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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL  
NEW BOMBAY BENCH

O.A.862/88

Sudhirchandra Vasudeo Vaidya,  
Rajeshwari Co-op.Hsg.Scty.Ltd.,  
Block No.21, 3rd Floor,  
Savarkar Road,  
Thane(West)

.. Applicant

vs.

1. Union of India  
through  
Secretary of  
Ministry of Finance,  
New Delhi.
2. The Collector of Customs,  
New Custom House,  
Ballard Estate,  
Bombay - 400 038.
3. The Deputy Collector of Custom,  
New Customs House,  
Ballard Estate,  
Bombay - 400 038.

and 53 others. .. Respondents

Coram: Hon'ble Shri Justice U.C.Srivastava,  
Vice-Chairman

Hon'ble Shri M.Y.Priolkar,  
Member(A)

Appearances:

1. Mr.V.K.Pradhan  
Advocate for the  
Applicant.
2. Mr.A.I.Bhatkar  
for Respondents  
No.1 to 3

ORAL JUDGMENT:  
(Per U.C.Srivastava, Vice-Chairman)

Date: 16-7-1991

The applicant who is an Examiner in the Department of Customs, Bombay is challenging his seniority in the seniority list taken in March, 1986 by the Deputy Collector of Customs Personnel & Estt. Deptt, Bombay through this application. The applicant's grievance is that his name has not been shown correctly in the seniority list. The facts relevant for the purpose of this case is narrated below:

2. The applicant joined service of the Customs Department on 25th June, 1955 as Lower Division Clerk. He was promoted as Upper Division Clerk in the year 1966. Thereafter he was promoted to the post of Examiner vide order dated 10-6-1976. The posts of the Examiners are filled from three different sources, (i) Direct Recruitment, (ii) Promotees and (iii) Transferees. The relative seniority of direct recruits and of promotees have been determined according to the rotation of vacancies and 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 which provides the quota for direct recruitment is 2/3 as against that the quota for promotion is 1/3. In the impugned seniority list applicant's name has been shown at Sr. No. 179 and thus according to him his continuous officiating period without any break as Examiner w.e.f. 10-6-1976 has been overlooked otherwise his position would have been higher in the list so published. The grudge of the applicant is that the direct recruits who came into service after the applicant had already been promoted but the applicant ~~was~~ still lags behind. The list according to the applicant is illegal, arbitrary and against the principles of seniority laid down by the Supreme Court of India in a number of cases. Apprehending that the seniority of the applicant has not been shown correctly <sup>and</sup> he will not be promoted, the applicant has approached this Tribunal.

3. The respondents, official as well as the private, filed written statements challenging the claim of the applicant. They have also taken a plea that the application is barred by time consequently

the same should be thrown out without adjudication of the same on merit. According to them the list has been published in the year 1986. The applicant filed this application ~~two years thereafter~~, as such in view of the Administrative Tribunals Act it is barred by time.

4. The applicant has filed his reply to this objection and stated that the list was not finalised till he made the representation on 17-8-1988. He has further stated that this tentative seniority list dated 10-3-1986 did not come to his notice earlier as he was on deputation to Director of Revenue Intelligence from 3rd October, 1984 to 4th May, 1988. It is when he came back to the parent department he learned about the list and thereafter he made a representation.

5. The facts stated above indicate that the explanation given by the applicant for delay is quite satisfactory and even if delay is there considering the circumstance of the case it is condonable. Even otherwise the list has not been finalised and so long as the list has not been finalised against which the applicant has filed a representation the question of limitation should not come in between.

6. On the previous date of hearing on behalf of the applicant it was contended that the records were deliberately not produced by the respondents and the respondents were directed to produce the record today. However, today a letter from the Asstt. Collector of Customs, Personnel & Estt. Deptt. addressed to the counsel for respondents No.1 to 3 has been filed before us in which it has been stated that

the seniority list of Examiners for the year 1981 & 1988 are not traceable and efforts are being made to trace out the same. A presumption can be drawn against Respondents No.1 to 3 that the files are not being produced deliberately otherwise they would have indicated something adverse against the private respondents in favour of whom they have pleaded. It is really a very sad commentary on the working of the Bombay Customs Department in not producing the file or misplacing the file for years together in this manner. The matter is of serious nature and it should be brought to the notice of the higher authorities in Delhi. That is why we direct that a copy of the judgment should be sent to the Secretary to the Ministry concerned for taking appropriate action as they deemed fit and proper.

7. On behalf of Union of India and others a written statement has been filed by S.S.Rana, Additional Collector of Customs. It has been stated that even the preparation, publication and finalisation of the impugned seniority list itself had undergone a rough weather in view of the several circumstances including Court's stay order etc. It is long thereafter that this ultimately has been made final and the administration, ~~is~~ is in a ~~pxx~~ position to operate the list and the employees after a prolonged period of uncertainty, have been able to know where they stand. This pleading is quite inconsistent with the letter which has been sent to the counsel for the respondents No.1 to 3 which has been produced before us and referred to above. This is also a matter which calls for an inquiry inasmuch as the Assistant Collector of Customs who has filed written statement has gone to the extent

of stating that the list has become final even though the same is not, for the reasons best known to him.

8. So far as the substantial part is concerned it has been stated that the applicant was promoted from the promotee quota w.e.f.10-6-1976 as there has been unavoidable delay for regular filling up of the direct quota and the place of the applicant in the finally published seniority list has to be determined in accordance with the provisions of the recruitment rules. He further goes on to say that in view of the subsequent appointments of the direct recruits in accordance with the recruitment rules and the prescribed quota reserved for them, in the final seniority list, direct recruits who were appointed against the slots reserved for direct recruits have been shown at a place higher than the place of the applicant, and unhesitatingly he craves leave to refer to the records maintained by the department to ascertain the correctness of what is stated therein and today he states that the records are not traceable. According to him the seniority is to be **fixed** on the rotation of the <sup>as per</sup> vacancies and the latest instructions of the seniority contained in O.M. No. 35014/2/80 Estt. (D) dtd. 7.2.86. The seniority of the applicant, according to him, has been correctly fixed in accordance with the said instructions.

9. In the written statement filed by the private respondents it has been stated that the seniority list published in the year 1978 was challenged before the High Court of Bombay and the Bombay High Court vide its judgment and order dated 6/7.3.1981 allowed the said petition in terms of prayer (b) with the addition of the words "subject to

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such modifications as may be made in the tentative list in accordance with the law". Thus the Bombay High Court issued a writ of Mandamus directing respondents No.1 and 2 to withdraw the order dated 27-1-1977 issued by the Central Board of Excise and Customs and also the seniority list published by the Collector of Customs, Bombay under his circular dtd. 3rd March, 1978 in so far as it relates to the inter se seniority of direct recruits and promotees from serial No.60 to serial No.203 and to restore the seniority list published by the Collector of Customs dated 19th August, 1974. Thus the result was that the entire matter was left open and the department was required to prepare a tentative seniority list. They have placed reliance on General Principle No.6 which reads as under:

**"6. Relative seniority of direct Recruits & Promotees.**

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 on the Recruitment Rules."

10. The factual position which emerges out is that ~~the~~ against the existing vacancies the applicant was promoted after undergoing the process of DPC etc. i.e. the manner in which the promotions are made it may be that at that stage it was not determined ~~how~~ many posts are available within the promotee quota and how many are available in the direct quota. But the seniority which has been filed indicates that direct appointments were made in the years 1976, 1977 and 1978 onwards also although in the list only one person has been shown to be from the direct recruit quota. As the applicant's appointment

has been made in accordance with the rules he is entitled to count the period of continuous officiation in case his post falls within the promotees quota and in case it does not fall within the promotees quota of that particular year the seniority will obviously date back from the date the post in promotees quota became available in the subsequent year.

11. In the case of V.B.Badami Etc. v. State of Mysore & Ors, 1976 (1) SCR 815, dealing with the problem regarding seniority between promotees and direct recruits it was observed that:

(1) The principles generally followed in working out the quota rule are (i) Where rules prescribe quota between direct recruits and promotees confirmation or substantive appointment can only be in respect of clear vacancies in the permanent strength of the cadre; (ii) confirmed persons are senior to those who are officiating; (iii) as between persons appointed in officiating capacity, seniority is to be counted on the length of continuous service; (iv) direct recruitment is possible only by competitive examination which is the prescribed procedure under the rules. In promotional vacancies the promotion is either by selection or on the principles of seniority-cum merit. A promotion could be made in respect of a temporary post or for a specified period, but direct recruitment has generally to be made only in respect of a clear permanent vacancy, either existing or anticipated to arise at or about the period of probation is expected to be completed; (v) if promotions are made to vacancies in excess of the promotional quota, the promotions may not be totally illegal but would be irregular. The promotees cannot claim any right to hold promotional posts unless the vacancies fall within their quota. If the promotees, occupy any vacancies which are within the quota of direct recruits, when the direct recruitment takes place, the direct recruits will occupy the vacancies within their quota. Promotees who are occupying the vacancies within the quota of direct recruits will either be reverted or they will be absorbed in the vacancies within their quota in the facts and circumstances of the case."

12. The question again came up for consideration in the case of A.N.Sehgal & Ors. v. Raje Ram Sheoran & Ors., 1991(1) SCALE 601. Here the service of Engineers Class I PWD Roads and Building Rules came up for consideration. The question was whether promotees who were promoted earlier would be deemed to be members of service in substantive capacity as Executive Engineers from the respective date of promotion as they were senior to the respondent who was a direct recruit. After considering Badami's case(supra) and K.C.Joshi & Ors. etc. v. Union of India & Ors. 1990(2) SCALE 951, the Court observed that the promotee has a right to be confirmed in the cadre post as per Rule 11(4) if a post is available to him within the quota or on a later date under the Rule 5(2) read with Rule 11(4) and get the appointment under Rule 8(11) who then becomes member of the service appointed substantively within the meaning of Rule 12(a). The seniority shall be determined accordingly. There is reasonable classification and discernible distinction drawn between the direct recruit and the promotee. Thus there is neither invidious discrimination nor arbitrariness in Rule 2(12)(a) offending Arts.14 & 16. and a direction was given to the Govt. of Haryana to determine the inter-se seniority between the promotees and the ~~respondents~~ ~~xxx~~ direct~~xx~~ recruits in respective cadre post of Executive Engineers. The Court in that case also considered the case of K.C.Joshi v. Union of India 1990(2) SCALE 951 and relied on the observation made by the Bench in the said case. In the circumstance the Court held that the ratio of the Constitution Bench in B.S.Yadav v.State of Haryana and the Direct Recruit, Class II Engineering Officers' Association v. State of Maharashtra & Ors. ~~xxx~~ cannot be imported bodily and applied to the facts of the case in the light of the operation of the rules in question.

13. Again in the case of State of Bihar & Ors. v. Shri Akhouri Sachindra Nath & Ors, 1991(1) SCALE 748 the question of inter-se seniority between direct recruits and promotees whose quota was 25% the Court held that it is well-settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter-se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law the respondent Nos. 6 to 23 cannot be made senior to respondent Nos. 1 to 5 by the impugned Government orders as they entered into the said Service by promotion after the respondent Nos. 1 to 5 were directly recruited in the quota of direct recruits.

14. The position thus appears to be clear that the applicant is entitled to count the entire period of continuous officiation as Examiner and the seniority is to be counted from that date. But in case his appointment was not against the promotees quota but in the direct quota then the seniority and continuous officiation will start from the date when the post became available in the promotees quota.

15. In view of what has been stated above this application ~~is~~ deserves to be allowed in part and the respondents are directed to count the entire period of continuous officiation of the applicant towards seniority and regularisation. But in case the vacancy is not available when he was promoted then the seniority and continuous officiation will start from the date the vacancy became available in the quota. The seniority list so prepared shall also be modified accordingly. Let all this be done

within a period of three months from the date of receipt of a copy of this order and the promotion shall also be made according to the revised seniority. in the light of directions/observations given above.

16. In the circumstance of the case there will be no order as to costs.



(M.Y.PRIOLKAR)  
Member(A)



(U.C.SRIVASTAVA)  
Vice-Chairman