(1963) 10 P&H CK 0029

In the Punjab And Haryana At Chandigarh

Case No : C.W. No. 189-D of 1962

S.G. Jaisinghan — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 04-10-1963

Acts Referred:

Administrative Service (Regulation of Seniority) Rules, 1954 — Rule 1, 3, 3(3)
Constitution of India, 1950 — Article 14, 15, 16, 16(1), 226
Income Tax (Amendment) Act, 1939 — Section 6
Income Tax Act, 1922 — Section 5, 5(1), 5(3)

Citation : (1963) 10 P&H CK 0029

Hon'ble Judges : Shamsher Bahadur, J;D.K. Mahajan, J

Bench : Division Bench

Advocate : Party in Person, for the Appellant; C.K. Daphtary, H.N. Sanyal, S.N. Chopra, R.N. Dhebor, K.L. Math, S.N. Shankar and Daljit Singh, for the Respondent

Judgement

Shamsher Bahadur, J.—The substantial point raised in these petitions under Article 226 of the Constitution of India by S.G. Jaisinghanl (Civil Writ No. 189-D of 1962) and seventy-two other Petitioners Civil Writs Nos. 190-D of 1962, 248-D to 250-D of 1962, 638-D to 662-D of 1962, 686-D to 701-D of 1962, 770-D to 788-0 of 1962 and 244-D to 251-D or 1963), who are all officers of the Income Tax Branch of the, Indian Revenue Service the other two wings of the Service being the Indian Customs and Central Excise Services) concerns the validity of what for the sake of convenience may be called the ''quota and ''seniority'' rules pertaining to Class I, Grade II Income Tax Service. S.S. Jaisinghani himself has argued his petition while Mr. Sarjoo Parshad had addressed this Court on behalf of the other seventy-two Petitioners. The Petitioners, who gained entrance in Class I, Grado II Service by an All-India Competitive Examination, assert that their colleagues in the Service promoted from Class II have gained an undue advantage over them on account of the operation of the quota" and ''seniority'' rules which are assailed as unconstitutional and violative of Article 16 of the

Constitution of India being discriminatory. The grievance of the Petitioners is pin-pointed at the order of the Central Board of, Revenue of 17th of April, 1962 (Exhibit L). According to this order which had been withheld for some time on the representations of the Petitioners and is now sought to be impugned in these proceedings, promotions to the rank of Assistant Commissioner were notified on a provisional basis of forty-four officers out of which as many as thirty-three are from the ranks of officers promoted from Class II to Class I.

2. The letter of the 29th of September, 1944, (Exhibit B) from the Deputy Secretary to the Government of India to all Commissioners of Income Tax purports to constitute different services of the Income Tax Department and the object of this re-constitution of service is stated to be the improvement of the Income Tax administration. There are two Grades in Class I Service one consisting of Commissioners of Income Tax, 54 Assistant Commissioners of, Income Tax and 163 Income Tax Officers Grade I. The second Branch of Class 1 Service is to consist of 183, Income Tax Officers, Grade II. Likewise, Central Service Class II is created which consists of 83 Income Tax Officers of Grade III. It may be mentioned that these different cadres include both permanent and temporary posts. It may be observed in passing that with effect from 1st July, 1959, there are now only two cadres of Income-Tex Officers, namely, Income Tax Officers Class I end Income Tax Officers Class II.

3. We are concerned in these petitions only in respect of the Service which came to be designated as Income Tax Officers, Grade II of Class I in Exhibit ''B'' consisting of persons directly recruited "via the Indian Audit and Accounts and Allied Services Examination," and secondly, of officers promoted from Grade III of Class II. Later, some war recruits also came to be included in this service. Clause (d) of paragraph 2 of the letter (Exhibit B) embodying the quota rule, which is under attack in these proceedings, is as under:

income tax Officers Grade II (Class I Service): Recruitment to Grade II will be made partly by promotion and partly by direct recruitment. 80 per cent of the vacancies arising in this Grade will be filled by direct recruitment via the Indian Auduit and Accounts and Allied Services Examination. The remaining 20 per cent of vacancies will be filled by promotion on the basis of selection from Grade III (Class II Service) provided that suitable men upto the number required are available for appointment. Any surplus vacancies which cannot be filled by promotion for want of suitable candidates will be added to the quota of vacancies to be filled by direct recruitment via the Indian Audit and Accounts etc. Service Examination.

4. The proportion of 80:20 mentioned in the rule was subsequently changed by another letter addressed by the same authority to all Commissioners of Income Tax on 18th of October, 1951 (Exhibit F) and it was stated that the Government of India.

have now decided in consultation with the Union Public Service Commission and in modification of Para 2 (d) of the Finance Department (Central Revenues) letter dated the; 29th September, 1944, that, for a period of five years in the first instance, 66 2/3%.of the vacancies in Class I, Grade II, will be filled by direct recruitment via Combined Competitive Examination and the remaining 33 1/3 % by promotion on the basis of selection from Grade III (Class II Service.)

It was again reiterated in this letter that

any surplus vacancies which cannot be filled by promotion for want of suitable candidates will be added to the quota of vacancies to be filled by direct recruitment.

In the quotas prescribed, there is a clear emphasis on the major source which is to consist of direct recruits as any unfilled vacancies by the channel of promotion are to be assigned to the direct recruits of the following years.

5. The second rule under attack concerns the determination of seniority of direct recruits and promoted officers inter se, their quotas being fixed in Exhibits ''B'' and ''E'' This rule of seniority is embodied in Annexure ''A'' to Exhibit ''H'' which is a letter of 5th September, 1952, of the Ministry of Finance to all Commissioners of Income Tax. This letter purports to lay down the "principles for determining the seniority of Income Tax Officers Class I, on an All India Basis." The relevant Clause (f) of Rule I is to this effect:

(f) The seniority of direct recruits recruited on the results of the examinations held by the Federal Public Service Commission 1944, and subsequent years shall, be reckoned as follows:

(i) Direct recruits of an earlier examination shall rank above those recruited from; a subsequent examination.

(ii) Direct recruits of any one examination shall rank inter se in accordance with the ranks obtained by them at that Examination.

(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.

(iv) Notwithstanding anything contained in Clause (iii) a Class II, Income Tax Officer subsequently appointed to Class I on the results of a Competitive Examination conducted by the Federal Public Service Commission shall, if he has passed the Departmental Examination held before the appointment of Class I Service, be deemed to be a pro-motee for the, purpose of seniority.

So far as the first two Sub-clauses are concerned, there is no dispute. The attack is centred on Sub-clause (iii) which gives weightage to officers who have been promoted from Grade III and to Sub-clause (iv) which elevates the position of a

Class II officer, who, though he has passed the competitive examination of Class I Service is to be deemed to be a pro-motee for purposes of seniority if he has already passed the. Departmental - Examination of Class I Service.

6. Mention may also be made of Rule IV which deals with the inter se seniority of officers in Class I, Grade II. Clause (b) of this rule provides that

the relative seniority of direct recruits and pro-motees shall be determined in accordance with the principles laid down in Sub-paragraph (f)(iii) of R. I above,

and by virtue of Clause (c)

pro-motees shall rank inter se according to the order in which their names are approved by the Departmental promotion Committee. Those promoted on the recommendations of an earlier Departmental promotion Committee shall rank senior to those promoted on the recommendations of subsequent Departmental Promotion Committee.

The other rules of Income Tax Officers (Class I, Grade II) are contained in Exhibit C of 26th of May, 1945, and purport to have been framed in pursuance of a resolution of the Finance Department in the Central Board of Revenue.

7. The ''quota'' and ''seniority'' rules, which have been recited in extensor, are challenged broadly on the ground that they are discriminatory both in their form and implementation. The appointments of officers appointed from Class II to Class I in pursuance of the quota and seniority rules are also challenged in these petitions and as many as 124 officers, who are likely to be affected if the impugned rules are struck down as unconstitutional, have been impleaded as ''Respondents along with the Union of India. It may be observed that as the impugned rules concededly have not been followed since 1956, me challenge is restricted to those officers who have been promoted by the Departmental Promotion Committees in 1951, 1952 and 1953, some of whom have since retired and many promoted as Assistant Commissioners while me Petitioners are still working as Income Tax Officers.

8. The constitutional provision, on which reliance has been placed by the Petitioners is Article 16, Clause (1) of which guarantees "equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State." This equality of opportunity stems from the recognition in the Constitution that all persons in the service of the State similarly situated are entitled to an equal opportunity not only in the matter of appointment but in promotion and other conditions of service. The guarantee enshrined in Article 16 does not exhaust itself after the first appointment in & particular branch of service and would include promotions to selective posts. As held by their lordships of the Supreme Court in The General Manager, Southern Railway Vs. Rangachari,

the matters relating to employment must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment.

In other words, if the advancement of the Petitioners is impeded or retarded by a rule which is found to be unjust or unreasonable in so far as it accords undue preference to one class in the same service as against another, the attack would certainly be open for examination and scrutiny of this Court under Article 16 of the Constitution. As observed by the Division Bench of the Patna High Court in Sukhnandan v. State of Bihar ILR (1956) 35 Pat 1 : (s) AM 1951 Pat 617, while the administrative authority is not precluded from making selection from numerous candidates before making appointments, "the selective test employed must be reasonable and not arbitrary" as "otherwise the principle of equality of opportunity would be infringed.

9. The weightage principle enabling promoted officers to rank senior to direct recruits of not only of that year but also of three previous years can only be saved if it is founded on an intelligible differentia which distinguishes the two classes of officers and it must further be shown that the intelligible differentia can be said reasonably to relate to the object to be achieved by the rule. As observed by Mr. justice Gajendragadkar in the recent decision of the Supreme Court in J. Pandurangarao Vs. Andhra Pradesh Public Service Commission, , "in every case, there must be some nexus between the basis of the classification and the object intended to be achieved by the statute." There is no substantial disagreement between the Petitioners and the Respondent Union that the objective of the rules was the creation of a well-governed integrated service for the improvement of Income Tax administration. Whereas the Respondents assert that the object was to create a "well-knit service." the Petitioners have stressed the aspect of improvement of the Income Tax administration as specified in the letter Exhibit B. Whether there is a nexus between the desideratum of a "well-knit" service and the impugned rules is the crucial question which falls for examination by this Court?

10. According to the contentions of the Petitioners, they having entered as direct recruits in the service through the medium of an All-India Competitive Examination form the essential core and substratum of the service. The other channel of service by way of promotion from Grade III, Class II has been created merely to secure the promotion of experienced and deserving officers. The quotas which have been fixed are no doubt indicative of the intention of the trainers of the rule to secure the main element in the service by the process of a competitive examination, and in the communications fixing the proportions at 80:20 and subsequently at 66 2/3 : 33 1/3 it is specifically stated that if the requisite number of promoted officers cannot be obtained the unfilled vacancies will go to direct recruits. Our attention has been drawn to an affidavit (Exhibit No. 1 filed with the rejoinder in which it was stated on behalf of the Union of India in a petition of a Class II officer alleging discrimination that "so far as the nature of work and the duties are concerned It is a matter of administrative

arrangement but normally Class I officers are entrusted with more onerous duties than Class II". The deponent on behalf of the Union further asserted in this affidavit that "Class II Officers are recruited by promotion from Income Tax Inspectors and also through the Union Public Service Commission Test but for appointment to Class I posts, persons of much higher merit are selected". It may be observed that in the case in which this affidavit was filed Kishori Mohanlal Bakshi Vs. Union of India, the aid of Article 16 was invoked by a Class II officer on the ground that he had been denied an equal opportunity as a member of Class It Service for further promotion as compared to officers in Class I, and Mr. Justice Das Gupta dismissed this contention on the ground that the classification between Classes I and II of the Service was reasonable and based on intelligible differentia.

11. The submission of the Petitioners is sought to be reinforced by the observations of the Income Tax Investigation Commission published in 1949. In paragraph 368, it was stated thus:

We would, therefore, prefer some method of recruitment, which will bring in the right type of men both in character and mental equipment at the right ago and for the rest rely upon giving them a good and adequate training. It is obvious that an Income Tax Officer must possess a high standard of ability, menial alertness, tact and patience. While the knowledge of law and of accounts may be of great value in his equipment, a more important qualification is a high standard of integrity and character. A mentally alert person will not find it dim cult with some training to adjust himself to the duties he may be called upon to perform, and, if endoewd with perseverance and patience, he can in due course master the intricacies of accounts (and) of law, required for the efficient discharge of his duties.

In paragraph 369, it is further observed that

for lack of a better substitute, we would therefore prefer the continuance of the system of direct recruitment through the Federal Public Service Commission as the most suitable in the present circumstances....

It was also mentioned by the Commission, and this has been stressed by the Respondents, that a Class II Officer had to shoulder responsibilities which were not commensurate. With the remuneration which he got and better opportunities for promotion from lower grades were recommended.

12. It is in the forefront of the Petitioners the quota limits prescribed by the Government Itself have been more honoured in their breach than the observance. According to the figures furnished in the petition of Jaisinghani, 142 officers had been promoted from Class II to Class I, Grade II, between 1945 and 1950, as against 117 officers taken in the service during that period by direct recruitment. From the year 1951 to 1954, 144 officers had been taken by competition and the number of promoted officers was 118. When we consider that the total strength of the cadre of Class II Grade III Officers was 83, it

becomes manifest that a very large number of the officers from the suborcinate service were taken over in Class I. These figures have not been challenged and what is contested on behalf of the Respondent Union is that the compliance of the quota has not been found to be an administrative possibility. It is further pleaded that it was an imperative necessity to take men of experience in Class I Service. It is contended that the mere breach of rules, which, according to the Respondent Union, lack any statutory force, is not actionable per se, though it is not disputed that if the breach of an administrative rule considered in conjunction with the rule of seniority, which again is asserted to be a mere administrative direction, the Court may'' interfere if their combined operation results in discrimination.

13. Figures and charts have been furnished by both sides and the Petitioners assert that the breach of the quota rule coupled with the artificial weightage in the seniority rule have deteriorated the position of the Petitioners to such, an extent that their chances of promotion have been dimmed considerably, and in some cases altogether blighted. The Respondents, on the other hand, have attempted to show that the Petitioners still retained the dominant position in the Integrated service at compared to the promoted offices. It is pointed out in the chart submitted on behalf of the Respondent, V. Gaurishanker, that while the age of a direct recruit at. the time of appointment ranged between 22 and 27 years from amongst the officers recruited as a result of 1950 examination, the ages of the officers promoted through the Departmental Promotion ''Committees of 1951, 1952 and 1953, varied from 26 to 46 years, though the average age ranged from 31 to 35.

14. The Petitioner Jaisinghani passed the competitive examination in the year 1950 and was appointed to Class I, Grade II Service on 27th of October, 1951. His date of birth is 15th of March, 1924. There were in all 38 persons recruited as a result of the competitive examination that year and the youngest of them was born in the year 1929. The officers promoted from; Class If as a result of the selection made by the Departmental Promotion Committees in 1951, 1952 and 1953 became senior to Jaisinghani and others who passed the competitive examination in 1950 in consequence of the weight-age rule. From Exhibit I, filed with the petition, it appears that the following thirty-three officers of Class II out of those promoted to Class I in 1951, 1952 and 1953, approximately of the same age group as the Petitioner Jaisinghani, have become senior to him in consequence of the application of the rule of seniority, although they were taken in the service after the competitors had passed their examination in 1950:

S. Name Date of birth Date of Date of No. appointment appoint- to Class II merit to Class I (Grade II) 1. D.G. Pradhan 31-10-1920 1-11-1945 1-1-1962 2. A.J. Kazi 11-2-1920 10-11-1945 do. 3. A.J. Rana 7-8-1920 1-2-1946 do. 4. S.G. Mohta 14-12-1920 10-5-1947 1-1-1965 5. V. Gaurishanker 21-12-1921 1946/47 do. 6. A.S. Saxena 6-11-1922 14-7-1947 do. 7. K.D. Saxena 4-11-1924 10-7-1947 do. 8. S.K. Basu 5-5-1928 9-7-1947 do. 9. K.C. Mahadevan

18-2-1920 1-7-1947 do. 10. S.D.Gupta 15-2-1920 1-7-1947 do. 11. D.K. Sen 2-2-1928 1-7-1947 do. 12. A.R.S.Narayanan 18-9-1920 1-7-1947 do. 18. P.P.Kayastha 25-9-1920 1-7-1947 do. 14. D.V. Junnarkar 30-10-1924 14-6-1947 do. 15. M B. Menon 21-6-1924 1-7-1947 do. 16. B.D. Holms 12-4-1921 1-7-1947 do. 17. L.K.Mohan 1-2-1922 1-7-1947 do. 18. A. Satyanarayana 15.7-1922 5-7-1947 do. 19 S.S. Sinha Jan. 1927 14-7-1947 do. 20. V.S. Gupta 12-4-1922 25-7-1948 do. 21. Balbir Singh 6-1-1922 28-6-1947 1-4-1964 22. S.B. Vaish 15-8-1928 26-51950 do. 23. V. Varodevan 1-11-1921 16-6-1947 do. 24. G.B. Both 1-7-1923 16-1-1948 do. 25. A.Y. Mehta 19-10-1921 17-6-1947 do. 26. K.T. Thakore 6-10-1926 21-6-1947 do. 27. D. Goswami 29-7-1928 11-7-1947 do. 28. N.Y. Tamhano 17-21925 1-2-1947 do. 29. G.N. Gadgil 18.5-1922 23-6-1947 do. 30. R.R. Gnpta 18-5-1924 1-7-1947 do. 31. Bisban Lal 15-9-1923 1-7-1947 do. 32. H.P. Mukbcrjoo 1.1-1928 1-1-1947 do. 33. E.M.N. Unni 8-5-1922 1-7-1947 do.

15. Only 33 officers have been mentioned out of total of 118 who were promoted during the three years and became senior to the Petitioners. Twenty of these officers were promoted as Assistant Commissioners between 17th of June, 1959 and 17th of April, 1962. It cannot be doubted that those promoted officers are of the same age group and would block the chances of promotion of the direct recruits who have come into the service by competitive examination. It is also worth observance that in the order (Exhibit L) passed by the Central Board of Revenue on 17th of April, 1962, out of the forty four officers (sic) were promoted to officiate as Assistant Commissioners provisionally, the first thirty three are promoted officers and the last eleven direct recruits. It is clear that in the appointments of Assistant Commissioners, the promoted officers have obtained substantial share far in excess of their strength in Class I, Grade II Service, and from a perusal of the Gradation List, it appears that the same position would be reflected in future promotions. The direct recruits, who are to form two-thirds of the Service, are thus reduced to a minor position and there can be no denial of the assertion made by the Petitioners that their position has been greatly depressed by the operation of the seniority rule under which young persons have been promoted from Class II to Class I Service.

16. The position is no different with regard to the persons who are deemed to be direct recruits though actually they are promoted officers. The Petitioner, for instance, has been made junior to three direct recruits from the same competitive examination held in September 1950, by application of the principle laid down in paragraph 1(f)(iv) of the letter Annexure ''A'' to Exhibit H. Mention may be made of the positions of C. N. Vaishnav, F.G. Jilani and C. Rajagopalan Nair who have been impleaded as Respondents. The position is summarised in the following chart:

S.No. Name Date of Date of Date of Date of birth appoint- appoint- appointment in ment in ment As Class II Class I Asstt. Class II Commissioner. 1. Shri O.N. 19-11-23 16-4-47 5-7-51/ 19-5-68 Vaishnav 1-9-53 2. Shri F.G. 26-6-23

1-7-47 16-7-51/ 8-5-58 Jilani 1-9-53 3. Shri C. 4-9-24 1-7-47 do. 9-5-58 Kaja gopalan Nair

Thus, all these officers, who passed out with the Petitioner and are of the same age group, were made senior to the Petitioner by many years and by virtue of the seniority assigned to them were appointed as Assistant Commissioners in May, 1958. Considering that the source of the promoted officers in Class I Service is the cadre of Class II, Grade III consisting of only 83 officers and also taking Into account that thirty three out of forty-four officers recently promoted as Assistant Commissioners came out of the promoted lot, and finally, that the deemed officers also have attained positions of predominance, it cannot be regarded a language of mere hyperbole when the Petitioner contended before us that the Class II Service as a body has been transformed into Class I Service at the expense of the direct recruits. It has been very vehemently contended by the Petitioners that one concession after another has been conferred to give position of absolute predominance to the pro-motees. It should have been enough that after five years'' experience an officer of subordinate service is considered fit for pro-motion. Once he is taken into service he ranks higher than all direct recruits of the same year. This is the second advantage which is given to him by the rules. The third benefit, to which a promoted officer has become entitled is that without undergoing the period of probation he has to rank senior not only to the direct recruit of that year but also to direct recruits of three previous years. Thus, a Class II Officer, who enters into the service perhaps a little earlier than a direct recruit, after an experience of five years, becomes entitled to promotion and to claim precedence over the direct recruits of three previous years. Our attention has been brought to Exhibit No. 20, annexed with the Rejoinder, which is an extract from the report of the Direct. Taxes Administration Enquiry Committed 1958-59. The benefit and weightage given to class II officers is deprecated by this-Committee and the entire paragraph 8.52 is worth reproduction:

At present When a Class II officer is promoted to Class I he gets a weightage of three years in seniority as compared to a direct recruit to Class I. Fears were expressed before us that this weightage to promotees over the direct recruits adversely affects the interests of the latter. The import of this system appears to be to give some priority to pro-motees in view of their past service in the Department. We understand that the operation of this rule has been rescinded by the Central Board of Revenue with effect from 1957. In our view, promotion to Class I is in itself a sufficient benefit given to Class II Officers. We, therefore, do not favour granting any further advantage in the nature of weightage.

17. In our view, the summary of the Direct Taxes Administration Enquiry Committee is a fair comment on the rules which are sought to be impugned.

18. On behalf of the Union of India, it has been contended by the learned Attorney-General that the matters raised in the petition do not constitute justiciable issues for the reason that the rules which are objected to and whose

breach is complained of are not statutory in nature and being the mere fiat of the executive Government can be modified at its pleasure. It is further claimed that the requirements of the Income Tax Service being technical, it has been found essential to give as much emphasis on practical experience as to intellectual abilities which are evinced by young persons who had passen the competitive examination. For support of the seniority rule, it is further submitted by Mr. Daphtary that it is the normal practice in Government services to give some premium for age and experience and rules have been framed in other services, which are akin to Rule 1(f)(iii) which is impugned. By way of illustration, our attention was drawn by the learned Solicitor-General to the Indian. Administrative Service (Regulation of Seniority) Rules 1954, under Rule 3 of which every officer is assigned a year of allotment after the previous service of a promoted officer is duty taken into reckoning. Likewise, in the Indian Police Service (Regulation of Seniority) Rules, 1954, Rule 3 deals with assignment of a year of allotment and under Sub-rule (3), the principles for such assignment are laid down giving credit to the officers who are recruited by promotion from the Junior service. In the contention of the Attorney-General, there is nothing wrong in principle under which a person who has come into the service through a competitive examination is equated with a promoted officer who has five years'' experience in Class II Service, and in this connection our attention has been drawn to Clause 5 of para B of Chapter IX of the Central Board of Revenue Manual, where it is stated that basis of promotion from. Class II, Grade III is minimum five years'' gazetted service. It has been pointed out that in actual practice, the officers are promoted long after they have put in the minimum service of five years and when they are recruited to Class I it is reasonable that they should have some precedence over those who have passed their way into the service through a competitive examination. In other words, the preference which is given to persons who may be assumed to be similarly situated is based on an intelligible differentia and does not come within the mischief of Article 16 of the. Constitution.

19. It is further pointed out that the Petitioner and the other direct recruits were informed on their first appointments that these were "subject to any chance in the constitution of the Income Tax Service, Class I which the Union Government may think proper to make from time to time" and that they would, "have no claim for compensation in consequence of any such changes".

20. it is argued by the learned Attorney-General that even If the expectations of the Petitioners have not been met as a result of induction of a large number of promoted officers in the service, there is no ground for striking down the rules which, in any event, have no statutory force. Mr. Sarjoo Parshad who addressed us at length on this aspect of the case, contended that the rules, though these do not in form purport to have been made u/s 241 of the Government of India Act, are in, substance made in pursuance of this provision and have attained the statutory imprint. This does not appear to be a point of much Importance and we have not thought it necessary to linger over It as it has not been disputed that

whatever may be the source of the rules, these could be struck down if found to be discriminatory under Article 16 of the Constitution.

21. The learned Attorney-General has asked us to eschew a, doctrinaire approach to the problem which has been posted before us and to direct our minds to it from a purely pragmatic point of view. He has cited in support of this contention an American case of Railway Express Agency v. People of the State of New York (1949) 336 U.S. 106 (117), decided by the Supreme Court of the United States in the Lawyers'' Edition of this authority (United States Supreme Court Reports, 93 Law Ed. page 533), the fifth head note is to this effect:

It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered.

It is contended that the right of the executive Government to choose the personnel of a service under its control either by competitive examination or by promotion cannot be questioned and ''Ex facie'' the quotas which it may choose to fix can be varied at its will and pleasure. Why should the breach of the quota rule be actionable when it is open for the Government to man the service in the proportions of its choice? There is no obligation, in the submission of the Attorney-General, cast on the executive Government by any statutory rule to make recruitment in the service by specified channels and any departure from an administrative rule fixing the proportions cannot be agitated in these proceedings. Though both the Attorney-General and the Solicitor-General have been at pains to justify the policy of the Government on grounds of experience and expediency, Its unquestionable right to depart from administrative rules has been equally stressed. It has been pressed upon us that as there is no yardstick by which this Court can judge whether the rule of weightage has operated to the detriment of the direct recruits, we should refrain from interference in proceedings under Article 226 of the Constitution.

22. It seems that the recruitment in service has been made in pursuance of rules framed by the Central Government and the position has to be viewed in this perspective. The abstract right of the Government would be relevant only when no rules on the subject have been framed when hundreds of persons who sat for the competitive examination have gained entrance to the service, are they not entitled to expect from the Government some measure of fulfillment of their expectations? The selections made by the Departmental Promotion Committee between 1951 to 1953 have been a subject-matter of acute controversy and the Petitioners have been making every effort before the appropriate authorities to ventilate their grievances that their rights and expectations have been thwarted by large scale promotions of officers from Class II Service and the senior positions being assigned to them although their selections were made three years after their own appointments to the service. The Association of Indian Revenue Service Class I officers made repeated representations on behalf of the direct recruits against the ''iniquity and illegality of the principles of seniority and

the contraventions of the statutory rules of recruitment''. As a result of these, representations, the rules in question have not only been in abeyance but even the appointments to the posts of Assistant Commissioners were stayed, though as stated before some appointments were made on a provisional basis in 1962. It is also further asserted in paragraph 21 of the petition that the Finance Minister announced that "he had come to the conclusion that the rules were not followed properly and that the ''status quo'' could not be allowed to continue." There is a letter of 27th of January, 1962 by the President of the Indian Revenue Service (I.T.) Association to the Finance Minister, and reference was made to what the Finance Minister, stated on 31st of January, 1961, that the ''status quo'' could not be allowed to continue. These allegations have not been denied and considering that titer rules, in question have been in a state of suspended animation since 1956, it can reasonably be inferred that the executive Government in its wisdom has become alive to the Injustice, of these rules and the widespread discontent generated by their operation. Though no hostility and ''mala fides'' have been attributed to the Government, still there can be no manner of doubt that the rules even though not strictly statutory in nature have in effect operated to the great detriment of the direct recruits. In the Supreme Court authority of The State of West Bengal Vs. Anwar Ali Sarkar, on which the Solicitor-General particularly relied upon, it was held that it is not Incumbent upon a person who has complained of discrimination to assert and prove that, in making the law.

the legislature was actuated by a hostile or Inimical intention against a particular person or class nor would the operation of Article 14 be excluded merely because it is proved that the legislature had no intention to discriminate, though discrimination was the necessary consequence of the Act. The question of ''mala fide'' may arise in ascertaining whether an officer acted ''mala fide'' or not; but It cannot arise when discrimination follows or arises on the express terms of the law itself.

23. In our view, the ruling of this decision does not advance the case of the Respondents. The Petitioners entered the service through a competitive examination and their merits have not been questioned at any stage. Can their positions be allowed to be depressed by an artificial rule of weightage however sound it may seem in principle? Indeed, we accept unreservedly the conclusion on this matter reached by the Direct Taxes Administration Enquiry Committee. The charts which have been submitted before us show, conclusively that a large number of persons have been affected and at this stage it may also be mentioned that some of the officers recruited by competition have been particularly hit hard. Some of the Respondents, particularly Guarishankar, have argued their own cases and though it cannot be denied that the promotions of some of the officers in Class II were based on merit, it is difficult to avoid the conclusion that on the whole large scale promotions have been made in utter disregard of the rights of the direct recruits. In support of this conclusion, reference may be made to Exhibit 19 attached to the rejoinder. It shows that

right from the years 1944 to 1950, some of the promoted officers of the same age have been assigned senior positions to direct recruits. It appears from this chart that Messrs. Thakore, Tamhane and Gupta, selected by the Departmental Promotion Committee of 1953 (their respective dates of birth being 6th October, 1926; 17th of February, 1925, and 18th May, 1924) have become senior to the Petitioner Jaisinghani (date of birth 15th March, 1924), O.P. Chopra (date of birth 20th of March, 1924) and H.K. Sondhi (date of birth 8th February, 1925) - all selected by the 1950 competitive examination. A similar state of affairs is disclosed with regard to the three Petitioners of 1949 examination, three of 1948, three of 1947, three of 1945 and three of 1944. In our opinion, there is no intelligible differentia to justify the perpetual depression of the direct recruits as against departmental promotees, and we have been persuaded that these are not merely isolated cases of injustice. The rule which is impugned is wide in its sweep and has affected a large number of persons in a very important service of the executive Government. It is rather a sad reflection that a number of Class I, Grade II Officers recruited on basis of their competence and undoubted merit in a very important service of the Union of India should have been left to approach this Court for redress of a genuine grievance under Article 226 of the Constitution.

24. We have no doubt in our minds that the open and repeated breaches of quota rule and the strict adherence of the seniority rule have uplifted the promptness a class and by and large they have assumed the rule of major partners in Class I Service a result which was manifestly unintended by the framers of the rules. It is of considerable importance, in our view, that the authorities themselves have thought it necessary to hold these rules in abeyance. During the years when the rules were in force, they have worked in a discriminatory manner and the direct recruits of the years 1950-1956 have clearly been relegated to positions from where they cannot aspire for early promotions to which they are entitled.

25. This brings us to the consideration of the grant of appropriate relief to the Petitioners. While we are of the view that the Impugned rules have operated discriminately against the Petitioners and should not be permitted to survive any longer, we have reflected long over the question of according relief which is sought by the Petitioners. It is claimed that promotions of as many as 450 persons in Class I are affected and also the consequential promotions to the posts of Assistant Commissioners. It has been urged before uS that many officers so promoted have passed orders granting or disallowing relief in taxation, and if the seniority rule is struck down elements of uncertainty and confusion may be introduced in an already complicated situation. The Government has suspended the operation of these rules since; 1956 though the further promotions of officers recruited from Class II have not been indefinitely stayed and have been gazetteer on a provisional basis. Mr. Sarjoo Pershad has invited us to hold, on the basis of a decision of the House of Lords in Edwards v. Bairstow 1956 AC 14, that we should not be deterred by any considerations of

administrative difficulties or confusion which might be created as a result of our decision. Lord Simonds, in his judgment at page 32, observed as follows:

We were warned by learned Counsel for the Respondents that to allow this appeal would open the floodgates to appeals against the decisions of the General Commissioners up and down the country. That would cause me no alarm, if decisions such as that we have spent some time in reviewing were common up and down the country.

Umamaheswaram, J. In Ramamoorthi v. State of Madras AIR 1956 AP 203, also made reference to an English decision in Rochester v. The Queen (1858) E.B. E 1024, in which the following observations were made by Martin, J.

Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every casa to which, by any reasonable construction, it can be made applicable.

26. The question which the Court has to ask itself is whether the grant of a writ in the present instance is on the same footing as the remedy by way of appeal with which the House of Lords was concerned in 1956 AC 14? It is an important circumstance'' for consideration that. some of the promoted officers who would be affected if the rule is struck down, have retired from service. A still larger number have been promoted while those who are still working as Income Tax Officers must have passed numerous orders which if the position of seniority is disturbed may be rendered ineffective and nugatory. These are the practical considerations which becomes germane in granting the discretionary relief under. Article 226 of the Constitution, While it is obvious that the Petitioners have suffered injustice as a result of the operation of the rule, it cannot be denied that the Government itself has to some extent recognised the existence of their grievance. The rules have been suspended on the representations of the Petitioners and it seems reasonable to assume that the Government itself has realised the unwisdom of the policy behind the rules. The statement attributed to the Finance Minister that the status quo cannot be permitted to continue - a statement which has not been denied expressly - supports this assumption. In passing appropriate orders, the Court cannot be insensible to the effects or steps which may have to be taken to implement a decision. Keeping this perspective in view, it might well be urged that the Court should refrain from striking down the rules and leave it to the Government to redress a wrong which it should be its pleasure and responsibility to bring about. The Government should be left to devise the most suitable methods of setting right a situation which has been created by an unjust operation of a harsh rule of seniority adversely affecting the Petitioners. The question being of importance, we are of the view that the matter should be left for a decision by a Full Bench of this Court.

D.K. Mahajan, J.

27. I agree with my learned brother that this matter relates to a very important

wing of the Central Services and, therefore, should be settled by a larger Bench, particularly when I do not agree with my learned brother on-the question of relief. We are both agreed on the principal question, namely, that the impugned rule is discriminatory and, therefore, is hit by Article 16 of the Constitution. I have separately stated my reasons in the following paragraphs for coming to this conclusion. In view of the [important nature of the question involved I am also of the view that it is a fit case which should be settled out of Court and I have no doubt that it can be so settled if the Government makes an earnest effort in this behalf. I am further of the view that it will not be proper either for the direct recruits or for the promotees to demand their pound of flesh. To me a reasonable solution seems to be that it would meet both points of view half way if the rule is made to operate with one year''s weightage instead of three years'' weightage particularly when the disputed period is very short, namely, from 1950 to 1956. The rule has remained in abeyance from 1957 onwards and it is hoped that Government will see that some reasonable rule is replaced for the impugned rule and no attempt is made to work the impugned rule, which, as I have already said, has remained in abeyance from 1956 onwards. In these circumstances, it seems proper that on the basis suggested by me it may be possible to settle the entire controversy. This course would not only be the Interest of the Service but also will lead to a harmonious working of the department. If the matter is pressed to its logical conclusion and is left to settlement by the Court, one of the parties will necessarily be adversely affected by the decision that may be ultimately arrived at. This will sow seeds of discontentment in the same service permanently and will not lead to efficient working of the department. For good administration, it is necessary that this state of things is not allowed to arise. So far as the question of relief is concerned, I am not prepared to stop half way and still hold the view that in view of our decision on the principal question, the relief claimed should logically follow It, As the entire matter is to be decided by a larger Bench, I would not express any further opinion on the question of relief. I am not insensitive to the various observations made by my learned brother on this aspect of the matter, but in view of the fact that the question of fundamental rights is involved I am not able to agree with him in the matter of relief.

28. The controversy in this petition relates to the question of inter se seniority of Income Tax Officers directly recruited to Class I Grade II and the promotees to this Class from Income Tax Officers Class II Grade III. The recruitment to Class I Grade II Service is through an examination held by the Union Public Service Commission known as the Indian Audit and Accounts and Allied Services Examination, and by promotion from the Income Tax Officers Class II Grade III. The quota fixed for direct recruits is 80 per cent and for recruitment by promotion 20 per cent. This proportion of 80 per cent and 26 per cent was later varied by Government of India''s letter F. No. 24(2) Admn. IT/51 dated 18th October, 1951. In accordance with this letter, 33 1/3 per cent vacancies were to be filled in by promotion from Class II Grade III, Income Tax Officers promotion to be based not on seniority but by selection on the basis of merit. The remaining

vacancies, that is, the 66 2/3 per cent, were to be filled directly by means of the aforesaid competitive examination. The selection by promotion from Class II Service is made by a Departmental Promotion Committee. The increase to quota, of the promotees was restricted by this very letter for a period of five years. The quotas were fixed when the Income Tax Department was reorganised.

29. Before the reorganization scheme was introduced the recruitment to Class I Service was by promotion. This would be apparent from an extract from the "Hindu" date the 1st October, 1944, filed with the rejoinder affidavit of Jaisinghani. The relevant part of the same reads thus:

Till now, the back bone of the Service, viz, the Income Tax Officer was borne on the Class II Service of that Central Government recruitment to this grade was atmost entirely by promotion from subordinate executive grades. Hereafter nearly 50 per cent of the Income Tax Officers will be borne ore the Class I Service of the Government of India. These Class I Officers who will be divided into two grades and who will be transferable all over British India will be recruited on the result of an-annual competitive examination conducted by the Federal Public Service Commission on the same lines as for the Indian Audit and Accounts Service. Recruitment to the Class I Service except for 20 per cent reserved for promotion from the lower grades will initially be into Grade II from which promotions will be made by selection to Grade I strictly on the basis of merit in consultation with the Federal Public Service Commission. The remaining posts of Income Tax Officers will be classified as Grade III and will heretofore be borne on the Class II Service of the Central Government. Promotions to posts of Assistant Commissioner and Commissioner except where they are reserved for officers in the ''pool cadre'' will again be made by selection from grade I Income Tax Officers.

30. The principal reason why the Income Tax Department was sought to be reorganised is to be found in Finance Department (Central Revenues) letter No.O. No. 195-Admn.(IT.)/39 dated the 29th September, 1944, to the Secretary, Federal Public Service Commission, (sic) The relevant part of the letter reads thus:

* * *with a view to Improving the Income Tax administration, the Government of India have, after carefully consideration, decided to reorganise the Income Tax Services, Classes I and II

31. In a letter addressed to the Commissioner of Income Tax, Bombay, by the Central Board of Revenue, New Delhi (D.O. No. 195-Admn.(I.T.)/39- dated the 24th.October, 1944), the following passages may be quoted usefully :

It has since been decided that recruitment by promotion to Grade III, of the Income Tax Officers Service Class II, will be on the basis of selection and orders modifying paragraphs 2(e) of the finance Department. (Central Revenue) letter of even number dated the 29th September, 1944, are being issued.

The Board, however, do not consider it feasible or necessary taking a long range view, to raise the maximum of 20 Per cent for recruitment to Income Tax Officers Grade II (class I Service) by promotion from Income Tax Officers, Grade III (Class Il Service), at any rate for the time being. Nor is it permissible to leave the percentage of recruitment reserved for promotion undefined, vide paragraph (a) of he instructions in the Government of India, Home Department Office Memorandum No. 23/1/39-Ests (S), dated the 4th September, 1942, a copy of which was sent to you in the Beard''s letter C. No. 423-Admn. (GI)/42, dated the 11th December, 1942. Further the procedure you suggest towards the end of paragraph 4 of your letter will not be practicable as the commission cannot compare the merits of the examination candidates and the departmental candidates. With a view to compensate the non-gazetted executive personnel of the Income Tax Department or their possible decreased prospects of promotion in future, ''it is proposed to permit them to appear in the Indian Audit and Accounts Service etc. examination subject to their not being over 27 years of age on the crucial date, so that they will have a chance of being appointed as Income Tax Officers, Grade II (Class I Service) against vacancies reserved for direct recruitment. With this added concession, the men already recruited. by you, if they are really outstanding, should in. the process of time get adequate opportunities for promotion and it is difficult to contend that really efficient men will find their prospects of advancement in the department curtailed by the reorganisation sanctioned recently. As regard the Subordinate Services, in future, it is proposed to get them recruited through the Federal Public Service Commission also and we have no reason to doubt that men of good quality will be forthcoming as we are reserving 50 per cent of the vacancies in grade III to be filled by promotion from the subordinate grade.

32. The comments of the Central Board of Revenue, contained in letter C. No. 34(28)-Admn. (I.T.J/49, dated 23rd March, 1950 (copy Exhibit ''D'') vis-a-vis resolution No.9 passed by the All-India Federation of Income Tax Gazetted Services Association at its eighth annual general meeting held on the 17th August, 1949, may also be usefully referred to at this stage. They are as under:

Resolution No. 9. - The Board are of the view that the prospects of advancement in Income Tax Service, Class I, are better than in any other established Class I Service, specially in view of the existence of an intermediate scale of Assistant Commissioner, which does not obtain in other Class I Services. In view of certain administrative difficulties involved, it has been decided to defer consideration of the proposal of the Federation for declaring the existing Grade II and Grade I as Junior or Senior scales of Income Tax Officers Service Class I. The Board cannot accept the proposal that class I Service should be abolished after all the existing Class II officers are absorbed in Class I.

33. The basis for the reorganisation, as already stat-ed was to improve the Income Tax administration and the creation of Class I Service of Income Tax Officers. This is further clear from the affidavit of Mr. Kaicker, Under Secretary,

Department of Revenue, Ministry of Finance, Government of India, filed in the Supreme Court of India to Kishori Mohanlal Bakshi Vs. Union of India, 9.

In paragraph 4 of the affidavit, the Union''s stand is as follows:

I say in the first instance that with a view to improving the administration of the Income Tax Department, the calibre and quality of the personnel who could be appoint ed as Assistant Commissioners had to be put on a higher level and, therefore, in 1944 it was decided that a cadre of Class I Income Tax Officers should be constituted in order to ensure better quality and efficiency in the service It was, therefore, decided that the appointment to the posts of Assistant Commissioners should be made from Class I Officers. The selection to the post of Class I Income Tax Officer was made from amongst the candidates selected for Class I posts through the Union Public Service Commission Examination. There was another source of recruitment to Class I post in addition to selection through U.P.S.C. Examination and that was through selection from officers holding Class III posts. The Petitioner could become a Class I officer through the above mentioned channels. I say that the Petitioner was selected by U.P.S.C. (then F.P.S.C.) for Class II post and so far as his promotion by selection is concerned his case was considered every year and he was not found fit for being promoted as such. There has thus been no discrimination or any deprivation of any right of the Petitioner and the Petitioner is not entitled to make any grievance on that account. * * * *

What has been stated above gives an idea underlying the reorganisation of the Department and the direct recruitment to its Class I Service.

34. The reasons for the classification of Services Class I Grade I and Grade II, and Class II Grade III Services, and the fixation of quotas by direct recruitment and by promotion are to be found in the report of the Central. Pay Commission, 1946, pages 151, 152, paragraph 3 (Exhibit No. 28) as under:

We were informed that the two grades in the Class I Service were introduced on the suggestions of the Public Service Commission and the arrangement was found convenient because a direct entrant could not without gaining further training and experience, be posted to any of the senior charges. It would also be impracticable to merge the Class II Services as junior scale in the Class I service since promotion would then virtually become automatic instead of by selection as at present. The difference between the class of work and the quality of work done by the ordinary mofussil officer who is attending to some small shopkeeper''s account and an officer in Bombay who is dealing with the highest class of lawyers and accountants in the country illustrates the kind of difference which exists between the nature of the charges held by Grade III and Grade I Officers. The differentiation between Grade 1 and Grade II was justified on the ground that it would constitute a better differentiation of responsibilities than the substitution of a single scale of pay with special pay attached to the heavier charges. At present the nature of the charges is determined on the basis of a yard stick which takes account of the nature and quantum of work and the kinds of assessment cases involved. On the basis of responsibility, there were roughly three kinds of charges, namely, - (i) the large circles where there is a volume of company assessments and E.P.T. work which require a very senior officer to handle it; (ii) a moderate size charge like some of the big cities; and (in) charges of minor importance. Grade III officers are generally posted only to the least important charges or are used to assist senior officers. In a sense, it was stated that they are readily successors to the old Assistant Income Tax Officers though for certain statutory purposes it was found convenient to declare them to be Income Tax Officers. The bulk of the departmental candidates have in the past been recruited from among the Examiners of Accounts, a category which will soon be abolished, since it has been considered desirable to ensure that all accounts are scrutinised by a gazetted officer preparatory to assessment, so as to avoid duplication of work. A certain amount of direct recruitment is also made and it is understood that in future almost 50 per cent of Grade III and 80 per cent of Grade II Income Tax Officers will be recruited by competitive examination. The Federation of Income Tax Officers'' Association and representatives of certain local branches gave evidence before us. The majority opinion among them was opposed to the retention of the Grade III Income Tax Officers in the present Class II Service. We have carefully considered the question. In view of the detailed explanation vouchsafed to us by the Board and on the general grounds set out in paragraphs 23 to 29 of part II, we are satisfied that there is no justificable grievance in allowing the Class II Service to continue as at present.

35. Section 5 of the Indian Income Tax Act, 1922, was substituted by Section 6 of the Indian Income Tax (Amendment) Act, 1939 (7 of 1939). Sub-section (1) of Section 5, as substituted, enumerates the Income Tax authorities. They are:

(a) the Central Board of Revenue; (aa)(b) Directors of Inspection;

(b) Commissioners of Income Tax;

(c) Assistant Commissioners of Income Tax who may be either Appellate Assistant Commissioner of Income Tax or Inspecting Assistant Commissioner of income tax

(d) Income Tax Officers;

(e) Inspectors of Income Tax.

Sub-section (3) of Section 5 makes a further differentiation as to Income Tax Officers. They are Income Tax Officers, Class, I Service, and Income Tax Officers, Class II Service. Income Tax Officers Class I Service and the sources of their recruitment have already been dealt with. So far as the Income Tax Officers Class II Service are concerned, they are Known as Class II Grade III Income Tax Officers. They are recruited by promotion from the Income Tax Inspectors and by direct recruitment. It is common ground that people who qualify in the competitive examination but are not eligible to be recruited to Income Tax Officers, Class I Grade II Service are generally taken on the basis of that examination to Class II Grade III Service in the order of merit in the examination. Reference in this connection be made to an extract from Memorandum No. 28/29/51-CS dated the 15th October, from the Ministry of Home Affairs, to the Ministry of Finance (Revenue Division) Exhibit No. 10), which is as under:

As, however, some Class II appointments happened to be vacant at the time those who had qualified for but could not be appointed to Class I posts for want of vacancies were offered such appointments. It was, of course, open to the candidate to decline such offers for Class II Services and appear at the examinations in subsequent years if they continued to be eligible for such examinations. * * * *

Therefore, persons who have appeared in the same competitive examination may enter the same year Class I Service or Class II Service. It is this Class II Service from which the promotees enter Class I Service after they have been, at least, for five years in Class II Grade III Service. It must also have been noticed that persons in Class II Service up to the age of 27 can sit for the competitive examination and enter Into Class I Service over and above the quota reserved for this Service by promotion. People are vecruited to Class II Service, we were told, from the age of 18 years up to the age of 21. Those who compete for Class I have to be of the ages between 21 and 24 years and those who are in Class II can appear in the examination up to the age of 27. Class I Service is again sub-divided into Grade I and Grade II Services. The initial entry to Grade II Class I Service is either directly by competitive examination or by promotion. From Grade II Service the entry. Into Grade I is purely by promotion. Before any one is considered for promotion, the requirement is that he must have put in, at least, five years service in Grade II. So far as the promotees from Class II Grade III are concerned, their Service in Class III is taken into account to. reckon the period of five years in Class I Grade II for promotion to Class I Grade I Service Those who come, directly to Class I Grade II Service or who are promoted or directly recruited to Class II Grade III Service have to undergo probation for a period of two years and if they are found unfit for the post during the period of probation their services can be terminated.

36. It is also true that in the very nature of things, a phased programme for the reconstitution of the Service had to be resorted to and by the year 1950 that phased programme had been put Into effect and there may be some justification for the strict non-compliance of the quota rule before 1950, but there is no justification for its non-observance after the year 1950.

37. Rule 1(f) which fixes the seniority of the promotees vis-a-vis the direct recruits for the first time is to be found in annexure ''G'' to the petition dated the 24th January, 1950. The heading "Principles for determining the seniority of Income Tax Officers, Class I, on an All India basis" contain the rules on the

subject. There is no dispute as to the rules fixing seniority inter se the promotees as a class and the direct recruits as a class. The basis of seniority is, so far as the promotees are concerned, the order in which they have been selected during a particular year and the promotees selected the next year would naturally in the order of seniority rank below them. Similarly, the direct recruits are ranked senior to one another on the basis of the marks obtained by them in the examination and the direct recruits of any particular year''s examination will naturally rank higher in seniority to the direct recruits of the succeeding year. The controversy arises when Rule 1(f) fixes the seniority inter se the promotees and the direct recruits of a particular year. Rule 1(f) is in these terms:

1. (f) The seniority of direct recruits recruited on the results of the examination held by the Federal Public Service Commission in 1944 and subsequent years shall be reckoned as follows:

(i) Direct recruits of an earlier examination shall rank above those recruited from a subsequent examination.

(ii) Direct recruits of any one examination shall Inter se in accordance with, the ranks obtained by them at that examination.

(iii) The promotees who have been certified by the Commission any calendar year shall be senior to all direct recruits who complete their probation during that year or after and are confirmed with effect from a data in that year or after.

provided that a person initially recruited as Class II In-come-tax Officer, but subsequently appointed to Class I on the results of a competitive examination conducted by the federal Public Service Commission shall, if he has passed the departmental examination held before his appointment to Class I Service, be deemed to be a promotee for the purpose of seniority.

This rule was later on amended by letter dated 5th September, 1952 (Annexure ''H''.) The amended rule is in these terms:

1. (f) The seniority of direct recruits recruited on the result of the examination held by the Federal Public Service Commission in 1944, and subsequent years shall be reckoned as follows:

(i) Direct recruits of an earlier examination shall rank, above those recruited from a subsequent examination.

(ii) Direct recruits of any one examination shall rank inter se in accordance with the ranks obtained by them at that examination.

(iii) Officers promoted in accordance with the rcom-mendation of the Departmental Promotion Committee before the next meeting of the Departmental Promotion Committee shall be senior to all direct recruits appointed on the result 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.

(iv) Notwithstanding anything contained in Clause (iii), a Class 11 Income Tax Officer subsequently appointed to Class I on the results of a competitive Examination conducted by the Federal Public Service Commission, shall, If he has passed the Departmental Examination held before the appointment of Class I Service, be deemed to be a promotee for the purpose of seniority.

It may also be mentioned at this stage that while fixing the quotas for recruitment to Class I Grade II Service of direct recruits and promotees it was laid down that in case persons required to fill in the quota allotted to promotees is not available, the shortage will be made good by direct recruitment. This principle has been maintained at both points of time when the ratio of promotees vis-avis direct recruits was 20 per cent to 80 per cent and 33 1/3 per cent to 66 2/3 per cent.

38. The grievances in the petition before us are by the direct recruits. Their contention is two-fold with regard to the first grievance:

(1) that the rule fixing the seniority inter se promotees and direct recruits, that is, Rule 1 (f)(iii) and (iv) is ultra vires Articles 14 and 16 of the Constitution inasmuch as it leads to discrimination between persons situate, that is, persons selected for Class I Grade II Service, and,

(2) that the actual working of the rule, according to the direct recruits, keeps on pushing down the direct recruits, who are taken into Class I Grade II Service the same year in which the promotees are selected for that service. To illustrate, persons are promoted and directly recruited to Class I Grade II Service in the year 1950. By operation of this rule, the promotees will rank senior to the direct recruits. Not only that all promotees who are promoted to Class I Grade II in the years 1951, 1952 and 1953 will rank senior to the direct recruits of 1950. It is only in 1954 that the direct recruits of 1950 will rank senior to the promotees of 1954. It is maintained by the direct recruits that there is no rational basis for this differential treatment in the matter of promotion.

39. It is now well settled that Article 16 applies not only to the initial stage of appointment but is also applicable to all stages of the service, Including matters relating to promotion. See in this connection The General Manager, Southern Railway Vs. Rangachari, It cannot be disputed that seniority is a matter which is very intimately connected with the matter of promotion.

40. The second grievance of the direct recruits is that the quota rule has not been adhered to. Initially the quota rule was: promotees 20 per cent and direct recruits 80 per cent. Later on it was altered to 331/3 per cent and 66 2/3 per cent respectively. Therefore, two prayers are made on the basis of the non-observance of this rule, namely,

(i) that a mandamus should be issued to the Government to adhere to this rule; and

(ii) that the non-observance of this rule has led to discrimination and, therefore, this discrimination being violative of Article 16 of the Constitution, the rule should be struck down to the extent as ultra vires the Constitution and in any case direction should be issued to the authorities to ignore persons who have been promoted in excess of the quota fixed for the promotees for Class I Grade II Service, so far as the direct recruits are concerned.

41. It is not disputed that it is for the Government to decide in what manner recruitment is to be made. The Government could recruit persons to Class I Grade II by promotion only or by direct recruitment only or from both sources. It is understood that no manner of recruitment will hold good if it offends Articles 14, 15 and 16 of the Constitution. If it does not, no grievance can be made in this case, the grievance is not on this score. The grievance is that the impugned rule makes a discrimination in the matter of promotion or in other words as to seniority between the officers of the same, class when they get into that Class together, though they do so from two different sources.

42. Controversy has also been raised as to the nature of the rules pertaining to the Income Tax Service. According to the direct recruits, these rules are statutory rules whereas the stand taken by the Government is that these rules are merely departmental rules and are not statutory rules. This aspect of the matter is only stressed vis-a-vis the power of this Court to grant mandamus so far as the non-obssrvance of the quota rule is concerned. It is maintained that if they are not statutory rules, no mandamus can be granted, because it is only the breach of statutory rules which is justiciable, but so far as the provisions of Article 16 are concerned, it is conceded, and rightly, by the learned Attorney-General that it hardly matters whether the rules are statutory rules or departmental rules or regulations or orders. If in their working they lead to discrimination, they can be struck down under Articles 14, 15 and 16 of the Constitution.

43. What I have stated above, in nut-shell, is the controversy that has been raised before us, and the record has been flooded with various plans, charts and affidavits by the direct recruits the promotees, and the Government to show how the discrimination occurs or that there is no discrimination.

44. I will in the first Instance consider the question Whether Rule 1(f)(III) and (iv) is ultra vires the Constitution. It may be mentioned at the outset that Clause (iv) of Rule 1 (f) will stand or fall with Clause (iii) of the same rule and this was conceded by both the parties. What I propose to examine, therefore, is the vires of Clause (iii) of Sub-rula (f) of Rule 1. It is also conceded by the learned Attorney-General, that the working of this rule does result in discrimination between the promotes and the direct recruits in the matter of promotion, but he sought to justify this discrimination on two grounds and no third ground has been urged before us. The grounds are:

(i) reasons of administrative efficiency; and

(ii) the promotees are given weightage in the matter of seniority because of their experience in Class II Grade III Service as Income Tax Officers. On the basis of these two considerations, it is sought to be contended that there is a rational basis for this discrimination in the matter of seniority and, therefore, the rule does not violate any of the three relevant Articles of the Constitution, namely, Articles 14, 15 and 16.

45. I will first take up the question of administrative efficiency. The very fact that the recruitment to Class I Grade II Service was not restricted to the channel of promotion from Class II Grade III Service alone and it was decided to tap a new source of recruitment to Class I Grade II Service, is an indication that the former method of recruitment to Class I Grade II Service by promotion alone was not considered proper as leading to efficiency of Class I Grade I Service. As a matter of fact, promotion to Class I from Class II was cent per cent previously but was later on restricted to 20 per cent and the bulk of Class I Service was decided to be recruited directly to the extent of 80 per cent. Not only that, if the 20 per cent quota, by promotion could not be filled in for want of suitable candidates, the unfilled quota was to be filled in by direct recruits. Even when the quota was altered temporarily for a period of five years, the filling in of the deficient quota remained the same. This clearly shows that the existing mode of recruitment to Class I Service by promotion was not considered good in the interest of administrative efficiency. This fact coupled with the reasons already stated for the reorganisation of the Department clearly indicates that the recruitment to Class I Service was not found satisfactory and that is why a drastic departure was made in the recruitment to Class I Service. Therefore, the argument of the learned Attorney-General that the recruitment to Class I Service by promotion leads to administrative efficiency in the Department is not sound and must be repelled.

46. It is also remarkable that from the year 1946, Income Tax Officers have been recruited to Class I Grade II Service directly and no point has been made either by the Government or by the promotees that the direct recruits have not proved equal to the task for which they were recruited or that their recruitment has, in any way, adversely affected the administration of the Department. This is a significant fact which also cuts at the very root of the argument of the learned Attorney-General that on the reasons of administrative efficiency Rule 1 (f)(iii) can be held to be Intra vires the Constitution.

47. Before examining the second ground, it will be proper to set out, at this stage, how the rule unduly favours the promotees and places an extraordinary and unreasonably high burden on the direct recruits in the matter of promotion. To illustrate, take a case of two persons who appear in the competitive examination held to fill in the vacancies in Class I Grade II Service, say in the year 1950. One of them is selected for Glass I Grade II Service. The other fails to secure a position in the order of merit for selection to that Service. He, however, qualifies and is appointed as Income Tax Officer Class II, Grade III in 1955, both become eligible for promotion the former to Class I Grade I Service and the

latter to Glass I Grade II Service they having proved themselves fit during the period of probation. For one reason or the other, Class I Grade II Officer in the year 1955 is not selected to be appointed to Class I Grade I Service there may not be vacancies or there may be people senior to him who have to be considered, though, of course, he will be considered along with them and if the senior officers are equally suitable along with him, naturally they will be entitled to promotion above him and he cannot have any grievance on that score. The other man is promoted in the year 1955 from Class II Grade III to Class I Grade II Service. The result is that in the year 1955, both the officers are in Class I Grade II Service and in the year 1956 both of them are eligible for consideration for promotion to Class I Grade I Service. Whereas one Income Tax Officer has been promoted from Class II Grade III Service to Class I Grade II Service in the year 1955, the other was directly recruited to Class I Grade II Service in the year 1950. Now the promoted officer will not only rank senior to the direct recruit but all promoted officers who enter Class I Grade II Service in the years 1951, 1952 and 1953 will rank senior to the 1950 direct recruit and will be eligible for consideration for promotion to Class I Grade I Service, whereas the 1950 direct recruit will not be, because he has not completed 5 years requisite service in Class I Grade II service for consideration for promotion to Class I Grade I. In other words, the service of an Income Tax Officer Class II Grade III is equated to the service of an Income Tax Officer Class I Grade II, thereby making the qualifying service for entry into Class I Grade II as the qualifying service for entry into Class I Grade I. No logical explanation has been offered for this preposterous result. It is not disputed that this result does follow and the only justification offered for this result is that when Class II Grade III Officers enter Class I Grade II Service they enter with an experience. Can it be said then, that their experience of Class II Grade III Service is the same as an experience in Class I Grade II Service? if that were so, the decision of the Supreme Court in Kishori Mohanlal Bakshi Vs. Union of India, would have been different and I may, for the sake of convenience, set out what was the claim of Kishori Mohanlal Bakshi, who was to start with, an, Inspector of Income Tax in 1943. He became an Income Tax Officer in the same Department on promotion in 1946. At the time of the petition he was Income Tax Officer Class II Grade III and the contention raised by him was that the provision as regards recruitment to posts of Commissioners and Assistant Commissioners of Income Tax from Class I Grade II Service and not directly from Class II Grade III Service violated Article 16(1) of the Constitution. Their Lordships of the Supreme Court rejected this argument with the following observations, which I have taken the liberty to quote in extensor because in my view the present ease stands, more or less, concluded by these observations:

it is difficult to understand this argument. What Article 16(1) provides is that there should be equality of opportunity for all citizens in matters relating to employ-ment or appointment to any office under the State. It might very well be that ''matters relating to employment or appointment to any office'' are wide enough to include the matter of promotion. Inequality of opportunity for promotion as between citizens holding different posts in the same Grade may, therefore, be an infringement of Article 16. Thus, if, of the Income Tax Inspectors some were made eligible for promotion as Income Tax Officers and others were not, there would be legitimate ground for complaint that Article 16(1) has been violated. No such complaint can however be reasonably made, if, for example, all Income Tax Inspectors are eligible under the Rules for promotion to the post of Income Tax Officer, while Income Tax Sub-Inspectors are eligible for promotion only as Income Tax Inspectors but not directly as Income Tax Officers. similarly if of the Income Tax Officers of the same Grade some are eligible for promotion to a superior Grade and others are not the question of contravention of Article 16(1) may well arise. But how can such question arise at all when the rules make Income Tax Officers of Grade I eligible for appointment as Assistant Commissioners but make Income Tax Officers of Class II eligible for promotion as Income Tax Officers of Class I but not for the promotion to the post of Assistant Commissioners? ''There is no denial here of the equality of opportunity as among citizens holding posts of the same Grade.'' As between citizens holding posts in different grades in Government Service there can be no question of equality of opportunity. It is fantastic to suppose that Article 16 of the Constitution forbids the creation of different grades in the Government service; that is what the Petitioner''s argument amounts to. The contention that Article 16 has been violated because Class II Income Tax Officers are not eligible for promotion to higher posts, like the posts of Commissioners and Assistant Commissioners directly is, therefore, wholly unsound.

These observations fully apply to the present case. The Impugned rule makes a distinction for promotion between officers in the same grade. Just as to enter Class I Grade II Service, a candidate has not only to qualify in that examination but has to come in, in one of the required positions, similarly five years service is merely a qualification for selection by the Departmental Promotion Committee which alone is not a stepping stone and the candidate must have something in addition to the five years service to warrant his selection, otherwise the selection would have been automatic and not on merit, but it is not automatic. There is a large number of persons who got promoted after a service of 7 to 15 years in Class II Grade III.

48. Promotees to Class I Grade II Service, though in some cases, were promoted provisionally but there is no rule requiring that they would undergo a probationary period in that Class, whereas the direct recruits have to undergo probation in that Class. It is highly inconceivable how by promotion and without trial the promotees can be held to be fit for absorption in Class I Grade II Service. As matter of fact, most of the promotees in Class I Grade II Service have been selected to Class I Grade I Service and confirmed in that service without being confirmed in Grade II Service, whereas the confirmed direct recruits in Class I Grade II Service were not considered for promotion because after confirmation they had not yet completed the five years'' period, which alone

makes them eligible for consideration for promotion to Class I Grade 1 Service. Therefore, there is no necessity for a promotee to wait for confirmation in Class I Grade II Service; whereas it is in the nature of things necessary for a Class I Grade II direct recruit to get confirmed and thereafter serve for another three years before he becomes eligible for consideration for promotion to Class I Grade I Service. It is also significant that the minimum service of five years in Class II Grade III which makes them eligible to enter Class I Grade II Service opens the door to them to straight on passing to Class I Grade 1 whereas the direct recruits who enter Class I Grade II Service along with them are not only left behind in the matter of promotion by them, but even by those promotees who follow them in the next three years. Therefore, this wonderful rule makes the qualifying service as service in Class I Grade II, and virtually abolishes the distinction between Class It and Class I Services, which distinction is not without a difference in this connection, reference may be made to the following extracts:

Exhibit No. 29.

Report of Enquiry on Emoluments and Conditions of Service of Central Government Employees- 1957-59-Chapter XIV, page 148:- "Where the duties and responsibilities of Class II Officers and of officers of the junior branch of Class I are similar, the differentiation in remuneration and status is usually sought to be justified on the ground that the Class I Officers are recruited for holding higher posts, and that the junior scale posts in their case are only meant to serve as training ground and to equip them for the higher responsibilities for which they are recruited. Class II Officers, on the other hand, are recruited, whether directly or by promotion, mainly to perform the duties of the grade to which they are appointed.

The Varadachariar Commission examined this question at considerable length and while some members of the Commission thought that all posts in the Class II. Service where the duties were indistinguishable from those discharged by members of the Class I Services should be merged in the junior scale of Class I, the attitude of the majority - to quote the Commission''s own words - was as follows:-

The inclination of the majority of members, however, was that it was desirable to retain the two classes; but, in departments where the differentiation between the two classes was not necessary or possible, either because of the mode of recruitment or because of the difficulty of distinguishing between the importance and responsibility of the duties respectively performed by Class I and Class II officers, the two-fold classification may be disputed (dispensed?) with and the two groups treated as one gazetted service.

We put the proposal of the association of Class II staffs to several of the official witnesses, and none of them supported it. They said that in practically every department there was a large volume of work which could be entrusted appropriately only to Class II officers it was sufficiently difficult and responsible not to be entrusted to Class III Officers, but not such that it should be attended to by highly qualified or talented persons such as those recruited to the Class I Service. as part of their training. Their point, in other words, was that the amalgamation proposed by the service associations would be wasteful. One of the official witnesses also said that the proposed arrangement might prove harmful to the interests of the Class III Officers who are now promoted to Class II, but many of whom, not being of the standard of. Class I, would lose their promotion altogether if the Class II grades were abolished. * * *

Exhibit No. 30.

Report of the Commission of Enquiry on Emoluments and Conditions of Service of Central Government Employees 1957-59-Chapter XXV, page 325:- "The main proposal made on behalf of these officers is the one the principle of which we have already discussed in an earlier chapter, viz. they should be upgraded to Class I junior scale. The Secretary, Department of Revenue, and the Chairman, the Central Board of Revenue, are not in favour of this proposal. During the course of oral evidence they said that in both Income Tax and Central Excise Departments there was a large volume of work which could be entrusted appropriately to Class II Officers, and on which it would be wasteful to employ officers recruited for higher type of work. We have elsewhere expressed our view in favour of retaining a separate Class II Grade, and we do not see any reason to make an exception in the case of these services.

Exhibt No. 31.

Report of the Direct Taxes Administration Enquiry Committee-1958-59 page 207 paras 8.49 and 8.50:- 8.50 "An important consideration in favour of retention of Class II cadre is that it provides an avenue for promotion of the non-gazetted staff to the higher executive cadres. The previous Committees and Commissions which considered this question, expressed themselves in favour of the retention of the Class II Service. The quality and efficiency associated with the Class I service which is largely manned by persons who have qualified in competitive examinations of the Union Public Service Commission have to be maintained at the highest degree and this cannot be done if Class II cadre is merged with it.

Exhibit No. 32.

Report of the Direct Taxes Administration Enquiry Committee-Paragraph 8.54, page 209:

* * Whilst an officer in Class I Grade and Grade II is expected to complete in a year 250 and 150 standard units respectively the quota fixed for assessing officers in Class II is only 70 such units for a year." Exhibit No. 33.

Report of the Income Tax Investigation Commission, paragraph 379:-- " * * *The Central Pay Commission seem to have acquiesced in the continuation of Class II Service in the I.T.O. grade only on the assurance that Grade III officers are generally posted only to the least important charges, or used to assist senior officers. * * * * If the Government cannot find a sufficient number of Class I officers and are compelled to use Class II ones in their places, the proper course is either to appoint the Class II Officers to Class I temporarily or to remunerate such class II officers by additional payments for doing more important work.

49. The only difference between the direct recruits and the promotees is that whereas the direct recruits have had no experience of assessment work, the promotees have and this by itself may entitle the promotees to rank senior to the direct recruits of that year, but I have not been able to discover any rational Basis on what principle the promotees of the subsequent three years can rank senior to the direct recruits who joined Class I Service three years earlier than the promotees did.

50. It may also be mentioned that from the year 1950 the departmental examinations that Class I Grade II Officers have to pass are two in number and of larger subjects than the departmental examinations that the Class II Grade III Officers have to pass and when these Class II Grade III Officers are promoted to class I Grade II Service they are not required to pass these subjects which Class I Grade II direct recruits have passed during the course of probation, for no direct recruit can get confirmed till he has passed the departmental examinations. As to the difference in the training of officers in Class, I and Class II, the following extract from Exhibit No. 22, letter C. No. 28(1) Admn. IT/49 dated 25-1-1950 from the Secretary, Central Board of Revenue to All Commissioners of Income Tax, may be usefully quoted:

* * * The Board have reviewed the existing arrangement for training of Probationers appointed to the Income Tax Services, in the light of the duties that these officers will have to perform on being posted to regular duty. They also consider that probationers in the Class I Service of Income Tax Officers should be given a broader training than Class II probationers; in order to fit them eventually for higher administrative and Secretariat posts.* * * *

51. The quota is fixed of the promotees and the direct recruits against permanent vacancies each year and this rule should ordinarily be applied to the persons who come against these permanent vacancies, but exigencies of service may need extra hands temporarily or for short intervals and for that purpose the recruitment has to be by promotion. Such recruitments admittedly were made in the present case and could only be made from Class II Grade III Service. But once they were made, those officers who come in those vacancies, whether in temporary capacity or in officiating capacity, and over and above the quota fixed for the promotees by virtue of this rule superseded all the direct recruits who invariably have come within their quota. By this process also the chances of promotion of the direct recruits have been considerably whittled down. Therefore, this rule directly in conjunction with the quota rule has led to discrimination in the same class of employment, that is, Class I Grade II Service, and, as I have already said, only two reasons were advanced to justify this discrimination. One of those two reasons administrative efficiency - I have

already dealt with and found to be of no consequence. The other reason is that it is the exocrine in assessment work in Class II which justifies the accelerated promotion. It is certainly not the experience in Class I Grade. II Service; and how can it justify accelerated promotion is beyond me. I have already said that the justification could only be to the extent of the same year''s promotees ranking senior to the same year''s direct recruits and no further. There are any number of direct recruits who have, after a year''s probation and within a few months of that, been entrusted to responsible positions which are meant for Class I Grade II personnel, and as I have already said if the experience-in Class II Grade III Service was the same thing as experience in Class I Grade II Service, the decision of the Supreme Court in Kishori Mohan Lal Bakshi''s case. AIR 1962 SC 1139, would have been different. It is also significant that the length of experience in Class II Grade III Service has no co-relation with the grant of seniority to promotees who come three years after the direct recruits so as to make them senior to the direct recruits who have been in Class I Service three years'' prior to their joining Class I Grade II Service. To illustrate, a Class 11 Grade III Income Tax Officer after 5 years may get promoted. His ''service excluding the period of probation would he three years. Another Income Tax Officer in the same service may get promoted after 8 years, while still another alter 12 years. It will be apparent from this that in the case of the first the actual experience is three years, in the case of the two others 5 years and 10 years respectively, but the seniority allowed by the rule is irrespective of the length of experience. Therefore, it is difficult to believe that the Rule 1(f)(iii) was based on the consideration of experience. To me it appears that it was purely a rule of thumb, and it is very difficult to say: What is the rational basis for the same? At least I have not been able to discover any, and the basis which has been urged in justification of the rule appears to be wholly inadequate. Moreover, I also cannot lose sight of the fact that those who join Class I Grade III Service by competition join on the basis of an objectiva test, and whereas those who Join on the basis of selection do so on the basis of a subjective test which varies from one individual officer to another. One can, if one has been long enough in Government service, visualize how people are promoted. It is not always the criteria of efficiency that is kept in view, many more factors enter into the matter of selection.

52. Moreover, the iniquitous working of this rule was recognised by the Union Finance Minister as well as by the various commisstons that were set up by the Government of India from time to time. In Exhibit ''K'' at p. 57 of the paper-book, in a representation from the Petitioner to the Secretary, Central Board of Revenue, New Delhi, there is a reference to the following effect:

* * * the Finance Minister announced that he had come to the conclusion that the rules had not been followed property and that the ''status quo'' could not be allowed to continue in the interest of the service and with a view to solving the problem amicably, the Finance Minister, however, appealed for an agreed compromise solution, failing which he would have to impose his decision.

The Report of the Direct Taxes Administration Enquiry Committee 1958-59, page 208, paragraph 8.52, Exhibit No. 20 is to the following effect:

8.52. - At present when a Class II Officer is promoted to Class I he gets a weightage of three years in seniority as compared to a direct recruit to Class I. Fears were expressed before us that this weightage to promo-tees over the direct recruits'' adversely affects the interests of the latter. The import of this system appears to be to give some priority to promotees in view of their past service in the Department. We understand that the operation of this rule has been rescinded by the Central Board of Revenue with effect from 1957 in our view, promotion to Class I is in itself a sufficient benefit given to Class II Officers. We, therefore, do not favour granting any further advantage in the nature of weightage.

53. It is also significant that there is no similar seniority rule when promotion is made from Class III Service to Class II Service. Our attention was also drawn to Government of India Home Department''s Memorandum No. 98/43 Ests. dated 24-4-1943 (Annexure No. 2) to all Departments of the Government of India, which runs as under:

* * * after consultation with the Federal Public Service Commission it has been decided that the seniority of an officer in a particular grade should be regulated in accordance with the following principles:

(a) in the absence of-special rules to the contrary, an officer''s seniority in any grade should be determined by the date of his permanent appointment to that grade. If two officers are appointed permanently to a particular grade on the same day, then seniority in that grade should be determined with reference to the dates on which they began to officiate continuously in that grade.

(b) When seniority is taken into consideration for the purpose of promotion from any grade to a higher grad or post, it should be reckoned not with reference to total service in the Department or office concerned but to length of service from the date of permanent appointment in the former grade only and in case of the kind referred to in the second sentence of Clause (a) from the date on which the officers concerned began to officiate continuously in that grade.

Therefore, it appears from what has been stated above that there is no rational basis on the basis of which the impugned rule can be sustained in its applicability to persons who are members of the same class of service, though of course they have entered it from different sources. But moment they are selected, they become members of that service and unless the impugned rule has any rational basis for discrimination it cannot be sustained.

54. The learned Attorney-General maintained that there was no connection between the seniority rule and the quota rule. Seniority rule, according to the learned Attorney-General, relates to the conditions of service whereas the quota rule merely rotates to the mode of recruitment. That is so, but where the mode

of recruitment is deviated and that deviation affects the seniority rule, in that situation, it cannot be said that the quota rule has no connection with the seniority rule.

55. At one stage an attempt was made to show that the seniority rule has not retarded the chances of promotion of the direct recruits, but ultimately the sama was given up, There can be no denying the fact that the rule does retard the chances of promotion, particularly when persons similarly situate are being differentiated on the basis of sources of recruitment. There is no distinction between them when they are in Class I Grade II Service. The promotees and the direct recruits both belong to Class I Grade II Service when the quota rule operates and it operates on the basis as already said of the sources of recruitment, and that can never be said to be a rational basis. It would be apparent from the decision of the Supreme Court in Kunj Beharilal Agarwal Vs. Union of India (UOI), , that their Lordships could have dismissed the petition on the short ground that the differentiation was not between the persons similarly situate on the ground that the source of recruitment was different. On the other hand, their Lordships were at pains to point out that the two services were different and not one integrated service, and, therefore, the rules of one service could not be applicable to the other. Their Lordships, on the facts of that case, held that the effect of the two army Instructions was that the two services remained separate and were not amalgamated into a unified service. The observations of their Lordships of the Supreme Court in paragraph 23, which are in these terms:

We consider, therefore, that on the date when the Constitution came into force the position was that for the determination of the relative seniority between the Extra. Temporary Clerks and the Temporary Clerks while in the case of the former the date from which they should be deemed to have come into the regular establishment and the common roll was August 1, 1949, in the case of the latter it was from the date when they entered service. On this basis the Petitioner could obviously not claim. that any rights as the seniority which he possessed on the date when the Constitution came into force ware, in. any way, restricted or denied to him by the impugned order on. April 20, 1955. It would be apparent that the order of Government of April 20, 1955, now impugned is really a concession in favour of the Petitioner and not any detraction from the rights that he possessed at the commencement of the Constitution. if the impugned order should now be vacated the result would be that the Petitioner would be relegated to the rights that he possessed under the orders of Government dated August 19, 1949 read with the clarification dated January 4, 1950. Obviously, that is not the relief which the Petitioner seeks by this petition in the circumstances the allegation that there has been an infringement of the fundamental right of the Petitioner to equal protection of the laws under (Art. 14 or equality of opportunity for employment under Article 16(1) must be held to have no factual basis. The fact was that the position of the Petitioner was improved and he was given a limited amount of seniority by the impugned order as compared to the rights which ho possessed on January 26, 1950. The impugned order, therefore, far from adversely affecting the Petitioner, really conferred upon him larger rights than he previously possessed.

clearly indicate the, basis on which the petition in that case was dismissed. The same view was adopted in dismissing a petition in the State of Punjab v. Joginder Singh AIR 1953 SC 913 in that case, to start with there were two independent services the Provincial Education Service and the Teachers employed in the District Boards or Local Bodies- Later on they were taken into Government employment, but separate sets of rules were framed for them. The argument before the High Court was that both the services were integrated services and were one service and on the basis of that the High Court had allowed the petition of the teachers, who had been taken to the State Service from the District Board or Local Bodies'' Service. Their Lordships of the Supreme Court reversed the decision of the High Court on the ground that both these services were independent services and the Government order of 27th September, 1957 did not integrate them into a single service.

56. These cases clearly indicate that if the persons are in the same service, then there cannot be different rules with regard to promotion in that service. These decisions indirectly support the contention of the direct recruits.

57. The observations of the Supreme Court in All India Station Masters'' and Assistant Station Masters'' Association, Delhi and Others Vs. General Manager, Central Railway and Others, support my conclusion on this part of the case. They are

It is clear that as between the members of the Same class the question whether conditions of service are the same or not may well arise. If they are not, the question of denial of equal opportunity will require serious consideration in such cases. Does the concept of equal opportunity in matters of employment apply, however, to variations in provisions as between members of different classes of employees under the State? in our opinion, the answer must be in the negative. The concept of equality can have no existence except with reference to matters which are common as between individuals, between whom equality is predicated.... Equality of opportunity in matters of employment can be predicated only as between persons, who are either seeking the same employment, or have obtained the same employment. It will, for example, plainly make no sense to say that because for employment as professors of colleges, a higher University Degree is required than for employment as teachers of schools, equality of opportunity is being denied. Similarly, it is meaningless to say that unless persons who have obtained employment as school teachers have same chances of promotions as persons who have obtained employment as teachers in colleges, equality of opportunity is denied. There is, in our opinion, no escape from the conclusion that equality of opportunity in matters of promotion, must mean equality as between members of the same class of employees, and not equality between members of separate, independent classes.

The learned Attorney-General advanced an argument that if we strike down Rule 1(f)(iii), people who have been promoted in accordance with the rule will have to be put down and the process may lead to great repercussions in the Department, and, therefore, we should not strike down the rule oven if it offends Article 16 of the Constitution. This argument is an argument of desperation. So far as this Court is concerned, it has the sacred duty of upholding the Constitution and strike down whatever offends its provisions. I need only refer to a passage in (1858) E B and E. 1024 (1033) which is as follows:

Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable.

58. After giving the matter my utmost consideration, I am clearly of the view that Rule 1(f)(iii) is ultra vires Article 16 of the Constitution because it lays down different standards of promotion vis-a-vis the same class of Income Tax Officers and, therefore, It must be struck down. With this rule, Clause (iv) of the Rule 1(f) will also automatically go. I further hold that where the quotas have been exceeded and the promotees, who formed that excess, have taken precedence over the direct recruits of that particular year would not be entitled to seniority in pursuance of the impugned rule. The Impugned rule is only held ultra vires so far as it supersedes the direct recruits of that year by the promotees who come in that Class in the next three years the rule would certainly be good to the extent that the promotees of that year will rank senior to the direct recruits of that very year.

59. In view of what has been stated above, we direct that the papers of this case be laid before Our Lord the Chief Justice for constituting a Full Bench to decide these matters.

