

Original Application No. 3338 of 2002

New Delhi, this the 31<sup>st</sup> day of May, 2004HON'BLE MR. KULDIP SINGH, MEMBER (JUD.)  
HON'BLE MR. S. A. SINGH, MEMBER (A)S. Wadia  
Additional Director  
A-103, Ashok Vihar,  
Delhi-110052.

. . . Applicant

By Advocate: In person.

## VERSUS

1. Union of India  
Through the Secretary,  
Department of Revenue,  
Ministry of Finance,  
North Block,  
New Delhi-110 001.
2. Central Board of Excise and Customs  
Through the Chairman,  
Department of Revenue,  
Ministry of Finance,  
North Block,  
New Delhi.
3. Shri Sanjeev Bihari  
Commissioner Central Excise (Appeals)  
38, M.G. Marg, Civil Line,  
Allahabad.
4. Shri A.K. Gupta  
Commissioner Central Excise (Appeals)  
C.R. Building,  
T.P. Estate,  
New Delhi-110 002.
5. Shri B.K. Juneja  
Additional Director General (Audit)  
C/o Director General (Audit)  
C.R. Building,  
T.P. Estate,  
New Delhi-110 002. . . Respondents

(By Advocate: Shri Madhav Panikar)

## O R D E R

By Hon'ble Mr. Kuldip Singh, Member (Jud.)

The applicant impugns the seniority list of officers of the Indian Customs & Central Excise Service Group 'A' issued by the Department on 24.9.2002 (Annexure

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A-1). The applicant also challenged the promotion orders passed by the Department based on the seniority list, Annexure A-1. The said promotion order is Annexure A-2. The main grievance of the applicant is that the seniority list has been prepared contrary to the judgments of the Hon'ble Supreme Court and different Tribunals particularly in the matters of Suraj Prakash Gupta and Others Vs. State of J&K, 2000 (7) SCC 561, Ganga Baksh Yadav Vs. U.O.I. JT 1996 (5) SC 118, All India Federation of Central Excise Vs. U.O.I. 1997 (2) SC 71, B.T. Gurusahaney Vs. U.O.I., CAT Mumbai order dated 8.3.2002 in TA No. of 1986 and A.K. Derashri Vs. U.O.I. CAT Jodhpur order dated 27.2.2002 in OA 173 of 2002.

2. It is stated that the above decisions directed the respondents to frame the seniority list in Group 'A' on the basis of the length of service as against the method adopted by the respondents of relating seniority to rotation of vacancies between direct recruits and promotees.
3. The applicant has a grievance that by applying wrong principle he has not been given proper placement in the seniority list.



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4. The applicant has been placed at S.No. 1009 of the seniority list as Promotee Appraiser and his date of appointment to the grade is 1.1.1983 whereas certain direct recruits who have been appointed later than the applicant but shown senior to the applicant.

5. The applicant alleges that he was initially recruited as Appraiser of Customs and was promoted as Assistant Collector Group 'A' w.e.f. 1.3.1983 and subsequently he was promoted from junior Time Scale Grade VI and then Senior Time Scale Grade-V and he also came to be promoted as Deputy Commissioner of Customs and Central Excise and then Additional Director.

6. The applicant further submits that in the year 1983 when the applicant was promoted, promotions from Group 'B' to Group 'A' were made on the basis of the principle of quota Rota rule which was fixed by administrative instructions issued by the Government from time to time. However, this method of filling up of vacancies on the basis of Quota Rota was challenged by the direct recruit Appraisers in a Civil Writ Petition before the Hon'ble Supreme Court which was disposed of by the Hon'ble Supreme Court vide order dated 23.9.1987 observing that the promotions now in dispute would be looked into with reference to the rules and redispensed of in accordance with law.

7. It is further stated that the Indian Customs and Central Excise Group 'A' Rules, 1987 came into being which, inter alia, applied to the persons who were appointed to the service after 15.8.1959 and before the



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commencement of these rules. The rules stipulated that 50% of the vacancies shall be filled up by direct recruits and 50% by promotees. The determination of inter se seniority was to be made with reference to the provisions of Rule 18(2)(b) which provided that the seniority of the officers in Group 'B' feeder categories of service for eligibility for promotion to Group 'A' shall be determined on the basis of their regular length of service in the grade.

8. It is further stated that in Gaya Baksh Yadav Vs. U.O.T. and Others JT (1996) SC page 118 the Apex Court had held that after the Customs Appraisers Service Class-II Recruitment Rules, 1961 came into force, the inter se seniority between direct recruit Appraisers and promotee Appraisers shall be based on the length of service.

9. Subsequently in All India Federation of Central Excise (Supra) wherein directions were given to review all post-1979 ad hoc promotions to the grade of Senior Superintendent/Assistant Collector in the promotee quota and redetermine the respective placement of the promotee officers in the combined Group 'A' seniority list and regularise the posts of ad hoc promotions.

10. It is further submitted that in Group 'A' service of the Customs and Excise Department, 50% of the cadre strength are filled by direct recruitment through UPSC and the balance 50% are filled through promotion from Group 'B' cadres, so it was incumbent upon the

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Government to re-arrange or regularise the seniority list in Group 'A' service keeping the inter se quota of the direct recruits and promotee intact.

11. It is further submitted that pursuance to that Government of India, Ministry of Finance, Department of Revenue, New Delhi circulated an updated part integrated seniority list of Assistant Commissioners comprising direct recruits and promotee officers promoted to the grade of Assistant Commissioners upto 1979 vide letter dated 29.9.2000.

12. It is further submitted that in pursuance of the Hon'ble Supreme Court's decision given in All India Federation of Central Excise (Supra) the Ministry of Finance issued a notification No.3/2000 dated 21.11.2000, Annexure A-6 by virtue of which promotions of Group 'B' officers were regularised from 1980 onwards under which the applicant was deemed to have been promoted on regular basis on 1.1.1985. Then a seniority list was issued on 30.11.2000 where the name of the applicant appeared at S.No.1105 treating him as promoted on 1.1.1985 below some of the direct recruits of 1985 such as Kum. Barbara Marwein who was appointed on 11.1.1985 and who had figured at S.No.597 of the said list. But this list has been further superseded by impugned revised seniority list dated 24.9.2002 wherein the applicant has been treated as promoted to Group 'A' on 1.1.1983 and has been shown at S.No.1009 below direct recruits of 1985 batch such as Kum. Barbara Marwein who was appointed on 11.1.1985 and who had figured at S.No.597 of the said list. Though according to the decision of the Apex Court



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in All India Federation of Central Excise (Supra) the applicant is entitled to be assigned seniority above the direct recruits of 1980 and subsequent batches.

13. The applicant further states that according to the Ministry of Home Affairs Memo dated 22.12.1959 relating to General Principles for determining seniority in the Central Services, Annexure A-7 the relative seniority is to be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quota of vacancies reserved for direct recruitment and promotees respectively in accordance with the Department Rules and the department is required to maintain a roster based on the reservation for direct recruitment and promotion in the recruitment.

14. The applicant then also refers to Ministry of Home Affairs OM dated 8.6.1967, Annexure A-7-A which requires that while filling up the vacancies which have to be considered for applying the quota of 50% for direct recruits are not just permanent vacancies but also temporary vacancies for long term duration and the Government of India had admitted in UOI Vs. Kishorilal Bablani reported in ATR 1999 SC 517 that upto the year 1990 only permanent vacancies which were available to direct recruits upto 50% quota were notified which position was rectified from the year 1990 onwards.

15. The applicant then referred to another DOP&T OM dated 7.2.1986, Annexure A-7B whereby the practice of keeping vacant slots for being filled up by direct

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7. recruits of later years, thereby giving them unintended seniority over promotees who are already in position would be dispensed with. It required that if adequate number of direct recruits do not become available in a particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees will be bunched together at the bottom of seniority list below the last position upto which it is possible to determine seniority on the basis of rotation of quotas with reference to the actual number of direct recruits who becomes available.

16. It is further pointed out that during the period 1980 to 1996 appointments made to the Group 'A' Service of Indian Customs and Central Excise Service were not in proper apportion of direct recruits and promotees. There were 2476 appointments by promotion and 873 appointments to the service by direct recruitment. Thus there were excess promotees. Had the promotion been made in the ratio of 50:50 then the direct recruits would have came to the tune of 1675 and similarly promotees would have also been 1675. So 801 vacancies of direct recruits were diverted for appointment of promotee officers during this period.

17. Then another affidavit was filed in the case B.T. Gurusahney Vs. U.O.T. by Ms. K. Kipgen, Under Secretary where the department had stated that since the promotions in most of the years had been in excess of the Direct Recruitment but seniority list had to be prepared on the general principles of seniority as per OM dated

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22.12.1959. In the year 1987 new rules were framed known as Indian Customs and Central Excise Group 'A' Rules, 1987 which also required 50% of the vacancies to be filled by promotion and 50% of the vacancies to be filled by direct recruitment. It also required that senior has not to be ignored if junior is considered for promotion.

18. The applicant further submitted that according to the judgment given in Gurushaney's case(Supra) the Hon'ble Supreme Court had clearly laid down the ratio with regard to the point that while the direct recruit can be shown against the earlier slot meant for the direct recruits, seniority will have to be counted from the date he was actually appointed. Similarly in A.K. Derashri Vs. U.O.T. OA 173/2001 decided by the Jodhpur Bench the Tribunal while relying upon the judgment in All India Federation of Central Excise Etc. (Supra) observed that the applicant has to be treated regularly promoted w.e.f. 30.11.1979 and it is this date which would determine his seniority. His seniority was not dependent on the quota rota rules which had obviously broken down on account of the promotions in excess and with a view to adjust the equities and balance the right of parties and taken into consideration the fact that the seniority of the persons promoted upto the year 1979, the Apex Court made a distinction between the promotees upto 1979 and direct recruits of post-1979 batches and it has held that the department was justified in giving effect to OM dated 22.12.1959 by rotating the promotees of 1979 batches of direct recruits post-1979 batches and it has held that the department was not justified in giving effect to the OM dated 22.12.1959 by rotating the promotees of 1979

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with the batches of direct recruits post-1979 batches. The OM cannot get precedence over the directions of the Apex Court.

19. It was further observed that the applicant who stood regularised w.e.f. 30.11.1979 and was to be treated senior to the post-1979 batches of the direct recruits, could not be rotated or interpolated for redetermining the seniority and he was to rank senior to all the post-1979 direct recruits.

20. It is stated that as per the OM of Home Affairs dated 8.6.1967 the vacancies arising from creation of temporary posts likely to be made permanent or continued on long basis should be brought on the recruitment roster which admittedly was not done till 1990. Thus it is stated that the impugned seniority list dated 24.9.2002 is against the mandate of the Hon'ble Supreme Court stated hereinabove as per the various judgments quoted by the applicant in his pleadings.

21. It is further stated that the applicant has been subjected to glaring and hostile discrimination. He had made various representations but to no effect.

22. The applicant further submits that in ignoring the fact that proper allocation of long term temporary vacancies to promotees plus 801 diverted vacancies plus 58 short promotions from Appraisers Cadre, by any reckoning would place the applicant in the year prior to 1980. Based on these facts the applicant prays for the following reliefs:-

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(a) To call for the record and proceedings leading to the issuance of the impugned seniority list dated 24.9.2002 and after going through the legality and validity of the same, quash and set aside the seniority list.

(b) To set aside the order of promotion No. 168/2002 and 178/2002 promoting officers to the grade of Commissioners.

(c) To direct the respondents No.1 and 2 to assign the applicant's seniority at the appropriate place in the seniority list above the direct recruitments of 1980 batch with all consequential benefits including retrospective promotions.

(d) To direct respondent Nos. 1 and 2 to consider the name of the applicant for promotion and if found fit on merits to promote him to the grade of Commissioner along with direct recruits of 1980 and prior batches.

23. Respondents filed their reply to contest the OA. Respondents agree that Rule 5(2) of IC&CES Rules, 1987 provides that 50% of the vacancies in Grade-VI (AC-JTS) shall be filled up by direct recruitment through UPSC and 50% of the vacancies in the Grade-VI by promotion of 3 feeder categories of officers in the grade of Superintendents of Customs (Prev.) and Customs Appraisers.

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24. It is further stated that the applicant was initially appointed as Customs Appraisers in 1972 and was promoted as Assistant Commissioner of Customs & Central Excise in 1983 and due to prolonged disputes among the 3 feeder grades on the question of apportionment of promotion quota vacancies, all appointments against promotion quota vacancies in the grade of Assistant Commissioner right from 1979 onwards were made on ad hoc basis.

25. Since promotions were being made on ad hoc basis only, no combined integrated seniority list of Assistant Commissioner directly recruited as well as promotees, as envisaged in sub-rule 2 of Rule 27, could be brought out.

26. The long standing dispute among the 3 feeder Grade 'B' cadre was given a finality by the Supreme Court's judgment dated 22.11.1996, which directed that all post-1979 ad hoc promotions to the grade of Assistant Commissioner may be reviewed by apportioning promotee quota vacancies in the ratio of 6:1:2 amongst the feeder grades, namely, Superintendents of Customs (Prevention) and Customs Appraisers. Thus all appointments made to the grade of Assistant Commissioner by promotion till 31.12.1979 whether regular or ad hoc were to be treated as regular and were to be interpolated with the Direct Recruit Officers of IC&CES in the ratio of 1:1 in terms of MHA's OM dated 22.12.1959.

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27. It is further stated that an updated draft seniority list of officers of IC&CS appointed till 31.12.1979 was issued by the department dated 24.3.2000 which was followed by another integrated seniority list of officers of IC&CEES appointed till 1996-97 circulated vide 30.11.2000. A final integrated seniority list of officers in the grade of Assistant Commissioner was issued on 24.9.2002.

28. Respondents further pleaded that the applicant has been deemed to have been promoted to the grade of AC(JTS) w.e.f. 1.1.1983 in the grade but this does not entitle him to automatic inter-se seniority with 1983 batch of Direct Recruits as the seniority is to be determined on the basis of the OM dated 22.12.1959. As the promotions in previous years had been far in excess of the direct recruits, so all promotee officers could not be interpolated with the direct recruits of the same years in view of the application of 1:1 ratio for fixing the inter-se seniority.

29. As regards the case of A.K. Derashri and Gurusahney is concerned which have been decided by Jodhpur and Mumbai Benches it is submitted that Writ Petitions have been filed against these judgments which are pending so the claim of the applicant for treating him at par with Derashri is futile and the same has to be rejected. Moreover none of the juniors have been promoted to the grade of Commissioner.



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30. Respondents also submitted that though the applicant has been given promotion w.e.f. 1.1.1983 but seniority has to be determined on the basis of the OM dated 22.12.1959 and since the promotions were in excess of the direct recruitment quota so applicant could not be interpolated with the direct recruits of 1983 so he got interpolated with the DRs of 1985. The directions of the Hon'ble Supreme Court as given in the judgment of All India Federation of Central Excise Etc. (Supra) dated 22.11.1996 regarding operating the promotee quota vacancies in the ratio of 6:1:2 amongst the feeder grades have been complied with.

31. As regards the judgments cited by the applicants are concerned, it is stated that the same are distinguishable and the benefit at par with the judgments given in Derashri and Gursahney cannot be extended since the Writ Petitions filed in that cases are still pending so it is stated that the OA be dismissed.

32. We have heard the applicant who argued in person and the learned counsel for the respondents.

33. The applicant submitted that he was promoted to Group 'A' Service vide order No.40/83 dated 1.3.83 as reflected in impugned seniority list, Annexure A-1 and he has been shown below the direct recruits of the year 1985. Thus the operation of the seniority list is against the law laid down by the Hon'ble Mumbai Bench as well as Jodhpur Bench.

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34. The applicant further submitted that the respondents had applied the OM dated 22.12.1959 for determining inter-se seniority between direct recruit and promotee officers whereby the department had reserved the slots for direct recruits for the previous years when direct recruits were not available. However, this practice has been deprecated by both the Benches in the case of Gurushaney (Supra) decided on 8.3.2002 and A.K. Derashri (Supra) decided on 27.2.2002. The Hon'ble Mumbai Bench in the case of Gurushaney (Supra) after relying upon the judgment in the case Suraj Prakash Gupta and Others Vs. State of Jammu and Kashmir decided on 28.2.2000 reported in 2000 (1) SCSLJ 427 had stated that "In this judgment among the points considered one point was whether direct recruits could claim retrospective date of recruitment from the date on which the post in direct recruitment was available, even though the direct recruit was not appointed by that date and was appointed long thereafter? It was laid down in this judgment that direct recruits cannot claim appointment from the date of vacancy, in quota, before their selection. The contention was raised that the direct recruitment can be antedated from the date of occurrence of vacancy in the direct recruit quota even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they ought to be pushed down whenever direct recruitment was made against the slot earmarked for direct recruits. Once they were so pushed down, even if the direct recruits came later, they should be placed in the direct recruit slot from the date on which such a slot was available under direct recruitment quota. The Supreme



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Court did not accept this contention. It was observed that the reason as to why this argument is wrong that in service jurisprudence a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not born in the service and this principle is well settled. Thus the Supreme Court clearly laid down the ratio in regard to this point. While the direct recruit can be shown against an earlier slot meant for the direct recruits, his seniority will have to be counted only from the date he is actually appointed". So considering the same, the Hon'ble Mumbai Bench allowed the OA.

35. The applicant further referred to a judgment of Jodhpur Bench in the case of A.K. Derashri (Supra). In the case of Derashri the Hon'ble Jodhpur Bench had referred to various cases including the All India Federation of Central Excise Etc. (Supra) and stated that the officers who were appointed up to the year 1979 their seniority cannot be interpolated with the direct recruits of later batches and in the impugned seniority list we find that there are various candidates who had been and promoted to Group 'A' service on or before 30.11.1979 but direct recruits appointed in the year 1981 have been shown senior to them. Thus the impugned seniority list does not appear to be in consonance with the directions given by the Hon'ble Supreme Court.

36. We may further observe that when the case of Derashri was decided the Jodhpur Bench had also taken into consideration the case of Direct Recruit Class-II Engineering Officers' Association and Others Vs. State

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of Maharashtra and Others, ATR 1990 SC 1607 and it was also observed that where the quota rule has broken down and the appointments are made from one source in excess of the quota but are made after following the procedure prescribed by the rules for appointment, the appointees should not be pushed down below the appointees from the other source inducted into the service at a later date. The Jodhpur Bench quoting the case of Narender Chadha and Others Vs. U.O.T. & Others 1986 (2) SCC page 157 stated that the Apex Court had ruled out that where certain persons have been allowed to function on higher posts for a substantial number of years with due deliberation it would be certainly unjust to hold that they have no sort of claim to such posts and could be reverted unceremoniously or treated as persons not belonging to the service at all and in the said case also the petition was allowed.

37. As against this in the reply the respondents have pleaded that though the applicant had been deemed to have been promoted to the grade of AC (JTS) w.e.f. 1.1.1983 but this does not entitle him to automatic inter-se seniority with 1983 batch of direct recruits as the seniority is to be determined on the basis of OM of Ministry of Home Affairs dated 22.12.1959 as the promotions in the previous years had been far in excess of the direct recruits and all promoted officers could not be interpolated with the direct recruits of the same years in the ratio of 1:1 for fixing inter-se seniority as prescribed in the aforesaid OM. Besides that the respondents also pleaded that in the judgments given in Derashri case(Supra) by Jodhpur Bench and Gurushaney

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(Supra) given by the Mumbai Bench though implemented but Writ Petitions have been filed against the said orders. There is nothing stated to the effect that any of the two judgments has been stayed by any of the respective High Courts, so as on record we find that the judgment of Mumbai Bench given in Gurushaney (Supra) as well as the judgment given by the Jodhpur Bench in Derashri's case (Supra) is binding on this Bench also unless this Bench proposes to differ with the same and the only reason given by the respondents that they could not give the applicant a place with the batch of direct recruits of 1983 is that since earlier there had been excess promotions given to the promotee officers.

38. In our considered view this contention of the respondents have no merits at all because the same was the position in the All India Federation of Central Excise Etc. (Supra) as well as the application of OM dated 22.12.1959 which has been thoroughly discussed in Gurusahney's case (Supra) and had been deprecated in the said case when the Bench had observed that if direct recruit can be appointed against the vacancy for a previous year but for the purpose of slot the seniority of previous year cannot be reserved for direct recruit. The Bench specifically observed that a direct recruit cannot be given seniority from a year in which he was not even borne on the cadre. His seniority has to be redetermined from the date he had joined on the particular post and from that date the principle of continuous officiation has to be applied, which principle has received judicial recognition by the Apex Court in various other cases including the case of Direct Recruit Class-II Engineering Officers Association and Others Vs.

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State of Maharashtra and Others. It is not a case of the respondents that the applicant's deemed promotion w.e.f. 1.1.1983 had not been given promotion by following thorough process of screening and giving promotion. It was not an ad hoc arrangement even. So once an officer has been given promotion on the basis of an earlier selection, he cannot be deprived of his seniority and cannot be pushed down on the plea that the slot was meant for direct recruitment and direct recruit has to be adjusted above him.

39. Thus we are of the considered opinion that the applicant has not been placed at a proper place in accordance with law laid down by the Mumbai Bench in the case of B.T. Gurushaney (Supra) and Jodhpur Bench in the case of Akshaya Kumar Derashri (Supra) as well as the law laid down by the Hon'ble Supreme Court in various cases. So as far as the case of the applicant is concerned, we hold that the applicant has not been assigned proper seniority as such the OA deserves to be allowed.

40. Accordingly, we allow the OA with the following directions:-

(i) Impugned seniority list dated 24.9.2002 so far as it places the applicant at S.No. 1009 is hereby quashed.

(ii) Respondents are directed to redetermine the seniority as per the observation and assign him proper place in the seniority list with all consequential benefits and in the recasted list if any of the junior to the applicant has already been promoted then review DPC be held and applicant shall also be considered for the

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next higher promotion and in case he is found fit then he  
will also be granted said promotion. This may be done  
within a period of ~~6~~<sup>12</sup> months from the date of receipt of a  
copy of this order. No costs.

  
(S. A. SINGH)  
MEMBER (A)

  
( KULDIP SINGH )  
MEMBER ( JUDI. )

/Rakesh