

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
NEW DELHI

O.A. No. 1089 1986  
T.A. No.

DATE OF DECISION 28.5.87

Shri Lal Bulchand Shivdasani

Applicants  
Petitioner

Shri M.K.Ramamurthi, Sr. Advocate  
with Shri M.A.Krishnamoorthy and  
Mrs. Chandan Ramamurthi

Applicants  
Advocate for the Petitioner(s)

Versus

Union of India & Others

Respondents

S/Sh. P.P. Rao, Shanti Bhushan, Subodh Markandey  
and Shri M.Chandrasekharan,

Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. Justice K. Madhava Reddy, Chairman

The Hon'ble Mr. Kaushal Kumar, Member

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes.
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement? No
4. Whether to be circulated to all the Benches? Yes.

( Kaushal Kumar)  
Member  
28.5.87

( K. Madhava Reddy)  
Chairman  
28.5.87

(12)

CENTRAL ADMINISTRATIVE TRIBUNAL  
PRINCIPAL BENCH: NEW DELHI

REGN. NO. OA 1089/1986

DATE OF DECISION: 28th May 1986

Shri Lal Bulchand Shivdasani .... Applicants  
and others Vs.  
Union of India & Others .... Respondents

CORAM: Hon'ble Mr. Justice K. Madhava Reddy, Chairman  
Hon'ble Mr. Kaushal Kumar, Member

For the Applicants .... Shri M.K.Ramamurthi, Sr.  
Advocate with Shri M.A.  
Krishnamoorthy and  
Mrs.Chandan Ramamurthi.

For Respondents No.1 to 5 .... Shri P.P.Rao, Sr.Advocate  
with Shri P.P.Khurana

For Respondents No.19 and 21 .... Shri Shanti Bhushan, Sr.  
Advocate with S/Shri L.R.  
Singh and K.K.Mohan

For Respondent No.9 .... Shri Subodh Markandey,  
Shri K.Dileep Kumar and  
Shri Sher Singh Rawat,  
counsel.

For Respondent No.6 .... Shri M.Chandrasekharan,  
Counsel.

( Judgement of the Bench delivered by Hon'ble  
Mr.Kaushal Kumar, Member(A) )

JUDGEMENT

This is an application filed under Section 19  
of the Administrative Tribunals Act, 1985 by the  
applicants in a representative capacity, representing  
the interests of the promotee officers belonging to the  
Customs Appraisers Service Class II, challenging  
the Circular No.A.23011/1/86-AD.II(A), dated the  
22nd May, 1986 issued by the Ministry of Finance  
(Department of Revenue), Government of India, regarding  
"Promotion of Appraisers of Customs to the Indian  
Customs and Central Excise Service, Group A- Principles  
regarding" and praying for quashing the "All India

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Combined List of Appraisers" circulated along with the said letter and for a direction to respondents to prepare a fresh seniority list on the basis of length of service and in accordance with the law, quashing the promotion of respondents No.6 to 26 to the post of Assistant Collector of Customs and Central Excise, for a direction to the respondents to promote the applicants to the post of Assistant Collector of Customs and for a further direction to the respondents to give the benefit of revised seniority with retrospective effect.

2. The applicants had earlier moved the Hon'ble Supreme Court of India under Article 32 of the Constitution of India for redressal of their grievances. The Supreme Court, vide its order dated 28th October, 1986 allowed the writ petition to be withdrawn with liberty to move the Central Administrative Tribunal. In its order dated 28th October, 1986, the Supreme Court also observed that "There is no basis for the submission that the Administrative Tribunal has no authority to entertain the petitions in a representative capacity".

3. Although lengthy arguments have been advanced on behalf of the applicants and the respondents comprising not only the parties in the Original Application but many others, whose applications for being impleaded were allowed by the Tribunal, the short point for determination in this case is whether the " All India Combined List of Appraisers with



effect from 15th September, 1970(Direct Recruits and Promotees in the ratio 1:1)" circulated with the letter dated the 22nd May, 1986 by the Ministry of Finance(Department of Revenue), Government of India, is valid and can stand judicial scrutiny in the light of various judicial pronouncements, rules and administrative instructions issued by the Government from time to time.

4. This All India Combined List of Appraisers is based on an amalgamation of two lists of direct recruits and promotees- the former according to their inter-se ranking determined by the Union Public Service Commission and the latter according to continuous length of service in the grade and then integrating the two lists into a combined All India list by rotating the officers in the two lists in the ratio of 1:1.

5. For a proper appreciation of the various contentions raised in this case, we have to go a little into the past history and a few judicial pronouncements pertaining to this service. As far back as 1936, an order was passed by the Central Board of Revenue which laid down that recruitment to the Customs Appraisers Service would be from two sources, i.e., 50 per cent by promotion, 25 per cent directly from experts and 25 per cent by means of a competitive examination or selection by the Public Service Commission. It was also said in the order that those percentages would be the maximum and the Collectors of Customs would not be bound to recruit upto

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the maximum particularly in the case of recruitment by promotion. It was in 1961 that for the first time, statutory rules under the proviso to Article 309 of the Constitution were framed called 'The Customs Appraisers' Service, Class-II Recruitment Rules, 1961'. Rules 3 & 4 of the said Rules, which prescribe the method of recruitment are in the following terms:

"Rule-3

Recruitment to the Service shall be made by any of the following methods:-

- a) By competitive examination in India in accordance with Part-III of these rules.
- b) By promotion in accordance with part IV of these rules.
- c) By transfer of an officer in Govt. Service in accordance with part V of these rules.
- d) By direct recruitment by selection otherwise than by competitive examination in accordance with part VI of these rules.

Rule-4

- a) No appointment shall be made to the service or to any post borne on the cadre of the service by any method not specified in Rule-3.

- b) Subject to the provisions of Sub-rule(a) the Board shall determine the method or methods of recruitment to be employed for the purpose of filling in particular vacancies in the service, as



may be required to be filled during any particular period and the number of candidates to be recruited by each method.

(c) The percentage of posts to be filled by direct recruitment by competitive examination or by selection otherwise than by competitive examination shall not be less than 50 per cent of the total cadre of Appraisers. The remaining posts may be filled by any other method mention in rule-3."

6. On 31st July, 1963, the Bombay Custom House issued a circular conveying the decision of the Board of Central Excise & Customs that " the position with regard to the Appraisers confirmed earlier than 15-8-1947 is not to be disturbed and that the seniority of direct recruits vis-a-vis promotees in the ratio of 1:1 should be worked out from the 15th August, 1947 only and a fresh seniority list drawn up on this basis." In pursuance of the said circular, a seniority list was also drawn up by the Bombay Custom House. This seniority list was challenged by the promotee Appraisers in the Supreme Court under Article 32 of the Constitution. The Supreme Court disposed of this petition by holding that " The order of the Board of 1963 on the basis of which the impugned seniority list of Appraisers has been prepared clearly lays down that ' the principle of determination of seniority of the direct recruits and the promotees inter se in the prescribed ratio of 1:1 should be worked out'."

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(Mervyn Continho v. Collector of Customs, Bombay-AIR 1967 S.C. 52).

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7. Whereas in Mervyn Continho and others v. Collector of Customs, Bombay and others referred to above, the Supreme Court held valid the seniority of Appraisers determined on the basis of rotation of direct recruits and promotees in the ratio of 1:1 on the clear assumption that appointments had been made to the cadre of Appraisers 50% by promotion and 50% by direct recruitment, they at the same time quashed the seniority list of Principal Appraisers on the ground that " The source of recruitment of Principal Appraisers is one, namely, from the grade of Appraisers. There is, therefore, no question of any quota being reserved from two sources in their cases. The rotational system cannot, therefore, apply when there is only one source of recruitment and not two sources of recruitment. In a case, therefore, where there is only one source of recruitment, the normal rule will apply, namely, that a person promoted to a higher grade gets his seniority in that grade according to the date of promotion subject always to his being found fit and being confirmed in the higher grade after the period of probation is over." (para 8). The Supreme Court also held that " The present method by which the respondent puts a direct recruit from the grade of Appraiser, though he is promoted later, above a promotee who is promoted to the grade of Principal Appraiser on an earlier date clearly denies equality of opportunity where the grade of Principal Appraiser has only one source of recruitment, namely, from the grade of Appraisers. In such a case the seniority in the grade of Principal Appraisers must be determined according to the date of continuous appointment in that grade irrespective of whether the person promoted to that grade from the Appraisers' grade is a direct recruit or a promotee." (Para 8),



8. The grade of Principal Appraiser, which was a Group 'B' post and promotions to which were made on regional basis by the respective Custom Houses, was abolished on 14.9.1970 and the Appraisers became eligible for promotion directly to the post of Assistant Collector of Customs, a Group 'A' post in the Indian Customs and Central Excise Service. The principles for preparation of an all-India list of Appraisers were decided by the Ministry of Finance, Department of Revenue & Insurance, vide their circular F.No.A 23011/2/71-Ad.IIA, dated 28.2.1973. In the said circular, the following principles were laid down for the preparation of the all-India list of Appraisers for the purpose of their consideration for promotion to the Class I Service:-

(i) Direct recruitment Appraisers belonging to three different cadres were arranged in the order of their ranking in the select list prepared by the UPSC. This was done taking into consideration that direct recruitment is made on all India basis.

(ii) The names of promotee Appraisers belonging to the different cadres were so placed in the all-India list of direct recruits that their relative seniority vis-a-vis the direct recruits as obtaining in the respective cadres to which the promotees and the direct recruits belong to the year was maintained.

(iii) In case where more than one promotee officer belonging to different cadres got placement between two direct recruits, names of such

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promotees were arranged in the order of  
their length of continuous service as  
Appraiser.

The basic principle followed for preparing all-India list was that inter-se seniority of Appraisers in the particular region cadre was maintained. However, as per this list, some promotee Appraisers belonging to Bombay Custom House cadre became junior to the promotee Appraisers of Calcutta and Madras Custom Houses cadres who were promoted from later dates. The seniority list prepared on this principle was challenged before the Bombay High Court by two promotee Appraisers of Bombay Custom House vide Writ Petition No.2699/72. The Bombay High Court vide its judgement dated 18th October, 1979 set aside the promotions made on 16th November, 1972 on the basis of all-India list prepared in pursuance of the principle contained in the circular dated 28.2.73 and issued directions to the Government to prepare a combined seniority list of Appraisers all over India on the basis of continuous length of service rendered by them as Appraiser or on any other legal and valid principle. It is significant that whereas the all-India list is stated in the counter filed by the respondents to have been prepared on the basis of principle contained in the circular dated 28th February, 1973 and the promotions were made on 16th November, 1972, the actual circular incorporating this principle was in fact issued on 28.2.73. The Bombay High Court, in its judgement dated 18th October, 1979, while quashing the impugned order of promotions, did not express any opinion in regard to the validity of the principles set out in the circular dated 28.2.73. The observations of the Bombay

*Mr. Murali*

High Court relevant in this behalf are as follows:

" Even regarding the alleged principles reflected in the letter of 28th February 1973, Mr. Singhvi, the learned counsel submitted that the same also violate the petitioners' fundamental rights under Articles 14 and 16 of the Constitution, inasmuch as the same discriminate the promotees inter se without any rational basis and without there being any just or substantial relation with the question of seniority and promotion. (Prima facie, there is substance in this contention of Mr. Singhvi) Inter se seniority of promotees does not appear to be determined according to the entry in the Appraisers' cadre, i.e. according to the continuous length of service as Appraisers, though inter se seniority of direct recruits is in fact determined according to their rank in the selection, with the result that persons appointed on the basis of earlier selection would rank senior to persons appointed on the basis of subsequent selection, thus prima facie resulting in discrimination not only amongst promotees inter se but also between direct recruits and promotees. Again, when all the promotee-Appraisers belong to one class and have to be treated equally in the matter of fixation of seniority in all India cadre, the principle of equality requires that seniority of promotees inter se should be fixed on the normal principle, i.e. according to their entry in the grade of Appraisers.

" The principles reflected in the letter of 28th February 1973 do thus prima facie appear to deny equality of opportunity to the promotees in the matter of seniority and promotion. Seniority inter se of promotee Appraisers has been linked

*J. M.*

with the fortuitous circumstances of promotees of a particular collectorate having a direct recruit of earlier year. Such a principle can result in denial of equality of opportunity in the matter of employment to the promotees such of the petitioners herein. Significant to note is also the fact that petitioner No.1 herein having been appointed as Principal Appraiser in a clear vacancy ought to have been placed above all the other appraisers and below the principal appraisers. He should have been treated in the category of principal Appraisers for the purpose of determination of his seniority in the All India Seniority list of Appraisers. We, however, do not feel it necessary to pursue all these aspects further in this petition because we are of the view that the principles reflected in the letter of 28th February, 1973 can have no relevance while determining the validity of the impugned order of 16th November, 1972, as also while determining the validity of the consideration list of 60 Appraisers as also while considering the validity of the all India list of Appraisers of Customs placed before the Departmental Promotion Committee in August/September 1972 all these events being such prior to the letter of 28th February, 1973. We must also state that our observations aforesaid on the principles reflected in the letter of 28th February, 1973 are only *prima facie* observations. The validity of these principles is left expressly open. If occasion arises, the principles reflected in the letter of 28th February 1973 will have to be fully considered and adjudicated upon.

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" In the result, so far as this petition is concerned, the same succeeds. The impugned order dated 16th November, 1972, Exhibit 'A' to the petition, issued by the Government of India, Ministry of Finance (Department of Revenue and Insurance) is set aside and quashed. Respondent No.1 Union of India is directed to prepare a combined seniority/list of Appraisers all over India on the basis of continuous length of service rendered by them as Appraisers or on any other legal and valid principles and to consider the claims of the petitioners herein for promotion as Assistant Collectors/Superintendents of Central Excise, Class I as on 16th November, 1972 and if found fit, to promote them and pay them arrears of salary and allowances consequent thereupon. Rule earlier issued on this petition will be made absolute. Respondent No.1 will pay the costs of this petition."

9. The Union of India filed a Special Leave Petition in the Supreme Court against the order of the Bombay High Court, but the same was rejected by the Supreme Court on 22.2.1982. Consequent upon dismissal of the S.L.P by the Supreme Court, the Department decided that the direct recruits and the promotee Appraisers would be brought on two different lists on all India basis and the posts of Assistant Collector of Customs/Central Excise falling in the share of Appraisers will be divided equally between the direct recruits and the promotees, vide Ministry of Finance (Department of Revenue), Government of India, circular F.No.A.23011/2/82/Ad.II-A, dated 29th October, 1982. Paras 8.1 to 8.4 of the said circular are extracted below:-

"8.1. After careful consideration of all aspects of the matter, the Government have decided that the vacancies in Group-A falling

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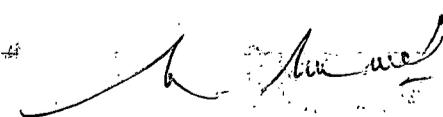
in the share of Appraisers should be apportioned between the direct recruits and the promotee Appraisers on 1:1 basis which corresponds to ratio prescribed for recruitment to the grade of Appraiser.

"8.2. For this purpose, two separate lists of Appraisers will be prepared- one of the direct recruits on the principles mentioned in paragraph 3(iv) above and the other of the promotee Appraisers of all the Custom Houses on the basis of their continuous length of service subject to the order in which they were included in the panel prepared by the D.P.C. in the respective Custom Houses.

"8.3. Two separate panels for promotion to Group-A will be prepared by the DPC from the respective consideration lists.

"8.4. The vacancies in Group-A meant for Appraisers will be filled up- from these two panels in the ratio of 1:1 alternative vacancies going to promotees and direct recruit Appraisers."

10. Immediately after the revised principles of promotion of Appraisers to Group 'A' posts were issued, a few promotee-Appraisers filed two writ petitions (Nos. 9925 of 1982 and 3077 of 1983) in the Madras High Court challenging the circular issued on 29th October, 1982, referred to above. The Madras High Court vide its judgement dated 12.9.1985 quashed paras 8.1 to 8.4 of the impugned communication dated 29.10.82 and gave a direction to fix the seniority of the



petitioners and respondents (promotee and direct recruit Appraisers) on some fair and just principle without causing serious prejudice to either the promotees or the direct recruits. Para 6 of the said judgment of the Madras High Court reads as under:-

"6. No doubt, in the course of the elaborate arguments addressed by counsel on both sides, several methods for fixing the seniority were suggested, namely, the circular dated 12.12.1959 the combined seniority list for each port, the bases on which the judgment was rendered by the Bombay High Court in Special Civil Application No. 2699 of 1972 dated 18.10.1979 the principles laid down by the decision of this Court in C.N. Raghavan V.P.B. Vedantam and others (W.A. No. 195 of 1973 dated 11.10.1977, etc.). However, this Court is not inclined to give a direction that any particular method in the fixation of seniority should be adopted, for, that would embarrass this Court later, in the event of the propriety of the fixation of seniority in the manner suggested should be challenged before this very Court. Under those circumstances, besides directing the Government to consider the question of fixing inter se seniority in the category of Appraisers consisting of promotees as well as direct recruits in a just and fair manner and also without causing serious prejudice to either the promotees or the direct recruits and prepare a seniority list of Appraisers and consider their claims for promotion, the impugned communication in so far as it apportions the vacancies of Assistant Collector of Customs between Appraisers belonging to the same integrated class but making



a distinction between direct recruits and promotees, is quashed. In other words, paragraphs 8.1 to 8.4 of the impugned communication dated 29.10.1982 cannot be sustained and they are accordingly quashed. The writ petitions are allowed to the extent indicated above. There will be no order as to costs."

11. L.P.A.s were filed both by the Government and the direct recruit respondents against the said judgement of the Madras High Court. Whereas the Government have withdrawn the L.P.A., the one filed by the direct recruit respondents is still pending in the Madras High Court.

12. In pursuance of the direction of the Madras High Court, the Government decided that the promotees of all the three cadres may be placed together on the basis of their continuous length of service and the direct recruits on the basis of their inter-se ranking assigned by the U.P.S.C. and then an all-India list be prepared by rotating the officers in the two lists in the ratio of 1:1. This is incorporated in the Ministry of Finance, Department of Revenue, circular letter dated 22nd May, 1986, which has been impugned in the present application before us. The circular dated 22nd May, 1986, while adopting the principle regarding preparation of two separate lists of direct recruits and promotees on an all-India basis- the former according to their inter-se ranking determined by the Union Public Service Commission and the latter according to continuous length of service in the grade and then preparing a combined all-India list by amalgamating these officers in the two lists in the ratio of 1:1 provides that this method will be applicable only to those Appraisers who were in

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position on 15th September, 1970 and were recruited/promoted to the grade on regular basis upto 28th February, 1986, and suitable modifications will be made in respect of those promoted/recruited to the grade on or after 1st March, 1986 in keeping with the principles contained in Department of Personnel and Training O.M.No.35014/2/80-Estt(D) dated 7th February, 1986. The said circular dated 7.2.1986 lays down that "while the principle of rotation of quotas will still be followed for determining the inter-se seniority of direct recruits and promotees, the present practice of keeping vacant slots for being filled up by direct recruits of later years, thereby giving them unintended seniority over promotees who are already in position, would be dispensed with. Thus, if adequate number of direct recruits do not become available in any particular year, rotation of quotas for purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. In other words, to the extent direct recruits are not available, the promotees will be bunched together at the bottom of the 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 become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year( and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Thereafter, in that year while seniority will be determined between direct recruits and promotees,

*J. Mehta*

to the extent of number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional direct recruits selected against the carried forward vacancies of the previous year would be placed en-block below the last promotee( or direct recruit as the case may be) in the seniority list based on the rotation of vacancies of that year. The same principle holds good in determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies(as the case may be) in the subsequent years".

13. In para 20 of the counter, the rationale in regard to fixation of seniority with effect from 1.3.1986 has been explained in the following words:-

" In the meantime Supreme Court and various High Courts have pronounced several judgments where they brought out inappropriateness of the direct recruits of later years becoming senior to promotees with long years of service. This matter was discussed in the National Council and it was decided that in future while the principle of rotation of vacancies will still be followed for determining inter-se seniority of direct recruits and promotees, the present practice of keeping vacant slots for being filled up by direct recruits of later years thereby giving them seniority over promotees who are already in position, would be dispensed with."

14. Shri Shanti Bhushan, learned counsel for the direct recruit respondents contended that the judgment of the Supreme Court in Mervyn Continho and others v. Collector of Customs, Bombay and others operates

*Sh. Shanti Bhushan*

as constructive res-judicata and the question having been once decided is not open to readjudication. Shri P.P.Rao representing the Department took the stand that the decision in Mervyn Continho's case is a binding precedent. However, Shri Ramamurthi, learned counsel for the applicants argued vehemently that the decision in Mervyn Continho's case did not operate as constructive res-judicata; nor is it a binding precedent. It was also common ground taken by counsel appearing for the Government and direct recruit respondents that the subsequent decisions of the Supreme Court in regard to question of seniority determined with reference to the quota and rota system or the principle of continuous officiation or the length of service in a particular grade were distinguishable on facts which gave rise to those decisions and that the judgement in the case of Mervyn Continho having been given by a constitution bench of five judges of the Supreme Court was still valid today.

15. Explanation VI to Section 11 " Res judicata" of the Code of Civil Procedure reads as follows:-

" Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

Order I, Rule 8(1) of the Code of Civil Procedure reads as follows:-

"(1) Where there are numerous persons having the same interest in one suit,-  
(a) one or more of such persons may, with the permission of the Court, sue or be

*Sub. Ramamurthi*

sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested."

It will be seen from the above that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued.

16. In Ahmad Adam Sait and others v. M.E.Makhri and others (A.I. R. 1964 S.C. 107), the principle of constructive res judicata was considered at length and the Supreme Court made the following observations:-

" It is clear that S.11 read with its explanation VI leads to the result that a decree passed in suit instituted by persons to which explanation VI applies will bar further claims by persons interested in the same right in respect of which the prior suit had been instituted. Explanation VI thus illustrates one aspect of constructive res judicata. Where a representative suit is brought under S. 92 and a decree is passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and, therefore, are constructively barred by res judicata from reagitating the matters directly and substantially in issue in the said earlier suit.

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" (17) A similar result follows if a suit is either brought or defended under O.I.R. 8. In that case, persons either suing or defending an action are doing so in a representative character, and so, the decree passed in such a suit binds all those whose interests were represented either by the plaintiffs or by the defendants. Thus, it is clear that in determining the question about the effect of a decree passed in a representative suit, it is essential to enquire which interests were represented by the plaintiffs or the defendants. If the decree was passed in a suit under S.92, it will become necessary to examine the plaint in order to decide in what character the plaintiffs had sued and what interests they had claimed. If a suit is brought under O.I.R. 8, the same process will have to be adopted and if a suit is defended under O.I.R.8, the plea taken by the defendants will have to be examined with a view to decide which interests the defendants purported to defend in common with others ..... "

17. The parties in Mervyn Continho's case were the Appraisers, both direct recruits and promotees, of the Bombay Custom House and no such permission of the Court, as envisaged under Order I, Rule 8(1) of the Code of Civil Procedure appears to have been obtained. As such, the parties in that case cannot be considered to have represented the interests of Appraisers of other Custom Houses in the country. For constructive res judicata to be applicable, the parties to the suit should be the same or they should have been litigating

*M. Nair*

in a representative capacity and the matters in issue should be the same. Whereas in the case of Mervyn Continho the parties were direct recruits and promotee Appraisers belonging to the cadre of Bombay Custom House and the issue raised was in regard to seniority between direct recruits and promotees of the cadre of Bombay Custom House, in the present case under our consideration, the parties are promotees and direct recruit Appraisers belonging to all the three Custom Houses and the issue raised is in regard to determination of seniority or eligibility for consideration for promotion on <sup>an</sup> all-India basis.

18. In the case of Mervyn Continho, the issue raised was in regard to determination of seniority between direct recruits and promotee Appraisers appointed to a particular cadre; in the present case, the question is one of determination of relative placement or seniority after amalgamating all the incumbents of three different cadres for the limited purpose of considering them for promotion to Group 'A' posts. Their inter-se seniority in their respective cadres stands already determined. Again in the case of Mervyn Continho, the seniority was relevant with reference to promotion to Group 'B' posts in the same cadre, whereas in the present case the inter-se relative placement or seniority is sought to be determined with reference to promotion to Group 'A' posts, not included in either of the three cadres. The issues involved in the present case are thus quite distinct from those which were considered in the case of Mervyn Continho and the decision in the said case cannot operate as res judicata.

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19. Now we have to consider as to what is the ratio decidendi in Mervyn Continho's case. As held by the Supreme Court in *Regional Manager v. Pawan Kumar* ( A.I.R. 1976 S.C. 1766), " It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts." (para 7).

20. In *State of Orissa v. Sudhansu Sekhar Misra and others* ( A.I.R. 1968 S.C. 647), the Supreme Court held as follows:-

".... A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury LC said in *Quinn v. Leathem*, 1901 AC 495.

" Now before discussing the case of *Allen v. Flood*, (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expression which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

A. Nair

The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all." It is not a profitable task to extract a sentence here and there from a judgment and to build upon it."

21. Shri Shanti Bhushan, learned counsel for the respondents also contended that the law laid down by the Supreme Court in Mervyn Continho's case, heard by a bench of five Judges, in determining seniority between direct recruits and promotee Appraisers, had held the field and had been acted upon for the last so many years. In the face of the said judgement, any other principle of law enunciated by a smaller bench of the Supreme Court could not be applied in this case. In this connection, he referred to the following observations of the Supreme Court in Union of India v. K.S. Subramanian ( A.I.R. 1976 S.C. 2433):

" 12. We do not think that the difficulty before the High Court could be resolved by it by following what it considered to be view of a Division Bench of this Court in two cases by and merely quoting the views expressed by larger Benches of this Court and then observing that these were insufficient for deciding the point before the High Court. It is true that, in each of the cases cited before the High Court, observations of this Court occur in a context different from that of the case before us. But, we do not think that the High

*J. Murali*

Court acted correctly in skirting the views expressed by larger benches of this Court in a manner in which it had done this. The proper course for a High Court, in such a case, is to try to find out and follow the opinions expressed by larger benches of this Court in preference to those expressed by smaller benches of the Court. That is the practice followed by this Court itself. The practice has now crystallized into a rule of law declared by this Court....."

He also relied on the observations of the Supreme Court in *M/s.Ujagar Prints v. Union of India* ( A.I.R. 1987 S.C.874) as under:-

"... Judicial discipline requires that a Bench of two Judges should not disregard the decision of a Bench of three Judges but if the Bench of two Judges is inclined to disagree with what has been said by the Bench of three Judges on the ground that it does not represent the correct law on the subject, the case should be referred by the Bench of two Judges to a larger Bench."

(Para 5).

22. It was further strongly contended by Shri Shanti Bhushan that what had been done over a long period of years in the matter of determining seniority of direct recruits vis-a-vis promotees operated as a promissory estoppel and the Department could not now adopt any other principle. He pointed out that a representation had been held out to the direct recruits that by virtue of their seniority, they would be earning promotion to Group 'A' posts within a certain span of time. They had joined the Service under this belief

*Sh. Bhushan*

and this position could not now be altered to their disadvantage. This was bound to happen if instead of fixing their seniority by rotating the promotees with direct recruits in the ratio of 1:1 in the all-India Combined List, the principle of continuous officiation of length of service was to be followed. Shri Ramamurthi, learned counsel for the applicants contested this position.

23. In Union of India v. Godfrey Philips India Ltd. (AIR 1986 S.C.806), the Supreme Court had occasion to examine the scope of the doctrine of promissory estoppel as applicable against the Government and made the following observations:-

"14. Of course we must make it clear, and that is also laid down in Motilal Sugar Mills case (AIR 1978 SC 621) (supra), that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government

*M. Mehta*

or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it....."

( Para 14).

From the above, it is clear that promissory estoppel cannot be used to compel the Government to carry out representation or promise which is contrary to law. If the determination of seniority or relative placement of direct recruits and promotees in preparing the all-India Combined List on the principle of rotating them in the ratio of 1:1 is not warranted either by rule or law as would be evident from the discussion in the subsequent paragraphs of this judgement, the doctrine of promissory estoppel cannot be invoked.

24. In Mervyn Continho's case, the Supreme Court had no occasion to consider the Recruitment Rules of 1961 framed under proviso to Article 309 of the Constitution. Even though the Rules had been referred to in the counter filed by the Government, the Court took into consideration only the circulars issued by the Central Board of Excise and Customs in 1936, 1953 and 1955 and the O.M. issued by the Home Ministry in 1959 and proceeded on the assumption that the recruitment in fact had been made to the cadre of Appraisers in the

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Bombay Custom House in the ratio of 50 per cent for promotees and 50 per cent for direct recruits. In such circumstances, determination of seniority by rotational system as provided for in the circular of 1959 was held to be valid.

25. Para 6 of the Annexure entitled "GENERAL PRINCIPLES FOR DETERMINATION OF SENIORITY IN THE CENTRAL SERVICES" attached to O.M.No.9/11/55-RPS, dated 22nd December, 1959 issued by the Ministry of Home Affairs, Government of India reads as follows:-

" The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules."

Thus, there is no difficulty in determining seniority on the principle of rotation where the Recruitment Rules provide for recruitment from two or more sources on the basis of a fixed quota and in actual practice, such recruitment has taken place on the basis of quota prescribed. We find that neither the Recruitment Rules of Appraisers as notified in 1961 provide for any fixed quota nor in practice the recruitment has taken place in a fixed ratio or quota.

26. The Recruitment Rule earlier referred to, viz., Rule 4(c) merely provides that " The percentage of posts to be filled by direct recruitment by competitive examination or by selection otherwise than by competitive examination shall not be less than 50 per cent of the total cadre of Appraisers. The remaining posts may be

*to be filled*

filled by any other method mentioned in rule-3."

What the rule provides is that the intake of direct recruits shall not be less than 50 per cent of the total cadre of Appraisers. It can be more than 50% also. This percentage is also related to the number of posts in the total cadre of Appraisers and does not refer to annual recruitment of persons to the cadre.

Whereas para 6 of the Appendix to O.M. of 22nd December, 1959 refers to the relative seniority of direct recruits and promotees being determined according to the rotation of vacancies between direct recruits and promotees based on the quotas of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules, rule 4(c) of the Customs Appraisers' Service Group 'B' merely prescribes that direct recruitment to the Service shall not be less than 50% of the total cadre. It has been contended that appointment to the Service by way of direct recruitment and promotions had been so ensured that ratio of 50:50 between direct recruits and promotees was maintained. The figures of actual intake of direct recruits and promotees to the Service shows that this ratio was not adhered to in filling up vacancies of Appraisers from year to year, as would be obvious from the following figures:-

<u>Year</u>	<u>Direct Recruitment</u>	<u>Promotee</u>
1962	6	35
1963	5	16
1964	12	8
1965	35	4
1966	13	25
1967	3	7
1968	Nil	80
1969	27	13
1970	4	19
1971	10	15
1972	23	1

*A. M. M.*

<u>Year</u>	<u>Direct Recruitment</u>	<u>Promotee</u>
1974	9	6
1975	26	36
1976	17	5
1977	25	9
1978	10	3
1979	20	16
1980	31	11
1981	15	2
1982	12	8
1983	22	9
1984	19	-

It has been conceded in paragraph 6.7 (parawise comments) of the counter filed by the Department that during the years 1978 to 1984, 129 direct recruits were appointed whereas the number of promotions made on regular basis during this period was only 49. It has, however, been pointed out that during the years 1962 to 1984, 334 posts of Appraisers were filled by direct recruitment as against 337 filled by promotion.

27. The above factual position shows that whereas there was no annual recruitment/promotion in the <sup>or</sup> fixed ratio of 50:50 to the cadre of Appraisers, this ratio has been sought to be maintained over a period of more than two decades. The Service, as such, can be considered to be divided vertically into two parts - one comprising the promotee Appraisers and the other direct recruit appraisers, who, more or less, hold equal number of posts as viewed over a long span of more than 20 years. When the recruitment rule itself is not based on a fixed quota of recruitment by way of promotion and direct intake and the actual recruitment has also not proceeded in any fixed ratio, even though the same might have been the intention of the Government, determination of seniority on the basis of the rota principle cannot be held to be valid. This is neither

*A. Nair*

warranted by the O.M. of 1959 nor by any decision of the Supreme Court. Even if it be assumed- which is not a fact in this case- that there was a quota system of recruitment, the same has obviously broken down and in such circumstances, the rotational system of seniority cannot be applied as held by the Supreme Court in so many cases.

28. The Supreme Court had occasion to distinguish the facts in the case of *Mervyn Continho v. Collector of Customs, Bombay* from the facts of the cases giving rise to rulings in a few other cases.

29. In *P.S. Mahal v. Union of India* (A.I.R. 1984 S.C. 1291), the Supreme Court made the following observations:-

".... Where the quota rule is a statutory rule which has to be scrupulously observed, the vacancy which according to the quota rule is allocable to promotees from one source cannot be filled by a promotee from another source and if notwithstanding the quota rule, the vacancy is filled by a promotee from that other source, such promotion would be irregular and as pointed out above, the vacancy would continue to remain a vacancy liable to be filled by a promotee from the first mentioned source. It would not be strictly accurate to say that in such a case the vacancy is carried forward in the sense in which that expression has been used in *T.Devdasan v. Union of India*, AIR 1964 SC 179. It was pointed out by this Court in *Mervin Continho v. Collector of Customs, Bombay*, (1966) 3 SCR 600: (AIR 1967 SC 52): ".... in the case of the

*A. M. M.*

carry forward rule certain quota is fixed annually for a certain class of persons and it is carried forward from year to year. This is very different from a case where a service is divided into two parts and there are two sources of recruitment, one of promotion and the other by direct recruitment. In such a case the whole cadre of a particular service is divided into two parts and there is no question of carrying anything forward from year to year in the matter of annual intake."

30. Again in O.P.Singla v. Union of India (AIR 1984 S.C. 1595), the following observations of the Supreme Court are relevant:-

"24. This Court has taken the view in many cases that whenever the rules provide for recruitment to a Service from different sources, there is no inherent infirmity in prescribing a quota for appointment of persons drawn from those sources and in working out the rule of quota by rotating the vacancies as between them in a stated proportion. (See for example, Mervyn Continho v. Collector of Customs, Bombay, (1966)

3 SCR 600: (AIR 1967 SC 52), S.G.

Jaisinghani v. Union of India, (1967)

2 SCR 703: (AIR 1967 SC 1427), Bishan

Sarup Gupta v. Union of India, (1975) 1

SCR 104: (AIR 1974 SC 1618), A.K.

Subraman v. Union of India, (1975) 2 SCR

1979: (AIR 1975 SC 483), V.B.Badami v.

State of Mysore, (1976) 2 SCC 901: (AIR 1980 SC 1561) and Paramjit Singh Sandhu

v. Ram Rakha, (1979) 3 SCR 584: (AIR

1979 SC 1073).....

"25. However, instances are not unknown wherein, though the provision of a rule or a section is not invalid, the manner in which that provision is implemented in practice leads to the creation of disparities between persons who, being similarly circumstanced, are entitled to equal treatment....."

31. In *N.K.Chauhan v. State of Gujarat* (AIR 1977 S.C. 251), the Supreme Court made the following observations:-

"32. We therefore reach the following conclusions:-

"1. The promotions of mamlatdars made by Government between 1960 and 1962 are saved by the 'as far as practicable' proviso and therefore valid. Here it falls to be noticed that in 1966 regular rules have been framed for promotees and direct recruits flowing into the pool of Deputy Collectors on the same quota basis but with a basic difference. The saving provision 'as far as practicable' has been deleted in the 1966 rules. The consequence bears upon seniority even if the year is treated as the unit for quota adjustment.

"2. If any promotions have been made in excess of the quota set apart for the mamlatdars after rules in 1966 were made, the direct recruits have a legitimate right to claim that the appointees in excess of the allocable ratio from among mamlatdars will have to be pushed down to later years when their promotions can be regularised by being absorbed in their lawful quota

*A. K. Mehta*

for those years. To simplify, by illustration, if 10 Deputy Collectors' substantive vacancies exist in 1967 but 8 promotees were appointed and two direct recruits alone were secured, there is a clear transgression of the 50: 50 rule. The redundancy of 3 hands from among promotees cannot claim to be regularly appointed on a permanent basis. For the time being they occupy the posts and the only official grade that can be extended to them is to absorb them in/subsequent vacancies allocable to promotees. This will have to be worked out down the line wherever there has been excessive representation of promotees in the annual intake. Shri Parekh counsel for the appellants has fairly conceded this position.

"3. The quota rule does not inevitably, invoke the application of the rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and those deficient vacancies have been filled up by promotees, later direct recruits cannot claim 'deemed' dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits' vacancy arose. Seniority will depend on the length of continuous officiating service and cannot

*M. Munawar*

be upset by later arrivals from the open market save to the extent to which any excess promotees may have to be pushed down as indicated earlier.

"33. These formulations based on the commonsense understanding of the Resolution of 1959 have to be tested in the light of decided cases. After all, we live in a judicial system where earlier curial wisdom, unless competently overruled, binds the Court. The decisions cited before us start with the leading case in *Mervyn Continho v. Collector of Customs, Bombay*, (1966) 3 SCR 600 = (AIR 1967 SC 52) and closes with the last pronouncement in *Badami v. State of Mysore*, (1976) 1 SCR 815. This time-span has been dieta go zigzag but we see no difficulty in tracing a common thread of reasoning. However, there are diversities in the ratiocination between *Mervyn Continho*(Supra) and *Govind Dattatraya Kelkar v. Chief Controller of Imports and Exports*, (1967) 2 SCR 29 = (AIR 1967 SC 839) on the one hand and *S.G.Jaisinghani v. Union of India*, (1967) 2 SCR 703 = (AIR 1967 SC 1427), *Bishan Sarup Gupta v. Union of India*, (1975) Supp SCR 491 = (AIR 1972 SC 2627), *Union of India v. Bishan Sarup Gupta* (1975) 1 SCR 104 = (AIR 1974 SC 1618) and *A.K.Subraman v. Union of India*, (1975) 2 SCR 979 = (AIR 1975 SC 483) on the other, especially on the rota

*Mr. Bhagwati*

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System and the year being regarded as a unit, that this Court may one day have to harmonize the discordance unless Government wakes up to the need for properly drafting its service rules so as to eliminate litigative waste of its servants' energies."

Their lordships of the Supreme Court summarised the conclusions in the above mentioned case in the following words:-

"(a) The quota system does not necessitate the adoption of the rotational rule in practical application. Many ways of working out 'quota' prescription can be devised of which rota is certainly one.

(b) While laying down a quota when filling up vacancies in a cadre from more than one source, it is open to Government, subject to tests under Article 16, to choose 'a year' or other period or the vacancy by vacancy basis to work out the quota among the sources. But once the Court is satisfied, examining for constitutionality the method proposed, that there is no invalidity, administrative technology may have free play in choosing one or other of the familiar processes of implementing the quota rule. We, as Judges, cannot strike down the particular scheme because it is unpalatable to forensic taste.

(c) Seniority, normally, is measured by length of continuous, officiating service - the actual is easily accepted as the legal. This does not preclude a different

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prescription, constitutionality tests being satisfied." ....

32. Again in G.P.Doval and others v. Chief Secretary, Government of U.P. and others (1984) 4 Supreme Court Cases 329), the Supreme Court observed:

"Therefore, in the absence of any specific rule of seniority governing a cadre or a service, it is well-settled that length of continuous officiation will provide a more objective and fair rule of seniority." (para 12)

Again their lordships observed in para 15 (Supra) -

" Now if there was no binding rule of seniority it is well-settled that length of continuous officiation prescribes a valid principle of seniority...."

33. Once the two categories of Appraisers viz., promotees and direct recruits have been fused into one cadre of a particular Custom House and their inter-se seniority also determined on the rotational principle, it would be discriminatory to limit or enhance the prospects of promotion of any particular member of that cadre or class solely on the ground that he belongs to a particular category, namely, whether he is a direct recruit or promotee. In Mohd. Shujat Ali v. Union of India (A.I.R. 1974 S.C. 1631), the Supreme Court held "But where graduates and non-graduates are both regarded as fit and, therefore, eligible for promotion, it is difficult to see how, consistently with the claim for equal opportunity, any differentiation can be made between them by laying down a quota of promotion for each and giving preferential treatment to graduates over non-graduates in the matter of fixation of such quota." (para 2

*A. Munshi*

34. While it would be perfectly valid to prescribe any higher qualification or quantum of experience for promotion to Group 'A' posts, it would be discriminatory and offending Articles 14 and 16 of the Constitution to prescribe that seniority or eligibility for promotion to the higher post of Group 'A' shall be determined with reference to the fact whether the incumbent is a direct recruit or a promotee and allocating him his position in the all-India list on such a consideration. All Appraisers from whichever source they have been appointed in their respective cadres, are to be considered on an equal footing for purposes of further promotion and their amalgamation into a common eligibility or seniority list prepared on an all-India basis has to proceed on a just and fair principle which can be applied as a common denominator or parameter for determining their inter-se seniority or relative placement in such a common list.

35. An analysis of the all India combined list of Appraisers prepared after rotating direct recruits and promotees in the ratio of 1:1 and circulated with letter F.No.A.23011/1/86-AD.II(A), dated the 22nd May, 1986 would show that it has resulted in violent distortions of seniority of the incumbents with reference to their postings in their respective regional cadres. Applicants Nos.1 and 2 were promoted on 6.6.1968 and 31.8.1968 respectively. Direct recruits appointed in 1976 and 1977 were placed against vacancies earmarked for them in 1968. Promotees of 1968 thus became junior to direct recruits of 1976 and 1977 in the combined all India list. Applicant No.1's name was shown at Sl.No.156 in the Seniority List of Appraisers in the Bombay Custom House and he was above direct recruit Appraisers shown at Sl. Nos.157, 159, 161, 163, 165 and 167 in the said list.

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of the Bombay Custom House. In the Combined Seniority List, these direct recruit Appraisers who were shown at Sl.No.157( Shri M.P.Dixit), Sl.No.159(Shri S.M. Rastogi), Sl.No.161(Shri Gurlal Singh Sandhu), Sl.No.163(Shri Mohan Singh), Sl.No.165(Shri Krishan Kumar) and Sl.No.167(Shri M.M.Magotra) have been shown at Sl.No.420, Sl.No.426, Sl.No.428, Sl.No.430, Sl.No.432 and Sl.No.434 respectively and Applicant No.1 has been brought down to Sl.No.435. These direct recruit Appraisers who were below Applicant No.1 in the Bombay Custom House Seniority List have been placed above him in the Combined All India Seniority List. Similarly one Shri W.F.Feegrade, a promotee Appraiser, who was promoted to the cadre of Appraisers on 9.7.68 and shown at Sl.No.24 in the seniority list of Calcutta Custom House, above Sl.No.27,29,31 and 33, has now been placed at Sl.No.441. in the Combined Seniority List and those shown at Sl.No.27(Shri S.C.Paul), Sl.No.29(Shri M.N. Dhar), Sl.No.31(Shri Amarendra Jha) and Sl.No.33(Shri V.B.Dhar) have been placed above him at Sl.No.418, 422,424 and 436 respectively. Applicant No.3 was promoted in April, 1979 against a regular vacancy. His name is not included in the impugned seniority list, although his name figured at Sl.No.368 in the seniority list of the Bombay Custom House as on 1.1.1982. Direct recruits of 1984, however, find place in the impugned list. Thus the Combined Seniority or Eligibility List has caused violent departure from and distortions in the established seniority lists of promotee and direct recruit Appraisers in their respective cadres. Obviously this cannot be sustained on any ground.

36. The violent distortions in the relative placement of direct recruits and promotees in preparing the all-India Combined List have been conceded by the

*A. Kumar*

Department. They have also accepted that the all-India list is in fact not a seniority list. In this connection, submissions made by the Department in para 6.10(para-wise comments) of their counter dated 23rd March, 1987 are relevant and are reproduced below:-

" Para 6.10

It is submitted that all-India list of Appraisers published vide Department of Revenue letter dated 22.5.86(Annexure-III to the application) is not strictly speaking a seniority list, as it does not follow the principle of seniority as contained in Ministry of Home Affairs O.M. dated 22.12.59(Annexure I-A to the application). For instance it is submitted that according to the principle contained in O.M. dated 22.12.59 all confirmed officers become enbloc senior to unconfirmed officers. This is not the case in the all-India list. I crave leave to refer to the seniority list of respective Custom House and the all India list of Appraisers at the time of hearing of the application. It is also submitted that in the all-India list the inter-se seniority of Appraisers in a particular cadre has not been maintained. Particularly in case of Appraisers belonging to Bombay Custom House cadre, promotee Appraisers who according to the Custom House seniority list were junior to some direct recruits belonging to that Custom House have gained in seniority <sup>the</sup> by a number of places ~~in~~/all-India list. On the other hand direct recruits Appraisers belonging to Calcutta and Madras Custom Houses have gained in seniority vis-a-vis their

*h. mawal*

senior promotee Appraisers belonging to respective cadres in the all-India list of Appraisers prepared in 1986. Had the all-India list been a seniority list, the inter-se seniority of direct recruits and promotees in a particular cadre had necessarily to be maintained....."

37. The All India Combined List, which has been challenged is based on application of different principles on different dates. While on the one hand, it takes into consideration all the incumbents as were in service as on 15.9.70 whether direct recruits or promotees irrespective of the fact whether some of the incumbents had later on resigned or retired or are no longer alive and gives them their placement in the ratio of 1:1 on the basis of their source of appointment i.e., direct recruitment or promotion, on the other hand, if in a particular year promotions were much in excess of the direct recruitment, slots were reserved for direct recruits, who were given places against those slots even though appointed a number of years later than those who had been appointed earlier; lastly, the circular dated 22nd May, 1986 also envisages that as from 1.3.1986 the inter-se placement of direct recruits and promotees will be determined in accordance with their continuous officiation or length of service as per provisions of the Department of Personnel and Training O.M.No.35014/2/80-Estt(D) dated 7th February, 1986. Thus the all-India List is vitiated also on the ground not only of violent distortions but adoption of different principles for different periods which cannot but be held to be arbitrary.

38. Another point raised in this case was that it was made clear in the orders of promotions in some cases that the promotions were made only as a stop-gap

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arrangement or temporary measure till direct recruits became available. However, as a matter of actual fact, these promotees were never reverted either when direct recruits became available or on any subsequent occasion. As such, denial of the benefit of length of continuous service for purposes of determining the relative position in the all India Combined List, in the absence of any other valid rule, would be contrary to law.

39. The question in this is one of determining the inter-se relative placement or seniority of Appraisers of three cadres relating to three Custom Houses. After the recruitment to the posts of Appraisers whether by direct recruitment or promotion is long over and the inter-se seniority of the incumbents in the respective cadres has already been determined on the rotational principle, the application of the rotational principle a second time for determining seniority in the all India Combined List of Eligibility is warranted neither by law nor by any rules. In the Indian Customs and Central Excise Service Group-A, 50% posts are filled by direct recruitment and 50% by way of promotion. The posts earmarked for promotion are allocated to three feeder Services, namely, Superintendents of Central Excise Group-B 80%, Appraisers 14% and Superintendents of Customs 6%. Thus, in the total cadre of Assistant Collectors of Customs and Central Excise, the intake by way of 'promotion' from the category of Appraisers is 7%. For filling up the quota of promotions in the cadre of Assistant Collectors of Customs and Central Excise, the Appraisers whose seniority in their respective cadres of zonal Custom Houses stands already fixed on the basis of the

*M. N. M.*

rotational principle cannot be discriminated against in the matter of promotion on the ground of source of their entry into the service. This position has, in fact, been accepted in Mervyn Continho's case while considering the question of promotion to the post of Principal Appraiser, which was a Group-B post in the respective Custom House cadre. The Supreme Court in no uncertain terms held that there was no question of any quota being reserved for promotion for Appraisers recruited from two sources. They observed:

" The source of recruitment of Principal Appraisers is one, namely, from the grade of Appraisers. There is, therefore, no question of any quota being reserved from two sources in their cases. The rotational system cannot, therefore, apply when there is only one source of recruitment and not two sources of recruitment."

( Para 8 )

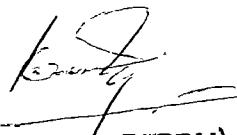
In the present case 7% of the posts in the cadre of Assistant Collectors of Customs and Excise Group-A are to be filled up through one source only viz., promotion of Appraisers and, therefore, any principle which gives an undue advantage or weightage to a member of the Appraisers Service with reference to his source of entry into the Appraisers Service cannot be sustained and is liable to be struck down. The identity of a member of the Service with reference to his source of entry or mode of recruitment stands submerged and lost after his appointment to the Service and he becomes a member of one homogeneous group. The relative placement or inter-se seniority of members of three cadres for preparing eligibility list for Group-A has to be based, in the absence of any other valid Rule of seniority, on the principle of continuous length of service in that grade.

*A. Muneer*

40. In the circumstances, the impugned Seniority List circulated with letter F.No.A.23011/1/86-AD.II(A) dated 22nd May, 1986 is hereby quashed. Any promotions made to the posts of Assistant Collector of Customs and Excise Group-A on the basis of the said list are also set aside. Respondents No. 1 and 2 are directed to prepare a fresh All India Combined List of Appraisers on the basis of continuous officiation of the incumbents in the post of Appraiser.

41. If the direct recruit respondents succeed in the L.P.A. filed by them against the judgment of the single Judge of the Madras High Court, the Government would no longer be under an obligation to prepare a combined list. Both parties (the applicants and the Department) proceeded on the footing that a combined eligibility list of Appraisers on an All-India basis has to be necessarily prepared. We express no opinion as to on what principle the combined eligibility list should be prepared in such <sup>a</sup>contingency. The application is accordingly allowed. There shall be no order as to costs.

  
(KAUSHAL KUMAR)  
MEMBER (A)  
28.5.1987

  
(K. MADHAVA REDDY)  
CHAIRMAN  
28.5.1987.