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**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH, JODHPUR**

.....

**ORIGINAL APPLICATION NO. 340/2002
JODHPUR THE 8th DAY OF JULY, 2008.**

CORAM :

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**HON'BLE MR. N.D. RAGHAVAN, VICE CHAIRMAN
HON'BLE MR. R.R. BHANDARI, MEMBER [A]**


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Bhoj Raj Gangnani S/o Shri H.R. Gangnani aged about 45 years, resident of 7, Customs Colony, Ratanada, Jodhpur, at present employed on the post of Superintendent Central Excise and Custom, Jodhpur.

.....Applicant.

None present for applicant.

Versus

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- 1- Union of India through Secretary to Government of India, Ministry of Finance, Department of Revenue, North Block, New Delhi.
 - 2- The Secretary, Department of Personnel & Training, New Delhi.
 - 3- The Chairman, Central Board of Excise and Custom, North Block, New Delhi.

.....Respondents.

None present for respondents.

**ORDER
[PER R.R.BHANDARI, MEMBER (A)]**

1. This Application has been moved under Section 19 of the Administrative Tribunals Act, by the applicant.

2. Applicant has sought for the following reliefs :-

"(i) That the clause (i) & (ii) OM dt. 11.7.2002 annexure A/1 may be declared ultra virus and unconstitutional and the same may be struck down.

(ii) That the impugned order dt. 10.12.2002 Annexure A/2 may kindly be modified by

R.R. Bhandari

excluding those SC/ST who have been promoted against general vacancy.

(iii) That the applicant may be promoted and given all consequential benefits prior to his juniors mention in O.A.

(iv) That the respondents may be directed to apply the ratio of 6:1:2 in the promotion to the post of Assistant Commissioner.

(v) That any other direction, or orders may be passed in favour of the applicant which may be deemed just and proper under the facts and circumstances of this case in the interest of justice.

(vi) That the costs of this application may be awarded."

3. The O.A. 340 was filed in 2002. On a number of occasions

Ed ~~including on 28 July, 2002~~, the learned counsel for the applicant or the learned counsel for the respondents have sought adjournment.

In view of being an old case, it was felt that based on the various documents on record, the case could be disposed of on merits.

Here, it is worthwhile to quote from JT 2000 (Suppl.2) Supreme Court 546 = 2001 SCC (L&S) 152 - **Ramon Services Private**

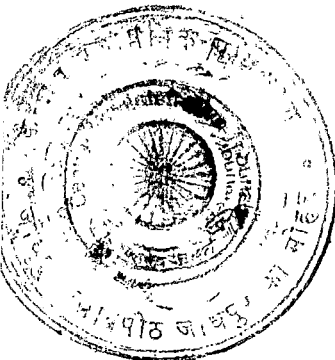
Limited vs. Subash Kapoor and others, :

"When the advocate who was engaged by a party was on strike, there is no obligation on the part of the court either to wait or to adjourn the case on that account. It is not agreeable that the courts had earlier sympathized with the Bar and agreed to adjourn cases during the strikes or boycotts. If any court had adjourned cases during such period, it was not due to any sympathy for the strikes or boycotts, but due to helplessness in certain cases to do otherwise without the aid of a Counsel."

(judgement paras 5 & 14)

"In future, the advocate would also be answerable for the consequence suffered by the party if the non-appearance was solely on the ground of a strike call. It is unjust and inequitable to cause the party alone to suffer for the self imposed dereliction of his advocate. The litigant who suffers entirely on account of his advocate's non-appearance in court, has also the remedy to sue the advocate for damages but that remedy would remain

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unaffected by the course adopted in this case. Even so, in situations like this, when the court mulcts and party with costs for the failure of his advocate to appear, the same court has power to permit the party to realize the costs from the advocate concerned. However, such direction can be passed only after affording an opportunity to the advocate. If he has any justifiable cause, the court can certainly absolve him from such a liability. But the advocate cannot get absolved merely on the ground that he did not attend the court as he or his association was on strike. If any Advocate claims that his right to strike must be without any loss to him but the loss must only be for his innocent client, such a claim is repugnant to any principle of fair play and cannons of ethics. So, when he opts to strike work or boycott the court, he must as well be prepared to bear at least the pecuniary loss suffered by the litigant client who entrusted his brief to that advocate with all confidence that his cause would be safe in the hands of that advocate."

(Para 15)

"In all cases where court is satisfied that the ex parte order (passed due to the absence of the advocate pursuant to any strike call) could be set aside on terms, the court can as well permit the party to realize the costs from the advocate concerned without driving such party to initiate another legal action against the advocate."

(para 16)

"Strikes by the professionals including the advocates cannot be equated with strikes undertaken by the industrial workers in accordance with the statutory provisions. The services rendered by the advocates to their clients are regulated by a contract between the two, besides statutory limitations, restrictions, and guidelines incorporated in the Advocates Act, the Rules made thereunder and Rules of procedure adopted by the Supreme Court and the High Courts. Abstaining from the courts by the advocates, by and large, does not only affect the persons belonging to the legal profession but also hampers the process of justice sometimes urgently needed by the consumers of justice, the litigants. Legal profession is essentially a service oriented profession. The relationship between the lawyer and his client is one of trust and confidence."

(para 22)

"No advocate could take it for granted that he will appear in the Court according to his whim or convenience. It would be against professional ethics for a lawyer to abstain from the Court when the cause of his client is called for hearing or further proceedings."

"In the light of the consistent views of the judiciary regarding the strike by the advocates, no leniency can be shown to the defaulting party and if the circumstances warrant, to put such party back in the position as it existed before the strike. In that event, the adversary is entitled to be paid exemplary costs. The litigant suffering costs has a right to be compensated by his defaulting Counsel for the costs paid. In appropriate cases, the

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Court itself can pass effective orders, for dispensation of justice with the object of inspiring confidence of the common man in the effectiveness of judicial system."

"Inaction will surely contribute to the erosion of ethics and values in the legal profession. The defaulting Courts may also be contributory to the contempt of this Court."

(paras 24, 29 & 30)"

4. The documents on record in this O.A. could be grouped-into four sub-groups as below :

- (i) OA No. 340/2002 alongwith its four Annexures.
- (ii) Counter filed by the respondents on dated 27.4.2004.
- (iii) Rejoinder filed by the applicant on dated 14.7.2004. Along with two Annexures.
- (iv) Amended Additional Affidavit filed on behalf of the Respondents dated 21.11.2007.

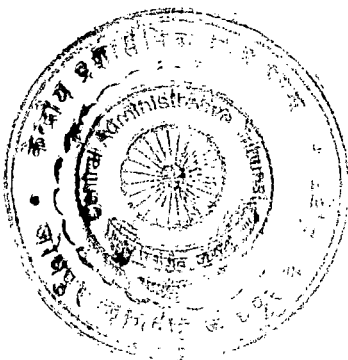
Information as brought-out from these four documents are summarized as below :-

ORIGINAL APPLICATION No. 340/2002.

Relevant portions are reproduced below :

"4.1 That so far relevant to this Original Application, the applicant qualified competitive examination conducted by Staff Selection Commission and was initially appointed to the post of Inspector in Jaipur Collectorate on dated 4.10.78. He enjoyed his next promotion to the post of Superintendent of Central Excise Group 'B' in Scale of Rs. 2000-3500 (hereinafter referred to as Superintendent for brevity), with effect from 20.3.1991.

4.2 That All India Seniority / Consideration list of Superintendent of Central Excise Group 'B' in Central Excise Commissionerate appointed / promotion to the grade from 1.1.86 to 31.12.1992 is issued vide respondent No. 1 vide its letter dated 2.4.1998 (should be 24.2.98). The name of applicant should have been placed at Sl. No. 2542 in this list but his name could not found place in the list due to error best known to respondent. The applicant immediately protested against the said list and the Additional Commissioner (P&V) forwarded the case of applicant and other two



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candidates with request/recommendation regarding placement of applicant name at Sl. No. 2542 in the final seniority list dated 24.2.98. A copy of letter dated 3.8.2001 is filed herewith and marked as Annexure A/3. And copy of relevant portion of this seniority list dated 24.2.98 is filed herewith and marked as Annexure A/4. However complete seniority list will be kept ready for perusal at the time of hearing of case.

4.3. That as per seniority list dated 24.2.98 the Superintendent of Central Excise up to Sl. No. 1738 has already been promoted to the post of Assistant Commissioner or retired prior to 10.12.2002. Now the 1st respondent has issued the promotion order of 330 posts of Superintendent of Central Excise, and 171 appraiser of customs and 93 post of Superintendent Custom (total 594 posts) to the post of Assistant Commissioner Customs and Central Excise in the scale of 8000-13500 vide its letter dated 10.12.2002. A copy of the same is filed herewith and marked as Annexure A/2.

4.4. That as per the judgement of Hon'ble Supreme Court in All India Federation of Central Excise etc. Vs. The Union of India and other decided on 22.11.1996 reported in 1996 (17) RLT 603 (SC) Hon'ble Supreme Court laid down the principal for promotion to Group 'A' service. As per this 6:1:2 ratio (i.e. 6 post by Superintendent of Central Excise, 1 post by promotion of Superintendent of Customs and next 2 posts by promotion of Customs Appraiser) should be followed. Meaning thereby out of 594 posts of AC, 396 should be filled up from Superintendent of Central Excise, 66 from Superintendent of Customs (Prev.) and 132 from Superintendent of Customs Appraisers should have been filled up. But this ratio has not been followed / applied while passing the promotion order dated 10.12.2002.

4.5. That as per policy of reservation out of 330 post of AC, 73 post (15% + 71/2%) should be filled up from SC & ST candidates while 140 SC/ST candidates have been promoted in total. Out of these 134 candidates 67 SC/ST candidates falling upto Sl. No. 257 in the promotion list has been promoted against general vacancy though these 61 candidates were originally promoted from Inspector to Superintendent against roster point by availing benefits of reservation. These promotions have been issued by following the O.M. No. 36028/17/2001 Estt.(res) dated 11.7.2002 clause (ii) of the said OM provide that if an unreserved vacancy arises in a cadre and there is any SC/ST candidates



within the normal zone of consideration in the feeder grade, such SC/ST candidate cannot be denied promotion on the plea that the post is not reserved. A copy of O.M. dated 11.7.2002 is filed herewith and marked as Annexure A/1. It would be relevant here to mention that as per judgement of Hon'ble Supreme Court reported in AIR 1995 SC 1371 R.K. Sabharwal and others Vs. State of Punjab and others as and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. The said principal is totally ignored while issuing the O.M. dated 11.7.2002. As the reserved candidates who were promoted against roster point due to accelerated promotion and became senior came into zone of consideration and in the light of the said OM they have been promoted against general vacancy to the post of Assistant Commissioner. Not only this in the case of Ajit Singh Juneja also the same principal was discussed and in para 10 and 11 of the judgement the focus has been thrown by giving example also. Thus the said O.M. is passed in clear violation of Hon'ble Supreme Court verdicts.

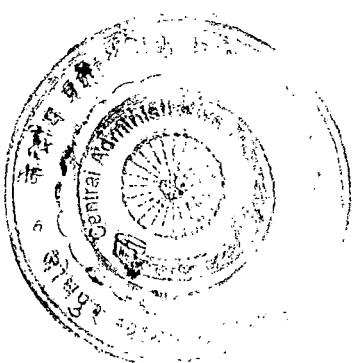
4.6 That not only this, the 17 juniors in the seniority list dated 24.2.98 whose name is after Sl. No. 2542 (the place of applicant) have also been promoted ignoring the applicant. The particulars of their juniors are as under (table not given).

From above it is clear that these persons were promoted on the post of Superintendent after 20.3.1991 which is the date of promotion of applicant. But without giving any prior notice / hearing to the applicant and without any reason whatsoever he has been ignored.

4.7 That as per the promotion to the post of AC the applicant should be promoted at Sl. No. 340. Had these 17 juniors and other 67 reserved candidates been not promoted against general vacancy the 85 posts more would be available and the applicant would have been certainly promoted. Not only this had the 6:1:2 ratio were applied then also the applicant would have come into promotional zone. The same has not been done.

4.8 That it has come to know that the respondents are going to issue next promotion list also by applying the same principle. Again the applicant would be out of zone of consideration without any reason. He has no any adverse entry. No disciplinary proceeding is

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pending or contemplated against him. He has no other way except to file this O.A."

2.-COUNTER

Relevant portions of the counter are reproduced below :-

"5. That the averments made in Para 4.2 of the Original Application are not admitted in the manner as stated by the applicants. It is submitted that draft seniority list of Superintendent of Central Excise promoted/appointed from 1.1.1986 to 31.12.1992 was circulated on 2.5.1997 to all cadre controlling Commissionrates for their comments. After considering objections / representations thereto, the final list was circulated on 24.2.1998 for bringing out any errors/mistakes. The Jaipur Commissionerate vide its letter dated 23.4.1998 drew attention to the exclusion of the name of three Superintendents, including that of applicant from the final seniority list though their names were in the draft seniority list. The final seniority list dated 24.2.1998 for the period 1986 to 1992 was, therefore, amended to rectify the omissions pointed out not only by the Jaipur Commissionerate but also to give effect to various CAT judgements and objections received from the other Commissionerates. In the amended seniority list, issued on 25.5.1999 the name of the applicant appears at Sl. No. 2569 i.e. above the name of Sh. K.L. Indurkhiya and below the name of Shri Shekhawat, exactly at the same place where the Commissionerate had recommended.

6. That the averments made in Para 4.3 and 4.4 of the O.A. are admitted being matter of record. However, it is clarified that at the time of holding DPC in August 1997, it was noted that the Customs Appraisers and Superintendent of Customs (Prev.) had suffered loss of vacancies vis-à-vis Superintendent of Central Excise during the ad hoc promotion made from 1980 to 1997 and in order to off set this loss, it was decided with the approval of the Board that the imbalance would be removed by earmarking vacancies of Assistant Commissioners in each batch of subsequent promotions. It is correct that promotion orders have been issued on 10.12.2002 promoting 594 officers in the grade of Assistant Commissioners which included 330 Superintendents of Central Excise, 171 Customs Appraisers and 93 Superintendents of Customs (Preventive). This order has, however, to read in conjunction with the earlier posting order No. 149/2002 dated 1.10.2002. Thus while making these promotions,



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the unfilled backlog in the promotion quota of Superintendents of Customs (Preventive) and Customs Appraisers was also made good. The number of Superintendents of Central Excise who were promoted as per their quota after making adjustment for the backlog. However, it is relevant to mention here that even if applicant's contention with regard to the number of vacancies that should have been provided to Superintendents of Central Excise is accepted, he would not figure in the list of the candidates to be promoted.

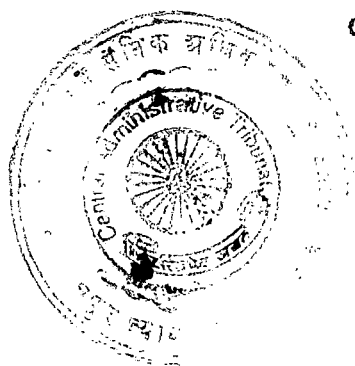
7. That the averments made in Para 4.5 of the O.A. are not admitted in the manner as stated by the applicants. It is submitted that SC and ST candidates were promoted against the 330 posts which fall in the quota of Superintendents of Central Excise as per the provisions laid down in Department of Personnel & Training's O.M. No. 36028/17/2001-Esst (Res) dated 11.7.2002. As per this O.M. if an unreserved vacancy arises in a cadre and there is an SC/ST candidate within the normal zone of consideration in the feeder grade, SC/ST candidate cannot be denied promotion of the plea that the post is not reserved. All other instructions relating to the reservation were also followed while making the promotions. The claim of the applicant that officers junior to him were granted promotion by over riding his claim is not made out.

8. That the averments made in Paras 4.6 and 4.7 of the O.A. are not admitted as stated by the applicants. It is submitted that the seniority of the officers mentioned in Para 4.6 of the O.A. was revised vide this Department's letter No. 23018/3/98 Ad II(B) dated 18.06.2001 and that too was not correct. It is further clarified that as per seniority list dated 24.2.1998 applicant is placed at Sl. No. 2569 against his claim in the O.A. at S. No. 2542. No general candidate who is placed below applicant in the seniority list dated 18.6.2001 has been promoted"

3. REJOINDER TO REPLY

In the rejoinder filed by the applicant, the points brought out by the respondents were denied and the applicant stressed the points brought out in the O.A. The applicant also annexed two Annexures - one giving the Seniority List of Group 'A' Officers dated 30.11.2000 and another is a Circular dated 1.7.1998.

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4. AMENDED ADDITIONAL AFFIDAVIT :

The respondents filed amended Additional Affidavit dated 21.11.2007. The relevant portions are reproduced below :-

"That promotions from Group 'B' to Group 'A' were made much earlier to the formation of roster. Therefore, excess representation of SC/ST Officers could not come to the notice at that point of time. Hence, it was decided by the department to make the roster before convening any departmental promotion committee so that representation of each category may be checked. After making Roster, it was observed that Scheduled Caste and Scheduled Tribes Officers in Superintendent of Central Excise were given promotion in excess in respect of their quota. Such excess came to notice at the time of exercise initiated for subsequent promotion to the grade of Assistant Commissioner from feeder grades i.e. Superintendent of Central Excise, Superintendent of Customs Preventive and Customs Appraiser which was adjusted in the subsequent promotion which issued on 22.8.2005.

That the applicant was considered for promotion to the grade of Assistant Commissioner and his service records were assessed for suitability of promotion to the grade of Assistant Commissioner by DPC held on 26-28.11.2002 and the recommendations in respect of him by the DPC were kept in a 'sealed cover' due to pending disciplinary proceedings against him. The applicant was also considered for promotion to the grade of Assistant Commissioner and his service records were assessed for suitability of promotion to the grade of Assistant Commissioner by the DPC held on 28.7.2005 and the recommendations in respect of him by the DPC were 'Fit' to be promoted on expiry of penalty period as he was imposed penalty of withholding of increments on conclusion of disciplinary proceedings. The claim of the officer is also baseless that his junior as general category candidate has been given promotion in the year 2002. His claim regarding comparison with Scheduled Caste / Scheduled Tribes candidates is not in order.

That as regards the version of seniority position of Superintendent of Central Excise, Shilong Commissionerate, Guwahati Bench's order dated 8.2.2001 in OA No. 237/1999 the All India Seniority List of Superintendent of Central Excise, Group 'B'



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appointed / promoted from 1.1.1986 to 31.12.1992 was amended and revised. Therefore, in view of above, the applicant is not entitled to get any relief from this Hon'ble Tribunal and the O.A. filed by the applicant deserves to be dismissed.

That the averments made in this amended Additional Affidavit are based on official record available with me and the same have been drafted under my instructions."

5- The applicant has challenged Office Memorandums dated 11.7.2002 and 10.12.2002 issued by Government of India, Department of Personnel and Training and Department of Revenue, respectively. These are policy circulars and we do not find anything wrong in these circulars. Having two clarified on relief No. 1 and 2, now we come to relief No. (iii), that is more relevant in this case and is discussed in detail.

6- The main relief sought by the applicant is that he should be promoted and given all consequential benefits prior to his juniors. The applicant is presently working as Superintendent of Central Excise and seeks promotion to the post of Assistant Commissioner. This promotion is by a process of selection. From the amended additional affidavit, it is noted that the applicant was considered for promotion to the grade of Assistant Commissioner in the DPC held on 26/28-11-2002. The recommendations of DPC in respect of him were kept in a sealed cover due to pending disciplinary proceedings against him. Further to this, the applicant was again considered for promotion to the grade of Assistant Commissioner in 2005. The Recommendations of the DPC held on 28.7.2005 were that he was considered 'fit' for promotion on expiry of penalty

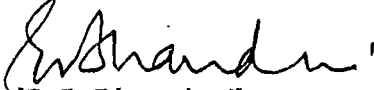
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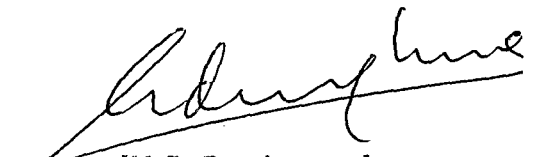


period. The penalty was with-holding of increments and that was after the conclusion of disciplinary proceedings.

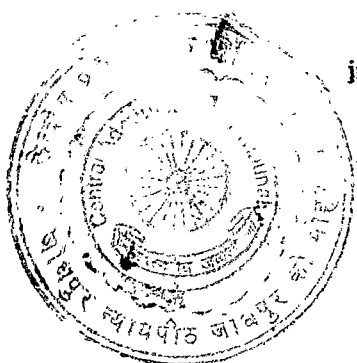
7. It is a well known practice that at the time of holding DPC, if a disciplinary proceeding is pending, the recommendation of the DPC (for that person) is kept in a sealed cover. This was followed for the DPC held in 2002. Further, it is also a well known practice that at the time of issue of orders for promotion, if the person concerned is undergoing certain penalty of stoppage of increment, promotion is affected only after completion of the penalty period. From the additional amended affidavit, the respondent has clarified this position also.

8- It is thus clear that the applicant is fit for promotion and it is only a matter of time when his penalty period is over. It will thus be in order of justice if we allow this OA to the extent that the respondents should promote the applicant after the expiry of penalty period, if found otherwise suitable as averred in the Additional Affidavit. Once the applicant is promoted, the major portion of his relief, as asked in the O.A., would materialize. The applicant may then represent, if aggrieved, ~~to~~ the rationale of ^{6:1:2} ~~6:1:2~~. The O.A. is disposed of accordingly with no order as to costs.


(R.R. Bhandari)
Member (A)


(N.D. Raghavan)
Vice Chairman

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