

A

DINKAR ANNA PATIL AND ORS.  
v.  
STATE OF MAHARASHTRA AND ORS.

NOVEMBER 9, 1988

B

[G.T. NANAVATI AND S.P. KURDUKAR, JJ.]

*Service Law :*

C *Maharashtra Sales Tax Officers Class-I (Recruitment) Rules, 1982/ Maharashtra Civil Services (Regulation of Seniority) Rules, 1982: Rules 4 and 4A/Rules 3(f) and 4—Post of Sales Tax Officers Class-I introduced in the Sales Tax Department—Appointment to the posts to be made by nomination and promotion in the ratio specified—Upto 1986, appointments made by promotion only—Quota rules violated—Recruitment Rules amended in 1987 by inserting rule 4A—Government empowered to violate rule 4 in case of*  
D *exigencies—Direct recruitment made to the said posts in 1988 only—Seniority Lists prepared by the State Government showing direct recruits below the promotees—Benefit of fortuitous period of service given to the promotees—Petition filed by the direct recruits before the Administrative Tribunal dismissed—Appeal preferred—On appeal, Held: The appointment of promotees*  
E *was fortuitous—No order for regularization was passed subsequently—Period of fortuitous service of the promotees to be excluded in preparing the Seniority List—Representations were sent by direct recruits against the Seniority Lists not responded—Hence the case cannot be said to be suffering from laches.*

F **In 1977, Government of Maharashtra, with a view to restructure the Department of Sales Tax, introduced a new cadre of Sales Tax Officers Class -I in the hierarchy one step above the Sales Tax Officers Class-II and below the Assistant Commissioner of Sales Tax. Accordingly, in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the State Government framed Maharashtra Sales Tax Officers Class-I (Recruitment) Rules, 1982 which came into force on 1st April, 1982. Rule 4**  
G **thereof provided that the appointment to the post of Sales Tax Officer Class-I by promotion and nomination to be in the specified ratio. On 21-06-1982, the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 were framed which provided the eligibility criteria. Rule 3(f) defined fortuitous appointment whereas Rule 4 stipulated that services on account of fortuitous appointment were to be excluded in computing the length of service.**

H

In October, 1982, the respondent replaced the said Recruitment Rules issued in March with a fresh set of rules namely "The Maharashtra Sales Tax Officers Class-I (Recruitment) Rule, 1982" with retrospective effect. Under the new rules, the ratio of filling up the promotional and quota posts remained the same. During the period 1982-86, no appointment was made by nomination. On the contrary, the respondent Government filled 747 posts of Sales Tax Officers Class-I *en bloc* by giving promotions to the promotees in violation of the statutory quota rules. The said appointments were provisional and fortuitous.

In 1988, the appellants for the first time were appointed as Sales Tax Officers Class-I by way of direct recruitment. The respondent government, by the Maharashtra Sales Tax Officers Class-I (Recruitment) (Amendment) Rules, 1987, inserted Rule 4A in the Recruitment Rules, 1982. According to the said newly inserted rule the State Government, in case of requirement of exigencies, in consultation with the Maharashtra Public Service Commission was empowered to make appointments to the posts in relaxation of the percentage prescribed in Rule 4 for appointment by promotion and nomination.

On the basis of the aforesaid Recruitment Rules the respondent published a Provisional Seniority List of Sales Tax Officers Class-I as on 01-04-1987 which was finalised later. Names of the appellants could not be included in the said list as the appellants were appointed only in September, 1988. Another Provisional Seniority List was published in January wherein the promotees i.e. the private respondents were shown above the direct recruits i.e. the appellants. The appellants' representation challenging legality of the said List was rejected. The third provisional seniority list was published in April, 1993 wherein the quota rule was applied following a decision of the Administrative Tribunal in the case of Sales Tax Inspectors wherein a direction was made to apply the quota rules. However, the said list also did not apply the quota rules finally and the appellants' representation was not responded. In another seniority list published in 1994, again the respondents were given seniority over the appellants.

Feeling aggrieved, the appellants filed an original petition before the Administrative Tribunal. The said petition was dismissed by the Tribunal holding that the decision of the Government to fill up the posts by promotions was not only conscious but also had the concurrence of the Maharashtra State Public Service Commission and also Rule 4A of the Recruitment Rules had retrospective effect. Also Rule 7 of the Seniority

**A** Rules empowered the Government to relax rules after consultation with the Commission. The appellants' challenge to the Seniority Lists in the petition was held to be suffering from laches. Hence the present appeal.

**B** The appellants contended that the respondent Government was not empowered to violate the quota rules and promote the departmental candidates even against the posts reserved for direct recruits. The said 747 promotions were *per se* illegal and violated Rules 4 and 4A of the Recruitment Rules and also there was nothing on record to indicate any conscious decision of the Government. It was also contended that even assuming the retrospective effect of Rule 4A, yet the promotions continued to be fortuitous as no order of regularisation was passed subsequently. The respondent urged that the Seniority Lists were valid and did not require disturbance.

**C** Allowing the appeal, this Court

**D** HELD : 1.1. The promotion cadres of the private respondents on record unmistakably indicate that their promotions/appointments were fortuitous or until further orders and some were on trial basis. The respondents were unable to point out from the records any order passed by the Government of Maharashtra regularising private respondents and if this be so, their appointments must be deemed to have been continued as fortuitous until further orders and on trial basis. Resultantly, this period of fortuitous service will have to be excluded in terms of second proviso to Rule 4 of Maharashtra Civil Services (Regulation of Seniority) Rules, 1982. [579-B-C]

**E** 1.2. The Administrative Tribunal held that the word "may" used in Rule 4A of the Recruitment Rules is directory but to give such a meaning to the said word would render the very object of consultation with the Commission, wherever necessary, nugatory. It would give unbridled power to the Government to dispense with the consultation with the Commission which may result in arbitrary exercise of the powers by the Authority. This could never be the object of Rule 4A. The word "may" must mean "shall" and this is also obvious from the correspondence between the State Government and the Commission. The Government of Maharashtra wanted to relax quota rule but the Commission was not agreeable and ultimately it relented to the request of the Government and suggested amended Rule 4A. This suggestion was accepted and accordingly the amendment was inserted in the rules. [579-F]

**H** *Keshav Chandra Joshi and Ors. v. Union of India and Ors.*, [1992] Supp.

1 SCC 272, relied on.

1.3. From the correspondence between the Government and the Commission, it is quite clear that the latter was resisting any such relaxation of quota rule and ultimately vide its letter dated 28-03-1989, the Commission relented to the desired relaxation and suggested amendment to the Recruitment Rules by inserting Rule 4A. Secondly, in order to give effect Rule 4A as regards regularisation, the Commission had asked the Secretary, Finance Department to furnish the necessary details as contained in the letter dated 28-03-1989 so that regularisation could be undertaken. Both these requirements were not satisfied by the Government of Maharashtra while appointing/promoting the private respondents as Sales Tax Officer Class-I. If this be so, then the promotion/appointment orders of private respondents cannot be justified by taking shelter of Rule 4A.

[580-H; 581-A]

2. The seniority list prepared as on 01-04-1987 could not have been challenged by the appellants because at that point of time, they were not born in the cadre. But, however, the subsequent provisional list as on -01-01-1991 which was published on 20-01-1992, the appellants did make their representation against the same on 23-09-1992. Alongwith the said representation, they also annexed a copy of the judgment dated 02-01-1992 rendered by the Tribunal giving certain directions in respect of seniority list of Sales Tax Inspectors to be recast strictly in accordance with the quota rule as provided under the Sales Tax Inspectors Recruitment Rules. These rules are similar to the Rules in question. The said representation was rejected and the list was finalised on 01-02-1993. The third provisional seniority list as on 01-01-1992 of Sales Tax Officers Class-I was published on 26-01-1993 wherein quota rule was applied and the direct recruits of 1988 batch were placed above some 22 promotees who were shown in the earlier seniority list as senior to them. However, while preparing the final seniority list dated 29-12-1993, the position as reflected in 1991 seniority list was again restored giving benefit of fortuitous service to the promotees and consequently, the appellants were shown below these promotees. The appellants did file their representation against the said seniority list on 30-03-1994 but there was no response one way or the other from the government. Again another provisional seniority list as on 01-01-1993 was published on 13-06-1994 and the said list was again prepared in violation of quota rule. It is true that the appellants did not file any representation against this provisional seniority list because it was not in any way different

**A** than the one prepared on 29-12-1993. Since, there was no purpose in filing further representation, the appellants approached the Tribunal for appropriate reliefs. Therefore, the original petition of the appellants could not have been branded as suffering from laches. [581-C-H]

**B** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5582 of 1998.

From the Judgment and Order dated 7.1.97 of the Central Administrative Tribunal, Bombay in O.A. No. 126 of 1995.

K.K. Singhvi, B.N. Singhvi and V.K. Garg for the Appellants.

**C** M.S. Nargolkar, S.S. Shinde and D.M. Nargolkar, in-person for Respondent No. 19.

The Judgment of the Court was delivered by

**D** S.P. KURDUKAR, J. Leave granted.

**E** 2. The appellants are the direct recruits as Sales Tax Officers Class-I in the Sales Tax Department of the State of Maharashtra. They were appointed on or after 6th September, 1988, after following the prescribed procedure laid down in the Maharashtra Sales Tax Officers Class-I (Recruitment) Rules, 1982 which came into force on October 14, 1982. Respondents 4 to 10 are the departmental promotees to the post of Sales Tax Officers class-I who will be hereinafter referred to as "promotees". The appellants seek to impinge the judgment and order dated June 7, 1997 passed by the Maharashtra Administrative Tribunal, Mumbai Bench, Mumbai (for short 'the Tribunal') on Original Application No. 126 of 1995 filed by them challenging legality and correctness of certain seniority lists published in 1991, 1993 and 1994. These seniority lists are in respect of Sales Tax Officers Class-I comprising of promotees and direct recruits.

**F** The Sales Tax Department is an important department which is entrusted with the work of revenue collection of the Government of Maharashtra. The Sales Tax Department is headed by the Commissioner of Sales Tax as the Principal Enforcement Officer. The hierarchy of other officers in the Sales Tax Department which is relevant in the present appeal is as follows :-

Additional Commissioner of Sales Tax.

**H** Deputy Commissioner of Sales Tax,

Assistant Commissioner of Sales Tax,

Sales Tax Officer Class-II,

Senior Sales Tax Inspectors, and

Sales Tax Inspectors.

With a view to restructure the department, the Government of Maharashtra in 1977 accepted the Yardi Committee report and on the basis thereof, a new cadre of Sales Tax Officers Class-I was introduced in the hierarchy one step above the Sales Tax Officers Class-II and below the Assistant Commissioner of Sales Tax. The Government of Maharashtra accordingly in exercise of powers conferred by the proviso to Article 309 of the Constitution of India, framed the Maharashtra Sales Tax Officers Class-I (Recruitment) Rules, 1962 which came into force on 1st April, 1982. The said Recruitment Rules, *inter alia*, provided the mode and manner of recruitment to the post of Sales Tax Officers Class-I. Rule 4 thereof provided that the appointment to the post by promotion and nomination shall be made in the ratio of 60:40 for the first three years and thereafter in the ratio of 50:50. On June 21, 1982, the Maharashtra Services (Regulation of Seniority) Rules, 1982 (for short 'Seniority Rules') were framed providing the eligibility criteria which is not the subject matter of present controversy. Under the said Rules, fortuitous appointment is defined in rule 3 (f) whereas rule 4 sets out the general principles of seniority. It has been clearly stated therein that services on account of fortuitous appointment shall be excluded in computing the length of service.

4. On October 15, 1982, the Government of Maharashtra, in exercise of its powers under Article 309 of the Constitution, framed the fresh set of rules called "The Maharashtra Sales Tax Officers Class-I (Recruitment) Rules, 1982" (for short 'the rules') replacing the earlier recruitment rules issued in March, 1982. It is important to note that under these new Rules, the ratio of filling up the post by promotion and nomination remained the same except the eligibility criteria that was slightly altered which is again not the subject matter of present dispute. These new set of rules repealed the earlier rules retrospectively. Thus, the existing rules provide a quota for filling up the posts by promotion and nomination as indicated earlier.

5. It was admitted on behalf of the State Government that the number of posts of Sales Tax Officers Class-II was 472 till the government converted

A 382 posts into Sales Tax Officers Class-I with effect from the date of filling the posts vide G.R. dated 16th June, 1982.

B 6. Despite the fact that the Rules came into force on October 15, 1982, the respondent Nos. 1 and 3 did not adhere to the quota rule and went on giving promotions to promotees as Sales Tax Officers Class-I. During the period 1982-86, no appointment by nomination was made. On the contrary the State of Maharashtra-the first respondent filled 747 posts of Sales Tax Officers Class-I en bloc by giving promotions to the promotees in violation of the statutory quota rules. Neither the vacancies were earmarked for the respective quotas nor any efforts were made to advertise and fill in the posts by nomination. It is the case of the appellants which is also born out from the various appointment/promotion orders of the promotees as Sales Tax Officers Class-I that their appointments were provisional and fortuitous and if this be so, the period during which they continued to work as such ought to have been excluded in terms of rule 3 (f). The seniority lists of Sales Tax Officers Class-I prepared under rule 4 of the Seniority Rules are unsustainable as they were prepared contrary to rule 3 (f) of the said Rules. Some of the appointment letters by way of illustrations placed on record and not disputed do indicate that the promotees were appointed as Sales Tax Officers Class-I on provisional, fortuitous, trial basis, until further orders and approval by the State Government. Suffice it to refer to the promotional orders of Shri P.N. Vathode and others contained in office order dated 22nd November, 1983, issued by the Commissioner of Sales Tax, Maharashtra State, Bombay. The relevant portion thereof reads as under:-

F The following Sales Tax Officers Class-II are promoted and appointed to the post of Sales Tax Officers Class-I. *Until further orders and until approval by the Government*, and their posting appointments are made as per the following :-

Sr. No.	Name of sales Tax Officer	Office where these persons are presently posted.	The office where they will be posted on such appointments
G 1	2	3	4
1.	Sh. P.N. Vathode	Sales Tax Officer Class-II (25)P Division Bombay.	On promotion as Sales Tax Officer Class-I he would be appointed against the post held by Shri P.L. Mulcutkar as

H

			Assistant Commissioner of Sales Tax.	A
2.	xxx	xxx	xxx	
3.	xxx	xxx	xxx	
4.	xxx	xxx	xxx	B
	.....			
	.....			
37.	xxx	xxx	xxx	
38.	Sh. V.R. Patil	Sales Tax Officer Class-I, Kohlapur	On transfer as Sales Tax Officer (4) KPR Division, Bombay, against the post by Shri M.R. Kulkarni, Sales Tax Officer, on his posting.	C

---

Paragraph 2 of the said office order is to the following effect :-

“The above appointments by promotion of the Sales Tax Officer Class-II, to that of Sales Tax Officer Class-I, *are fortuitous and until further orders and after approval of the Government.* S/Shri R.M. Patil, S.R. Kulkarni, G.B. Naik, M.D. Pore, R.K. Beedkar and K.S.P. Blaruah are promoted *on trial basis.*”

[Emphasis supplied]

Thus, it is clear that 747 Sales Tax Officers Class-II came to be promoted as Class-I Officers in violation of quota rule.

7. That the posts of Sales Tax Officers Class-I were advertised for the first time in January, 1986 of which the results were declared in August, 1987 and pursuant thereto the appellants were appointed as Sales Tax Officers Class-I on 6th September, 1988. To demonstrate how the appointments were made in violation of quota rule between 1982 and 1994, it was pleaded on behalf of the appellants that the State Government had filled in 1118 posts out of which 956 by promotion and only 162 by direct recruits.

8. The Government of Maharashtra, in exercise of its powers under Article 309 of the Constitution, amended the Rules (October 19, 1982 ) by the Maharashtra Sales Tax Officers Class-I (Recruitment) (Amendment) Rules, 1987. By this amendment, Rule 4A was inserted and it was provided that it

A shall always be deemed to have been inserted. Before we set out Rule 4A to complete the narration of facts, we may reproduce relevant rules contained in the Maharashtra Sales Tax Officers Class-I (Recruitment) Rules, 1982 which came into force on October 15, 1982 :-

B "1. By promotion of a suitable Sales Tax Officer having not less than three years service as Sales Tax Officer, rendered prior to the 15th day of October, 1982 including service, if any, as Sales Tax Officer, Class-II, rendered after the 15th day of October, 1982, or

2. xxx xxx xxx

C

3. xxx xxx xxx

4. Appointment to the post by promotion and nomination shall be made in the ratio of 60:40 for the first three years and thereafter in the ratio of 50:50

D

5. xxx xxx xxx

6. xxx xxx xxx

E Then follows the amendment which was brought into force on 30th December, 1987 by inserting Rule 4A and providing that the said Rule shall be inserted and shall be deemed always to have been inserted. It reads as under :-

F "4A- Notwithstanding anything contained in rule 4, if in the opinion of the State Government, the exigencies of service so require, the Government may, in consultation with the Maharashtra Public Service Commission, wherever necessary, make appointments to the posts in relaxation of the percentage prescribed in rule 4 for appointment by promotion and nomination."

G

9. The Government of Maharashtra on the basis of the aforesaid Rules on May 11, 1991, published a provisional seniority list of Sales Tax Officers Class-I as on 1st April, 1987. Since none of the appellants were-in service on 1st April, 1987 as they were appointed on or after 6th September, 1988, their names were not included in the said provisional seniority list and they had

H

no reason to make any representation against the said provisional seniority

list. It was finalised on 11th December, 1991. Subsequent provisional seniority list, as on 1st January, 1991 was published on 20th January, 1992. In this provisional seniority list, the promotees were shown above the direct recruits. Since this provisional seniority list had adversely affected their positions in the list, they, on 23rd September, 1992 submitted their representation challenging the legality and correctness of the seniority list and prayed for appropriate corrections. At about the same time, an identical issue relating to the seniority list of the Sales Tax Inspectors was the subject matter of decision by the Tribunal wherein it was directed that the seniority of Sales Tax Inspectors be recast strictly in accordance with quota rule as provided under their Recruitment Rules. It was stated in the representation that the Recruitment Rules of Sales Tax Officers Class-I and the said judgment being of a competent Tribunal be followed while recasting the seniority list of the appellants as on 1st January, 1991. However, the representations filed on behalf of the appellants were rejected and the seniority list came to be finalised on 1st February, 1993. In the meantime, the third provisional seniority list as on 1st January, 1992 of Sales Tax Officers Class-I was published on 26th April, 1993 wherein the quota rule was applied following the decision of the Tribunal in the matter of Sales Tax Inspectors and accordingly the direct recruits of 1988 batch were placed above some 22 promotees who were shown above the direct recruits in the earlier lists. However, while preparing the final seniority list dated 29th December, 1993, the government restored the 1991 position by allowing benefit of fortuitous service to the promotees and placing them above the appellants and other direct recruits. The appellants, therefore, made a representation against the same on 30th March, 1994 but, however, no response was received from the Government of Maharashtra. Thereafter, another provisional seniority list as on 1st January, 1993 was published on 30th June, 1994 and the said seniority list was again made in violation of quota rule and the promotees were given seniority over the direct recruits reckoning their seniority from the date they were given the fortuitous appointments. The appellants believed that no purpose will be served by making representations against the provisional seniority list published on 30th June, 1994 because their earlier representations made against the final seniority list dated 29th December, 1993 remained unattended, they therefore, filed the present original petition before the Tribunal vindicating their grievances as regards these seniority lists.

10. It was contended before the Tribunal that the Government has prepared these seniority lists in total violation of the Rules (October 14, H

A 1982) inasmuch as erroneously construed rule 4A of the Rules. The promotions of promotees being contrary to the quota rule, the same could not be termed as regular promotions under rule 4A of the Rules. Unless other requirements contained therein were complied with, the period of fortuitous service of a promotee could not be reckoned for the purposes of determining the seniority of promotees and direct recruits. No order of regularisation in respect of these promotees was issued by the Government and, therefore, such promotees cannot be treated senior to the direct recruits who were regularly appointed. The seniority lists prepared as on 11th December 1991, 23rd September, 1992 and 30th March, 1994 are illegal and unsustainable in law. The appellants, therefore, prayed that fresh seniority list be prepared strictly in accordance with rule 4 of the Rules.

11. The State of Maharashtra filed its return and justified the appointments contending, inter alia, that having regard to the exigencies of service, the promotees were given the promotions. Moreover, it was not possible to have recourse to the direct recruits by following quota rule because of time constraint. Besides, the promotees were experienced hands and were well equipped to deal with the service exigencies. Rule 4A being retrospective in operation, it will be deemed that these promotees were promoted as if this rule was in existence from October, 1982. Moreover, the State Government in consultation with the Maharashtra Public Service Commission ( hereinafter referred to as "MPSC") has relaxed the quota rule by inserting rule 4A in order to streamline the department with experienced hands to meet the service exigencies. The government had taken a conscious decision to promote the departmental candidates as Sales Tax Officers Class-I with a view to bring efficiency in the working and have effective machinery to collect the revenue. The private respondents also filed separate return and adopted the contentions raised on behalf of the Government of Maharashtra. In addition thereto, it was pleaded that they have been rightly promoted as Sales Tax Officers Class-I in accordance with law after consultation with MPSC. Any change in the seniority lists at this stage would adversely affect the efficiency in the department. Many of the senior officers by now earned further promotions and resultantly they will have to be reverted. Moreover, the appellants did not file their objections to the seniority list within limitation and, therefore, their challenge at this belated stage be not entertained. The contentions raised on behalf of the appellants are devoid of any merit and the original petition be dismissed.

12. The Tribunal after considering the rival contentions and on perusal of the government files rejected the original petition of the appellants holding that the decision of the Government to fill up the posts of Sales Tax Officers Class-I by promotions was not only conscious decision but it had a concurrence of MPSC. Rule 4A of the Rules having been made retrospectively applicable, the promotions of the promotees can not be faulted on any ground. Besides rule 7 of Seniority Rules empowers the government after consultation with the MPSC to relax rules in certain cases if it is satisfied that the operation of any of these rules causes or is likely to cause undue hardship to any government servant or class of government servants or that the relaxation is necessary in the public interest for the reasons recorded in writing. The Government had taken a conscious decision in terms of rule 7. After referring to the correspondence between the Finance Department and MPSC which commenced on 20th October, 1983 and ended with the latter's approval for relaxing the quota rule vide letter dated 28th March, 1989, accepted the suggestion of MPSC to amend the Rules by adding rule 4A retrospectively. In view of these developments, Tribunal opined that the decision of the Government of Maharashtra to promote the departmental candidates to the posts of Sales Tax Officers Class-I in relaxation of quota rule did not suffer from any vice. The Tribunal then observed :-

“The primary purpose of the appointment of the applicants and the other direct recruits and even the promotees, was to increase collection of Sales Tax for the Government. Who is the employer: giving them employment was only the means for achieving that purpose. Viewed in that light, it is tempting to make light of their grievance. But that must not be done as they have acquired rights under their Recruitment Rules and M.C.S. Rules and executive orders made by the Government. Besides, they joined government service with legitimate expectations of promotions to higher positions and the two applicants have remained S.T. Os Class-I for more than 6 years now. Those are factors to be remembered while deciding their O.A.”

The Tribunal then held that the Government did not make efforts to make appointments by nomination for more than three years. The first requisition of the Finance Department sent to the MPSC for selection of candidates by nomination was in 1986 and it was confined to only 50 posts though the requisition should have been for 166 posts in the ratio of 40 (60:40). The first batch of the appellants was selected in 1987 and their

A appointments as Sales Tax Officers Class-I were made in September, 1988. The Tribunal then held that the Government had no intention to revert the promotees which was obvious from the fact that it sought the approval of MPSC in respect of these promotees though belatedly vide letter dated 20th October, 1983 and continued to do so even after MPSC refused to give its approval and ultimately it suggested amendment to the Rules by inserting

B rule 4A in the Rules relaxing the quota rule. The Tribunal also held that since the appellants did not challenge the seniority lists published on 11th December, 1991, 1st February, 1993 and 29th December, 1993 within time, it must follow that present action suffers from laches. Consistent with these findings, the Tribunal dismissed the original application filed by the appellants.

C 13. Mr. Singhvi, learned Senior Counsel appearing in support of this appeal, urged that the Tribunal has totally misconstrued rule 4A. According to learned counsel, the Rules provide a quota between the promotees and the direct recruits. It was, therefore, not permissible for the Government of Maharashtra to violate the quota rule and promote the departmental candidates

D even against the vacancies/posts reserved for direct recruits. In the absence of any material on record including the conscious decision of the Government to indicate that quota rule was broken down, any relaxation in quota rule would be without authority of law and illegal and no promotions could have been given to the departmental candidates under the pretext of exigencies of

E service. The promotions of 747 Sales Tax Officers Class-II to the posts of Sales Tax Officers Class-I were per se illegal and in violation of rules 4 and 4A. The Government files do not indicate any conscious decision having been taken by the Government in prior consultation with the MPSC while promoting the departmental candidates to the posts of Sales Tax Officers

F Class-I between 1982 and 1986. He led much stress on the communication of the MPSC resisting any relaxation in quota rule. He also urged that assuming that rule 4A has been retrospectively made applicable from October 10, 1982, yet the appointments/promotions of the private respondents continued to be fortuitous. Because no order was issued by the Government of Maharashtra regularising their services retrospectively, In fact, the MPSC in its letter

G dated March 28, 1989 asked the Secretary, Finance Department:

H “..... the Commission had accorded its sanction to relax the percentage retrospectively prescribed for the posts of sales Tax Officers Class - I on the basis of the amended provision to the Recruitment Rules and approval of appointments to 747 vacancies fallen upto 31st December, 1986 according to it.

The yearwise figures regarding the availability of posts and full confidential records of the concerned officers may please be sent to the Commission to take the decision on the pending Select Lists in view of the above mentioned decision of relaxing the percentage provided in the Recruitment Rules to regularise the promotions of the Sales Tax Officers Class-I from 1982 to 31st December, 1986.”

Relying upon this letter, Mr. Singhvi, submitted that the private respondents could not be said to have been regularised as Sales Tax Officers Class-I till 20th of March, 1989 and there is no order on the record to show that the Government has in fact regularised the promotions /appointments of private respondents in prior consultation with the MPSC in terms of rule 4A. The impugned seniority lists prepared in violation of rule 3 (f) read with rule 4 of Seniority Rules (annexure -II) are unsustainable. Rule 4A of Rules cannot save such unsustainable seniority lists.

14. Mr. Nargolkar, learned Senior Counsel appearing for the State of Maharashtra, supported the judgment of the Tribunal and adopted the reasoning given in the impugned judgment. He urged that seniority lists are valid and be not disturbed at this point of time.

15. Mr. Nakage, the respondent No. 10 appearing in person sought to justify not only his promotion but also other similarly situated colleagues as Sales Tax Officer Class-I. According to him, the private respondents have acquired a right in the posts of Sales Tax Officers Class-I by virtue of their appointments which are not only in confirmity with rule 4A but these promotions were made by the Government of Maharashtra after taking a conscious decision to relax quota rule. Any contrary view then the one taken by the Tribunal would cause great hardship to these respondents. He, therefore, prayed that the appeal be dismissed.

16. After careful consideration of the rival contentions and on going through the records produced before us, we are of the considered view that the impugned judgment of the Tribunal is unsustainable in law as well as on facts of the present case.

17. The Rules under consideration are framed by the Government of Maharashtra in exercise of its powers under Article 309 of the Constitution of India and therefore, they are statutory rules holding the field. From the promotion orders of the private respondents, it leaves no manner of doubt

A that they were promoted/ appointed as Sales Tax Officers Class-I between 1982 and 1986 under these Rules. Rule 4 provides that appointment to the said post by promotion and nomination *shall be* made in the ratio of 60:40 for the first three years and thereafter 50:50. The promotion orders of the private respondents on record unmistakably indicate that their promotions/

B appointments were fortuitous or until further orders and some were on trial basis. Except these promotion orders. No other order regularising their promotions/appointments at any point of time under rule 4A was brought to our notice either by the counsel for the State Government or the private respondents. Therefore, the effect of such promotions /appointments has to be traced under the Rules only. The Maharashtra Civil Services (Regulation

C of Seniority ) Rules. 1982 were framed under Article 309 of the Constitution and were brought into force on 21st June, 1982. Applicability of these rules in the present case is not disputed. Rule 3(f) defines fortuitous appointment as under :-

D “3(f)-“Fortuitous appointments” means a temporary appointment made pending a regular appointment in accordance with the provisions of the relevant recruitment rules.”

Rule 4 relates to the general principle of seniority:-

E “4. *General Principles of Seniority-*

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

F Provided that, for the purpose of computing such service, any period of absence from the post, cadre or service, due to leave, deputation for training or otherwise or on foreign service or temporary officiation in any other post shall be taken into account, if the competent authority certifies that the Government servant concerned would have continued in the said post cadre or service during such

G period, had he not proceeded on leave or deputation or been appointed temporarily to such other post :

H Provided further that the service, if any, rendered by him as a result of a fortuitous appointment shall be excluded in computing the length of service and for the purpose of seniority he shall be deemed to have been appointed to the post or in the cadre or service on the

date on which his regular appointment is made in accordance with the provisions of the relevant recruitment rules.” A

In view of the aforesaid provisions, the question would be as to whether the period during which private respondents continued to hold the posts of Sales Tax Officers Class-I on fortuitous basis, until further orders and until approval by the Government could be reckoned for the purposes of determining their seniority in the said cadre. The answer obviously is in the negative unless the regularisation is in confirmity with rule 4A. As stated earlier, the respondents were unable to point out from the records any order passed by the Government of Maharashtra regularising private respondents and if this be so, their appointments must be deemed to have been continued as fortuitous until further orders and on trial basis. Resultantly, this period of fortuitous service will have to be excluded in terms of second proviso to rule 4 of the Seniority Rules. B C

18. Coming to the interpretation of rule 4A, it is no doubt true that the language used therein indicates that the said rule is made applicable retrospectively from the date when the Rules were made applicable w.e.f. October 10, 1982. Rule 4A opens with non-obstante clause and provides that if in the opinion of the State Government, the exigencies of service so require, the government *may in consultation with the MPSC wherever necessary* make appointments to the post in relaxation of the percentage prescribed in rule 4 of the Rules by promotion and nomination. The Tribunal held that the word "may" used in this rule is directory but in our considered view to give such a meaning would render the very object of consultation with the MPSC wherever necessary nugatory. It would give unbridle power to the government to dispense with the consultation with MPSC which may result into arbitrary exercise of the powers by the Authority. This could never be the object of rule 4A. In our considered view, the word "may" must mean "shall" and this is also obvious from the correspondence between the State Government and MPSC. The Government of Maharashtra wanted to relax quota rule but MPSC was not agreeable and ultimately it relented to the request of the Government of Maharashtra and suggested amended rule 4A. This suggestion was accepted and accordingly the amendment was inserted in the Rules. We also find support to our view from the decision of this Court in *Keshav Chandra Joshi and Ors. v. Union of India and Ors.*, [1992] Supp 1 SCC 272. This Court was dealing with the interpretation of rule 27 of U.P. Forest Service Rules, 1952 and the said rule is similar to rule 4A. While construing the word "may" used in rule 27, this Court held that the word "may" has to be read as "shall" and, D E F G H

A therefore, consultation is mandatory. It must, therefore, follow that the MPSC gave its approval to the relaxation vide its letter dated March 28, 1989 but by that time, several appointments of the departmental candidates on similar terms in the cadre of Sales Tax Officers Class-I were made exceeding quota rule. As far as the regularisation process is concerned, it is quite clear from the letter dated March 28, 1989 by the MPSC to the Secretary, Finance Department calling upon the latter to furnish the details about the availability of posts yearwise with confidential records thereof in order to enable the Commission to take the decision on the pending select list and to regularise the promotions of the Sales Tax Officers Class-I from 1982 to December 31, 1986. As stated earlier, the respondents did not produce any order regularising these private respondents. The appellants were appointed by nomination on or after September, 1988 and therefore, their placement in the seniority *vis-a-vis* the promotees will have to be determined on the basis of date of regular appointment in the cadre excluding the period of fortuitous appointment. Consequently, the impugned seniority lists as on 1991, 1993 and 1994 shall be modified suitably. In our considered view, rule 4A will have to be construed as indicated above and any other construction to the said rule would violate the very object of quota rule.

19. Coming to the next argument which weighed with the Tribunal, namely, that the relaxation of quota rule under rule 4A was necessitated due to service exigencies. It was sought to be justified on the premise that experienced officers were needed to man the cadre of the Sales Tax Officers Class-I. The Tribunal in its judgment has not considered the situation where quota rule is broken down because no such argument was advanced before it. The argument before the Tribunal on behalf of the appellants was simple, namely, that the requirements of rule 4A were not complied with by the Government of Maharashtra while giving promotions to the departmental candidates/promotees as Sales Tax Officers Class-I. The Government could have resorted to the relaxation of quota rule in favour of the departmental candidates/promotees provided they had done so in consultation with the MPSC being a condition precedent under rule 4A and then made the appointments/promotions. From the correspondence between the Government of Maharashtra and MPSC, it is quite clear that the latter was resisting any such relaxation of quota rule and ultimately vide its letter dated March 28, 1989, MPSC relented to the desired relaxation and suggested amendment to the rules by inserting rule 4A. Secondly, in order to give effect to rule 4A as regards regularisation, the MPSC had asked the Secretary, Finance Department to furnish the necessary details as contained in the letter dated

March 28, 1989 so that regularisation process could be undertaken. Both these requirements, in our considered view, were not satisfied by the Government of Maharashtra while appointing/ promoting the private respondents as Sales Tax Officer Class-I. If this be so, then the promotion/ appointment orders of private respondents cannot be justified by taking shelter of rule 4A.

20. The Tribunal upheld the contention raised on behalf of the Government of Maharashtra and the private respondents that the action of the appellants in challenging the seniority lists was belated one and the same deserved no consideration. This finding of the Tribunal, in our considered view, cannot be sustained. The seniority list prepared as on 1st April 1987 could not have been challenged by the appellants because at that point of time, they were not born in the cadre. But, however, the subsequent provisional list as on 1st January, 1991 which was published on 20th January, 1992, the appellants did make their representation against the same on 23rd September, 1992. Along with the said representation, they also annexed a copy of the judgment dated 2nd January, 1992 rendered by the Tribunal giving certain directions in respect of seniority list of Sales Tax Inspectors to be recast strictly in accordance with the quota rule as provided under the Sales Tax Inspectors Recruitment Rules. These Rules are similar to the Rules in question. The said representation was rejected and the list was finalised on 1st February, 1993. The third provisional seniority list as on 1st January, 1992 of Sales Tax Officers Class-I was published on 26th January, 1993 wherein quota rule was applied and the direct recruits of 1988 batch were placed above some 22 promotees who were shown in the earlier seniority list as senior to them. However, while preparing the final seniority list dated 29th December, 1993, the position as reflected in 1991 seniority list was again restored giving benefit of fortuitous service to the promotees and consequently, the appellants were shown below these promotees. The appellants did file their representation against the said seniority list on 30th March, 99 but, there was no response one way or the other from the Government of Maharashtra. Again, another provisional seniority list as on 1st January, 1993 was published on 13th June, 1994 and the said list was again prepared in violation of quota rule. It is true that the appellants did not file any representation against this provisional seniority list because it was not in any way different than the one prepared on 29th December, 1993. Since, there was no purpose in filing further representation, the appellants approached the Tribunal for appropriate reliefs. Having regard to this background, we are of the firm opinion that the original petition of appellants could not have been branded as suffering from laches.

A The appellants did approach the Government of Maharashtra as well as the Tribunal vindicating their grievance as regards their placements in the seniority lists.

21. In fairness, we must refer to the submissions made before us by Mr. Nakace-respondent No. 10. The sum and substance of his argument was that the Government was justified in relaxing quota rule in favour of the promotees. The exigencies of service did require the experienced officers to man the class-I cadre in order to augment the government revenue. It was not possible for the Government to appoint direct recruits in their quota by taking recourse to rule 4 at an early date. He also submitted that these private respondents have been in office as Sales Tax Officers Class-I for all these years and some of them have either retired or holding higher promotional posts. It would be too harsh to deprive them of their status after serving for more than a decade. He adopted the reasoning given by the Tribunal. Mr. Nakade also relied upon certain decisions of this Court which we have gone through very carefully. In our considered view, all these decisions are not on the issues involved in the present case. Moreover, the phraseology of the rules in all these decisions was quite different. Thus, these judgments do not advance the case of the private respondents.

22. In view of our conclusions recorded hereinabove, the three seniority lists are unsustainable and consequently they are quashed and set aside and respondent Nos. 1 and 2 are directed to prepare a fresh seniority list of promotees and nominees on the basis of the date of appointments of the respective Sales Tax Officers Class-I in that cadre ignoring the period during which the private respondents and other similarly situated Sales Tax Officers Class-I were appointed on fortuitous basis, until further orders or on long term basis etc. The date of regularisation shall be the relevant date for the purpose of fixing the inter seniority of promotees and nominees.

23. In the result, the impugned judgment and order dated January 7, 1997 passed by the Tribunal is set aside and the respondent Nos. 1 and 2 are directed to prepare a fresh seniority list in terms of this judgment expeditiously and finalise the same within six months from today. In the circumstances, there will be no order as to costs.

R.C.K.

Appeal allowed.