in AIR 1977 251 (SC) and it was held that if it became

non-feasible and impracticable for the State to fill up the requisite quota by direct recruits after making a serious efforts to do so, it was free to fill the posts by promotions of suitable hands, if the filling up of the vacancies was administratively necessary and could not wait. Similar is the position here, and the Rule 1 of the 1960 Rules must be held to be realistic and flexible, true to life rather than abstractly absolute.

19. While construing the phrase "as far as practicable," in the manner suggested by the respondents, it must be indicated that serious efforts were made with all promptness on the part of the State to secure the hands to fill up the required number of vacancies from the open market.

20. This submission was also raised in Transfer Application No. 822 of 1991 and while construing the said expression, MAT Bombay Bench, referred to the judgment in AIR 1977 251 (SC) and held that having regard to the facts and circumstances of the case and in particular the inaction on the part of the State Government in recruiting the direct recruits during this block, it could not be said that the State in tune with the mandate of the rule had made serious efforts to secure the hands to fill up the required number of vacancies from the open market. The Tribunal in paragraph 7 has concluded:

According to him between the period 6th September, 1971 to 31st December, 1987, 2561 posts of Sales Tax Inspectors have been filled, out of which only 335 posts have gone to direct recruits and the remaining 2226 have gone to promotes and thus 1202 promotes have been promoted in excess of quota. The total percentage of direct recruitment would come hardly to 13% as against the 60% prescribed in Rule 2 of Maharashtra Sales Tax Inspectors (Recruitment) Rules, 1971.

21. In view of these findings, a similar contention sought to be raised in the present proceedings cannot be entertained and the Tribunal, in our opinion, has rightly negated the said contention on the ground of res judicata. An equally unsustainable contention was raised on behalf of the appellant that the aforesaid finding is per incuriam and as such the principle of res judicata will have no application. Reliance was placed on the decisions of this Court in Direct Recruit Class II Engineering Officers The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, , Municipal Corporation of Delhi Vs. Gurnam Kaur, and A.R. Antulay Vs. R.S. Nayak and Another, . We wonder how this contention can be accepted in view of the specific finding recorded by the MAT in its judgment dated September 3, 1992 which is quoted herein above. This submission cannot be sustained and hence rejected.

22. It was then contended on behalf of the appellants that neither the recruitment Rules of 1971 nor the seniority Rules of 1982 provided for carrying forward the vacancies falling in either category. In the absence of such rule which specifically provide for carrying forward the vacancies falling in either category, no such carry forward rule could be implied either in Recruitment Rules or in the

Seniority Rules. This contention need not detain us any longer because such a contention was available to the appellants in the earlier proceedings, namely, Transfer Application No. 822 of 1991 and the same was not put in issue. That not having been done, it must follow that such a contention is barred by principles of constructive res judicata. Neither the contesting respondents nor the appellants ever raised this contention at any stage of the proceedings in Transfer Petition No. 822 of 1991. It would, therefore, be too late to raise such a contention when the seniority list has been finalised pursuant to the judgment of the MAT Bombay Bench in Transfer Petition No. 822 of 1991. The reliance placed on behalf of the appellants on the decision of this Court in Narender Chadha and Others Vs. Union of India and Others, , therefore, does not advance the case of the appellants.

23. It was then contended on behalf of the appellants that in the year 1988, the Recruitment Rules were amended and as per the amended rules, cases where appointments are not made strictly in accordance with the ratio of recruitment as prescribed in the Rules 1971, such appointments will not be fortuitous appointments. If the competent authority certified that it was not expedient/possible or practicable to make a regular appointment strictly in accordance with the ratio. In support of this submission reliance was placed on the certificate dated 21st February, 1992 issued by the competent authority in terms of the amended rules. The legality and correctness of the said certificate, counsel urged cannot be challenged. The certificate reads thus:

In accordance with the said Rules dated 23rd September, 1988, it is hereby certified that from 6th September, 1971 to 31st December, 1987, total 1750 posts of Sales Tax Inspector became vacant. Under the recruitment rules, 1050 posts, or direct recruit were required to be filled in according to the ratio of 60 : 40. However, during the said period only 346 direct recruits were available and they were appointed. Balance of 704 posts of Sales Tax Inspectors to be filled in by temporary promotions because no candidates were available for direct recruitment for posts of Sales Tax Inspectors.

(Emphasis supplied)

24. We fail to understand how, on the face of findings noted above, this certificate would advance the case of the appellants. Further the certificate recites that the balance of 704 posts of Sales Tax Inspectors "to be filled in by temporary promotions" because no candidates were available for direct recruitment for the post of Sales Tax Inspectors. On the contrary, this certificate unmistakably indicates that although it was issued on 21st February, 1992, the promotions given to the promotes in excess of their quota for the respective unit years were treated as temporary promotions. No document is brought to our notice to indicate that the Government of Maharashtra has ever taken any decision much less the conscious decision in accordance with law to treat the promotions of these promotes (in excess of the quota) on regular basis. In the absence of any such decision on the part of the Government, it would be wrong to assert that such promotions were on regular basis and not fortuitous/

temporary/ad hoc or stop-gap arrangement. This certificate, therefore, is of no consequence. This certificate was issued on 21st February, 1992 when the Transfer Petition No. 822 of 1991 was pending before the MAT when it rendered its judgment on September 3, 1992. It does not appear that either of the parties ever produced the same in the earlier proceedings. The respondents were therefore justified in contending that this issue cannot be agitated in the present proceedings as it is barred under the principles of constructive res judicata. Even on merits of this certificate, we have already indicated that the appellant cannot draw any support therefrom to contend that the promotions were on regular basis. It was contended by Mr. K. K. Singhvi, learned senior counsel appearing for the respondents that this in judicator was issued by the Addl. Commissioner of Sales Tax after the service of notices in Transfer Petition No. 822 of 1991, Of course, there is no prohibition/bar as such but, this would only indicate an afterthought attempt to lend support to the appellants. This contention must also stand rejected.

25. It was then contended by Mr. Ganguly that the respondents 3 and 4 in Transfer Petition No. 822 of 1991 were riot sued in a representative capacity on behalf of all the promotes. No leave under O. 1, Rule 8, C.P.C. was obtained by the petitioners therein (direct recruits). In view of this relevant circumstance, at the most, it would be an inter parts judgment and would not bind the appellants save and except the respondents Nos. 3 and 4. This submission was strongly opposed on behalf of the non-official respondents. It was contended by Mr. Singhvi, the learned senior counsel that the petitioners in T.P. Case No. 822 of 1991 sued the respondents Nos. 3 and 4 in a representative capacity and, therefore, the law laid down by the MAT Bombay Bench in Transfer Petition No. 822 of 1991 must bind all the promotes who are similarly situated. This contention raised on behalf of appellants was negated by the MAT in its impugned judgment and held that the said Transfer Petition by the direct recruits was in the representative capacity. No such specific contention appears to have been taken up in the present civil appeal. We see no reason to doubt the findings of the Tribunal in this behalf which is supported by Mr. Singhvi.

26. Lastly, it was contended on behalf of the appellants that some of the appellants have put in more than 17 years of service when few of the direct recruits were either schooling and/or not born in the cadre. If the appellants were to be pushed down, it will cause a great hardship to them. We are unable to subscribe to this contention be cause if there is patent violation of the quota rule, the result must follow and the appellants who remained in the office for all these years cannot take the advantage of this situation. This submission is, therefore, devoid of any substance.

27. Thus, we concur with the findings recorded by the MAT on the issue of res judicate and consequently, the O. A. No. 690-A of 1993 will have to be dismissed on this ground alone for the reasons recorded herein above. We accordingly do so. If this be GO, the findings of the MAT in the impugned judgment on merits

and certain directions issued therein and in particular para 50 would be of no consequence. Accordingly, any such direction in the operative portion of the impugned judgment based on para 50 will be non est. Principle of pushing down will have to be adhered to so long as the Rules of 1971 and Rules of 1982 as interpreted by MAT and this Court hold the field. The seniority of such pushed down STIs vis-a-vis the direct recruits appointed after 31st December, 1987 is left open as it was not the subject-matter of O.A. Consequently, challenge to the impugned seniority lists issued on 28th December, 1992 and finalised on 29th October, 1993 as on 31st December, 1987 must fail. We must make it clear that subject-matter of challenge before the MAT was in respect of impugned seniority list issued on December 28, 1992 and final seniority list issued on October 29, 1993. It is expressly made clear that this judgment is confined to the seniority list as on 31st December, 1987 and no more.

28. In view of the aforesaid discussion, we find no merit in this appeal and the same is dismissed. In the circumstances of the case, parties are directed to bear their own costs.

I.A. No. 7 of 1997 and I .A. No. 8 of 1998

In view of our order in the main appeal, I.A. No. 7 of 1997 and I.A. No. 8 of 1998 are allowed.

Civil Appeal No. 6316 of 1997

This civil appeal by Special Leave is filed by the State of Maharashtra challenging the legality and correctness of the judgment and order dated February 23, 1989 passed by the Division Bench of the Bombay High Court in Writ Petition No. 2742 of 1987. This writ petition was filed by the first respondent-Vasant Krishnaji Chavan, the Sales Tax Inspector (for short 'STI') on behalf of himself and other similarly situated STIs who were promoted to the posts of STIs prior to September 1, 1980. To this writ petition. State of Maharashtra and the Commissioner of Sales Tax, Maharashtra State along with other 35 respondents were arrayed as respondents.

The challenge in this writ petition was to the provisional seniority list of STIs as on April 1, 1984 issued by the Government of Maharashtra on April 28, 1987. It is this provisional seniority list which was quashed by the High Court by this impugned order and the State Government was directed to prepare a fresh seniority list of STIs in accordance with the directions contained therein.

A few facts leading to the present proceedings are as under:

Prior to April, 1974, the staffing pattern amongst Class III employees in the Sales Tax Department, Maharashtra State was (1) Clerk (2) Sales Tax Inspectors and (3) Selection Grade Inspectors. Prior to the said date the post of Clerk was divided into Junior Clerk and Senior Clerk. The posts of STIs are filled up by promotion as well as nomination in equal ratio. Promotion to the STI from the cadre of Clerk was made from the suitable candidates on the basis of the

certificate issued by the Select Committee about his suitability. The post of Sales Tax Inspector is a selection post.

Earlier, the work of recovery of sale tax was entrusted to the Revenue Department of the Government of Maharashtra. The Government of Maharashtra vide their resolutions passed in 1976 and 1978 decided to transfer the said work to the Sales Tax Department and accordingly in the year 1980, they implemented the said decision. Resultantly, 462 posts in the Revenue Department for the recovery of sale tax dues were abolished and equal number of posts were created on the establishment of Sales Tax Department. A question arose as to how to equate these posts with various corresponding posts in the Sales Tax Department in terms of the Government resolution dated September 25, 1978. The posts were equated as under:

The post of Aval Karkun/Senior Clerk in the service of Revenue Department was equated with the post of Senior Clerk in the Sales Tax Department as the scale for both these posts was identical i.e. Rs. 335-15-500-20-580-BB-20-680.

Consistent with this Government Resolution, the employees in the Revenue Department came to be absorbed in the Sales Tax Department permitting them to exercise the option in this behalf. While determining the seniority of such absorbed employees vis-à-vis the employees in the Sales Tax Department working on the post of Senior Clerks, the Government of Maharashtra, Finance Department by Resolution dated June 18, 1980 determined the norms of fixation of the seniority and it reads thus:

So far as terms and conditions regarding fixation of seniority are concerned, the seniority of the revenue staff in the post of absorption should be fixed from the date from which such persons are working regularly in the equated posts prior to their absorption, for all purposes, including promotions, confirmation, etc. The total length of service in the equivalent posts in the Revenue Department in which a person was working regularly prior to absorption should be taken into account for fixation of seniority in the post of absorption.

36 employees from the Revenue Department came to be absorbed in the Sales Tax Department in terms of the order dated December 12, 1980. The said order also recites that the seniority of the revenue staff in the post of absorption will be separately fixed from the date from which such persons were working regularly in the equated posts prior to their absorption for all purposes including promotions, confirmations, etc. These 36 employees who were absorbed in the Sales Tax Department were holding the posts of Senior Clerk/Aval Karkun, Aval Karkun, Entertainment Duty Inspectors etc. in the Revenue Department and since their scale was found to be equivalent to the Senior Clerk in the Sales Tax Department, they were absorbed in the cadre of Senior Clerk in the Sales Tax Department. These employees are the respondents at serial Nos. 2 to 36 in this appeal.

The respondents herein (the writ petitioners) and other similarly situated clerks

and senior clerks who were working in the Sales Tax Department were promoted on October 15, 1976 onwards to the posts of STIs against regular vacancies. Respondents 2 to 36 who were absorbed from the Revenue Department in the Sales Tax Department in the cadre of Senior Clerk, were also promoted to the post of Sales Tax Inspectors in August, 1981. The total number of Clerks and Senior Clerks working in the Sales Tax Department came to be promoted from October 15, 1976, were about 200 in number. The seniority list of the Senior Clerk of Sales Tax Department as on September 1, 1980 was prepared and published on May 15, 1982 by the Government of Maharashtra wherein respondents 2 to 36 herein were included. From the provisional seniority list so published, it appears that such of the Clerks/Senior Clerks working in the Sales Tax Department and promoted prior to September 1, 1980 were not included in the seniority list. The Sales Tax Department issued a circular enclosing the list of persons in the Sales Tax Department who were promoted from the post of Senior Clerks between 1980 and 1982.

From the material placed on record, it is noticed that the employees who were initially working in the Revenue Department and were absorbed in the Sales Tax Department were making representations to the State Government to reckon their seniority in the cadre of STIs by taking into account their service/seniority in the cadre of Senior Clerk in their parent department. The Government of Maharashtra, however, published the provisional seniority list on April 28, 1987 whereby respondents 2 to 36 herein were included in the said provisional seniority list. It is this provisional seniority list which was challenged by the first respondent on behalf of himself and similarly situated STIs who were promoted between 1976 and 1980. The first respondent pleaded that on the date when the respondents 2 to 36 were absorbed, the first respondent and other similarly situated persons were already promoted as STIs and, therefore, the provisional seniority list was not only erroneous but also violative of Articles 14 and 16 of the Constitution.

The appellants herein and also the respondents 2 to 36 contested the claim of the first respondent on the ground that in view of the decision of the Government to absorb the Senior Clerks/Aval Karkuns, Aval Karkuns, Entertainment Duty Inspectors etc. on the equivalent posts in the cadre of Senior Clerk in the Sales Tax Department, they are entitled to reckon their seniority in the parent department as they were absorbed along with their seniority. It was, therefore, necessary to prepare a common seniority list of the Clerks/Senior Clerks of the Sales Tax Department as well as the absorbed employees from the Revenue Department. The promotions to the post of STIs be governed by the seniority subject to other rules, regulations and Government orders. The provisional seniority list prepared by the State of Maharashtra suffers from no infirmity and the writ petition be dismissed.

The learned Division Bench of the Bombay High Court after considering the rival contentions found that the provisional seniority list published by the Government

of Maharashtra on April 28, 1987 is contrary to law and the same cannot be sustained. The High Court opined that the post of Sales Tax Inspector being a selection post and unless the Select Committee finds the Senior Clerk suitable, no promotion to such selection post could be made. The first respondent and other similarly situated persons were selected by the Select Committee and came to be promoted to the STIs from October 15, 1976 onwards. The absorbed employees from the Revenue Department might be entitled for appropriate placements in the seniority list of Clerks and Senior Clerks in the Sales Tax Department but, however, it cannot be ignored that such absorbed employees came to be promoted as STIs much after the respondent No. 1 and other similarly situated persons were promoted. As stated earlier, the first respondent and other similarly situated persons were promoted between 1976 and 1980 whereas respondent Nos. 2 to 36 were selected by the Select Committee and came to be promoted in the year 1981 and thereafter. The Government Resolution dated June 18, 1980 specifically recites that the seniority of the absorbed employees should be fixed in the equated post i.e. in the present case in the cadre of Senior Clerk. The Resolution nowhere provides that seniority can have any effect while determining the seniority in the higher cadre of Sales Tax Inspector. The effect of the impugned provisional seniority list dated April 28, 1987 would be that the respondent Nos. 2 to 36 who were absorbed personnel and who were promoted as the Sales Tax Inspectors after 1981 would be senior to those STIs like the first respondent and other similarly situated persons who were promoted after selection prior to September, 1980. It was, therefore, an error on the part of the Government to ignore the date of selection and appointment of the first respondent and other similarly situated employees to the post of STIs and treat them as junior to respondent Nos. 2 to 36 who were selected subsequently. If such course is followed, the action of the Government of Maharashtra and the Commissioner of Sales Tax would be violative of Articles 14 and 16 of the Constitution. The Division Bench accordingly set aside the impugned provisional seniority list and directed the Government of Maharashtra to prepare fresh seniority list in accordance with the directions contained in the impugned judgment.

Mr. Sathe, the learned Advocate appearing for the State of Maharashtra took us through the impugned judgment as well as the relevant documents on record but was unable to persuade us to take a different view than the one taken by the High Court. As indicated earlier, the respondent No. 1 and other similarly situated persons were selected by the Select Committee and came to be promoted between 1976 and 1980 whereas the respondent Nos. 2 to 36 were selected by the Select Committee and came to be promoted in 1981 and thereafter. If this be so, in our opinion, the provisional seniority list has been rightly quashed by the High Court. Thus, the appeal is devoid of any substance.

In the result, the appeal to stand dismissed with costs.