
(1983) 03 BOM CK 0023

In the Bombay High Court

Case No : Writ Petition No"s. 24/B, 25/B and 26/B of 1978

M.P. Padmanabhan

APPELLANT

Vs

Union of India (UOI) and others

RESPONDENT

Date of Decision : 22-03-1983

Acts Referred:

Constitution of India, 1950 — Article 16, 16(1)

Citation : (1983) MhLj 593

Hon'ble Judges : G.F. Couto, J;B.C. Gadgil, J

Bench : Division Bench

Advocate : K.K. Singhvi with P. Mulgaonkar, for the Appellant; J. Dias, Govt. Pleader for Govt. of Goa, Daman and Diu, H.P. Datar for respondent Nos. 10 to 16 and S.K. Sonak with M.S. Borkar, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Gadgil, J.—These three writ petitions can be conveniently decided by a common judgment as they arise out of the recruitment rules and the seniority rules pertaining to the Assistant Engineers, P. W. D. of the Government of Goa, Daman and Diu.

2. On 6th May 1967 the Government framed rules called Goa Government (Department of Public Works) Class II Gazetted Recruitment Rules of 1966 (hereinafter referred to as "the Recruitment Rules"). A copy of those rules is at Exh. A to petition No. 24/B/1978. In this judgment we would be referring to various documents from the record of this petition for the sake of convenience. By these recruitment rules, it is provided that there would be 25% posts to be filled in by promotion and 75% posts to be filled in by direct recruitment. As far as the eligibility for the promotion is concerned, it is laid down that the concerned junior Engineers must have three years total service, if he would be a degree holder. A different period of service is prescribed for Diploma holders but that aspect is not relevant. On 21st February 1969 the Government framed seniority rules known as Goa Government (seniority) Rules 1967. A copy thereof

is at Exh. B. The relevant rule for fixing inter se seniority of direct recruits and promotees, is rule 7. It runs as follows:

Rule 7:--Relative seniority of direct recruits and promotees - The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the percentage of Vacancies reserved for direct recruitment and promotion respectively in the recruitment rules.

It is also necessary to reproduce Rule No. 12 and it reads as follows:

Rule 12:--Removal of difficulties--If any difficulty arises in giving effect to the provisions of these rules, the competent authority, may by order, as occasion requires, do anything which appears to it to be necessary for the purpose of removing the difficulty.

The petitioners in writ petition No. 24/B and 26/B of 1978 were appointed as junior Engineers in the year 1967; while petitioner in petition No. 25/B of 1978 was appointed in a similar position in 1968. On 12th February 1971, five junior Engineers were promoted to the posts of Assistant Engineers. The petitioners in petitions Nos. 24/B and 26/B of 1978 were amongst them. It is said that these promotions were ad hoc and on 28th February 1972, there was a fresh order of promotion of 13 junior Engineers. The earlier ad hoc promotees were also included in this order of 1972.

3. From the date when the recruitment rules came into force, a number of direct recruits were also appointed. Similarly, such direct recruits were appointed even after the seniority rules became applicable. The question therefore arose as to how the seniority amongst the direct recruits and the promotees was to be fixed. On 27th December 1973 the Government fixed such seniority vide Exh D. It is not necessary to give the details of the said seniority list. Suffice it to say that the said list appears to have been prepared on the basis of the continuous length of service in post. Thus the rota that was prescribed by rule 7 of the seniority rules was not followed. Hence respondent No. 12 in writ petition No. 24/B of 1978 filed a writ petition No. 56 of 1974 in this Court challenging the abovementioned seniority list. The main grievance in that petition was that the fixation of the seniority on the basis of continuous length of service was contrary to the rota which would govern the seniority as per rule 7. It was also alleged that the seniority should be fixed by having a promotee at serial No. 1 and thereafter three direct recruits at serial Nos. 2 to 4 and such cycle should have been continued to cover all the Class II officers, namely the promotees as well as the direct recruits. Of course, it would not have been possible to disturb the seniority of the Assistant Engineers who were already there before the seniority rules were prepared. The present petitioners in all these matters were the respondents in that petition. It seems that after the filing of this petition, the Government decided to frame the seniority rules afresh on the ground that the earlier seniority list of 1973 was in derogation of rule 7 of the seniority rules.

Accordingly, the Government prepared a tentative seniority list by following the rota system. After inviting objections to that tentative list the Government finalised the said list which is now in controversy. The said seniority list dated 21st January 1978 is at Exh. I. While preparing that seniority list incumbents at serial Nos. 1 to 20 were appointees earlier to 1969 and it cannot be disputed either by the petitioners or the contesting respondents that their seniority is properly made. The grievance of Mr. Singhvi, learned counsel for the petitioners, is that the seniority of incumbents from serial No. 20 onwards was wrongly fixed. In this seniority list what has been done is that the Assistant Engineers at serial Nos. 21 to 27 (excluding O. R. Bagali at serial No. 24) though direct recruits have been placed in consecutive order without following the rota system. At serial No. 28 is T. K. Mohandas who is a promotee and thereafter there are three direct recruits at serial Nos. 29, 30 and 31. No. 32 is a promotee while at serial Nos. 33, 34 and 35 are the direct recruits. The said sequence has been continued. The grievance of the petitioners is that the preparation of the seniority list on the basis of rota i.e. three direct recruits and then one promotee is bad. What is urged is that rule 7 was not at all followed. The roster that was contemplated to be kept by this rule was not kept. Similarly, appointments were not made in accordance with the rota fixed by the rules. It was further contended that on account of this departure or non-observance of rule 7, the seniority rule itself has come to an end and that therefore an occasion arose for fixing the seniority by applying rule 12. That rule contemplates that the competent authority may by order; do anything which would appear to it to be necessary if any difficulty would arise in giving effect to the provisions of the rules. It was submitted on behalf of the petitioners that the non-observance of rule 7 has created a difficulty and hence the fixation of the seniority list on the basis of the continuous length of service (as was done on 1973) was correct. There are also certain other grounds taken by the petitioners in challenging the seniority list of 1978 and we would propose to consider the details thereof at the time when we would be discussing the merits of those grounds.

4. The Union of India as well as the Government of Goa, Daman and Diu, have filed their returns. It was pleaded that the 1973 list was put under a challenge in writ petition No. 56 of 1974 and that after Careful study of the allegations in the said petition, the Government found that the seniority rules have been infringed and that therefore the Government after informing the Court prepared a fresh seniority list. It was further submitted that in 1973 seniority list rule 7 appeared to have been overlooked as the seniority list was prepared in accordance with continuous length of service. It was then contended that the seniority list of 1973 would not be protected under rule 12, as according to these respondents, there existed no difficulty contemplated by that rule. As far as the other grounds that have been taken by the petitioners, we need not at this stage narrate the detailed submissions of those respondents as we propose to consider them at the time when those contentions themselves are to be discussed and decided.

5. In all these petitions the contesting respondents are the direct recruits.

Respondents Nos. 10 to 16 (who are the direct recruits) have opposed the petition on a number of grounds. As far as the list of 1973 was concerned, they contended that the list was illegal and in violation of the rule. They also pleaded that rule 12 did not come into picture as there was no difficulty. Respondent No. 6 has also filed a return separately.

5A. The question therefore, is as to which of the lists is prepared according to the rules, whether the list of 1973 or of 1978. The seniority list of 1973 was under a challenge in Writ Petition No. 56 of 1974. However, after the 1978 list was prepared the petitioner in the petition No. 56 of 1974 applied for withdrawal of the petition. It seems that the contesting respondents in that petition opposed the withdrawal and hence no orders were immediately passed thereon about the withdrawal.

5B. That matter however, came before the Bench of this Court on 2nd February 1982 and the Court ordered the petition should be allowed to be withdrawn mainly on two grounds. In the first place, it was observed that the said petitioner could have no grievance as the subsequent seniority list of 1978 has corrected the position in favour of the petitioner. It was further observed that the petitioner being a party to the present petition, he can protect his seniority in the present petition. During the course of the arguments, in this petition the question arose as to what would be the effect of the withdrawal of the petition. Mr. Sonak learned advocate for the petitioner in Writ Petition No. 56 of 1976 (i.e. respondent No. 12 in Writ Petition No. 24/B/1978) submitted that he has withdrawn the petition as the petitioner got the relief in view of the order in the said petition. He also stated that if respondent No. 12 is to be treated as barred from challenging the legality of the seniority list of 1973, on account of the withdrawal, he would orally pray for restoration of that petition and that if necessary, he would make an application to that effect. Mr. Singhvi then stated that the present petitioners do not want to make any capital of the withdrawal and that the respondents may argue on all points including the challenge to the 1973 seniority list. In view of this, we informed the advocate that we would not be inclined to consider the oral request for restoring the Writ Petition No. 56 of 1974.

6. It was therefore necessary to consider the validity or otherwise of the list of 1973 as also the list of 1978. It is needless to say that if the list of 1973 was correctly prepared in terms of the seniority rules, there was no scope for passing the subsequent orders in 1978. Similarly if the 1973 list was in derogation of those rules, the list of 1978 would be correct. The question as to how the seniority list is to be prepared when a rota is fixed, had arisen before the Supreme Court in the case of *Mervyn Coutindo and Others Vs. Collector of Customs, Bombay and Others*, . There the cadre was of the Appraisers in the Customs Department. As per rules of 1959 the quota of the direct recruits and the promotees was 50 : 50 and the seniority was to be determined by the system of rotation, i.e. the list was to be arranged in such a way that one person

would be from the direct recruits and other from the promotees alternatively. It seems from 1969 onwards the quota as well as rota was not strictly followed and the direct recruitment did not keep pace with the posts available to that category. Even then in 1963 the seniority list was prepared not on the basis of the continuous length of service but strictly in accordance with the rotation system based on the fixed quota for the recruitment of direct recruits and promotees. Obviously that seniority created certain anomaly inasmuch as the direct recruit who was recruited later on was placed above a promotee who was already in the cadre for some time past. This rota system was challenged before the Supreme Court on the ground that it offends the principles of equality enshrined in the Constitution. The Supreme Court negated that contention by holding that there is nothing inherently improper in having rota system. While pressing the point about inequality in the rota system, an argument was advanced about the anomaly mentioned above. In paragraphs 5 and 7 of the judgment the Supreme Court has considered the aspect in the following words:

One of the principles in this circular of 1959 is with respect to relative seniority of direct recruits and promotees. It provides the relative seniority of direct recruits and promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quota of reservation for direct recruitment and promotion respectively in the recruitment rules. It was further explained that a roster should be maintained based on the reservation for direct recruitment and promotion in the recruitment rules. Where, for example, the reservation for each method is 50 per cent. the roster will run as follows--(1) promotion, (2) direct recruitment, (3) promotion, (4) direct recruitment, and so on. Appointments should be made in accordance with this roster and seniority determined accordingly.

After reproducing the roster rule that was available there, the Supreme Court held that there would be no violation of the principles enshrined in Article 16 (1) of the Constitution in following the fixation of seniority. Some arguments were advanced about the anomalies in the seniority list and the Supreme Court has observed in paragraph 7 of the said judgment as follows:

The anomalies which have been referred to in the petition arise not on account of there being anything opposed to, equality of opportunity in Government service by the use of the rotational system; they arise out of the fortuitous circumstance that in this particular service of Appraisers, for one reason or another, direct recruitment has fallen short of the quota fixed for it. It is merely because of this fortuitous circumstance that anomalies to which reference has been made in the petition have arisen. There is no doubt that if direct recruitment had kept pace with the quota fixed therefore there would have been no anomalies in fixing the seniority list. The question, therefore, narrows down to this: Can it be said that there is denial of equality of opportunity which arises out of the fortuitous circumstance and which is not a vice inherent in the rotational System? We are not prepared to say that the rotational system of fixing seniority itself offends

equality of opportunity in Government service. Any anomalies which may have resulted on account of insufficient recruitment of direct recruits in the past cannot in our opinion be a ground for striking down the rotational system, which, as we have said, does not itself amount to denial of equality of opportunity in the matter of employment in Government service. It is regrettable that some anomalies have appeared because of insufficient recruitment of direct recruits in the past in this particular service. But that in our opinion can be no reason for striking down the seniority list prepared in 1963 which is undoubtedly in strict accordance with the rotational system based on the fixed quotas for recruitment of direct recruits and promotees. The order of the Board of 1963 on the basis of which the impugned seniority list of appraisers has been prepared clearly lays down that "the principle of determination of seniority of the direct recruits and the promotees inter se in the prescribed ratio of 1:1 should be worked out". This order is in accordance with the circular of 1959 and as we have said already, there is no inherent vice in the principle of fixing seniority by rotation.....

It is true that Mr. Singhvi for the petitioners did not contend that the seniority list as per rule -- is in any way bad. His argument however, is that the said rule is not followed as the roster was not maintained and appointments have been made as per the quota and rota. He further contended that in this background rule 7 has to give way for rule 12. He relied upon the decision of the Supreme Court in the case of S.G. Jaisinghani Vs. Union of India (UOI) and Others, . It was a case pertaining to the income tax Officers (Class I, Grade II). Initially a quota of 80 per cent for direct recruitment and 20 per cent for promotion (from Class II, Grade HI) was fixed. Later on this quota was altered to 66-2/3 per cent for direct recruitment and 33-1/3 per cent for promotion. There was also the seniority rule. The relevant seniority rule reads as follows:

"(i) ** ** *

(ii) ** ** *

(iii) Officers promoted in accordance with the recommendation of the departmental Promotion Committee before the next meeting of the Departmental Promotion Committee shall be senior to all direct recruits appointed on the results of the examinations held by the Union Public Service Commission during the calendar year in which the Departmental Promotion Committee met and the three previous years.

The question arose as to whether this seniority rule was good or bad. The Supreme Court accepted the validity of the seniority rule. What had happened was that between the period of 1951 to 56 there were certain promotions far in excess of the quota reserved for them. It was held that the quota was binding and these excess promotions were bad. Mr. Singhvi, however, relied upon the following observations in paragraph 13 of the judgment.

As we have already indicated the quota rule is linked up with the seniority rule and unless the quota rule is strictly observed in practice it will be difficult to hold

that the seniority rule i. e. rule 1(f)(iii) and (iv) is not unreasonable and does not offend Article 16 of the Constitution.

On the basis of these observations it was urged that the non-observance of the quota rule would put an end to the seniority rule as the seniority and the quota are inter-linked. We do not think that the Supreme Court has laid down such a proposition. In the case before the Supreme Court the promotees were given seniority with a weightage of three years. The Supreme Court has considered this weightage as valid on the ground that the quota for the promotees was very small one and that the experienced officers who deserved to be selected were required to be promoted. It is material to note that in the case before the Supreme Court the promotees have exceeded the quota and if this excess has resulted in nullifying the seniority rule, there would not have been any occasion for the Supreme Court for issuing a mandamus that the seniority should be fixed in terms of the seniority rules. For example, immediately after the abovementioned observations the Supreme Court has said as follows:

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 the letter of the Government of India.

There is thus much substance in the contention of the respondents that in the abovementioned case the Supreme Court has not laid down that the seniority rule stands abrogated whenever the quota rule has not been followed. On the contrary, the Supreme Court has granted a mandamus directing that the quota rule should be observed and thereafter the seniority rule should be applied while fixing inter se seniority of the direct recruits and the promotees.

7. Mr. Singhvi then relied upon the decision of the Supreme Court in the case of Bishan Sarup Gupta Vs. Union of India (UOI) and Others, . In fact, that matter arose out of certain orders passed by the Government in pursuance of the abovementioned decision of S. G. Jaisinghani v. Union of India. In this later decision the Supreme Court divided the recruitment in three categories. The first was to cover the recruitment of 1951-56, where the abovementioned quota as well as the seniority rule was applicable and it was directed that the seniority should be fixed in accordance with those rules. The said seniority rules were applicable only for five years. However, the Government applied those rules by some administrative order for the next two years i. e. 1957-58. The Supreme Court therefore held that the seniority of the appointees in the promotional cadre in these two years should also be fixed on the basis of the abovementioned rules. However, the said quota rule was not at all followed from 1959 onwards presumably because there was no administrative order to cover that period. The

question arose as to how the seniority of the incumbents recruited (either by direct recruitment or by promotion) by the administrative order of 1959 onwards should be fixed. On facts the Supreme Court held in paragraph 23 that by the upgrading of a large number of posts and the allotting them to promotees, the quota rule collapsed and with that the seniority rule also. The relevant observations are as follows:

The decision to upgrade 100 posts was taken in January 1959 and the remaining 114 posts in the year 1960. In our opinion the quota rule came to an end on January 16, 1959 when sanction to upgrade 100 temporary posts was given by the President, and with that went the seniority rule.

For this period of 1959 onwards the Supreme Court came to the conclusion that there was no existing quota. Therefore, by applying the above mentioned case reported in Jaisinghani's case seniority rule was not applied as it was linked with the quota rule. Thus this case also shows that quota rule and the seniority rule are linked together. Mere disobedience of those rules would not enable a party to say that the seniority should not be fixed in terms of those rules. What has been held by the Supreme Court is that by the administrative order of 1959 the quota rule actually came to an end. Consequently the seniority rule could not be applied.

8. The facts in the present case show that in spite of there being rule 7 prescribing rota system, the Government has not followed that rule. As to what is the liability of the Government in following such rules can be considered in the background of the decision of the Supreme Court in the case of AIR 1977 251 (SC) . It was a case about the fixing of the seniority of the Deputy Collectors. The quota was 50 : 50 i. e. 50 percent promotees and 50 percent direct recruits. However, the wording of the Government resolution of 1959 fixing such quota was peculiar. It provided that as far as practicable 50 per cent substantive vacancies should be filled in by nomination of the candidates to be selected in accordance with the rules. The term "as far as practicable" has been interpreted by the Supreme Court to mean that serious attempts should be made by the concerned authority to fill in the posts by nomination. It would be proper if we reproduce certain observations of the Supreme Court in paragraphs 26 and 27.

"Paragraph 26 : What does "as far as practicable" or like expression mean in simple anglo-saxon? Practicable, feasible, possible, performable, are more or less interchangeable. A skiagraph of the 1959 Resolution reveals that the revival of the direct recruitment method was motivated by "the interest of administration"--an overriding object which must cast the benefit of doubt if two meanings with equal persuasiveness contend. Secondly, going by the text, 50% of the substantive vacancies occurring in the cadre should be filled in by selection in accordance with appended Rules. "As far as practicable" finds a place in the Resolution and the Rule. In the context, what does it qualify ? As far as possible 50% ? That is to say, if 50% is not readily forthcoming, then less ? Within what period should the impracticability be felt? What is the content of

"impracticability" in the given administrative setting ?

"Paragraph 27 : The straightforward answer seems to us to be that the State, in tune with the mandate of the rule, must make serious effort to secure hands to fill half the number of vacancies from the open market. If it does not succeed, despite honest and serious effort, it qualifies for departure from the rule. If it has become non-feasible, impracticable and procrastinator to get the requisite quota of direct recruits, having done all that it could, it was free to fill the posts by promotion of suitable hands if the filling up of the vacancies was administratively necessary and could not wait. "Impracticable" cannot be equated with "impossible"-- nor with "unpalatable" and we cannot agree with the learned Judges of the High Court in construing it as colossally incapable of compliance. The short test, therefore, is to find out whether the Government, in the present case, has made effective efforts, doing all that it reasonably can, to recruit from the open market necessary numbers of qualified hands.

After laying down the above mentioned meaning to the phrase "as far as practicable" the Supreme Court scrutinised the recruitment from 1959 onwards by dividing it into three parts. For 1959-62 it was held that the Government did make attempts to nominate direct recruits but those attempts were fruitless. The Supreme Court therefore held that the promotees who had been appointed in place of the quota meant for the direct recruits would hold the substantive posting. The second period is of 1962-63. It was found that the Government did not make any serious attempts to fill in direct recruits by nomination. The Supreme Court therefore ordered that the promotees who were occupying the posts in the quota of the direct recruits should be pushed down. The rules were amended in 1963 and the phrase "as far as practicable" did not exist thereafter. For this period of 1963 onwards the Supreme Court held that the quota rule must be followed. It is material to note that all this was required to be ordered because in spite of the quota rule, the Government had not filled in the posts of the direct recruits as per those rules. If the contention of Mr. Singhvi is to be accepted then the non-observance of the rule would make the reservation rule bad. However, what the Supreme Court has done is that it passed an order that quota system should be followed whenever it was necessary to do so. In this background we are not able to accept the contention of Mr. Singhvi that rule 7 came to an end, simply because the Government did not follow that rule by maintaining a roster or making appointments in terms of that rule. It was rightly urged on behalf of the contesting respondents that the rules framed by the Government cannot be set at naught by a callous act of a flagrant breach of rule. Mr. Sonak learned advocate for the respondents is right when he contends that in such a case the proper order would be to direct the Government to obey the rules.

9. It is also material to note that rule 7 gives a mandate as to how the relevant seniority of the direct recruits and the promotees shall be determined according to the roster of the promotions. It is true that Note (1) to that rule provides that

a roster should be maintained on the basis of the reservation of vacancies for direct recruits and promotees and that the appointments shall be made in accordance with this roster. In our opinion, the note would be explanatory one, but it will not control or alter the meaning or import of the rule proper. If there is a non-observance of the Note viz., non-maintenance of the roster and omission to make appointments in terms thereof, such a breach of the Note would not make, rule 7 null or inoperative. The net result is that the Government was bound to observe the seniority rule 7 and any breach of it would not enable the petitioners to contend that the rule has ceased to be operative.

10. Another contention of Mr. Singhvi is that at any rate, the case will fall under rule 12. According to him, the competent authority is entitled to pass any appropriate orders if a difficulty arises in giving effect to the provisions of the rule. What is urged is that as the Government has not given any effect to rule 7, such an omission is to be treated as a difficulty arising out of the provisions of the rule. In our opinion, rule 12 is meant to cover a case where there exists a real difficulty in following or obeying the seniority rules. It does not contemplate a breach of the rule. Whenever there is a breach the only order would be to correct the breach by fixing an appropriate seniority. It is true that if an authority has a power to act either under rule 7 or rule 12, it will be open for the authority to adopt any of the modes and then in that case it will not be possible for the authority to reconsider the matter afresh. However, in the present case rule 12 would not come into picture when rule 7 is applicable and can be applied while fixing the seniority list. Certain decisions were cited before us for the purpose of submitting that a seniority list can be reviewed only in exceptional case. Of course, there is no dispute that fixing of seniority list being an administrative order, it is amenable to a review. In the case of *Dr. M. R. Sarama v. State of Andhra Pradesh* 1974 (1) S L R 822, a seniority was fixed in accordance with law and it was sought to be reviewed. The Andhra Pradesh High Court has held that such a review was not permissible as no new facts had come to light or there was no patent error. Our attention was also drawn to the decision of Desai J., in *Misc. Petition No. 27 of 1973*. The Commissioner of Municipal Corporation of Greater Bombay has passed certain orders and later on those orders were sought to be reviewed or revised. The orders pertained to the seniority of certain employees. After considering the abovementioned decision of the Andhra Pradesh High Court it was held that there was neither a patent error nor coming into existence of certain new facts so as to enable the Municipal Commissioner to review the order. It is material to note that there the order which was reviewed was in accordance with a view, that is permissible to be taken. As discussed above, in our case the list of 1973 was not at all prepared on the basis of the principle laid down in rule 7. That list was put to scrutiny by respondent No. 12 in Writ petition No. 56 of 1974 and the contention of the Government is that after considering the legal position it transpired that the said list of 1973 was not prepared in accordance with the rules and hence a new list was prepared in 1978. The new list of 1978 was thus prepared for the purpose of bringing the

seniority as per the rules and to correct the illegality. It would be very difficult for the petitioners to contend that the preparation of the seniority list of 1978 is not permissible though the previous seniority list of 1973 was in violation of the seniority rules.

11. It was next urged that the preparation of a fresh seniority list of 1978 has caused an irreparable prejudice to the promotees. There was a direct recruitment in 1974 as also in 1976. The grievance of the promotees is that on account of their favourable placement in the list of 1973, they did not feel it necessary to compete in a direct recruitment through Public Service Commission. It was also submitted that the Government thus made a representation about the placement of promotees in a particular manner in 1973 and on that basis the promotees acted in a particular way viz., they did not seek to have direct recruitment in 1974 and 1976. It should not be forgotten that the list of 1973 was against rule 7 of the seniority rules. There cannot be any estoppel against this illegal act. Another important factor is that the list of 1973 was under a challenge in writ petition No. 56 of 1974 and the list of 1978 was prepared after scrutinising the legal position. We are therefore not able to accept the contention of Mr. Singhvi that there was any estoppel against the preparation of the list of 1978. It is also material to note that the present petitioners were respondents in writ petition 56/74 wherein the list of 1973 was brought under challenge.

12. It was alleged that no grounds were given by the Government when it called for the objections for the tentative list which was prepared prior to the list of 1978. Reliance is placed on the decision of the Supreme Court in the case of Union of India (UOI) and Another Vs. P.K. Roy and Others, . It was a case of fixation of the seniority list under States Reorganisation Act (1956). Certain assumed dates were determined on the principle of "kicking down". It was held that before preparing the final seniority list an opportunity should have been given about this principle of "kicking down" and in its absence the rules of natural justice cannot be said to have been observed. The relevant part of the judgment in paragraph 11 reads as follows:

The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case. See the decision of this Court in S Shri Bhagwan and Another Vs. Ram Chand and Another, . In view of the special circumstances of the present case we think that the respondents were entitled to an opportunity to make a representation with regard to the two points urged by Mr. Asoke Sen before the final gradation list was published...

The decision itself makes it clear that the application of the doctrine of natural justice depends upon a variety of factors and there can be certain special circumstances which would require a special course of... opportunity to be afforded to the concerned party. In the present case there was already a pending writ petition to which the present petitioners were the parties. In that petition

the controversy was as to whether the list was in consonance with the seniority rules. The present petitioners were the contesting respondents in that petition. The said tentative list prepared in 1977 is at Exh. G, which contains a sort of preamble in the following words:

The Government having re-examined the seniority list pursuant to the writ petition No. 56/74 and having found the same not in keeping with the recruitment rules and the seniority rules applicable to the post has now prepared a fresh tentative list as follows.

It was rightly urged by Mr. Dias, learned Government Pleader that this preamble gives an indication to the concerned employees about the basis on which the tentative list was prepared afresh and it will not be possible for the petitioners to contend that they were not able to make any satisfactory representation for want of data on which the tentative list was prepared.

13. There is another department of the Government viz., the Electrical Engineering Department where there are similar posts of Assistant Engineers. The seniority rules which are available in the present litigation are also applicable to that department. The petitioners have produced at Exh. E, a seniority list of the Assistant Engineers, Electrical Department and it shows that the said list was prepared as per the continuous length of service of the concerned employees ignoring the rota rule. It was, therefore, urged that there would be inequality in the two departments as the Government would be following rule 7 in the P. W. D. and not following it in the Electricity Department. It is on this basis that a contention is raised that principles of equality have been violated. In the first place, the said seniority list of the Electrical Engineers was prepared on 25th September 1976, i. e. during the pendency of the writ petition No. 56/1974. It was urged by Mr. Dias that while preparing the said list of the Assistant Engineers (Electrical) rule 12 was followed meaning thereby there was a difficulty in following rule 7. The contesting respondents urged that in that case there was one promotee viz., A. K. Tamba, serial No. 10 and that though he initially challenged the seniority list, he did not pursue that challenge as he resigned from the Government service. In our opinion, it would be very difficult to maintain or sustain the impugned list of 1978 on a hypothesis that rule of continuous service was followed in the Electrical Department. It is rightly urged that the non-observance of the rule while preparing some other seniority list would not enable the concerned party to contend that the non-observance of the particular rule should be held proper even though the list is put under a challenge.

14. The Result, therefore, is that the preparation of the seniority list as per rule 7 is quite legal and proper. Mr. Singhvi, however, contended that the list is factually wrong even if it is assumed that the list is required to be prepared under rule 7. We have already observed that in the list (annexure I) serial No. 1 to 20 are recruited prior to 1968 and there is no dispute on either side that their seniority has not been correctly considered. The dispute really starts from serial No. 21.

The question is as to whether the roster should begin with a promotee or whether it should begin with a direct recruit. As per the list it begins with the direct recruits at serial Nos. 21, 22 and 23. It was contended on behalf of the petitioners that the manner in which the roster should begin or run will depend upon the decision of the competent authority as contemplated by Note 2 and that in the absence of such decision there should be a writ directing the competent authority to determine the starting point of the roster either beginning with a direct recruit or a promotee. It is material to see that Note (1) has given an indication as to how the roster should begin. If the quota of 75 per cent is in favour of the promotees, the roster has to begin with a promotee. In our case the quota for direct recruits is 75 per cent and on the same analogy it will be proper to fix the beginning of the rota with a direct recruit. Hence the fixing of seniority of the three persons at serial Nos. 21, 22 and 23 is quite correct. As far as seniority at serial No. 24 is concerned it appears that he is absorbed from some other department. Thus he is neither a promotee nor a direct recruit. In our view the ends of justice would be met if we put at serial No. 24, a promotee T. K. Mohandas and O. R. Bagali at serial No. 25. From serial No. 26 onwards the rota should be of three direct recruits viz., P. P. Borkar, B. N. Nawalawala and M. Narsaraju and they should be placed at serial Nos. 26, 27 and 28. Thereafter would come a promotee and this process should be followed till the end. The respondents are directed to prepare a seniority list in terms of this order.

15. The net result is that the rule is discharged subject to modification as mentioned above. The parties to bear their own costs of the petitions.

At this stage a prayer was made on behalf of the petitioners that a certificate be issued that the matter involves a substantial question of law as to interpretation of the Constitution or a substantial question of law of general importance. We do not however, think that this is a fit case where such a certificate should be issued. Hence the prayer in that respect is rejected.