

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Dated this the 21st day of February, 2002

Coram: Hon'ble Mr. Justice Birendra Dikshit - Vice Chairman
Hon'ble Mr. B.N. Banadur - Member (A)

(1) O.A. 299 of 2001

Asnok Arjun Saikar,
Preventive Officer,
NIPT, Sahar Airport, Mumbai
(By Advocate Shri V.S. Masurkar with
Shri K.R. Yelwe)

- Applicant

versus

1. Union of India
through the Secretary,
Ministry of Finance,
Department of Revenue,
Government of India,
North Block, New Delhi.
2. Commissioner of Customs (General),
Mumbai New Customs House,
Ballard Estate, Mumbai - 400 030.
3. Dy. Commissioner of Customs (P & V),
New Customs House,
Ballard Estate, Mumbai.
4. Shri Raju,
Joint Commissioner of Customs
(Personnel & Estt. Department),
New Custom House, Ballard Estate,
Mumbai - 400 038.
(By Advocate Shri M.I. Sethna with
Shri V.G. Rege)

(2) O.A. 291 of 2001

Krishnakumar Sitaram Dhuri,
Preventive Officer,
Jawahar Lal Nehru Port,
Nava Sheva.
K/O B/23 209 Vrindavan Dham,
V.B. Phadke Marg, Mulund (E),
Mumbai.

(By Advocate Shri V.S. Masurkar with
Shri K.R. Yelwe)

- Applicant

versus

1. Union of India
through Secretary,
Ministry of Finance,
Department of Revenue,
Government of India, North Block,
New Delhi - 110 001.

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2. Commissioner of Customs (General),
Mumbai New Customs House,
Ballard Estate, Mumbai.
3. Dy. Commissioner of Customs (P & V),
New Customs House,
Ballard Estate,
Mumbai.
4. Shri Raju,
Joint Commissioner of Customs,
(Personnel & Estt. Department),
New Customs House,
Ballard Estate, Mumbai.
(By Advocate Shri M.I. Sethna with
Shri V.G. Rege)

- Respondents

(3) O.A. 336 of 2001

1. Manohar Awatram Masand,
Preventive Officer,
Bombay Customs,
Office at 1, Uncleared w/House,
Ballard Pier Extension,
Indira Dock, Mumbai.
R/O Block No. 2126/12, M.I. Section,
Uinashnagar.
2. Mrs. Aparna Ashok Koregaonkar,
Preventive Officer,
Bombay Customs,
Floating PSU, New Customs House,
Mumbai.
R/O 15-A, Guruprasad, Swastik Park,
Chembur, Mumbai.
3. Ms. Bharati Vallabhdas Kapadia,
Preventive Officer,
Bombay Customs,
New Customs House, Mumbai.
R/O Flat No. 35, Ground Floor,
Parijat, UBI Housing Society,
Vishnubnag, Andheri (West), Mumbai.
4. Shri Ram Krishna Shridhar Phansekar,
Preventive Officer,
Bombay Customs,
SIIB, New Customs House, 10th Floor,
Ballard Pier, Mumbai.

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5. Shri Sudhash Vasant Patade,
Preventive Officer,
Bombay Customs, 'F' Division,
(Hay Bunder), R/O D-2/1302, Yogi Nagar,
Eksas Road, Borivall (West), Mumbai.
6. S. Indavamani,
Preventive Officer,
Bombay Customs,
Dock Intelligence Unit, K & I,
Mole Station, 1st Floor, Ballard Pier
Extension, Indira Docks, Mumbai - 1.
7. C.T. Ibrahim Kutty,
Preventive Officer,
Bombay Customs, K & I (Admn.),
New Customs House, Mumbai.
8. Suryakant Rajaram Adate,
Preventive Officer,
Bombay Customs,
O/O Commissioner of Customs,
New Custom House, Ballard Estate,
Mumbai.
9. K. Ganesan,
Preventive Officer,
Bombay Customs,
A.I.U. (Airport) C.S. International
Airport, Sanar, Mumbai.
10. Satish Shankar Deshpande,
Preventive Officer,
Bombay Customs,
New Customs House, Ballard Estate,
Mumbai.
11. Ashok Balaji Parab,
Preventive Officer,
Bombay Customs, Haji Bunder,
R/O C/41, Vasant Villa,
Amrut Nagar, Ghatkopar (West),
Mumbai.
12. Shri Puroshottam D. Kulkarni,
Preventive Officer,
Bombay Customs, K & I (Admn.),
11th Floor Annexe, New Customs House,
Mumbai.

13. M.A.Vidyasagaran,
Preventive Officer,
Bombay Customs, Container Yard,
Wadala.
(By Advocate Shri M.S.Ramamurthy with
Shri Sai Kumar)

versus

1. Union of India,
through the Secretary,
Ministry of Finance,
Govt. of India, Department of Revenue,
New Delhi.
2. The Chief Commissioner of Customs,
New Custom House, Ballard Estate,
Mumbai.
3. Commissioner of Customs (General),
Mumbai Commissionerate,
New Custom House, Ballard Estate,
Mumbai.
4. Additional Commissioner of Customs (P & V),
New Customs House, Ballard Estate, Mumbai.
5. Shri Anil Kumar Pundir,
Preventive Officer, New Customs House,
Ballard Pier, Mumbai.
(By Shri V.D.Vadhavkar for Shri M.I.Sethna)

(4)

O.A.4/4 of 2001

1. V.R.Dixit,
Preventive Officer,
Air Intelligence Unit,
Sahar Airport, Mumbai.
2. S.M.Pawar,
Preventive Officer,
Cummaging & Intelligence,
Prosecution Cell, 11th Floor,
New Customs House, Mumbai.
3. P.D.Anire,
Preventive Officer,
Cummaging & Intelligence,
R.S.R., New Customs House,
Ballard Pier, Mumbai.

4. K.S.Nair,
Preventive Officer,
'A' Division II, Mole Station,
B.P.X. Building Ballard Pier Extension,
Mumbai.
5. F.V.Fernandes,
Preventive Officer 'A' Division,
Mole Station, B.P.X. Building,
Mumbai.
6. V.J.Monte,
Preventive Officer,
Airport Terminal Building,
C.S. International Airport,
Sahar.
7. Smt. R.L.Valdya,
Preventive Officer,
Airport Terminal Building,
C.S. International Airport, Sahar,
Mumbai.
8. C.P.Umar,
Preventive Officer,
Air Cargo Complex,
Preventive Administration, Sahar,
Mumbai.
9. Preventive Officer,
Sahar Airport, Mumbai.
10. C.N.Sarwankar,
Preventive Officer,
Mulund Container Freight Station,
Mulund (East), Mumbai.
11. R.L.Karungutkar,
Preventive Officer,
Marvel Fragrance Bond, Vashi.
12. H.T.Balani,
Preventive Officer,
Kumming & Intelligence,
Reward Section, 12th Floor,
New Customs House, Mumbai.
13. N.H.Kshirsagar,
Preventive Officer,
B.D.S. Office, Indira Docks,
Mumbai.
14. B.D.Bawkar,
Preventive Officer,
Air Intelligence Unit, Sahar Airport,
Mumbai.
(By Advocate Shri M.S.Ramamurthy with
Shri Sai Kumar)

- Applicants

VERSUS

: 0 :

1. Union of India
through the Secretary,
Ministry of Finance,
Govt. of India, Department of Revenue,
New Delhi.
 2. The Chief Commissioner of
Customs, New Customs House,
Ballard Estate, Mumbai.
 3. Commissioner of Customs (General)
Mumbai Commissionerate,
New Customs House, Ballard Estate,
Mumbai.
 4. Additional Commissioner of Customs (P & V)
New Customs House, Ballard Estate,
Mumbai.
 5. Shri Ramesh Vaszge,
Preventive Officer,
Central Investigation Unit,
Customs House, 10th floor,
Ballard Estate, Mumbai.
(By Advocate Shri M.I. Sethna with
Shri V.G. Rege)
- Respondents

(5) OA 521 OF 2001

1. H.G. Padwal,
B-4, Bhagirath, Panadi School Road,
Goregaon (East), Mumbai.
 2. Hemant Atmaram Shinde,
R/O 2/21, Vincent Court Bldg.,
Dr. B.A. Road, Dadar (East),
Mumbai.
 3. Smt. A.V. Jagtap,
R/O A-1, Sanman Co-operative
Housing Society, Veera Desai Road,
Andheri (West), Mumbai.
 4. P.R. Purandare,
C.G.H.S. Colony, Sector VII,
Bldg, No. 49/1983, Antop Hills,
Mumbai.
 5. Smt. Sushma S. Sawant,
R/O at H-18 Everard Nagar,
Eastern Express High Way, Slon
Mumbai.
 6. Smt. Deepali D. Kondvlikar,
R/O 223/1/84, Motilal Nagar -1
Road No. 5, Goregaon (West), Mumbai.
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1. D.M.Kadam,
R/O 153/1219, Motilal Nagar No.1,
4th Road, Goregaon (West),
Mumbai.
8. Shri Gopinath Waman Tare,
R/O 3/185 Old M.H.B. Colony,
Goral Road, Borivili (West), Mumbai.
9. B.K.Hande,
R/O Gulmonar, D/4, D.G.Manajani Road,
Sewree, Mumbai.
10. Arun B.Jage,
R/O 2/12, Raghunath Ashish,
Gavan Pada, Mulund (East),
Mumbai.
11. Y.S.Savadi,
R/O 3, Sai Shyam, Kopar Road,
Dombivili (West).
12. Smt.R.K.Masaram,
R/O A-102, Highland Park,
Dahanukar Wadi, Kandivili (West),
Mumbai.
13. R/O 41, Kantharia Building,
66, Gokhale Road (S), Dadar,
Mumbai.
14. A.S.Khanijoan,
R/O C.G.S.Quarters T/B/3/34,
Ghatkopar (West), Mumbai.
15. V.K.Mulam,
3/398, M.H.B.Colony, Nagothane,
Borivili (East), Mumbai.
16. D.S.Patkar,
R/O B-6, Kapit Co-operative
Housing Society Ltd.,
2nd Floor, Model Town,
Jayprakash Road, Seven Bungalow,
Andheri (West), Mumbai
17. Smt.Kashmi R.Dhawade,
R/O Corner Chambers,
Room No.29, Second Floor,
Room No.3, Mahim, Mumbai.
18. Madnukar Y.Dive,
R/O Raj Sarita
B-206, Opposite Bhakti Complex,
Link Road, (Extension), Kanderpada,
Danisar (West), Mumbai.

19. D.S.Dingankar,
R/O M.M.Yadav, Chawl No.4,
Room No.17, Kajupada, Borivall,
East, Mumbai.
20. Vijay N.Bhanadkaor,
R/O 301, Ramkrishna Apartments,
Salvi Wadi, Mitnagar Road,
Mullund (East), Mumbai.
(All the applicants working as
Preventive Officers under
Commissioner of Customs (G),
New Custom House, Ballard Estate,
Mumbai.
(By Advocate Shri G.K.Masand)

versus

1. Union of India
through the Secretary
to the Government of India,
Ministry of Finance,
Department of Revenue, North Block,
New Delhi - 110 001.
2. Chief Commissioner of Customs,
New Customs House, Ballard Estate,
Mumbai.
3. Commissioner of Customs (G),
New Custom House, Ballard Estate,
Mumbai.
(By Advocate Shri M.I.Sethna with
Shri V.G.Kege) - Respondents

O R D E R

By Hon'ble Mr.B.N.Banadur, Member (A) -

AS the issues involved in the above five set of OAs are similar, they were heard together and are being considered and decided by this common order. For the sake of convenience we will take up the facts in OA 299/01.

2. The applicant is a Preventive Officer in the Customs department and comes up to this Tribunal seeking the relief for a direction to the respondents not to operate the seniority list dated 25.10.2000 and 28.1.2001 in so far as it affects the applicant. He also seeks a direction to the respondents that the earlier seniority list dated 8.3.1999 be operated for all purposes including promotion to the higher post. A relief is

also sought to the effect that the respondents be directed not to hold DPC on the basis of aforesaid seniority list but on the basis of the list dated 8.3.1999.

3. The facts of the case are that the applicant is in fact claiming the seniority in the cadre of Preventive Officers from the date of his initial appointment as Preventive Officer as per judgment of this Tribunal dated 10.12.1998. The applicant states that he was promoted after a DPC recommendation from the post of DPC as Preventive Officer in February, 1985. He qualified all processes of promotion. However, his appointment was wrongly described as ad-hoc rather than regular appointment although it was against clear vacancies. There has been no interruption or break in service. Further developments of 1991 are described. Also the developments and controversy vis-a-vis 1997 and 1998 lists are described and details regarding the OA 338/98 in a batch of OAS namely 386/97 and others (P.K.G.Kurup & 2 others vs. Union of India & others) decided on 12.10.1998 are described.

It is stated that on basis of decision in Kurup's case a seniority list of 8.3.1999 was published wherein applicant's position was correctly shown at serial no.940. It is stated further that respondents have been acting upon this seniority list upto serial no.189 who were promoted to the post of Superintendent of Customs.

4. The applicant now comes in because of issue of fresh draft seniority list issued on 25.10.2000 where the applicant's seniority was substantially lowered and the final seniority list issued on 28.1.2001. In the draft seniority list, the applicant's seniority was lowered from RS.940-1045/- whereas in the final seniority list issued on 8.3.1999 his seniority was lowered to 940. It is with this grievance the applicant is

before the Tribunal seeking the reliefs as described above. Further details to grounds taken etc are incorporated in the application. In fact the grievance of the applicant in the other four OAS is the same and similar reliefs are sought.

5. The respondents in the case have filed two written statements in reply. The first one being filed on 10.7.2001 (Page 283) and second one filed on 11.9.2001 (Page 384). The respondents have dealt with the averments made in the OA parawise and have provided details of facts and communicated their stand. It is stated interalia that the seniority of the applicant fixed vide order dated 8.3.1999 was not correct, proper and justified. It was an inadvertent error which had been rectified during the process of issue of subsequent two lists as part of continuous verification and correction. It is a problem which has cropped up after almost 15 years and while co-relating data of 15 years, minor errors cannot be ruled out, it is asserted. It is further stated that representations had been received in the department against the final seniority list dated 28.1.2001 which is being scrutinised and the list is to be amended shortly. It is further stated that this is to issue just and fair treatment to me and all as per rules. It is further stated that in the seniority list dated 25.10.2000/1.11.2000 as many as 225 representations were received which were looked into and acted upon. Action taken in respect of these representations is highlighted at the beginning of the seniority list dated 28.1.2001. Further that this list dated 28.1.2001 (barring the amendments) i.e. in progress, is now the legitimate just and complete list in the matter and hence stands to scrutiny. In the second statement of reply referred to the details and examples and chart which

urnish two examples and justify the stand taken and some further details are provided.

7. Besides all these papers there are number of MPs and replies been filed which have also been seen.

8. The case was argued at length by learned counsel on both sides, Shri Masurkar with Shri K.K.Yelwe argued the case on behalf of the applicants in OAS 291/01 and 299/01. OA 336/01 and OA 4/4/01 was argued by Shri M.S.Kamamurthy for the applicants. Shri G.K.Masand with Shri S.R.Savant argued the case for the applicants in OA 521/01. The respondents were represented by Shri M.L.Settna with V.D.Vadnavkar and V.G.Rege. Shri Ashok Dnamija also argued the case for respondent no.5 in OA 4/4/01 whereas Shri Anil Kumar argued the case on behalf of respondent no.5 in OA 336/01. Shri G.S.Walia was allowed to intervene for the direct recruits in OAS 299/01 and 4/4/01.

9. Arguing for the applicant in OA 299/01 and OA 291/01, learned counsel Shri Masurkar took us over the judgment made in Kurup's case at some length and stated that the promotion was made against the promotional quota. He drew attention to the circular of the respondents dated 25.10.2000 (Annexure-A-1). He stated that list was published on 8.3.1999. It was revised seniority list of Preventive Officers of Mumbai Customs as on 1.1.1991. It was argued that in Para (d) of the covering letter or circular dated 8.3.1999 was important that in the case of promotee Preventive Officers, as per judgment of Mumbai Bench in the case of Kurup and others, the seniority has been accorded to Preventive Officers promoted on ad-hoc basis promoted with effect from 1983-90 as per their date, ad-hoc promotion etc.etc. He drew our attention to the dates in OA 283/01 in the case of Salwakar and Dhuri. Shri Masurkar argued that for all this

approved list where Shri Sawalkar's seniority dropped very substantially. He submitted a representation. Shri Masurkar attacked this action and stated that it was arbitrary and malafide and without any basis. The direct recruits appointed after the applicant are to be above him in very large numbers. Shri Masurkar argued and stated that the applicant had even represented (Page 26/): In the covering circular dated 28.1.2001 i.e. impugned list, the explanations given were discussed by Shri Masurkar who stated that all contentions and stand taken while issuing this list are illegal and that the 1999 list is incorrect. In exercise of the direction made by impugned list promotion can only be done based on 1999 seniority list. Shri Masurkar cited the decisions in the case of Sural Prakash Gupta and others vs. State of Jammu & Kashmir and others, 2000 (1) SC (SLJ) 42/ and Sushma Mutreja vs. Union of India and others, 2000 SOL Case No.414. It was argued here that in the 1999 list, the judgment of this Tribunal was quoted and that is now being unsettled and executive action of Commissioner of Customs which was illegal. Such action could be taken only by a judicial forum.

10. In OA 29/ of 1991 an MP had been filed by Shri V.C.Sinna which was argued on his behalf by learned counsel Shri G.K.Masand. He argued that the interim relief only envisaged that the list of year 2001 should not be operated. In other words, the earlier list could be operated and DPC could be held. He took the stand that the applicant would not be prejudiced and made the point that the reply to the MP filed by the applicant was totally irrelevant. Shri Masand made the point that his client had a limited prayer. In that the interim relief should be modified and orders to be issued for conducting DPC for

Appraisers. The learned counsel Shri Masurkar, replying to the argument made in the above MP objected to Shri Sinha coming in the OA in this manner. Through this MP it was open for him to file another OA or to prejudice the department for implementing the list of 1999. Shri Masand stated that he was applicant's junior and referred to page 101 of the Paper Book where certain observations were made by the Tribunal in Kurup's case. A plea was made by Shri Masurkar for the rejection of MP 494/01.

11. The learned counsel Shri Suresh Kumar also argued MP 500 of 2001 on behalf of the intervenors in OA 299/01, the three persons being S/Shri Patra Bisri and Dhillion. He argued on similar lines made by Shri Masand as described and similar objections were taken by Shri Masurkar on this MP also.

12. We now come to the arguments made by learned counsel Shri M.S. Kamamurthy who represented the applicants in OA 336 of 2001 and OA 4/4 of 2001. The learned counsel took us over the order dated 28.1.2001 and questioned the propriety seniority lists being amended, and that too after a judgment has been rendered on relevant points. It was also questioned as to what the idea was if further amendments were to come. He alleged that this kind of intention for continued amendments on behalf of the Government amounted to tinkering and following the judgment in the matter of Kurup (supra). The principle of Kurup's case was applicable in regard to date of promotion of the applicant in these two OAs also.

13. Shri Kamamurthy then took us over the judgments of the facts of the case in two OAs, and stated that the applicants were fully eligible as per the recruitment rules and have been promoted on ad-noc basis, and then later promoted on regular basis. There was no ground to violate the principles laid down in Kurup's

case. He alleged that the entire argument was to circumvent the judgment of Kurup's case. Certain details were referred to, questioning the actions taken. Kota quota, he argued cannot be used in 2001 for recasting seniority w.e.f. 1978 (Page 86). He referred to OM of 1986 and stated that it could not be applied retrospectively. The preamble in the new provisional list and the preamble in the final list were then sought to be compared by learned counsel in some what lengthy argument and the stand taken in the latter were not available in the former. The learned counsel also made the point that there was nothing to show that promotions were made against cost recovery posts, and the only expression used was "against existing vacancies". He pleaded for this point being checked up in absence of any affidavit regarding discontinuing etc. The learned counsel cited the following case law in support of his contentions-

- (a) Baleshwar Dass & others vs. State of U.P. and others, AIR 1981 SC 41.
- (b) Suraj Prakash Gupta & others vs. State of J & K & others, 2000 (1) SC 427.
- (c) D.S. Bajwa vs. Union of India & others, 1993 (26) SC 168.

It was argued that the ratio laid down was that the respondents were estopped in law from going against their own records and unsettling matters of seniority.

14. OA 527 of 2001 was also argued by learned counsel Shri V.S. Masurkar. He took us over the facts of the case stating that the order of 17.5.1991 was common to all cases and what had happened that the new Chief Commissioner had challenged the list without any justifiable reason. It was for the respondents to show how the list of 1999 was illegal or fraudulent or was drawn up by not following the correct procedure. It was argued that upto 1.1.1991, the 1999 list is sacrosanct. The order of CAT in

Kurup's case was not challenged and hence finalised the issues that were settled. Now in the 2001 lists namely draft and final lists dated 25.10.2000 and 25.10.2000/1.1.2001 respectively the date as on "1.1.2001" is also being changed as between final list and provisional list. The learned counsel stated that the basic argument in this case will also be the same as made by him in earlier OAS 297/01 and 299/01. He stated additional case laws as follows -

- (I) All India Customs Appraising Officers' Association & Others V/S. Union of India & Others decided on 01.12.2000 by the Mumbai Bench of this Tribunal.
- (II) Kudra Kumar Sain & Others V/S. Union of India & Others reported at 2000 (8) SCC 25.
- (III) I. K. Suknija & Others V/S. Union of India & Others reported at 1997 (6) SCC 406.
- (IV) P. Mohan Reddy V/S. E.A.A. Charles & Others decided by the Supreme Court reported at 2001 (4) SCC 433.
- (V) V. P. Shrivastava & Others V/S. State of M.P. & others reported at 1996 (7) SCC 759.

15. The case in OA 4/4 of 2001 was argued for respondent no.3 by learned counsel Shri Ashok Dhamija. He stated that respondents no.3 was not a party in Kurup's case and hence the case is not applicable in entirety on facts explained on ratio as per facts disclosed. It was argued that in Kurup's case three DPCs were considered namely 1983, 1984 and 1985 whereas the present applicant was considered in the present DPC of 1987. He took support from the case law reported at AIR 1988 SC 69 to make the point that statutory rules prevail over the executive instructions. He went on to say that the orders of appointment were ad-hoc and provisional and not regular and this was not a regular promotion and hence for the present applicants, facts have to be gone into afresh and total reliability of Kurup's case

cannot be made. The promotion of applicants was clearly in contravention of the recruitment rules and were in excess. Vacancies were manipulated to favour the promotees and that seniority could be considered only against regular posts.

16. Arguing on the aspect of viva-voce taken by the Government, the learned counsel Shri Dhamija stated that as the Cost Recovery Post was a temporary plank, adhoc promotions were followed only for one year and that the Department of Posts and Telegraphs Circular at page 180 of OA 299/01 made this point clear that Cost Recovery Post had been counted for calculating eligibility for promotion and adhoc promotions were wrong. The learned counsel repeatedly made the point that facts of Kurup's case would not apply in present case and only the ratio would apply. There was no harm in rectifying the list when deserving representations were made. The following case law was cited by learned counsel Shri Dhamija.

- (1) Dr. Anuradha Bodhi & Others v/s. Municipal Corporation of Delhi & Others reported at AIR 1998 SC 2093.
- (11) The Direct Recruits Class-II Engineering Officers' Association & Others reported at AIR 1990 SC 1607.
- (111) Keshav Chandra Joshi v/s. Union of India reported at AIR 1991 SC 284.
- (1V) C. K. Anthony v/s. B. Muraleedharan reported at AIR 1998 (6) SCC 630.

17. In OA 336/01, Shri Anil Kumar intervened on behalf of respondent no.5, he made two general points the first regarding seniority list of 2001 and the second to state that the prayer in Kurup's case was one of ad-noc appointment should not be taken as regular appointment. Expounding on the above he stated that Kurup's case did not assess facts correctly and the law laid down

by the Hon'ble Apex Court was not taken into consideration hence it could be regarded as a judgment per incuriam. The onus is on intervenor to prove his point. Further he stated that the DPC notes regarding vacancies was not the gospel truth and the vacancy register should be considered. Wrong facts were placed before the DPC and correction can be made. He also made the point that none of the applicants in this OA were party in Kurup's case and the list drawn up now in 2001 was impartial. Kurup's case should be recorded as in personam as it was not a general case for all alike. The learned counsel stated that writ petition has been filed in the High Court and its admission showed that there is a prima facie case against Kurup's judgment. He sought to depend on the ratio of the decision in the case of Dinkar Anna Patil & Anr. v/s. State of Maharashtra & Ors. reported at JT 1998 (1) SC 513. The learned counsel Shri Anil Kumar then cited the facts about respondent no. 3, Shri A. K. Pundir, stating that an appeal was made and that calculations are totally wrong. The Chief Commissioner had found false counter into it and change it into present order. Hence there was nothing wrong in this.

18. Shri G.S. Walla had also sought at the time of start of argument to intervene for direct recruits in Salkar and Dixit's case namely O.A. Nos. 299/01 & 4/4/01 respectively. He was allowed the liberty of arguments on the explicit understanding that he would not file any papers or any written pleadings as he had admittedly come at the last stage. He argued that at first there were two sets of applicants namely the first set being Salkar and Dhuri etc. in Kurup's case and the second set represented the new applicants vis-a-vis Kurup's case. It was argued that quotas were fixed and that seniority could be granted

only if the promotions were within the quota. In Dixit's case it was argued by learned counsel that people had been promoted outside the quota on Cost Recovery (ex-cadre post). This question was not posed before the earlier Bench and there is no finding on this point. He sought the support of the ratio in A.N.Sengal's case to make the point that outside the cadre appointment cannot be counted for seniority. A.N.Sengal vs. Sheoram (1993 SCC (L&S) 615). The learned counsel also sought support from the case of Syed Rizvi. The learned counsel further argued that the applicants were fully eligible as per recruitment rules even though promoted ad-noc since they were regularly promoted and that the order in Kurup's case had already decided the principles on all issues and facts. The learned counsel charged the respondents with trying to circumvent the judgment in Kurup's case. He argued that the rota quota principle could not be used in the year 2001 for recasting seniority w.e.f. 1978. Learned counsel sought to depend on the case of Suraj Prakash Gupta (supra) and the judgment in the matter of Baleshwar Das vs. State of Uttar Pradesh (AIR 1981 SC 41).

19. Arguing the case for the respondents their learned counsel Shri Mege first went into the details of the creation of posts on the cost recovery concept. He took us over page 194 of OA Nos.4/4, and made the point that cost recovery post are not part of strength of cadre. It was asserted by learned counsel for respondents that cost recovery post are not part of strength of the cadre. The earlier seniority list including the 1999 seniority list was drawn up after taking into consideration the cost recovery post. He referred to the Shankar Prasad case decided by Hon'ble Supreme Court for support. The learned counsel also referred to the fresh affidavit filed by the

respondents after opportunity was afforded for the same regarding the cost recovery post and took us over that affidavit to assert the above argument.

20. Shri Kege stated that the issue in Kurup's case was a limited one, namely whether ad-hoc service was to be counted or not. The Tribunal decided this point in the affirmative and the department have followed the judgment. The dates were counted but learned counsel argued that cost recovery post will rightly have to be excluded for determining the quota position. On this basis he dwelt at length seeking to justify the action of the respondents in the impugned order. It was also alleged that the stand of the respondents regarding cost recovery post was not properly countered by the applicants. Learned counsel took us over to Para 14 of the Kurup's judgment to make his points.

21. It can be seen that since there is a fair number of different counsels representing the applicants in different cases, private respondents and intervenors, apart from the respondents. Detailed pleadings have been made, both in writing and especially in oral arguments. In fact the arguments lasted over a number of days. These pleadings have been recorded in detail by us, above, and have been carefully considered, even though each one of them may not be separately discussed ahead. All the important papers have been gone through and the case law cited in support of their arguments by different counsel have been also seen even though each one may not be taken up for mention.

22. The applicants in these cases who are promotees are aggrieved because of the change in the seniority list which has been modified to their disadvantage, and as they allege, very substantial disadvantage, by the impugned orders, since the

position of several applicants vis-a-vis the earlier seniority list of 8.3.1999 which was earlier held valid.

43. Some of the points that importantly come into consideration are a sequence to the issues considered and decided in a batch of O.As. In what is being referred to as Kurup's case decided on 10.12.1998. This decision came through a judgment (of over 25 pages) where this Tribunal had gone into all aspects of the problems raised and had come to the conclusion that the applicants therein were entitled to succeed and allowed the OAs in terms of Para 20 of the judgment therein. This judgment has been referred to time and again by learned counsel on all sides in their arguments taking of course different stands while present O.As were being heard.

44. The first thing that is seen is that after Kurup's case was decided in 1998 and a seniority list published thereafter, some eight or nine months elapsed thereafter, when a revised draft seniority list came to be issued dated 25.10.2000. The list contains the names of 1421 persons who could possibly be affected. It is also to be noted that a time of about 35 days were provided to file objections. Given the fact that circulation would have taken some days and the very large number of persons involved, this time certainly appears to be short especially considering that certain major changes have taken place in seniority line-ups. Be that as it may, this is only one of the aspects about this list.

45. The respondents state that minor errors had crept in in the list of 8.3.1999 and that representations had been received in the department. It is also stated that the list of 28.1.2001 which was later issued as the final list vis-a-vis this provisional list of 25.10.2000 is being further amended as representations are being received. This was repeated during

arguments. This is a point that hits the eye immediately as it is contrary to all rules and law relating to finalisation of seniority lists. Once a provisional list is issued, and it is finalised after considering all objections it attains a finality which can be changed only after further legal process, whereby a fresh provisional list has to be issued, fresh objections invited and decisions taken, after considering these objections. Proper time needs to be given for objections. This kind of stand that objections received after the publishing of the final list can also be changed is totally against law and we do not have the slightest hesitation in calling this an illegal action. It is indeed surprising that this has been done, and one would be tempted to agree with one of the learned counsels who called this as an attempt to tinker with the list.

20. Let us further see the reasons that have been advanced for this action of changing the list of 8.3.1999. It is stated that representations have been received for one, and for another mistakes have been found to have crept in, in finalising the list of 8.3.1999, since large volume of work was involved. In fact at one stage, the argument taken is that this change was necessary if the orders in Kurup's case were to be followed in letter and in spirit. Even granting that such a thing is likely, the whole thing has to be changed by following proper rules allowing sufficient time to all concerned especially since major changes are involved and more importantly arriving at a list which has full finality. The final list certainly cannot be changed merely on the basis of continued objections on the basis of applications coming in with reference to the provisional list.

21. One of the stands taken on behalf of the learned counsel representing the interest of the direct recruits was that Kurup's

case had merely decided the issue that ad-noc service was to be counted as regular service and that this was all. Therefore, it was contended, that beyond this, there was no other decision. We are not convinced after going through Kurup's case that such a narrow view can be taken when a Division Bench of this Tribunal went through all facts and law related to the subject and came to a conclusion where all these aspects were before it.

28. The matter regarding cost recovery posts has been issued at great length. We have gone through the circular dated 28.1.2001 and also the Kurup's case. We have also seen such papers as are available regarding the earlier period and affidavits filed and it is difficult to be convinced that a clear account of seniority can be arrived at by saying that the fresh seniority list is relatable to the cause and effect of the cost recovery post aspect. In any case the issues already decided by the Tribunal in Kurup's case cannot be re-agitated here.

29. An argument was made to the effect by one of the learned counsel that if there were any errors apparent in Kurup's case they could be corrected. By no stretch of imagination can the changes in seniority brought about by the two impugned lists be called as error apparent. Vide fluctuations and changes are brought about and such changes cannot go under the garb as an action merely to correct errors apparent.

30. In view of the discussions above, we see justification in allowing all the O.As. All five O.As. bearing Nos. 297/2001, 299/2001, 4/4/2001, 521/2001 and 336/2001 are hereby allowed in that the respondents are hereby directed not to operate the impugned seniority list issued vide circulars dated 28.01.2001 or seniority list issued vide order dated 25.01.2000. In case

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respondents are of the view that the seniority lists finalised prior to these dates need to be changed. This should be done in consonance by following proper procedure and law. No order as to costs.

(B. N. BAHADUR)
MEMBER (A).

(BIRENDRA DIKSHIT)
VICE-CHAIRMAN.

m.

o/s only dt 21/2/92
cc: ... ment (s)
cc: 5/3/92
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