

CENTRAL ADMINISTRATIVE TRIBUNAL

BOMBAY BENCH

O.A.N. 232/96

Date of Decision 16-12-96

D.S. Karanth

Petitioner

Shri S.P. Saxena

Advocate for the Petitioner.

versus..

Union of India & Ors.

Respondent

Shri V.G. Rege.

Advocate for the Respondents.

Coram:

The Hon'ble Mr. B.S. Hegde, Member (J),

The Hon'ble Mr. M.R. Kolhatkar, Member (A).

1. To be referred to the Reporter or not?
2. Whether it needs to be circulated to other Benches of the Tribunal?


(M.R. KOLHATKAR)
MEMBER (A).

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION NO. 232 /1996.

Coram: Hon'ble Shri B.S.Hegde, Member(J),
Hon'ble Shri M.R.Kolhatkar, Member(A).

Pronounced this the 16th day of December 1996.

D.S.Karanth,
Additional Commissioner (P&V),
Central Excise & Customs office,
Hirabag, Tilak Road,
Pune - 411 002.

... Applicant.

(By Advocate Shri S.P.Saxena)

V/s.

1. The Union of India
through the Secretary,
Ministry of Finance,
Department of Revenue,
Govt. of India,
New Delhi - 110 011.

2. The Chairman,
Central Board of Excise & Customs,
North Block,
New Delhi - 110 011.

3. The Secretary,
UPSC,
Dholpur House,
New Delhi - 110 011.

... Respondents.

(By Advocate Shri V.G.Rege).

O R D E R

(Per Shri B.S.Hegde, Member(J))

By this application, the applicant is seeking a direction to the Respondents to open the sealed cover containing the recommendations of the DPC in regard to the promotion of the applicant from the post of Additional Commissioner, Central Excise & Customs to the next higher post of Commissioner in Central Excise & Customs Department of the Respondents. He further states that

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neither any departmental inquiry nor any criminal proceedings were contemplated against him at the relevant time viz. April, 1990 and the applicant was eligible and entitled for the aforesaid promotion to the post of Commissioner. The applicant was enlisted at Sl.No.1 in the select panel for promotion to the post of Commissioner prepared by the Review DPC on 9.10.1995 for filling up the vacancies for the year 1990, whereas, the other Officers enlisted below the applicant in the said select list are now promoted to the post of Commissioner against 1990 vacancies by an order dt. 23.2.1996. However, in the case of the applicant, the DPC had followed the 'sealed cover procedure' in respect of his promotion to the above post of Commissioner in the Review DPC held on 9.10.1995 for the 1990 vacancies which is not permissible merely on the ground that he has been served with a charge memo by an order dt. 7.8.1995.

2. The brief facts are, the applicant was initially appointed to the Customs and Excise services on 19.9.1969 through UPSC. He was thereafter promoted to the senior scale of Assistant Collector w.e.f. 1.1.1973 and later on the applicant was also confirmed as Senior Scale Assistant Collector w.e.f. 1.8.1980. Presently, the applicant is working as Additional Commissioner (P&V), Central Excise & Customs, Pune. The counsel for the applicant Shri S.P.Saxena submits

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that while working as Assistant Collector, his ACR for the year 1976-77 contained certain irregularities in respect of filling of the said ACR by officers who were not competent to fill the ACR or act as reviewing officer for ACR. This aspect came to be known to the applicant only in 1989 and the records were submitted to the CAT Madras in another original application by the Respondents. In the meanwhile, the applicant was promoted to the post of Deputy Collector w.e.f. 23.11.1981 on ad-hoc basis, similar to many other such promotions on ad hoc basis due to pending court cases. Subsequently, the respondents convened a DPC on 23.12.1982 and regularised about 141 ad-hoc promotions of Dy. Collectors including the promotion of the applicant in that grade. He submitted a representation to the Respondents on 24.2.1989 for taking steps to correct the irregularities in the said ACR and on the basis of the rectified ACR he should be given proper and appropriate seniority in the post of Dy. Collector. Though the applicant was heard by the Additional Secretary (Admn.), of the Ministry. However, no action was taken by the Respondents for correcting the applicant's seniority in Dy. Collector's grade, due to which some of his junior Officers superceded the applicant in promotion to the post of Collector in the DPC held by the Respondents in February, 1990. The irregularities in ACR were rectified by the respondents, thereby his grading has improved for the year 1976-77 and accordingly, the

respondents ought to have reviewed the case of the applicant for promotion to the post of Collector w.e.f. 20.4.1990 by holding a Review DPC, on the basis of his improved grading in ACR for 1976-77. In the meanwhile, the juniors to the applicant were promoted to the post of Collector on 20.4.1990, but the applicant's case has not been considered in view of the charge memo, the applicant had made a representation on 19.10.1995 on which no action has been taken by the Respondents. Later on, the Respondents by convening a Review DPC restored his seniority in Dy. Collector's grade by their order dt. 15.5.1995 and the applicant was placed below one Shri T.R.Rastogi and above one Shri K.Parasuram in the seniority list. By the said order, one Shri Chandra Sen was placed below Shri K.Parasuram and thus both are juniors to the applicant who were promoted to the higher post of Commissioner of Central Excise by virtue of the revised seniority position. The applicant was promoted to the post of Additional Commissioner of Excise & Customs w.e.f. 1.7.1989 on the basis of his unrevised seniority which should have been re-fixed w.e.f. 1.1.1986. The applicant was issued a memorandum of charge on 7.8.1995 under the CCS(CCA) Rules, 1965, but the said proceedings have still not been started or completed till date. The Review DPC took place on 9.10.1995 for preparing a select list for promotion to the post of Commissioner against 1990 vacancies. The applicant, though was considered for promotion along with others

against existing vacancies, however, they took into consideration of the pending charge memo issued on 7.8.1995. Accordingly, his case was kept in 'sealed cover', against which the applicant had made a representation, but has received no reply so far.

3. In the light of the above, and in the facts and circumstances of the case, the short question for consideration is whether the DPC is justified in keeping the recommendations of the promotion of the applicant in 'sealed cover' merely on the basis of pending charge memo issued against him in the year 1995. The Respondents adopted the 'sealed cover procedure' in the case of the applicant in respect of his promotion to the post of Commissioner by the Review DPC held on 9.10.1995 on the ground that the applicant is now issued with a memorandum of charges on 7.8.1995. The main thrust of argument on behalf of the applicant is that he was due for promotion on the basis of DPC to the post of Commissioner in February, 1990 and the charge sheet has been issued to him only on 7.8.1995 and there is no need to place the findings of the DPC in a 'sealed cover'. Further, the persons who are junior to him, have been promoted to the higher post by virtue of the Review DPC for the vacancies of 1989-90. Therefore, he submits that the findings of the Review DPC be implemented after opening the 'sealed cover' and grant him consequential benefits as deemed fit.

4. Heard the learned counsel Shri S.P.Saxena for the applicant and Shri V.G.Rege the learned counsel for the Respondents. Though the O.A. was filed on 4.3.1996

the Respondents did not file their reply till 20.6.1996.

Considering the facts and circumstances of the case, the respondents were directed to furnish the file pertaining the decision taken by the department for initiation of departmental proceedings against the applicant along with DPC proceedings held in 1990 and 1995 promoting persons to the post of Commissioner.

During the course of hearing, the learned counsel for the respondents has drawn our attention to the question whether the 'sealed cover procedure' as envisaged in DOP & T O.M. dt. 14.09.1992 should be applicable in the case of Shri D.S.Karanth has been considered in consultation with the Department of Personnel & Training.

Their advise is that, since the Review DPC which met in October, 1995 to consider the case of Shri D.S. Karanth is deemed to be the DPC of December, 1989 and January, 1990, when the proceedings were instituted against him vide memo dt. 7.8.1995 were not in existence, therefore the sealed cover procedure could not be made applicable in his case. He also stated that the matter will have to be decided in consultation with the UPSC. Accordingly, time was granted to do the needful and consider him for ad-hoc promotion. The learned counsel for the respondents Shri V.G.Rege stated that as per the direction of the Tribunal the matter has already been referred to UPSC, but they have not received any reply from the UPSC regarding ad-hoc promotion and hence respondents counsel sought time, instead of promoting the applicant on ad-hoc basis as directed by the Tribunal. The

Respondents have filed an affidavit stating that they have re-examined the matter keeping in view para 7 of the DOP & T O.M. dt. 14.9.1992 which reads as follows:

"When a Government servant is recommended for promotion by the DPC (which will include the review DPC) but in whose case the circumstances mentioned in para 2 of O.M. dt. 14.9.1992 arise after the recommendation of the DPC (including review DPC) are received, but before he is actually promoted, it will be considered as if his case has been placed in a sealed cover by the DPC. In such a case, he shall not be promoted until he is completely exonerated of the charges against him."

The learned counsel for the respondents relying upon the aforesaid O.M. dt. 14.9.1992 cited the following decisions in support of his contention. The decisions are : (1) Dr. H.Mukherjee V/s. Union of India & Ors. 1994 Supp (1) SCC 250 (2) State of Madhya Pradesh and Anr. V/s. Syed Naseem Zahir and Ors. 1993 Supp (2) SCC 225 (3) Ram Singh V/s. V.K.Duggal and Anr. 1995 30 ATC 747 (4) B.S.Lalchandani V/s. Union of India & Ors. C.P. No.200/92 in O.A. No.472/88 and submitted that the sealed cover findings of the Review DPC in respect of the applicant cannot be implemented until he is completely exonerated of the charges against him. However, the respondents further submitted that the interpretation, scope and application of para 7 of O.M. dt. 14.9.1992 are matters that may be decided by this Hon'ble Tribunal and if the Tribunal so directs, the respondents will have no hesitation in implementing its order in respect of the applicant. Insofar as, Dr. H.Mukherjee's case is concerned it relates to Direct recruitment by UPSC, selection made

by the Commission was only recommendatory in nature, open to the government to accept or not to accept. There is nothing to suggest that the government cannot take into consideration of the developments subsequent to the selection made by the UPSC. The facts of this case is distinguishable from the case on hand and thus not applicable. In the second case, the decision to initiate disciplinary proceedings had already been taken on the date of DPC, but charge sheet was not issued, this case is also distinguishable from the present case. Similar is the other two cases referred to above and the facts of those are distinguishable from the present case.

5. Accordingly, we have called for the relevant original files of the department and DPCs recommendations in order to satisfy ourselves regarding the observation of the DPC, as well as the department. The DPC has recommended as follows :

"The committee reviewed the case of the two officers viz. S/Shri D.S.Karanth and Chander Sen for promotion to the grade of Collector of Customs and Central Excise. The committee assessed both of them as VERY GOOD and recommended that the name of Shri Chander Sen be included in the panel for the year 1989 for promotion to the grade of Collector of Customs and Central Excise at S.No.44B below Shri T.R.Rastogi and above Smt.Nisha Malhotra. The Committee further recommended that Shri D.S.Karanth may be included in the panel for the year 1989 at S.No.44-A below Shri T.R. Rastogi and above Smt.Nisha Malhotra subject to his clearance in the vigilance case pending against him and the competent authority furnishing the integrity certificate in his regard. Accordingly, the DPC's findings is placed in a sealed cover."

6. This case has a chequered history. The matter was referred to the DOP&T for its opinion (i) Whether there are any separate instructions with regard to the sealed

procedure to be followed in review cases like the instant one; (ii) Whether the instructions in O.Ms of 10.4.1989 ~~or~~ 14.9.1992 are applicable in respect of review DPC case. The DOP&T opined that the facts as available during December, 1989 and 1990 only should be taken into consideration, because had the Officer been considered by 1990 DPC he would have been promoted in the normal course. That being the position, no need to follow 'sealed cover procedure'. Since this is a Review DPC, normally it has to ascertain whether there is any charge pending against him and it will have to be seen with reference to the position prevailing at the time of holding of the DPC till the date of promotion of his juniors. The applicant regained his lost seniority in the grade of Dy. Commissioner in ~~May~~, 1995; As a result of revision of his seniority in the grade of Dy. Commissioner, he became eligible for consideration for promotion to the grade of Commissioner with reference to his junior was considered in 1989.

7. When the matter was referred to the UPSC pursuant to the ~~undertaking~~ given to the Tribunal by the Respondents, the Department had taken up the matter with the UPSC who in turn replied by saying that the processing of 'sealed cover procedure' and the appointment is purely an 'administrative matter' and that the Department may take suitable action as they deem fit and they have no comments to offer in this respect.

8. It may be recalled that though the department

had taken up the matter with the UPSC for clarification of ACRs for the years 1976-77 as far back as in 1990 itself for initiation of Review DPC on the basis of representation made by the applicant no action has been taken by the UPSC till 1995 and many correspondence that have been taken place between the Department and the UPSC regarding initiation of Review DPC, therefore, there was considerable delay in initiation of the Review DPC by the Department, as well as the UPSC. On this pretext it may not be fair and just to deny the Officers for no fault of theirs, relief which they are otherwise entitled to by way of such corrective action. When the Department repeatedly brought to the notice of the UPSC that similar cases the UPSC have initiated review DPC such as in the cases of S/Shri G.S.Narang and S.D.Khere of the department and thereafter with great pressure, the UPSC have taken up the review DPC and rectified the error. It is not the case of the respondents that the review DPC has not recommended the applicant, the applicant has been recommended to be included in the panel for the year 1989-90 at Sl.No.44(a) and above Ms.Nisha Malhotra who has already been promoted as Commissioner against 1990 vacancy. The decisions of the Supreme Court in Khurana and Kewal Ram would indicate that pendency of departmental inquiry can be a good ground for following sealed cover procedure, provided the charge sheet is issued prior to the consideration of the claim by DPC. The decision to initiate departmental enquiry proceedings was taken and recorded in the file and charge memo could not be

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issued before the DPC to consider the claim. However, in the instant case, there is nothing to show on record, any decision has been taken to initiate disciplinary action, when he was to be considered against the vacancy for 1989-90 in 1990 DPC; promotion was denied to him due to lapses on the part of the administration in wrong grading. If the charge levelled against him was grave enough, he would have been kept in suspension, since no disbursement of reward amount is made by the respondent department, but only apprehended that he is involved in the episode.

9. In this connection it is relevant to note the observation of the Learned Finance Minister on the file who himself is a distinguished Jurist stating that O.M. of 1989 is a comprehensive one, that O.M. of 1992 purports to repeal all earlier instructions on the subject referred to in the margin. However, the margin does not refer to the OM dt. 10.4.1989. He also states that para 7 of the 1992 O.M. includes Review DPC in such cases if a person is recommended for promotion by the DPC, but in whose case the circumstances mentioned in para 2 above but before he is actually promoted, he shall not be promoted until he is completely exonerated and his case will be placed in the sealed cover by the DPC. He also states that the Review DPC will be deemed to be the original DPC. Insofar as the Review DPC is concerned there is no specific instructions were issued by the DOP&T and after the observation of the Finance Minister

the matter was again referred to the DOP&T, they again reiterated the earlier view stating that the 'sealed cover procedure' need not be resorted to by the Review DPC if the sealed cover procedure was not required to be resorted to with reference to the original DPC, the review DPC should restrict its scrutiny to the CRs for the period relevant to the first DPC. Hence conditions as applicable to the original DPC will only have to be taken into consideration at the time of holding the review DPC.

10. In this connection, the learned counsel for the applicant relies upon the recent decision of the Hyderabad Bench in M.P. Venkataswamy v/s. Union of India & Ors. [CP. 36/95 in OA.1082/92] decided on 15.2.1996 in respect of his contention that sealed cover procedure need not be resorted to by the review DPC if the sealed cover procedure was not required to be resorted to with reference to the original DPC, wherein similar issue arose for consideration. The Tribunal held that "when it is a case of review DPC, it shall be deemed that the DPC was meeting as on the date on which the cases of the juniors of the concerned employees were considered and if there was no disciplinary action against the concerned employee by the date on which the original DPC met for consideration of the case of his juniors, then we feel that it is not just and proper to adopt the sealed cover procedure if any disciplinary action is pending by the date the review DPC meets especially when that charge memo itself is in regard to the alleged acts of omissions which had taken place subsequent to the date on which the DPC met in regard to the consideration

of the cases of the juniors of the concerned employee." This case also pertains to the very same department i.e. Department of Revenue, which has been accepted and complied with the directions of the Tribunal.

11. Further, on a perusal of the file, we also noticed that in the case of one Shri Dhahia who belongs to the Income-tax Department agitated regarding the seniority in the rank of Assistant Commissioner. By virtue of CAT Judgment, a Review DPC was held on 30.11.1994 for considering his suitability for inclusion in the select list prepared by the original DPC held on 23.9.1985 and recommended antedating his seniority as Commissioner of Income-tax. In the meanwhile, the CVC advised major penalty proceedings against Shri Dhahia on 8.3.1994 and a charge-sheet was issued to him on 18.4.1995. The stand taken by the Department in this case was that ⁱⁿ since 1985 there was no charge-sheet against the officer, it would not be proper to take a stand that subsequent developments would prejudicially affect the promotion prospects of the officer. In this connection, the Law Ministry was consulted and the Law Ministry concurred with the view of the Department of Personnel stating that the actual promotion to the grade of CIT took place before the issue of charge-sheet dt. 18.4.1995, instructions contained in para 7 of the O.M. dt.14.9.1992 are not applicable. Hence it has advised that the sealed cover procedure contained in para 7 of the O.M. dt. 14.9.1992 need not be resorted to in the case of Shri Dhahia. In the present case also, the original DPC took place in December, 1989-90 which did not

consider him for promotion. Subsequently, as a result of representation by him, the Review DPC which met on 9.10.1995 and not by Court's Order unlike Shri Dhahia and found him fit on the basis of the records placed before that DPC, but the findings were placed in a sealed cover. In the meanwhile, a charge sheet was issued on 7.8.1995 with reference to the allegations which relates to the events of December, 1990. Applying the principle adopted in Shri Dhahia's case, it would appear that the procedure adopted by the DPC in placing the findings in a sealed cover is not warranted on the basis of 1992 O.M. It is also noticed that the observation of the Finance Minister that comparison of Shri Dhahia's case and the present applicant is not correct since in Dhahia's case the original DPC held on 23.8.1985 and the review DPC was held on 30.11.1994 and the charge-sheet was issued on 18.4.1995 after the review DPC was held. Therefore, the comparison is not justified. However, a querry was raised as to whether para 7 of the O.M. 1992 would apply to the facts of this case. The department has taken a stand that para 7 of the O.M. of 1992 would apply. However, it is also stated that the matter were left to the discretion of the Tribunal for interpretation of para 7 of the O.M.

12. From the above notings it clearly emerges that the DOP&T, Law Ministry, as well as the Department are of the firm view that review DPC dates back to the original DPC and the CRs to be considered were only for the period relevant to the first DPC. Therefore, situations/conditions as applicable to the original DPC will only

have to be taken into consideration at the time of holding of the review DPC. Hence, the views expressed by the DOP&T and Law Ministry, in our opinion, is a correct one and therefore any subsequent events cannot be taken consideration for denying the promotion to the applicant though in the case of Shri Dhahia's charge-sheet was issued subsequent to the DPC that by itself does not make much difference except adopting sealed cover procedure, nevertheless the promotion can be deferred if they so desire; however, Shri Dhahia was promoted to the post of Commissioner, but the question is whether the review D.P.C. dates back to the original DPC or can they take subsequent events for consideration. Admittedly, in this case there was a considerable delay in initiating the review DPC despite the reminders and the request sought by the department with the UPSC the review DPC did not take place till 1995 and it is not the case of the respondents that they did take the decision to initiate disciplinary action against the applicant immediately after the original DPC.

13. In our view, the charge memo was issued only in the year 1995 for the occurrence of 1990 and therefore, under no stretch of imagination the question of resorting to sealed cover procedure and the applicability of para 7 of the O.M. dt. 14-9-1992 is warranted and justified. Further, the question to be seen is whether the action of the Respondents is justified that his juniors whose cases were also reviewed and promoted from the date of review against the vacancies of 1989-90

and the applicant's case be kept in a sealed cover till the pending inquiry is completed. Even in K.V.Jankiraman's case (AIR 1991 SC 2010) the Supreme Court has envisaged that "It is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee". Even subsequent decisions of Apex Court in Khurana & Kewal Ram, it only indicate that a decision taken to initiate disciplinary proceedings and charge-sheet issued to the government servant in that event only the matter can be kept in sealed cover as stated earlier. There is nothing on record to show that any decision has been taken by the respondents till 1995 to initiate disciplinary proceedings against the applicant though the incident goes back to 1990. Therefore, the ratio laid down in both the decisions would not apply to the facts of this case. Further, in our opinion, in the facts and circumstances of this case, the 1992 instructions would apply for regular DPC. In respect of review DPC the facts as existed at the time of original DPC, the applicant was not involved in any vigilance or disciplinary case, but at the time of review DPC he was facing a charge-memo for an offence alleged to have been committed in 1990. Therefore,

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the procedure adopted by the DPC to keep the findings in sealed cover is not justified.

14. The applicant is working in a Revenue Department and has been suffering the humiliation of working under his juniors for the last six years, and that his non-promotion to the Commissioner's grade itself is a kind of punishment and agony inflicted unintendedly by the lengthy procedural system over which he has no control. In the instant case, there is nothing to show on record any decision to initiate disciplinary action against the applicant when he was to be considered against the vacancy for 1989-90 in 1990 DPC. Promotion was denied to him due to lapses on the part of the Administration in granting wrong grading. Therefore, subsequent events are not to be taken into consideration for considering his promotion to the post of Commissioner as against the vacancy of 1990. The Apex Court in Dr. Ms. O.S. Hussain V/s. Union of India (1990(1) SLR 297) has held that "provision for promotion increases efficiency of the public service while stagnation reduces efficiency and makes the service ineffective. Promotion is thus a normal incidence of service. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representations of the Council and its members and provide promotional avenue for this category of officers." It is now settled, that the words employment or appointment are wide enough

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to include matter of promotion including promotion to selection posts. In the sphere of public employment that any action taken by the employer against the employee must be fair and reasonable which are the component of fair treatment because the Review DPC is deemed to be the DPC of 1989-90, where the proceedings instituted against him were not in existence the sealed cover could not be made applicable in his case. As the review DPC was reviewing the proceedings of December, 1989 and January, 1990 DPC, when there was no vigilance/disciplinary case against him, therefore the findings of the Review DPC kept in a sealed cover is not justified and falling outside the scope of para 7 of O.M. dt. 14.9.1992 which was issued as a result of Judgment of the Supreme Court in Jankiraman's case. These instructions are relevant in cases where regular DPC is to be held as distinct from Review DPC. Therefore, it is manifestly clear that in respect of 'review DPC', the facts as they existed at the time of the original DPC only should be taken into consideration. In this case, the original DPC was held in 1989-90 and the review DPC was held in October, 1995. The guarantee of equal protection as envisaged under Article 14 of the Constitution applies against substantial as well as procedural laws, equal protection means the right to equal treatment in similar circumstances. In our view, Mr. Venkataswamy's case is similar to the applicant, his case has been favourably

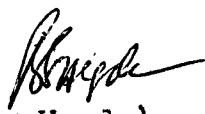
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considered by the department as per the direction of the Hyderabad Bench decision dt. 15-2-1996 and promoted him to the post of Dy. Commissioner from the date his juniors are promoted.

15. For the reasons stated above, and in the light of the aforesaid discussion, we admit the O.A. and dispose of the same at the admission stage itself by passing the following order.

16. We reiterate that para 7 of the O.M. dt. 14-9-1992 will not be applicable to the facts of this case. Insofar as the review DPC held on 9.10.1995 against the vacancy of 1989-90 of the original DPC held in 1990, admittedly, no charge-memo was issued at that point of time and no vigilance case was pending, therefore, the question of resorting to sealed cover procedure is not warranted. Accordingly, we hereby direct the respondents that the findings of the Review DPC be implemented after opening the sealed cover, grant him consequential benefits such as notional seniority as Commissioner from the date on which his juniors were promoted i.e. 20.4.1990 as was done in the case of others and the monetary benefits be given to the applicant from the date on which Shri Chander Sen who was junior to the applicant was promoted as Commissioner by virtue of Review DPC on 23.2.1996. The order may be complied within a period of two months from the date of receipt of the order but, no order as to costs.


(B.S. Hegde)
Member (J)

(Per Shri M.R.Kolhatkar, Member(A))

16. My learned brother Shri B.S.Hegde, Member(J) was kind enough to show the draft of the proposed order. With great respect, I am unable to agree with the draft order. I hereby record my separate order as below.

17. In this case the facts are as below. The applicant belongs to 1969 batch of the Customs & Central Excise Service and he is at present working as Additional Commissioner, Central Excise & Customs (P&V) at Pune. He had a grievance that he had lost his seniority in the post of Deputy Collector on account of the irregular ACR for 1976-77, but the same has been redressed by the review of the relevant ACR vide letter dt. 15.5.1995. On this basis the applicant was eligible for consideration for promotion to the post of Commissioner against 1990 vacancy. The review DPC held on 9.10.1995 has considered his case and decided to keep its finding in 'sealed cover' in view of institution of disciplinary proceedings for a major penalty against the applicant by Memorandum dt. 7.8.1995, this has been done in accordance with para 2 and 7 of O.M. No.22011/4/91-Estt.(A) dt. 14.9.1992 on the subject "Promotion of Government servants against whom disciplinary/court proceedings are pending or whose conduct is under investigation - Procedure and guidelines to be followed." Para 2 states that "at the time of consideration of cases of Government servant for promotion, details of Government

servants inter-alia in respect of whom a charge sheet has been issued and disciplinary proceedings are pending should be specifically brought to the notice of the DPC. Apparently, since the DPC met on a date viz. 9.10.1995 subsequent to the date of issue of the charge sheet viz. 7.8.1995, the fact of pendency of the disciplinary proceedings was obviously brought to the notice of the DPC and the DPC has apparently followed instructions in para 7 which reads as below :

"A Government servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in para 2 above arise after the recommendations of the DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by the DPC. He shall not be promoted until he is completely exonerated of the charges against him and the provisions contained in this OM will be applicable in his case also."

Para 7 refers to DPC, it does not specifically refer to Review DPC, but the department appears to have understood the term DPC to include Review DPC also and the finding in respect of his promotion has been kept in sealed cover. It is this which the applicant has impugned and the relief sought by the applicant is to direct the Respondents to consider the promotion of the applicant w.e.f. 20.4.1990 in the light of findings of the Review DPC and by ignoring the effect of the charge sheet dt. 7.8.1995 and to pay all arrears of pay and allowances and other consequential benefits. ✓ 1

18. Our order dt. 2.9.1996 is relevant and may be quoted in full :

"Heard Shri S.P.Saxena for the applicant and Shri V.G.Rege for the respondents.

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On the last occasion i.e. 2.8.1996, after hearing both the parties, the Tribunal directed the respondents to furnish the file pertaining to the decision taken by the Department for initiation of departmental proceedings against the applicant within two weeks along with the DPC proceedings held in 1990 and 1995 promoting persons to the post of Commissioner. The learned counsel for the respondents urged that he has received a letter dt. 30.8.1996 from the respondents' department stating "that the question whether sealed cover procedure as envisaged in DOP&T's O.M. dt. 14.9.1992 should be applicable in the case of Shri D.S.Karanth has been considered in consultation with the Department of Personnel & Training. Their advise is that, since the review DPC which met in October 1995 to consider the case of Shri Karanth is deemed to be the DPC of Dec. 1989-Jan. 1990, when the proceedings instituted against him vide memo dt. Aug. 1995 were not in existence, the sealed cover could not be applicable in his case".

In the circumstances, Shri Rege states that the matter will have to be decided in consultation with the U.F.S.C. and he seeks six weeks time.

The respondents are granted four weeks time to comply with the order, failing which, the applicant may be considered for giving ad hoc promotion.

List the case on 4.10.1996. Copy of the order be given to the parties."

It would be seen that on the basis of advice said to have been received by the respondents from the nodal department viz. Department of Personnel and Training, the Tribunal had directed the department to comply with the instructions of the DOP&T after obtaining the advice of the UPSC and if they are not able to do so then to give an ad hoc promotion to the applicant.

On 4.10.1996, we gave further time to the Respondents to consider ad hoc promotion of the applicant. On 1.11.1996 the Joint Secretary of the Ministry who was personally present filed an affidavit seeking review of our earlier interim order dt. 2.9.1996 stating that

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on a correct interpretation of para 7 of the O.M. dt. 14.9.1992 and the relevant case law viz.

(1) Dr. H.Mukherjee V/s. Union of India & Ors.

1994 Supp (1) SCC 250 (2) State of Madhya Pradesh and Anr. V/s. Syed Naseem Zahir and Ors. 1993 Supp (2) SCC 225 (3) Ram Singh V/s. V.K.Duggal and Anr.

1995 30 ATC 747 (4) B.S.Lalchandani V/s. Union of India & Ors. (C.P. No.200/92 in O.A. No.472/88)

the sealed cover procedure was correctly adopted and in terms of para 5 of the O.M. dt. 14.9.1992 the applicant would not be ripe for consideration for ad hoc promotion till after two years from the date of Review DPC (October, 1995). To be fair to the respondents we would also like to note that the learned counsel for the respondents made available the connected files of the department including DPC proceedings and the note sheets and requested the Tribunal to pass appropriate directions.

[19. The question therefore to be decided in this case is whether para 7 of the O.M. dt. 14.9.1992 applies to the Review DPC, as well as, to the normal DPCs and assuming that it applies to Review DPC whether in terms of that O.M. the sealed cover procedure was correctly adopted and whether even otherwise the Tribunal can give a direction to the Respondents to give promotion to the applicant either on a regular basis or on an ad hoc basis.]

20. The comprehensive instructions in regard to

procedure for promotion are contained in the Government O.M. No.22011/5/86-Est.(D) dt. 10.4.1989. Para 18 of these instructions deal with Review DPCs. Para 18.1 considers when Review DPCs may be held and para 18.2 deals with scope and procedure of Review DPCs. The relevant paragraphs are as below :

"18.2 A Review DPC should consider only those persons who were eligible as on the date of meeting of original DPC. That is, persons who became eligible on a subsequent date should not be considered. Such cases will, of course, come up for consideration by a subsequent regular DPC. Further, the review DPC should restrict its scrutiny to the CRs for the period relevant to the first DPC. The CRs written for subsequent periods should not be considered. If any adverse remarks relating to the relevant period were toned down or expunged, the modified CRs should be considered as if the original adverse remarks did not exist at all.

18.3 A Review DPC is required to consider the case again only with reference to the technical or factual mistakes that took place earlier and it should neither change the grading of an officer without any valid reason (which should not be recorded) nor change the zone of consideration nor take into account any increase in the number of vacancies which might have occurred subsequently."

A Review DPC is held only if the original DPC has not taken the material facts into consideration or if material facts have not been brought to the notice of the DPC or if there is any grave error of procedure followed by the DPC. In the instant case the Review DPC so far as the applicant is concerned was necessitated by the following circumstances :

"as a result of the review DPC for promotion to the grade of Dy. Collector of Customs and Central Excise held on 17.2.1995, the seniority of S/Shri D.S.Karanth and Chander Sen had been revised in the feeder grade of Dy. Collector

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of Customs and Central Excise. Consequently, in the list of officers considered by the DPC held in December, 1989/January, 1990, the name of Shri Karanth appears below Shri T.R.Rastogi and above Shri K.Parusaraman at S.No.56A".

It is clear that keeping in view the scope and procedure the Review DPC although held subsequently, rightly considered CRs etc. only up to the material date i.e. 1990. Thus Review DPC is nothing but the original DPC which happens to meet at a subsequent date to review earlier decisions in the light of certain new material but relevant only in relation to the date the original DPC met. Therefore, the instructions which apply to the normal DPC would squarely apply to the Review DPC also. I am therefore, of the view that instructions in para 7 of the O.M. dt. 14.9.1992 apply to Review DPC as much as to the normal DPC and in terms of these instructions the action of the Review DPC which met on 7.10.1995 in keeping the finding as to the applicant in sealed cover was in accordance with the O.M.

21. Here we come up against the fact that the orders which were passed by this Tribunal on 2.9.1996 were with reference to certain advice said to have been given by the DOP&T itself. The Tribunal itself had not gone into the correctness or otherwise of the advice but it had merely directed the Respondents to take action consequent on that advice. Apparently, the respondents themselves do not consider the earlier advice as correct and that is why they have filed additional affidavit seeking a review of our earlier orders. However, we may consider

the reasons for the advice given earlier. These grounds appear to be as below :

"1) Sealed cover procedure need not be resorted to by the review DPC if the sealed cover procedure was not required to be resorted to with reference to the original DPC. The logic behind this view is that as per the DPC guidelines the review DPC should restrict its scrutiny to the CRs for the period relevant to the first DPC. Hence conditions/situations as applicable to the original DPC will only have to be taken into consideration at the time of holding of the review DPC.

2) The Central Administrative Tribunal (Hyderabad Bench) has also taken a similar view in its decision dt. 15.2.1996 in CP No.36/95 in OA 1082/92 (M.P. Venkataswami Vs. Union of India). The Tribunal observed that "we feel that it is not just and proper to adopt the sealed cover procedure if any disciplinary action is pending by the date the review DPC meets especially when that charge memo itself is in regard to the alleged acts or omissions which had taken place subsequent to the date on which the DPC met in regard to the consideration of the cases of the juniors of the concerned employee. Whenever it is a case where the review DPC has to consider the benefit is being given from the date on which the junior was promoted. Hence by way of fiction, it has to be stated that in order to consider whether the recommendation of the DPC has to be implemented or not, the conditions which existed on the date on which the DPC met for consideration of the case of the juniors of the concerned employee, have to be taken into consideration. CIT

3) In ~~an~~ case of Shri B.Dhahia/he had regained seniority in the rank of Assistant Commissioner of Income Tax/Deputy Commissioner of Income Tax by virtue of a CAT Judgment. Consequently a review DPC was held on 30.11.1994 which considered his suitability for inclusion in the select list prepared by the original DPC held on 23.9.85 and recommended antedating his seniority as Commissioner of Income Tax accordingly. In the meanwhile the CVC advised major penalty proceedings against Shri Dhahia on 8.3.94 and a charge-sheet was issued to him on 18.4.95. It was held that since the actual promotion to the grade of CIT took place before the issue of charge-sheet dt. 18.4.1995, instructions contained in para 7 of the O.M. dt. 14.9.1992 are not applicable."

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Since the Respondents have asked us to interpret

para 7 of the O.M. dt. 14.9.1992 irrespective of the earlier stand of the Department which the Department now considers to be incorrect, we are required to consider these grounds critically. While doing so, we would also be taking account of the essential case of the applicant since the counsel for the applicant has heavily relied on the case of M.P.Venkataswamy V/s.

Union of India & Ors. So far as the Ground No.1 is concerned, we need not consider the same because it is just a view and does not appear to reflect the intention of para 7 of the O.M. dt. 14.9.1992. So far as Shri Dhahia's case is concerned the same is clearly distinguishable because Shri Dhahia's promotion took place in terms of finding of review DPC which met on 8.3.1994 i.e. prior to the date of issue of charge-sheet viz. 18.4.1995. In the instant case, the applicant's promotion is yet to take place and the Review DPC met on a date subsequent to the date of issue of charge sheet and has taken note of that development and has decided to keep the findings in the sealed cover.

22. We, therefore, come to the case of M.P.Venkataswamy. In regard to this case it needs to be observed that the decision rendered by the Tribunal was in C.P. 36/95 arising out of O.A. 1082/92. In the O.A. the Tribunal had granted the relief of restoration of promotion of the applicant in the post of Assistant Collector as per order dt. 10.6.1976 against 17th roster point. Accordingly, necessary orders were issued and his case was considered for promotion by the DPC which met on

16.1.1996. The recommendations of the DPC were kept in sealed cover on the ground that charge-memo dt.22.7.93 was issued to the applicant and the said inquiry is still pending. Thus that case was similar to the present one, inasmuch as, the date of the review DPC was subsequent to the date of issue of charge-sheet. The Tribunal gave a direction to open the sealed cover and to promote him if recommendation is for promotion. The reasons given for this order are contained in para 6, 7 and 8 of the order which are reproduced below :

"6. The Apex Court held in SLP (C) No.2344/90 which was considered along with Jankiraman's case (AIR 1991 SC 2010; Union of India V/s. K.V. Jankiraman) that even if promotions are given with retrospective effect and if disciplinary proceeding was not pending against the concerned employee by the date by which the promotion was given to his juniors, still sealed cover procedure has to be followed, if by the date the DPC met, inquiry was pending and there was no need to open the sealed cover if that inquiry ultimately ended in punishment.

7. The facts therein also disclose that the charge memo was issued to the concerned employee in regard to the allegations of a date earlier to the date on which retrospective promotion was given to the juniors.

8. But when it is a case of review DPC, it shall be deemed that the DPC was meeting as on the date on which the cases of the juniors of the concerned employees were considered and if there was no disciplinary action against the concerned employee by the date on which the original DPC met for consideration of the case of his juniors, then we feel that it is not just and proper to adopt the sealed cover procedure if any disciplinary action is pending by the date the review DPC meets especially when that charge memo itself is in regard to the alleged acts of omissions which had taken place subsequent to the date on which the DPC met in regard to the consideration of the cases of the juniors of the concerned employee. Whenever it is a case where the review DPC has to consider, the benefit is being given from the date on which the junior was promoted. Hence by way of fiction, it has to be stated that in order to consider whether

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the recommendation of the DPC has to be implemented or not, the conditions which existed on the date on which the DPC met for consideration of the case of the juniors of the concerned employee, have to be taken into consideration."

23. Paras 6 and 7 above deal with Jankiraman's case. The Hyderabad Bench appears to concede that the reference to Jankiraman's case and especially its observation in relation to 2344/90 does not help the applicant and still the Hyderabad Bench wants to distinguish those observations in relation to review DPC. Let us, therefore, first consider the observations of the Hon'ble Supreme Court in K.V.Jankiraman's case which appear at page 2022 of the report :

"21. Special leave granted.

The peculiar facts in this case are that at the relevant time the respondent-employee was working as Superintending Engineer since July 1986. When earlier he was working as Garrison Engineer in Bikaner Division, there was a fire in the Stores in April 1984 and there were also deficiencies in the Stores held by the Store-keeper during the period between 1982 and 1985. Hence, disciplinary proceedings were commenced in February 1988 and the respondent was served with a charge-sheet on February 22, 1988. By an order of August 19, 1988 a penalty of withholding of increment for one year was imposed on the respondent as a result of the said disciplinary proceedings.

22. On June 3, 1988, the DPC met for considering the promotion to the Selection Grade. Pursuant to this meeting, by an order of July 28, 1988 some juniors were given the Selection Grade with retrospective effect from July 30, 1986. The respondent-employee's name was kept in a sealed cover and was, therefore, not included in the list of the promotee officers.

23. The Tribunal has found fault with the authorities on two grounds. The Tribunal has observed that although when the DPC met in June 1988, the employee was already served with a charge-sheet on February 22, 1988 and,

therefore, the sealed cover procedure could not be faulted, since admittedly his juniors were given promotion with retrospective effect from July 30, 1986, the DPC should not have excluded the respondent's name from consideration when it met on June 3, 1988. The second fault which the Tribunal has found is that since the penalty of stoppage of increment was imposed at the end of the disciplinary proceedings, it was not open for the authorities to deny the respondent his promotion to the Selection Grade as that amounted to double penalty. Having taken this view, the Tribunal has directed that a Review DPC should consider the respondent's case for promotion w.e.f. July 1986 when his juniors were given promotion taking into account his performance and confidential records up to 1986. We are afraid the Tribunal has taken an erroneous view of the matter. Admittedly, the DPC met in June 1988 when the employee was already served with the charge-sheet on February 22, 1988. The charge-sheet was for misconduct for the period between 1982 and 1985. Admittedly further, the employee was punished by an order of August 19, 1988 and his one increment was withheld. Although, therefore, the promotions to his juniors were given with retrospective effect from July 30, 1986, the denial of promotion to the employee was not unjustified. The DPC had for the first time met in June 3, 1988 for considering promotion to the Selection Grade. It is in this meeting that his juniors were given Selection Grade with retrospective effect from July 30, 1986, and the sealed cover procedure was adopted in his case. If no disciplinary proceedings were pending against him and if he was otherwise selected by the DPC he would have got the Selection Grade w.e.f. July 30, 1986, but in that case the disciplinary proceedings against him for his misconduct for the earlier period, viz., between 1982 and 1985 would have been meaningless. If the Tribunal's finding is accepted it would mean that by giving him the Selection Grade w.e.f. July 30, 1986 he would stand rewarded notwithstanding his misconduct for the earlier period for which disciplinary proceedings were pending at the time of the meeting of the DPC and for which again he was visited with a penalty. We, therefore, allow the appeal and set aside the finding of the Tribunal. There will, however, be no order as to costs."

24. In para 8 of its order the reference made by the Hyderabad Bench to fiction by which Review DPC meets is correct and it is true that the fiction applies to the material considered by the ~~Tribunal~~ ^{DPC}, but whether the sealed cover procedure has to be followed or not is quite different. The sealed cover procedure is followed in terms of para 7 of the Memorandum dt. 14.9.1992. Here the two stages are required to be distinguished. First of all, DPC meets and takes a decision regarding whether or not the applicant is fit for promotion and while taking this decision the DPC considers the material relevant for the applicable date which may be well in the past. The Hyderabad Bench of the Tribunal is quite right when it states that by means of a fiction DPC meeting in 1995 considers as if it is meeting in 1990 and therefore it considers the ACRs up to that date and also considers any other material like Disciplinary Enquiry, Penalties etc. up to that date only. Therefore, if a Disciplinary Enquiry has been initiated against the applicant at a subsequent date the DPC cannot consider the same and DPC will make a recommendation uninfluenced by this subsequent development.

25. But the second stage is as to whether to keep the finding in sealed cover or not. For this purpose the DPC is strictly bound by the instructions of para 7 of O.M. dt. 14.9.1992 which enjoins on the DPC to keep the findings in a sealed cover. The fiction

referred to earlier does not operate to prevent the DPC from keeping the finding on sealed cover because of the specific government instructions to do so. Unless these instructions are held to be invalid, this Tribunal cannot ask the DPC not to follow the sealed cover procedure. There has been no challenge to the instructions dt. 14.9.1992 and therefore the question of directing the DPC not to keep the finding in sealed cover does not arise. It may also be observed that the orders of Hyderabad Bench were passed in C.P. without noting provisions of para 7 of Memorandum dt. 14.9.1992 and hence its weight is to that extent reduced.

26. The next question is whether even assuming that the Tribunal directs the department to open the sealed cover and act on it, it is open to the government not to act on it because of other overriding instructions and law laid down by Supreme Court. It appears that such overriding instructions do exist vide para 17.1 of the Memorandum dt. 10.4.1989 which reads as below :

"17.1 A clearance from the Vigilance Section of the Office/Department should also be obtained before making actual promotion or confirmation of officer approved by DPC to ensure that no disciplinary proceedings are pending against the officer concerned."

Apart from these instructions, ~~however~~, the case law cited by the Respondents appears to support them. The latest case is that of Dr.H.Mukherjee V/s. Union of India & Ors. (1994 Supp (1) SCC 250). In that case the applicant was selected by the UPSC for the

post of Chief Controller of Explosives. The Officer was a departmental officer being the seniormost Joint Chief Controller of Explosives. It is not disputed that his name was recommended for appointment to the post by the UPSC in terms of application filed by the applicant in response to an advertisement. The Appointments Committee of the Cabinet (for short 'ACC') did not accept the recommendation of the UPSC on the ground that since the receipt of the recommendation of the UPSC there were certain subsequent adverse remarks. The Principal Bench had held the decision of the ACC to be unsustainable because no reasons were given by the ACC. The Hon'ble Supreme Court set aside the order of the CAT. The Hon'ble Supreme Court pointed out that the Tribunal events not wrongly thought that subsequent could be taken into consideration and that since the government's decision was based on adverse remarks, the same could not be considered to be arbitrary, mala fide or capricious. This Judgment therefore is an authority for the proposition that subsequent events can be taken into account while deciding whether or not to promote an Officer. On the specific issue of sealed cover, the Supreme Court Judgment in State of Madhya Pradesh and Another V/s. Syed Naseem Zahir and Ors. (1993 Supp (2) SCC 225) is on the point that even when sealed cover procedure could not have been adopted in terms of government instructions, government could take into account

subsequent developments. To quote :

"It is no doubt correct that in view of Jankiraman case the DPC was not justified in keeping the recommendation pertaining to Syed in a "sealed cover", but it is difficult to ignore glaring facts in a given case and act mechanically. Even in Jankiraman case while dealing with Civil Appeal Nos.51-55 of 1990 this Court observed as under :

"In view of the aforesaid peculiar facts of the present case, the DPC which met in July, 1986 was justified in resorting to the sealed cover procedure, notwithstanding the fact that the charge-sheet in the departmental proceedings was issued in August/December, 1987. The Tribunal was, therefore, not justified in mechanically applying the decision of the Full Bench to the facts of the present case and also in directing all benefits to be given to the employees including payment of arrears of salary."

Keeping in view of the facts of this case we are of the view that the "sealed cover" containing recommendations of the DPC in respect of respondent Syed be not opened till the departmental proceedings against him are concluded."

25. In this connection, para 8 of Judgment in Jankiraman's case may also be referred, which makes it clear that an Officer against whom ~~a~~ departmental proceedings are pending cannot be considered for promotion, which reads as follows:

"An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and moreso, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently."

It is therefore clear that there is no authority of the Supreme Court ~~for~~ that the adoption of sealed cover procedure in the case of an Officer against whom ~~DE is pending~~ would be violation of Art 14 of Constitution. 35.

26. As correctly pointed out by the Respondents in the latest affidavit, the question of ad hoc promotion of the applicant does not arise because this can be considered only after expiry of two years from the date of holding of the Departmental Promotion Committee viz. two years after October, 1995.

27. Incidentally, we had earlier directed the Respondents to obtain the advice of the UPSC, but it appears that UPSC has indicated that the matter is primarily for the Government to decide, therefore that aspect is no longer relevant. Under the circumstance, the applicant cannot have the relief of directing the Department to give him promotion irrespective of the pendency of the disciplinary proceedings. At the same time, the applicant does have a right to have an expeditious conclusion of his departmental enquiry so that there is no further avoidable delay in the ~~new~~ ^{new} ~~promotion~~ ^{decision to promote} which has been denied to him.

28. In the light of the discussions above, I pass the following directions.

1. The O.A. is admitted and disposed of at the admission stage.
2. The order dt. 2.9.1996 is reviewed and in particular, the order directing ad-hoc promotion of the applicant is hereby recalled.
3. The respondents are directed to finalise the pending disciplinary enquiry against the Officer within six months from the date of communication of this order and

thereafter act according to rules.

4. Subject to above, the O.A. is dismissed with no order as to costs.

M.R.Kolhatkar

(M.R.KOLHATKAR)
MEMBER(A)

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p.t.o.

There is a difference of opinion between the members of the Division Bench viz. Member (J) is inclined to allow the O.A. and Member (A) is inclined to dismiss the O.A. Therefore, we direct the Registrar to refer this case to the Hon'ble Chairman to nominate a third Member so as to resolve the difference of opinion by majority in terms of S.26 of the A.T. Act 1985.

M.R. Kolhatkar

(M.R. Kolhatkar)
Member (A)

B.S. Hegde

(B.S. Hegde)
Member (J)

B/ssp

C.P. No. 17199
Filed by applicant
Filed on 7.6.99

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Urgent Ex parte of Appeals
Recd. at 15/7/99 for today
the Notice of 7/5/99 to
Henry John as C.P.

(B)
ATB

Dated: 7/5/99.

Heard the learned counsel
for the applicant MR. G. K. Marand.
Notice on C.P. 17199 returnable
by 2/7/99.

Letter dtd. 22/6/99 (D. S. Sawajir) (R. G. Vaidyanatha)
re d. 6 of
applicant is
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Notices issued to
Applicant/Respondents on

8/6/99

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