

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION NO.107 & 108/1999

DATED:

Tuesday this, the 31st ^{Am} DAY OF OCTOBER, 2000

Shri Avnish Kumar Yadav & 4 Ors. Applicants.

(Applicants by Shri G.K.Masand, Advocate)

Versus

Union of India & Ors Respondents

(Respondents by Shri M.I. Sethna, Sr. Advocate with
Shri Vadhavkar, Adv. for R.1, R.4 & R.5 & Shri V.G.Rege,
Adv. for R.S & R.3.)

CORAM

Hon'ble Shri B.N. Bahadur, Member (A)

Hon'ble Shri S.L.Jain, Member (J)

- (1) To be referred to the Reporter or not? Yes
- (2) Whether it needs to be circulated to No
other Benches of the Tribunal?
- (3) Library. No

B.N.
(B.N. Bahadur)
Member (A)

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

ORIGINAL APPLICATION NO.107/99
&
ORIGINAL APPLICATION NO.108/99

DATED THIS 31st DAY OF OCTOBER, 2000.

CORAM: HON'BLE SHRI B.N BAHADUR, MEMBER (A)
HON'BLE SHRI S.L.JAIN, MEMBER (J)

1. Shri Avnish Kumar Yadav,
residing at Qtr. No.604
Bldg. No.14-B, Customs
Colony, Powai,
Mumbai 400 076.
2. Shri Tribhavan Yadav,
residing at
Quarter No.701,
Bldg. No.14-B
Customs Colony,
Powai,
Mumbai 400 076.

.... Applicants in
O.A.No.107/99

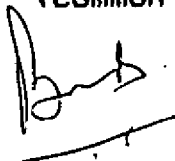
1. Shri Sandeep Pandurang Hedao
residing at Quarter No.403,
Building No.14-B,
Customs Colony, Powai,
Mumbai 400 076.
2. Rakesh Bihari,
Residing at
Quarter No.603,
Building No.14-B
Customs Colony,
Powai,
Mumbai 400 076.
3. Shri Dhanajay Dahiware,
residing at
Shri Ganesh Co-operative
Housing Society Ltd.
D-2/1-1,
Sector 28, Nerul,
New Bombay.

..... Applicants in
O.A. 108/1999

vs.

1. Union of India through
the Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi.
(Common in both OAs)
2. Secretary,
Department of Personnel
& Administration Reforms
New Delhi.
(Common in both OAs)

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3. Chairman,
Staff Selection Commission,
Army & Navy Building,
Kala Ghoda, Mumbai 400 001.
(Common in both OAs)

4. Chief Commissioner of Customs
New Customs House,
Ballard Estate,
Mumbai 400 039.
(Common in both OAs)

5. { (Only in O.A.107/1999)
Chief Commissioner of Central
Excise, M.K. Road,
Churchgate, Mumbai 400 020 }

5. { (Only in O.A.108/1999)
Chief Commissioner of Income Tax
Aayakar Bhavan, M.K.Road,
Mumbai 400 020. }

..... Respondents.

(By Shri M.I. Sethna, Sr. Advocate with Shri Vadhavkar,
Advocate for R.1, R.4 & R.5 and Shri V.G. Rege, Advocate
for R.2 & 3)

(ORDER)

Per Shri B.N.Bahadur, Member (A)

Since the basic issues involved in the two OAs.
bearing Nos.107/99 and 108/99 are identical, both the
OAs. were heard together, and are being disposed of
herein by a common Order. The two Applicants in the
first O.A. (107/99) viz. Shri Avnish Kumar Yadav and
Shri Tribhuvan Yadav state that they have been working as
Customs Examiners in pursuance of their selection by
Staff Selection Commission (R.3) and pursuant to their
accepting the offer of appointment by Respondent No.4.
They were appointed as Examiners in Bombay Customs House
on 12.3.1996 and 20.5.1996, respectively. Applicants
state that they belong to Other Backward Class (OBC) and
their postings have been made in slots earmarked for OBC
candidates.



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2. The Applicants' grievance is that they have been directed after over two years plus, vide impugned orders dated 12.1.1999 (Exhibit A and A.1) to report to the Office of Respondent No.5. This reallocation is being challenged by both Applicants, who seek the relief, in substance, that the impugned action by Respondent No.3 to reallocate the Applicants to Excise Department be declared illegal and that Respondents be directed to retain the Applicants in the Cadre of Examiners of Customs. Allied reliefs are also sought.

3. The Applicants further make the point that they are well qualified persons, and had openings in life which they did not pursue, only because they have been selected for this particular post. Their decision was consciously made for this particular post which was offered to them,. It is contended that if they go to the Department now offered to them their chances for promotion would be severely slowed down, to their detriment. This is the basic point made by both applicants who have, nevertheless, cited individual details of their careers separately. They say that they have undergone Training courses, in 1996, conducted by National Academy of Customs and Excise. Applicant further contend that Staff Selection Commission (R.3) had initiated the selection in order to fill up the backlog of reserved posts which remained unfilled. They cited a case O.A.No.442/96 etc. filed before the Principal Bench (copy of judgement at Ex.E) They allege that Govt. of India had failed to clarify before the Principal Bench that excess appointments in favour of Reserved

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Communities was being made only to clear the backlog. This point is further expounded in the Application.

4. Applicants further state that Respondent No.3 had thereupon posted people out of the Customs Department to the Excise Department or Income Tax Department. The Applicants then describe the subject matter of original Application No.690/97, and the decision of the Tribunal in this case is discussed in some detail along with the number of other OAs. through which termination orders had been challenged by various applicants who had been affected. This Tribunal had decided in O.A.S. ^{690/97 and batch} that any staff found surplus should be adjusted against future vacancies according to the Applicant's averments. The Applicants also give further details in regard to the litigations which are not being repeated here, but have been considered, and will be referred to wherever necessary.

5. In the other (O.A.108/99), there are three Applicants who have all being reassigned to the Income Tax Department, as against the assignment of the Applicants in O.A.107/99 to the Excise Department. The three Applicants herein are S/Shri Sandeep P Hedao, Rakesh Bihari and Dhananjay Dahiwal. Shri Hedao states that he belonged to the Scheduled Tribe, and was appointed as Customs Examiner from 12.3.1996 against a post meant for ST candidate. He, thereafter describes his career and takes contentions similar to those made by Applicants in O.A.107/99. Shri Rakesh Behari states that he belongs to OBC and, giving details of his career, makes the same contentions stating *inter alia* that he

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would not have given up his employment with LIC if he were offered the post of Income Tax Inspector in the year 1996.

6. The third Applicant Shri Dahiwalé states that he belonged to the Scheduled Castes, was appointed as Customs Examiner 22.2.1996 against the post meant for SC Community candidate. He also makes the same pleas, as recorded in some detail in the paragraphs above relating to the first O.A.

7. There is an affidavit filed on behalf of Respondent No.2 and 3 ^{Bns} ~~also~~ where it is stated that the action to reallocate the Applicants to the Central Excise Department by cancelling their appointments in the Customs Department had to be taken because of the judgement of the Principal Bench of the Tribunal made in November, 1996 and the Order of the Mumbai Bench in made in 690/97 on 18.3.1998. This, it is averred is the reason for their action and, as such, the Application is hit by the principle of *resjudicata* and ^{that the O.A. Bns} deserves to be dismissed. This affidavit then goes on to give parawise replies stating that no change in service conditions is involved in reallocating these applicants and that such action is totally within the powers of the President under Art.309 of the Constitution. There is no provision of law where consent of the Applicants is required since there is no detriment to pay or other basic conditions. No fresh offer of appointment is also necessary. The further part of the affidavit gives parawise replies to the points made in the O.A. It is denied specifically that the concerned selection had been made with a view to filling any backlog of reserved posts and applicants are

put to strict proof in respect of such an allegation made. It is stated that ordinarily the selections are conducted as per vacancies reported by user department and that such vacancies may possibly include backlog vacancies also.

8. We have seen all the papers in the case and have heard the arguments made by learned Counsel Shri G.K.Masand on behalf of the Applicants in both O.As., the arguments made by learned Counsel Shri Rege for Respondents No.2 & 3 and learned Counsel Shri Vadhavkar for Shri M.I.Sethna on behalf of Respondent Nos.1, 4 and 5.

9. Learned Counsel Shri Masand argued the case in detail and started by recapitulating the pleading at para 2(OA.107/99) regarding the legal points that, in his view were for determination in the present cases. He questioned the authority of the Commissioner (R.5 in O.A.107/99) to make reallotment of Service and made the point that even in the Excise side there is an excess of OBC representation. Counsel for Applicants traced the factual developments regarding the O.A.No.690/97 and the other litigation. It was argued that applicants were not party in the Principal Bench case. The position regarding changes in the different Cadres with regard to the percentage strengths of various communities was discussed at great length by Counsel for Applicant with reference to a chart that had been prepared for the purpose. Agreeably there was distortion, the learned Counsel agreed, but strongly made the point that the action taken by the Respondents had not remedied the situation in any of the Cadres by sending the Applicants

from one Department to another the excess was merely transferred. Thus this action is neither logical nor necessary, it was argued.

10. Learned Counsel for Applicants also contended that such an action was taken only in Bombay Customs and no where else in the country. The recruitments were by the Staff Selection Commission (R.3) was not made in isolation but were made only on the basis of the vacancy strengths notified by the Department. The distortion in percentage could easily be adjusted in the future years. Shri Masand dwelt at length on the point taken in the pleadings that having joined the Customs Department as a conscious decision, all Applicants have stopped pursuing their careers and that such a change, which came out of the blues, was unfair to them in having blocked their possible options in the early stage of their career.

11. Another plea taken by the learned Counsel for the Applicant was that of estoppel. It was argued that the transfer to another Service was not a condition of appointment and hence the Respondents were estopped from taking recourse to such an action. Learned Counsel cited the following Case Law in support of the case of the Applicants: (1) *Bhagawati Prasad Bhatt vs. State of Gujarat* [1979(3) SLR:805] The point made was that it was decided here that even for sending a person on deputation his consent was needed. (2) *Prem Prayin vs. UOI* [1973(2) SLR 659] Learned Counsel argued that it was decided herein that a Govt. ^{servant} ~~who~~ ^{Bmb} is recruited to a particular Cadre cannot be compelled to serve outside his Cadre (3) *Prakash Borkar vs. UOI* [1983 (3) SLR 725.

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12. The learned Counsel for Respondent No.2 & 3 argued the case in detail taking us over the facts as pointed out, and first made the point that since the Principal Bench of this Tribunal had disposed of this matter, and since the selection has been quashed there was no question of estoppel operating. It was only allowed that the existing select list would be used for making appointment. It was explained that recollection of data had to be done to assess the position regarding reservation etc. Shri Rege referred to the letter of the Staff Selection Commission dated 21.7.1997 and made the point that a large number of similar persons were involved but only these 5 persons have come up to the Tribunal. It was contended that this was a case of abnormal circumstances. Reacting to the point made about these applicants not being parties before the Principal Bench it was argued that the Applicants were equally to blame for not invoking the Law. Even if they were made parties, no material difference would have come about. It was argued that the Respondents were only following the judgement of Principal Bench and that not doing so would in fact make them open to contempt of Court.

13. It was argued by Shri Rege further that conditions of appointment in the initial order of Appointment was subject to general Rules and the case of *Bhagawati Prasad Bhatt* cited by Shri Masand related to deputation and was not relevant. Learned Counsel also countered the claim regarding lessening of promotion prospects of the Applicants on their reallocation to other departments stating that availability of promotional chances in a particular manner or with the

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particular speed was not a condition of service. Reacting to the point made about the possibility of adjustment against future vacancies in the same department it was argued that such a kind of leverage was not granted by the Principal Bench. Learned Counsel Shri Rege further raised the point of *resjudicata* as taken by Respondents in their Written Statement (page 129 of Paper Book).

14. The case was argued on behalf of Respondents No. 1, 4 and 5 by their Learned Counsel Shri V.D.Vadhavkar. He first drew our attention to the order of the Principal Bench to make the point that the appointments of the Applicant had become invalid and the selection had been quashed. He argued that while it was true that the same list was to be reused, it was explained that this was done by SSC. It was not possible for the Department to keep the post vacant. It was argued that the open category appointees had got the relief for themselves and not in a PIL.

15. Shri Vadhavkar also discussed the judgement of the Mumbai Bench of the Tribunal dated 18.3.1998, he made the point that Govt. was bound by this judgement and made specific reference to para 9 of the same judgement. It was argued that the judgement did not cover the Applicant and that they had been protected for the interim period. Learned Counsel argued that the Applicants should have gone up in appeal if they were aggrieved with the Order of the Principal Bench and that if this Bench is to disagree the matter would need to be referred to a Larger Bench.

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16. The case was reargued by learned Counsel Shri Masand to make the following point: a reserve post cannot be filled by open category candidate (b) revised requisition was sent after the Principal Bench judgement, the requisition was only for 17 category candidate in the first requisition based on vacancy position. The total remains the same and hence the posts of reserved categories were transferred to Reserve category. Reserve category posts are to be carried forward as per Rules.

(3) If the argument is that Applicants appointment is abinitio void then the transfer to another department is itself void since no rule provide for such transfer. At least a hearing should have been given.

17. Let us first examine the contention of the Respondents that the Application is hit by the principles of resjudicata, since the matter has been finalised by the Order of the Mumbai Bench on 18.3.1998 and by the Order of the Principal Bench in November, 1996. The Order of the Principal Bench had indeed quashed the selection made but had stated in the very next sentence as follows: "This does not mean that the selection has to be done again, From the existing select. List, appointments can be made applying the limit of 50% quota." In the Order of the Mumbai Bench, the matter has been gone into, after the pronouncement of orders in the Principal Bench, and the subsequent action of selection by Govt./SSC. The termination orders have been held as unsustainable for the reasons explained. *Bench held that surplus staff can be adjusted* against future vacancies. Thus, it is clear that once the process has been restarted by the very liberty granted by

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the Principal Bench judgement to make fresh appointments from the same select list, it has to be concluded that it cannot be held that the matter is hit by the principle of resjudicata. Having settled this point, we now move on to the other arguments raised by the respective sides.

18. There is considerable merit in the argument taken by the Applicants that they had accepted the posts in the Customs Department after due consideration of all prospects and had left whatever profession they were pursuing, and also stopped any efforts for a change. Thus an expectation had been provided to them in a situation where the normal Rules certainly did not contemplate or even allow a shift or transfer to the Excise or Income Tax Departments. There is hardly any strength in the argument taken by learned Counsel for SSC that the conditions in the order of appointments were general conditions and that it was open to the Govt. to allot them to any one of the Departments for which the Applicants had opted at the time of making Applications. Even the fact that the Applicant/s might have opted for the Departments to which they are now being posted does not mean that they can be summarily shifted there, after a period of a few years. One could have understood this position had it come about before the Applicants had joined their Departments or very shortly thereafter. But not after the few years that have lapsed. This is indeed something that is not heard of in a system of such nature which is followed in several Cadres of Govt. where joint examinations are conducted centrally for entries into different Departments. The cases of *Prem Paswan vs. UOI* cited by the Counsel for the Applicants certainly holds

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some relevance on the principle that it settles that a Govt. Servant who is recruited to a particular Cadre cannot be compelled to serve outside his Cadre. Similarly, the case of *Prakash R. Borkar vs. UOI* cited by the Applicants [1983 (3) SLR 725] may well relate to deputation, but it certainly settles a principle which supports the case of the present Applicants before us.

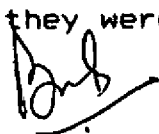
19. The plea of estoppel was also taken by Counsel for Applicant, where also the ratio settled in the case of *Bhagawati Prasad Bhatt* (1979 (3) SLR⁸⁵) and the case of *Prem Parveen* (supra) were sought to be depended upon. In the case of *Prem Pawan*, the Delhi High Court has discussed the issues which are relevant and applicable to the present case holding *inter alia* that Courts can interfere where the Govt. does not have the powers for a particular transfer or reallocation to another Department. In the case of *Prakash Borkar* the question whether Govt. can transfer a person from one Cadre to another was considered. The High Courts had interpreted the ratio settled by the Supreme Court in another case to again hold that when a person is appointed to a particular post in ^a Cadre he has ^{the} ~~to~~ future career before him "Chartered in one sense". He has a certain knowledge about the future, and a shift to another Department deprives him of the benefit which he has acquired or which he may acquire. This case is also relevant to the present case before us. Here it can be said that one party has made unequivocal promise and a legal relationship has come about between two parties and hence this is a promise which will be binding on the party making it.

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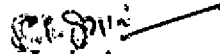
20. The Respondents have also taken the argument that they were merely implementing the judgement of the Principal Bench. This issue has been dealt with in detail in the judgment of Mumbai Bench in OA.690 and others and the matter explained. Hence we need not go into them again.


21. It is in this relation that the question of Reservation to the extent relevant in the present case will be looked into. It goes without saying that the percentage of Reservations will need to be adhered to and adjustments made as per Rules/ pronouncement by Courts. Thus if any correction has to be made, it can certainly be made in the years ahead. In any case, the present correction, is also envisaged by adjustment for one of the previous years. Secondly, it is an admitted position, for example, that in the case of the Officer being transferred to the Income Tax Department, the percentage of Reservation does not get corrected in that Department, either. And adjustments in future years will be necessary. These corrections will need to be made as per Rules and can certainly be made in further years. Thus the transfer of the Applicants in the two O.As. before us would certainly not be justified and it would be an unjust solution, in view of the discussions made in detail.

22. In view of the discussions above, we hereby allow, both the O.As. No.107/99 and 108/99. The impugned orders in the two cases seeking to reallocate the Applicant to other Departments of Govt. of India are hereby quashed and set aside. The Applicants in both OAs. will continue in their Original Cadres in which they were appointed (Examiners of Customs). Necessary



orders shall be made as early as possible to place them back in the same Department if already relieved by the Respondents. There will be no orders as costs.


(S.L.Jain)
Member (J)
sj*


(B.N. Bahadur)
Member (A)

31-10-2000