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RESERVED

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD.

Dated: This the 2nd day of September, 2005.

Original Application No. 501 of 2005.

Hon'ble Mr. D.R. Tiwari, Member (A)
Hon'ble Mr. K.B.S. Rajan, Member (J)

1. Awadhesh Kumar, S/o Late Ram Kishore Kaithal.
2. Satish Kumar, S/o Sri Sri Ayodhya Prasad.
3. Satish Kumar, S/o Late R.C. Ram.
4. Narendra Pal, S/o Late R.C. Ram.
5. Mohd. Yawar Khan, S/o late Ghasitey Shanker.
6. Awadhesh Singh, S/o Sri Ram Singh.
7. Sudhakar Shukla, S/o Sri O.P. Shukla.
8. Hari Babu Lal, S/o late Shanker Lal.
9. Rajendra Kumar Shukla, S/o Sri K.K. Shukla.
10. Virendra Kumar, S/o Sri late Prem Sagar.
11. Shesh Chandra Tiwari, S/o late S.P. Tiwari.
12. L.S. Yadav, S/o Sri Ganpat Singh Yadav.
13. N.C. Shukla, S/o Sri G.C. Shukla.
14. Rajesh Dubey, S/o late V.S. Dubey.
15. Jitendra Giri, S/o Sri Markandey Giri.
16. Mukesh Kumar, S/o Sri S.L. Sahu.
17. Pawar Kumar Misra, S/o Sri T.N. Misra.
18. Satya Ram, S/o Sri Kanhaiya Lal.

.....Applicants

By Adv: Sri Vikas Budhwar.

V E R S U S

1. Union of India through Secretary,
Ministry of Finance, Department of Revenue,
NEW DELHI.
2. Central Board of Excise & Customs through its
Chairman, New Delhi.
3. Chief Commissioner of Customs & Central Excise,
19-C, Vidhan Sabha Marg, Lucknow.
4. Commissioner, Central Excise Commissionerate,
Kanpur, U.P.

.....Respondents.

h By Adv: Sri S. Singh

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O R D E RBy K.B.S. Rajan, Member (J)

The legal validity of the following portions of the relevant recruitment rules has been challenged through this O.A:-

(a) Rule 5(3) and 5(4) of Central Excise and Customs Department Senior Tax Assistant (Group 'C' Posts) Recruitment Rules 2003

(b) Rule 4(4) and 4(5) of Central Excise and Customs Department Tax Assistant (Group 'C' Posts) Recruitment Rules, 2003.

2. For the purpose of full understanding, the relevant rules under challenge are quoted below:-

(a) Central Excise and Customs Department Senior Tax Assistant (Group 'C' Post) Recruitment Rules:-

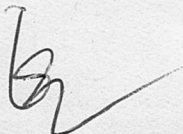
"5. Initial Constitution

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(iii) The Data Entry Operator Grade 'B' (4500-7000) and Tax Assistants (4500-7000) have been placed in their higher scale of Rs. 5000-8000 and they shall be placed below the Assistant and Data Entry Operator Grade 'C' and their inter-se placement shall be fixed in accordance with the date of regular appointment to the respective grade subject to the condition that their inter-se placement in respective category shall not be disturbed.

(iv) Upper Division Clerk with Special Pay shall be placed below Asstt. Data



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Entry Operator Gr. 'C' Data Entry
Operator Grade 'B' Tax Assistant."

Central Excise and Customs Department Tax Assistant
(Group 'C' Posts) Recruitment Rules, 2003.

"4. Initial Constitution:

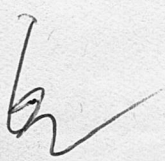
- (i)
- (ii)
- (iii)
- (iv) The Upper Division Clerks and Data Entry Operator Gr.'A' shall be placed en-block senior and , their date of regular appointment to the respective grade subject to the condition that their inter se placement in the respective grade shall not be disturbed.
- (v) Lower Division Clerks shall be placed below Upper Division Clerks and Data Entry Operators Grade 'A' ."

3. The Brief Facts of the case are as under:-

(a) The applicants, 18 in numbers are employed in the ministerial cadre of the Respondents organization as L.D.Cs, in the grade of Rs 3050 - 4590 and in the ladder of promotion as then available they had the following promotional chances:-

- (i) Upper Division Clerk in the grade of Rs 4,000 - 6,000
- (ii) Tax Assistant in the grade of Rs 4,500 - 7000
- (iii) Assistant in the grade of Rs 5,000 - 8,000/-.

(b) With the modernization of the offices, by introducing computers, a parallel cadre called Data Entry Operator Cadre was created in 1992 and the hierarchical system of the said Cadre is as under:-



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- (i) Data Entry Operator Grade 'A' – (Rs 4,000 – 6000)
- (ii) Data Entry Operator Grade 'B' – (Rs 4,500 – 7000)
- (iii) Data Entry Operator Grade 'C' – (Rs 5,000 – 8000)

(c) The above mentioned two grades were functioning independent of each other, with independent sets of recruitment rules and modes of appointment to the respective posts. Qualifications have also been fixed for the afore said posts in the relevant Recruitment Rules.

(d) The Government had decided to merge the Technical cadre with the Ministerial cadre by framing two recruitment Rules as under:-

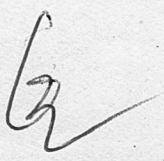
- (i) Central Excise and Customs Department Senior Tax Assistant (Group 'C' Posts) Recruitment Rules 2003
- (ii) Central Excise and Customs Department Tax Assistant (Group 'C' Posts) Recruitment Rules, 2003.

(e) According to the abovementioned Rules, posts with identical scales were merged and suitable nomenclature assigned. Accordingly, posts of Assistants (pay scale Rs 5,000 – 8000) and Data Entry Operator Grade 'C' had been merged together to be called as Senior Tax Assistants in the same grade and these were placed at the top, with the inter se seniority of the officials maintained.

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(f) The applicants, working in the ministerial cadre are aggrieved inasmuch as the Technical cadre which joins the main stream gets undue position in the seniority at various levels, at the cost of the seniority position of the applicants. The grounds raised in this regard are inter -alia as under:-

- (i) While the Ministerial cadre is one of earliest, right from the inception of the very Central Excise & Customs department, the Technical cadre is nascent.
- (ii) There can be absolutely no comparison in respect of the qualifications, ability between the Ministerial Cadre, which stands in a higher pedestal, and the technical cadre. Thus, un-equals are made equal which is anathema to equality clause.
- (iii) The Selection process is equally different, inasmuch as in the Ministerial cadre, the entry at the base level is at the All India basis, while the Data Entry Operators are recruited at the Commissionerate level.
- (iv) Even assuming without accepting that merger is permissible, there has been no application of mind and the entire action of the respondents is mechanical, putting at par the technical cadre which has no match compared to the stream of Ministerial Cadre.
- (v) The technical cadre cannot be allowed to steal a march over the Ministerial Cadre



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which has already accrued its right in matters of promotion etc.,

(vi) While assigning the seniority to LDCs, the respondents should invoke the power to relax and ensure that the seniority of LDCs is above that of the Data Entry Operators Grade A.

(vii) Apart from depriving the applicants of their seniority, they are also sought to be thrown out of the Zone and pushed to Meerut Zone.

4. The respondents have contested the O.A. Their contention is that recruitment rules for LDC framed in 1979 have been abolished and after cadre restructuring, the new Recruitment Rules have been framed w.e.f. 09-09-2002. Promotion to the higher post is not routine but all the Senior Tax Assistants, Tax Assistants, UDCs, Data Entry Operators of various grades are to qualify in the departmental examination for getting their respective higher promotion. The restructuring is necessary in view of the modernization as well as introduction of computer in the administration. The new structure abolished not only the erstwhile ministerial structure but also the Data Entry Operators' and as such the benefit cannot be made available only to the applicants, who belong to the ministerial cadre. And that inclusion of technical stream cannot be stated to be an illegal encroachment.

5. Arguments were advanced by the counsel for both the parties. The learned counsel for the applicants, while justifying

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the challenge, by taking us through various documents and grounds as adduced in the O.A. also have referred to the following two judgments, which are on the very same subject i.e. legal validity of provisions contained in notification dated 16th January, 2003:-

(a) Order dated 30th December, 2003 in OA 558/2003 and connected O.As of the Madras Bench.

(b) Order dated 11th May, 2004 of this Bench in OA No. 1214 of 2003, following the decision of the Madras Bench.

(c) Order dated 12th May, 2004 in OA No. 259/2003 of the Lucknow Bench, following the order of the Madras Bench.

6. The applicants have also relied upon the judgment reported in 2001 (6) SCC 428 – Sushma Mutreja vs U.O.I. and Ors.

7. We have considered the case and gone through the pleadings, as also the reliance placed upon by the counsel for the applicants to the orders of Madras Bench, and the orders of this Bench and Lucknow Bench, passed on the basis of the order of the Madras Bench.

8. The question is not limited to seniority of the applicants being affected, but in a way, the very merger has been questioned. (See Para 26 and Ground IV of the O.A) As such, first it is essential whether merger can be questioned and if it



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cannot, whether the consequences of merger have directly or indirectly, / proximately or remotely affected the career prospects of the applicants, to the extent that the same offends provisions of Art. 14 and 16 of the Constitution.

9. The fact that merger is a policy decision and the Govt. has full powers to effect merger has been affirmed by the Apex Court in the case of **S.P. Shivprasad Pipal v. Union of India, (1998) 4 SCC 598**, wherein at page 603 the Apex Court has held as under :

16. The appellant, however, contends that as a result of the merger his promotional chances have been very adversely affected because his position in the seniority list has gone down. Rule 9 of the Central Labour Service Rules, 1987 under which the merger is effected, lays down the rules of seniority. It provides that the inter se seniority of the officers appointed to the various grades mentioned in Schedule I at the initial constitutional stage of the service shall be determined according to the length of regular continuous service in the grade subject to maintenance in the respective grade of inter se seniority of officers recruited in their respective original cadres. The proviso to this Rule prescribes that although Assistant Labour Commissioner (Central), Labour Officer and Assistant Welfare Commissioner shall be equated, all Assistant Labour Commissioners (Central) holding such posts on or before 31-12-1972 shall be en bloc senior to Labour Officers and (2) Senior Labour Officers and Regional Labour Commissioners shall be equated. But all Regional Labour Commissioners holding such posts on or before 2-3-1980 shall be en bloc senior to the Senior Labour Officers.

17. Explaining the proviso the respondents have said that before 31-12-1972 Assistant Labour Commissioners were in a higher pay scale than Labour Officers. The parity between their pay scales came about only from January 1973. That is why to preserve their inter se position, Assistant Labour Commissioners appointed prior to 31-12-1972 have been placed above Labour Officers. Similarly, Regional Labour Commissioners drew a higher pay scale than Senior Labour Officers prior to 1980. The parity has come about in 1980 and hence Regional Labour Commissioners holding such

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posts on or before 2-3-1980 have been placed above Senior Labour Officers.

18. The seniority rules have thus been carefully framed taking all relevant factors into consideration. The respondents have also pointed out that as a matter of fact, by reason of the merger, the appellant has not, in fact, suffered any prejudice and he has also received promotions.

19. However, **it is possible that by reason of such a merger, the chance of promotion of some of the employees may be adversely affected, or some others may benefit in consequence. But this cannot be a ground for setting aside the merger which is essentially a policy decision. This Court in Union of India v. S.L. Dutta² examined this contention. In S.L. Dutta case² a change in the promotional policy was challenged on the ground that as a result, service conditions of the respondent were adversely affected since his chances of promotion were reduced. Relying upon the decision in the State of Maharashtra v. Chandrakant Anant Kulkarni¹ this Court held that a mere chance of promotion was not a condition of service and the fact that there was a reduction in the chance of promotion would not amount to a change in the conditions of service. (Emphasis supplied)**

¹ (1981) 4 SCC 130 : 1981 SCC (L&S) 562 : (1982) 1 SCR 665

² (1991) 1 SCC 505 : 1991 SCC (L&S) 406 : (1991) 15 ATC 737

10. The Madras Bench has referred to the above judgment and observed in para 10 of the order as under:-

"10. The applicants in their plea have stated that only after the issue of impugned notification of Recruitment Rules, they found that their seniority has been unsettled. On going through the various judgments quoted by the learned counsel for the applicants, it is clear that now it is well settled law that an employer has a right to merge or interrogate different cadres into one single cadre or to split a single cadre into different cadres for regularizing administration and hence whether there should be merger of cadre or not is a matter which is exclusively within the domain of executive policy. Similarly, the rules of administration orders which bring about integration might provide for the principles and manner in which the seniority of the integrated employees are to be determined. Such

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rules or orders must pass the test of constitutionality which particularly implies that they must be based on some fair, just and national principle. But this will vary according to the facts and circumstances of the case and particularly the historical background of the integration. Hence the cases quoted reveal a flexible approach by the Court in complex situations with the ultimate aim of striking a just balance between the rival claimants. In the instant case, therefore, we feel that it is necessary to examine the historical background of the case. Initially in the Customs Department, there were only Ministerial cadre comprising of LDCs, UDCs and Tax Asstts. LDCs with 5 to 7 years of service was promoted as UDC and then as Tax Asstt. After five years of service as UDC/Tax Asstt. They would be promoted as Inspector (Preventive Officer/Examiner) which are in the Executive cadre. They were performing the functions as per the provisions of the Customs Act and allied rules and regulations. The cadre of the Clerk is notified as the proper officer to do many customs related work, which includes manifest, nothing collection of duty and other treasury works. The LDC/UDC/Tax Assistant are attending to complex nature of work which includes drafting of various administrative proposals, original order, scrutiny of main customs documents like bill of entry, shipping bill and transshipment applications etc. Further as LDC gets promotion as UDC only after passing the departmental examination which includes subjects in Customs Law, FEMA ITC regulations, Central Excise Act alongwith Administrative procedure such Conduct Rules, Treasury Rules etc. In the year 1992 a technical cadre of Data Entry Operator was formed which has been initially filled by getting option from the LDCs and also by inter Commissionerate transfer of those who have been directly appointed from the Employment Exchange. DEO Posts are purely technical i.e. typing data in the Computer. There are four grade available in that cadre viz. DEO Gr. 'A', 'B', 'C' and they were promoted mainly on the basis of length of service without writing any departmental examination. It is, therefore, clear that duties and responsibilities of Ministerial staff and their skill level required is more when compared to the Data Entry Operators. Further, before restructuring technical cadre of DEOs were not eligible for further promotion to the Executive cadre in the Customs Department. After merger, all these provisions have been changed completely. Not only that the technical cadre has been merged with the Ministerial cadre, in fixation of inter-se seniority the UDCs have been put in an advantageous position vis-a-vis UDCs, their status also enhanced

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by way of opening up entry into the Executive positions. The Department has justified the change on the ground that the major objective of the restructuring is to create the Tax Assistants who are technology originated and can compete with the higher standards at a global level. No doubt, it is a laudable objective. It is necessary in all walks of life to replace the manual methods of working by introduction of computers to achieve speed in disposal and thereby encourage capacity development of the staff. We accept the stated policy of the Department and the need to merge the technical cadre with the Ministerial cadre. It is also open to the Department to take into account the different background, nature and duties performed by the two categories and evolve a just and fair policy for the integration. We have, therefore, proceed to examine whether the policy adopted by the respondents is just and fair in all respects.

11. After so observing, the Madras Bench, analyzed the case from the point of view of equation of posts and referred to the case of State of Maharashtra vs Chandrakant Anant Kulkarni **(1981) 4 SCC 130**, wherein at page 137 the Apex Court has observed:

"In the matter of equation of posts:

(i) Where there were regularly constituted similar cadres in the different integrating units the cadres will ordinarily be integrated on that basis; but


(ii) Where, however, there were no such similar cadres the following factors will be taken into consideration in determining the equation of posts—

(a) nature and duties of a post;

(b) powers exercised by the officers holding a post, the extent of territorial or other charge held or responsibilities discharged;

(c) the minimum qualifications, if any, prescribed for recruitment to the post, and

(d) the salary of the post."



It is well settled that these principles have a statutory force."

12. Referring to the above and taking into account the admitted fact that the respondents had taken only the pay scale as the basis for the integration (see first line of para 11 of the order dated 30-12-2003 of the Madras Bench), the Bench had held as under:-

"In the instant case , we find that only the pay scale has been taken into account ignoring the nature of functions, responsibilities discharged by the functionaries in the Ministerial cadre, DEO, were performing mechanical duties of data entry cannot be equated with the Ministerial staff who were all along performing statutory duties enshrined in the various Acts/Rules of the Department and while assigning seniority to them these factors should have weighed by the Department and the determination of inter-se seniority from the date of appointment in the grade has given the DEOs a fortuitous advantage....."

13. The Madras Bench has thereafter observed as under, vide para 11 and 12 thereof:-

"..... In the case of seniority, the Supreme Court has recently held that in such situations, the fixation of seniority on the basis of length of service in their respective parent cadres had a rational nexus to the objects intended to be achieved. The argument that no credit should be given to the past service when cadre after merger has been taken into another service, has been rejected by the Supreme Court. It is also held that when there is a merger of cadres, it would be in order to place those in such lower cadre below those in the higher cadre in fixing seniority of the merged cadre.

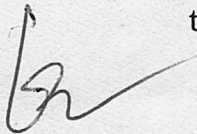
12. In the light of various pronouncements of the Supreme Court cited above, on merger of cadre and seniority and keeping in view the historical background of the status of the services of the Ministerial staff prior to integration, we consider



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that seniority principle stipulated in the impugned notification in the OAs is unfair to the Ministerial cadre of the respondent department and considering any other date than the date of initial appointment is discriminatory and arbitrary. Therefore, we have no hesitation to quash the said Rules 5(ii) of the Central Excise and Customs Department Senior Tax Asstt. (Group 'C' pos) Recruitment Rules 2003 published vide notification dated 16.1.2003 and Rule 4 (4) of the Central Excise and Customs Department Tax Assistant (Group 'C') post Recruitment Rules, 2003 published vide notification dated 2.5.2003 in respect of stipulation regarding inter-se seniority among the Ministerial cadre of UDCs and Technical cadre of DEOs. We further direct the respondents to apply fair just and rational principle in determining the seniority while integrating the different cadres. In order to evolve, an acceptable solution, the respondents are directed to initiate a consultation process with the employees representative/ association concerned and recast the seniority rules on a fair and rational basis keeping in view the principle laid down by the Apex Court as mentioned in para 1 above. We further direct the respondents to complete the above exercise within a period of six months from the date of receipt of copy of this order."

14. We respectfully agree with the views and decision of the Madras Bench. In addition we would hasten to add that the Apex Court has impliedly held in the case of **R.K. Sethi v. Oil & Natural Gas Commission, (1997) 10 SCC 616**, that if in the administration of the powers to effect merger, there appears vice or arbitrariness, judicial interference is justified. In that case, the High Court had directed the respondents to High Court has expressed the view that the cadres in the regions should have been integrated in a unified cadre and the seniority should have been assigned to the Telex Operators in the integrated cadre and has directed that a consolidated list be prepared of all regions and



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promotions should be made on that basis. In other words, the High Court has directed that AG-II cadre should be converted from a regional cadre to a centralised cadre. (The direction of the High Court was identical to the one what the respondents have done in the instant case.) The Apex Court has held, "Such a direction could not be given by the High Court. It is for the Commission to decide how to organise its administrative services in order to achieve efficiency in the administration. The Commission has taken a decision that cadres up to AG-I should be maintained on regional level. There is nothing to show that the said decision of the Commission suffers from the vice of arbitrariness." This means that when there is a vice of arbitrariness then notwithstanding the fact that merger is a policy matter and is within the domain of the employer, judicial interference is called for where there is vice of arbitrariness. In the instant case, as held by the Madras Bench followed by the Lucknow as well as this Bench, there is arbitrariness in equating the un-equals. Where there is absolutely no comparison or parity in any way, say, qualifications, mode of recruitment, functional responsibilities etc., just on the basis of equation of pay scale no two posts could be merged and if so merged, the same amounts to equating unequals as equals. It has been held in the case of **T. Sham Bhat v. Union of India,**

1994 Supp (3) SCC 340, at page 349 :

16. Venkateshwara Theatre v. State of A.P (1993) 3 SCC 677, is a decision of this Court which points out, as to how discrimination can arise, if persons who are unequals are treated as equals, thus: (SCC p. 693, para 23)

"Just as a difference in the treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, i.e., differently placed, are treated similarly. ... A law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law."

15. It would be appropriate at this juncture to borrow the golden words of the Apex Court in regard to equality clause enshrined in our Constitution, as observed in the case of **G.M., South Central Rly. v. A.V.R. Siddhantti, (1974) 4 SCC 335, at page 343 :**

20. *The fundamental right of equality means that persons in like situation, under like circumstances are entitled to be treated alike. The constitutional code of equality and equal opportunity", observed this Court in State of Jammu and Kashmir v. Triloki Nath Khosla reported in (1974) 1 SCC 19, "is a charter for equals". So long as employees similarly circumstanced in the same class of service are treated alike, — the question of hostile discrimination does not arise. The equality of opportunity for purposes of seniority, promotion and like matters of employment is available only for persons who fall substantially, within the same class or unit of service. The guarantee of equality is not applicable as between members of distinct and different classes of the service.*

16. Admittedly in the instant case, the ministerial cadre and the technical cadre do not fall substantially within the same class because of vast difference in all aspects, recruitment, qualifications, functional responsibilities etc., and merely the pay scales are equal the technical cadre cannot pass the test of equality vis-à-vis the ministerial cadre.

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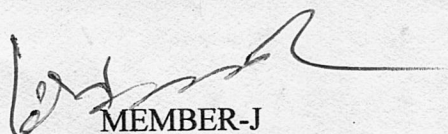
17. In view of the above, the OA fully succeeds. The following portions of the two Recruitment Rules as mentioned against each are held unconstitutional and accordingly quashed

(i) Rule 5(3) and 5(4) of Central Excise and Customs Department Senior Tax Assistant (Group 'C' Posts) Recruitment Rules 2003

(ii) Rule 4(4) and 4(5) of Central Excise and Customs Department Tax Assistant (Group 'C' Posts) Recruitment Rules, 2003.

The respondents are directed to apply a fair, just and rational principle in determining the seniority while integrating the different cadres. It would be worthwhile to taken into confidence the representatives of the employees as well so as to arrive at a consensus in designing the policy of assignment of seniority in the integrated cadre. As the quashing of the above provisions would cause certain inconvenience in effecting promotion etc., to the individuals who are awaiting their promotion, it would be in the interest of justice if finalization of seniority takes place at the earliest, say within four months from the date of communication of this order.

18. Under the above circumstances, no orders as to costs.



MEMBER-J



MEMBER-A

GIRISH/-