

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,  
MUMBAI BENCH.

Original Application No. 704/2001.

Friday, this the 9th day of November, 2001.

Hon'ble Shri Justice Birendra Dikshit, Vice-Chairman,  
Hon'ble Shri B.N.Bahadur, Member (A).

Sunil Kumar Choudhury,  
Chief Commissioner,  
Central Excise & Customs,  
ICE House, 41A Bund Garden Road,  
Pune - 411 001.  
(By Advocate Shri G.K.Masand)

...Applicant.

v.

1. Union of India, through  
Secretary, Department of Finance,  
Revenue, Ministry of Finance,  
North Block,  
New Delhi - 110 001.
2. Shri M.V.Reddy,  
Chief Commissioner,  
Central Excise,  
No.121, Mahatma Gandhi Salai,  
(Nungambakkam High Road),  
Chennai ~ 600 034.
3. Shri D.K.Acharya,  
Chief Commissioner of Customs,  
New Custom House,  
Ballard Estate,  
Mumbai - 400 038.  
(By Advocate Shri V.G.Rege for R-1,  
Shri M.S.Ramamurthy for R-2,  
Shri M.I.Sethna for R-3).

: ORDER (ORAL) :

Shri Justice Birendra Dikshit, Vice-Chairman.

Applicant, S. K. Chaudhary, having known from the Website 'Tax India On Line' that he has been included in recommendations made by Committee of Secretaries (in short, C.O.S.) and subsequently learning that Appointment Committee of Cabinet (in short A.C.C.) has not included his name in the panel for appointment as Member of C.B.E.C, the applicant has approached this Tribunal for redressing his grievance. The

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applicant feels aggrieved due to non-inclusion of his name in the panel prepared by A.C.C. while name of M.V.Reddy, Chief Commissioner, Central Excise, Chennai stands included though vigilance inquiry is pending against him, and D.K.Acharya, Chief Commissioner of Customs, Mumbai, who is junior to him according to ~~him~~ stand taken by him. In short, the grievance of the Applicant is that M.V.Reddy was not eligible for being considered in absence of Vigilance Clearance while D.K.Acharya being junior to applicant (counsel for D.K.Acharya disputes applicant's claim of seniority) stands included. The grievance by applicant is raised on the ground that there is nothing against him due to which he could be passed over and as the selection of members to C.B.E.C. is considered keeping in view their seniority, he was to be put on the panel before D.K.Acharya could be empanelled.

2. While hearing arguments for interim relief we asked Mr.V.G.Rege to get the record so that case be finally heard. We appreciate the co-operation of official respondents for promptness with which they made the record available enabling us to hear the case finally. While handing over record to us, Mr.Rege has prayed to us that so far as vigilance proceedings are concerned, they may not be made public. He has no objection in respect of Court dealing with the file of appointments. We also appreciate the stand of Mr.Rege and official respondents whom he represents, for making said request only in respect of vigilance proceedings and keeping the file in respect of appointments to Public Offices open for the purpose of being discussed during ~~the~~ <sup>next</sup> ~~the~~

argument and which throws light as to how the matter was dealt with of the case for determining the controversy.

3. We have gone through the record and we find that the applicant has not been considered for empanelment for the reason that he did not fulfill the requirement of minimum residual service, as he was to retire on attaining the age of superannuation on 31.1.2002. We find from the record that the panel, which has been formed for total four vacancies, one existing and three others, which were likely to occur on 1.10.2001, 1.11.2001 and 1.12.2001 by the Government, is as follows:-

1. M. V. Reddy, I.C. & C.E.S., subject to grant of vigilance clearance.
2. N. Raja, I.C. & C.E.S.
3. M. K. Zutshi, I.C. & C.E.S.
4. D. K. Acharya, I.C. & C.E.S.

This panel was prepared by Cabinet Secretary on 31.08.2001 and was finally approved by A.C.C. Thus, so far Website 'Tax India on Line' is concerned, it did not give correct position in respect of panel.

4. The Applicant has not disputed the inclusion of Shri N. Raja and Shri M. K. Zutshi in the panel, who have been appointed as Member of C.B.E.C. as according to him, they are senior to him and he has no grievance against them. They have also not been arrayed as respondents.

5. It is also apparent from the record that empanelment of M.V.Reddy is subject to vigilance clearance. It is also admitted to Counsel for parties that Shri N.Raja has been appointed

against existing clear vacancy and Shri M.K.Zutshi has been appointed against the vacancy which occurred on 01.10.2001 and the two have joined as Members. The present dispute is in respect of a vacancy which was likely to occur on 01.11.2001 when panel was recommended by COS and was approved. Before hearing of this case started, we are informed that beside vacancy of 1.11.2001, which was taken into consideration while preparing panel, another vacancy has occurred on 01.11.2001 as an Officer, who was Member of C.B.E.C., has been appointed as Director General, Central Economic Intelligence Bureau and he has also joined that post on 01.11.2001 which is admitted by counsel for the parties, including Mr.Rege, who is representing the Union of India. It is also relevant to mention here that out of two vacancies, which have occurred on 1.11.2001, D.K.Acharya stands appointed on one of the vacancy, which appointment is subject to final order of this O.A. in view of interim-order passed by this Bench.

6. On hearing Mr. G. K. Masand, for Applicant, S. K. Chaudhary, Mr. V. G. Rege, for Union of India, Respondent No. 1, and Mr. M.S. Ramamurthy, for M. V. Reddy Respondent No.2 and Shri M. I. Sethna <sup>for</sup> D. K. Acharya, Respondent No.3 we find that following three questions arise for determination to resolve the controversy in question :

- (i) Whether M. V. Reddy could be empanelled subject to vigilance clearance ?
- (ii) Whether D. K. Acharya could be empanelled in preference to the Applicant, being junior?
- (iii) What relief, if any, will applicant be entitled, in case anyone of the above point is decided in his favour?

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POINT NO. 1 :

7. The very first point which arise for determination on the basis of arguments is if M.V.Reddy could be empanelled subject to vigilance clearance. Admittedly, the empanelment is for an ex-cadre post and not in regular channel of promotion. The panel for which has been finalised by A.C.C.

7-A. Learned Counsel for Applicant argued that M.V.Reddy could not be empanelled unless he had vigilance clearance and his empanelment subject to vigilance clearance is bad in law. According to him, though the post is an ex-cadre post, but as the post is being filled up by officers of Customs and Excise Services, the post of Member C.B.E.C. is virtually a promotion post for the officers of said services. He contended that as there is no guidelines available for empanelment<sup>of</sup> officers of said services, the procedure which is to be adopted should be the same which is applied in respect of promotions of officers in concerned department. According to him, principle of promotion laid down in the guidelines for regular promotion in O.M. No. 22011/4/91-Estt (A) dated 14.09.1992 of Government of India, Ministry of Personnel, Public Grievance and Pension, Department of Personnel & Training, New Delhi be taken into consideration for considering the legality and validity of panel prepared for appointment as Member of C.B.E.C. In other words, his contention is that validity legality of panel be tested on that basis. It is on that basis that he argued, relying upon paragraph 2, 2(i) and 2(ii) of said O.M., that "Government servant in respect of whom a charge sheet has been issued and a disciplinary proceedings are pending" is to be brought to the notice of the

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Departmental Promotion Committee at the time of consideration of cases of Government servants for promotion. It is argued by him that an officer against whom Vigilance inquiry is pending cannot be considered to be placed on panel. Para 2, 2(i) and 2(ii) of O.M., relied for argument regarding wrongfully inclusion of M.V.Reddy in the panel, is as follows:

2. At the time of consideration of the cases of Government servants for promotion, details of Government servants in the consideration zone for promotion falling under the following categories should be specifically brought to the notice of the Departmental Promotion Committee :-

- (i) Government servants under suspension;
- (ii) Government servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and"

According to learned counsel for applicant the C.B.E.C. being the Highest Departmental Body, no one could be included in final panel if any Officer is under clout and therefore, pending vigilance clearance M.V. Reddy could not be included in the panel. The sole basis of contention is that if an officer cannot be promoted in the Department right from peon to the highest post, unless he gets vigilance clearance, there could be no question of considering a person to appoint <sup>as</sup> <sub>an</sub> officer to such a high office without having vigilance clearance and therefore inclusion of Reddy's name in panel is bad in law. Much emphasis has been given on this aspect by learned counsel for applicant for the reason that during course of argument <sup>when</sup> we pointed out from file <sub>and</sub> that the Applicant has not been considered as he was to retire on 31.01.2002 and he did not have minimum residual tenure of service. The emphasis was given as had M. V. Reddy been not brought on panel, who is senior to applicant, the Applicant was

to be considered for the post of Member if minimum residual service of three months was to be taken into consideration. It is for that reason learned counsel contended that the Applicant was entitled to be considered for being a Member. Learned Counsel for the Applicant has also argued that as case of Union of India is that age of superannuation, according to counter affidavit, is not relevant. He relied on para 5 (c) of the Counter Affidavit of Shri G. C. Das, Under Secretary at the Ministry of Finance. Another reason assigned during arguments by Learned Counsel for Applicant for setting aside the inclusion of M.V.Reddy on panel is that in anticipation of vigilance clearance, the A.C.C. could not have given the clearance for vacancies which were to occur on specific dates as the office of Member of such a high body could not be left vacant when it is well known that vigilance clearance takes time while the dates for occurrence of vacancies were known. He contended that such high offices are not to be kept vacant. He pointed out that the Tribunal can take notice of the fact, which is admitted by all, that vigilance clearance has not been given as yet. He also emphasized that Applicant being senior to D. K. Acharya, was to be considered keeping in view that there is no legal requirement of minimum residual service under any law and, therefore, the A.C.C. could not exclude him from consideration. Lastly it has been contended that in case this Tribunal considers that M.V. Reddy could be considered, and applicant could not be considered for vacancy likely to occur on 1.12.2001, then Applicant being above D.K. Acharya was to be considered for the reason that one of the Member was likely to become the Director General of Central Economic Intelligence Bureau any moment and vacancy was to occur.

9. Mr. Rege, appearing on behalf of Union of India, opposed the claim of applicant and argued that Applicant has approached this Tribunal on the basis of an information based on Website, which is neither an official communication nor it gave correct report as C.O.S. did not recommend applicant for being included in panel and, therefore, the applicant is to be non-suited on this ground. He further contended that so far O.M. dated 14.09.1992 relied upon by the Applicant is concerned, it is an O.M. for posts where promotions are involved and as the Office of Member, C.B.E.C. is an ex-cadre post, the said O.M. does not apply and, therefore, the Applicant is not entitled for relief claimed. He relied upon procedure mentioned in para 5(f) and (j) of official reply which provides that the appointment to the post of Member, C.B.E.C. is made with the approval of Appointment Committee of Cabinet on the recommendation of the Cabinet Secretary, after considering all the eligible officers and in this process he is assisted by a Special Committee of Secretaries which takes into account the service record of the eligible officers, including the A.C.Rs., vigilance position and other required materials before making such recommendations. Keeping in view the said procedure he contended that the C.O.S. takes into account various materials relevant at that particular point of time for making recommendations. He also argued that vigilance clearance in respect of M.V. Reddy, is required at the time of appointment and not at the time of consideration for inclusion in panel and therefore M.V. Reddy has rightly been empanelled. He emphasised that though M.V. Reddy is empanelled higher to Mr. N. Raja and Mr. M. K. Zutshi, but the latter two have been appointed in preference to Reddy as Reddy is not yet having vigilance clearance. According to him, as applicant could be B. violent

considered only for the vacancy likely to fall on 1.12.2001, for which he did not fulfill the requirement of minimum residual period, he has been rightly kept out of consideration.

9. Respondent No. 2, whose case has been placed before us by Mr. M.S. Ramamurthy, Advocate, has been empanelled subject to vigilance clearance, for whom Learned Counsel contended that M. V. Reddy, has been rightly considered as vigilance clearance is required at the time of actual appointment and not at the time of consideration. He contended that vigilance clearance is a condition precedent before the selected officer is appointed and not for empanelling him. He also relied upon para 17.1 of Chapter 53 of Swamy's Complete Manual on Establishment and Administration for Central Government Offices (7th Edition 1990) in respect of promotion. He contended that the Highest Executive Body of Union Government, a most responsible Body, has taken a responsible decision, which may not be interfered by this Tribunal <sup>as</sup> no procedural rule stands violated. He also argued that whatever decision has been taken is subject to vigilance clearance and as soon as vigilance clearance is there, the M.V. Reddy will be entitled for appointment. He argued that applicant has no cause for grievance as the Applicant could not be empanelled in view of decision of Supreme Court of India in Union of India V/s. B.S. Agarwal & Another (1997 SC SLJ Vol.25 Part.II page 493) wherein it has been held that the date of occurrence of the vacancy is relevant and as Applicant was not fulfilling the minimum residual service for the vacancy likely to occur on 1.12.2001, he could not be considered for empanelment. As we put questions to learned counsel for Union of India Mr. V.G.Rege, during his argument that what is the minimum residual period for consideration and it was pointed out to Mr. Rege

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appearing for Union of India that one of the Officer, who has not been considered, one of the reason out of two is that he did not have the minimum residual period of six months service. Mr. Ramamurthy built up argument that even if it is taken that a vacancy was to occur on 01.11.2001 when ACC was finalising panel, the applicant could not be considered for want of minimum residual period of service as he is to retire on 31.1.2002 and therefore, he is not entitled to challenge the panel. He also relied upon the State of Madhya Pradesh v/s. J.S. BTansa reported at 1998 (1) SC SLJ Vol. 26 Part.I page 265 and argued that pendency of disciplinary proceedings cannot be a ground for not considering applicant as the Supreme Court of India has held that the right of an employee for consideration cannot be taken away from him pending disciplinary proceedings.

10. Mr. M. I. Sethna, Advocate, appearing to defend D. K. Acharya's empanelment, disputed Applicant's status of being senior to D. K. Acharya and contended that Acharya is senior to Applicant. In respect of the relief sought for by Applicant, he has pointed out that no relief has been claimed against D. K. Acharya. He has also argued that minimum residual service period is relevant criterion, which could be taken into consideration for excluding Applicant from panel, and as applicant did not fulfil requirement of minimum residual period of service, he could not be included in panel. He also argued that as it is a selection post, where a junior can supersede a senior, the inclusion of D.K.Acharya after due consideration by ACC does not require any interference.

11. We are resolving the controversy raised by the Applicant in respect of an ex-cadre post for which the decision are taken at the highest level by Union Government. C.B.E.C. is a Board *present*

which happens to be the highest Body of concerned department giving effect to the Government policy. It is an advisory and a supervisory Body. We may express ourselves that looking to the small constitution of the Board the Office of a Member of such a Body, which consists of one Chairman and five Members, cannot be expected to be left vacant. It is a body by which decisions are to be taken by the Members who are supervising one of the greatest revenue earning department of government. Beside taking decision collectively, there is distribution of administrative work amongst Members supervising for proper functioning of department. Formation of panel well in time, as soon as one member vacates office another takes over is a part of good and efficient governance.

12. After perusing the record and hearing counsel for parties, we asked Mr. Rege if the office of Member of C.B.E.C. is filled up by appointing some Officer of Customs/Central Excise alone or other departments also. He stated that mostly the appointments have been made in past and are being made of Officers of Customs and Excise Department only. He also made it clear that for some time past the Chief Commissioners of Excise and the Chief Commissioners of Customs alone have been taken into consideration and appointed as Members of C.B.E.C. From perusal of record we also find that official who were considered to be in zone of consideration for panel are holding the posts of either Chief Commissioner of Excise or Chief Commissioner of Customs.

13. To determine dispute, we asked Mr. Rege as to what are the rules or guidelines to fill up the post of Member C.B.E.C. His answer has been that whatever procedure is there, has been mentioned in para 5(f), 5 (j) and 6(c) of the official reply and he can say nothing more. The aforesaid paras are as under:

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"5.f. The posts of Member in CBEC are ex-cadre post. Appointment to these posts is made with the approval of the Appointment Committee of the Cabinet. Recommendation in this regard is made by the Cabinet

Secretary after considering all the eligible officers.

In this process, he is assisted by a Special Committee of Secretaries, which takes into account the service records of all the eligible officers including their ACRs, vigilance positions and other relevant material, before making a recommendation, ACC has approved the appointment of Shri M.V. Reddy as Member subject to vigilance clearance of Shri Reddy who has not so far been appointed as Member and the matter is under examination in this Department.

g. It may be reiterated that the recommendations of the Special Committee of Secretaries are 'Secret' in nature and the information obtained by the petitioner through a website cannot be relied upon. However, it is denied that his name was approved by the Committee of Secretaries.

6.c. The appointment to the post of Member, CBEC is approved by ACC after considering the recommendations of the Special Committee of Secretaries. The Committee takes into account various factors relevant at the time of making their recommendations".

We do not find anything in said paras which could be said to be guidelines or procedure for filling up the posts in question. The three paras speak about certain records and material which is to be taken into consideration in making recommendations by C.O.S. and are to be considered by A.C.C. Though we are considering panel formed by the highest Executive Body and we are conscious that in the absence of any rule or guidelines, the Committee entrusted <sup>with</sup> the power of appointment of Members to C.B.E.C. can have its own procedure, but due to absence of Rule or Guideline, this Tribunal is faced with the difficulty for testing the legality and validity of panel on the basis that the State being governed by rule of law, every administrative action has to be tested so that principles giving effect to rule of law are not violated while exercising administrative power. It would have been better if some rule or guidelines were given in respect

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of zone of consideration, so far present case is concerned.

14. While counsel for applicant relied upon said O.M. during arguments ~~and~~ except that so far sealed cover under para 2(ii) is concerned, <sup>it is said</sup> it be not applied. Shri Ramamurthy appearing for M.V.Reddy opposed it. When we asked Mr.Ramamurthy as to what procedure is adopted or should have been adopted, Shri Ramamurthy argued that it is for the State to point out what rules they have applied. His contention is that ~~the~~ O.M. deals with normal channel of promotion and, therefore, it cannot apply to nature of appointment which is in question. According to him there is a lacuna which may require recommendation by Court to have some guidance but, while we are finding that there is absence of guideline in respect of appointment on the post in question, <sup>we also consider that</sup> the power of an administrative authority cannot be kept uncannalised. There has to be some guideline, <sup>How so higher</sup> an administrative authority be, <sup>there is to be</sup> ~~and~~ the touchstone of which the exercise of the power can be tested. Even if such a lacuna as pointed out by Shri Ramamurthy is accepted, yet we feel that there should be some guidelines <sup>and</sup> in the absence of any guidelines we have to consider what could be the test for examining the grievance of applicant. We find from the record that though the posts in question are ex-cadre posts but while preparing the panel, the COS has considered all the persons in the eligibility zone on the basis of seniority, which principle is being followed by department concerned in matters of regular promotions. It is similar to guidelines laid down in respect of regular promotions. Therefore, we consider that the appointments of Chief <sup>B. S. G. M. T.</sup>

Commissioners of Excise or Chief Commissioners of Customs <sup>for CBEC</sup> be considered under same O.M. under which a regular departmental promotion is done i.e. in accordance with para 2, 2(i) and 2(ii) of the O.M. No.22011/4/91-Estt. (A) dt. 14.09.1992.

15. During arguments there has been objection on behalf of the applicant that sealed cover procedure is not to be adopted in preparation of panel for Member of Board. Mr. Ramamurthy appearing for Respondent, M.V.Reddy, has argued that if O.M. is made applicable then sealed cover procedure is to be adopted. We find that guideline for preparing the panel do not allow a Government servant to be promoted against whom disciplinary proceedings are pending but if he is within the zone of consideration, then his case will be considered and placed in a sealed cover. We are adopting guideline in this matter but as here we are dealing with a matter where a decision has been taken on the recommendation of C.O.S., which is the basis of the panel, we are not inclined to accept the procedure of sealed cover. This procedure we would not like to accept here, despite Mr.Ramamurthy's argument that this OM applies then the position of his client is virtually of a sealed cover per se. It is a fact that M.V.Reddy was not empanelled at the earlier occasion. However, it is being argued on his behalf that post is a selection post and if he was not empanelled last time and has been considered this time, then there is nothing wrong if he is subjected to vigilance clearance. <sup>However, our reason is different.</sup>

16. There are two reasons for not accepting the contention of Shri Ramamurthy that sealed cover procedure be also adopted.

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Firstly, we are not inclined to accept that any office of Member in the Board consisting of One Chairman and Five Members be allowed to remain vacant and, therefore, if we exclude part of sealed cover, part the appointment of selected person will be effective as soon as vacancy occurs. The second reason for not accepting Mr.Ramamurthy's argument that his client's position is that of an officer who has been considered and the decision has been kept in a sealed cover <sup>for</sup> <sub>when</sub> <sup>there</sup> the person has <sup>already</sup> <sub>been</sub> placed on panel <sup>but</sup> as per the guiding rules he could not have been placed on the panel till vigilance clearance was there. Shri Rege, despite our asking is unable to explain as to how and why M.V.Reddy was placed on panel except that he says that whatever is the reason, it has been brought on record. We would like to mention that <sup>there may be different reason</sup> on earlier occasion <sup>is not relevant</sup> also M.V.Reddy was bye-passed.

17. There is another aspect which we have to take into consideration. The two cases cited by Mr. Ramamurthy <sup>are</sup> the case of Union of India V/s. B. S. Agarwal (supra) and State of M.P. V/s. J. S. Bansal (supra). <sup>They</sup> lay <sub>down</sub> that for the purpose of consideration for a post, the date of occurrence of the vacancy is relevant and <sup>on</sup> <sub>that</sub> every eligible officer is to be considered. Now, neither on the date of consideration nor till today the disciplinary proceedings against M. V. Reddy are over. In such circumstances, when there were four vacancies, the administrative action of the Government in bringing on panel a person who was under cloud and not placing four persons who were absolutely clear on the panel is not a well founded approach. However, even otherwise, if sealed cover procedure was to be adopted then the <sup>Answer</sup>

four names of person who could be immediately appointed and were to be on the panel. In case M. V. Reddy was cleared at some stage, then he could have been put on one post reverting one person, which could have been clearly stated in the appointment order of the last person that he will be reverted if <sup>on</sup> ~~to~~ M.V.Reddy being cleared. Thus, according to us, placing M. V. Reddy on panel is bad in law.

POINT NO. 2 :

18. The next question which arise for consideration is whether Applicant could be considered for empanelment by A.C.C.? We have gone through the record and we find that S. K. Chaudhary, has not been considered for the reason that he did not have minimum residual service. There is nothing on record to guide us as to what minimum residual services should have been there except that, on record, we find that one senior Officer was left out from consideration for whom one of the reason assigned is that his balance tenure was less than six months. As observed earlier, during the course of argument, when Shri Rege, was asked that what was the minimum residual service which was wanting in case of S.K.Choudhury. Shri Rege contended that the Committee ~~s~~ has taken six months into consideration as it is free to have its own procedure.

19. Mr. Masand has argued for applicant that no minimum residual period is provided anywhere for appointing an officer as Member of C.B.E.C. and therefore, the applicant could not be kept out of consideration on the ground that he was not having the requirement of "minimum residual service". However, in the ~~Respect~~

absence of any other guideline for considering an officer for appointment, alternatively, <sup>has</sup> he argued that there is a requirement of three months in accordance with O.M. No. 22011/89/Estt.(D) dated 25.01.1990 of Government of India, Department of Personnel & Training. Shri G. K. Masand conceded that if six months period is taken into consideration, then his client is to be non-suited but if it is three months, then his client was to be considered against the post which was likely to fall vacant on 01.11.2001 if M. V. Reddy had not been empanelled. Although, no minimum residual period is prescribed but <sup>we consider that</sup> if an officer is allowed to be considered at ~~the~~ end of his service, then it will be a mere formality at the cost of public interest. There has to be some reasonable time <sup>during</sup> for which he can serve and benefit of his service experience goes to department, the determination of period being in exclusive domain of the Government. However, as applicant's claim is in respect of a post which was likely to fall vacant on 1.11.2001 and has fallen vacant, we are required to consider it in the light of promotions which are made to other posts by the Government under its guidelines.

20. We have no difficulty in accepting Mr. V.G. Rege's argument that the ACC is entitled to have its own procedure and there will be nothing unreasonable if it lays down six months as "minimum residual service", but it is to be laid down by ACC before matter was taken up by COS. It is a relevant consideration having regard to the nature of duties of the post of Member C.B.E.C. and to ensure continuity of incumbent. The ACC can lay down that incumbent should have reasonable minimum tenure before retirement. But, in case in hand, it did not specify that period before the matter was taken up by COS. Mr. <sup>Rege</sup>

Rege, on being questioned, for considering the case in the light of O.M. No.22011/11/89-Estt. (D) dt. 25.1.1990, did accept that if applicant makes out a case for attracting said O.M., it will require reconsideration of the matter, so far applicant is concerned.

21. We may observe here that though one of the Officer was not to be considered for panel (beside having been withheld by vigilance) as his balance tenure was less than six months, <sup>in</sup> absence of any specific determination, it can only be inferred but rule of law requires removal of all kind of uncertainties. The uncertainty of the period for determining minimum residual service could have been removed by ACC before COS took up the matter. However, <sup>we consider that</sup> the least which could be expected from COS was that before considering the candidates, it should have got it determined by ACC and then scrutinised the list of Officers who were under zone of consideration. For the purpose of this case, it is not necessary to say any further about the procedure in respect of this part of argument as the learned counsel for applicant has relied on the criteria laid down in O.M. No.22011/11/89-Estt. dt. 25.1.1990. The Government has laid down guidelines <sup>for</sup> promotion before superannuation in ACC Appointments. It has laid down criteria for promotion for all appointments which fall within the purview of the ACC in O.M. dt. 25.1.1990 <sup>which</sup> is as under:

"Promotion immediately before superannuation in case of ACC appointments. - Attention is invited to O.M. No.27(4)-EO/89 (ACC), dated the 11th April, 1989, communicating the order of the Government to the effect that in respect of appointments which fall within the purview of ACC, no officer should be promoted to a higher post in his own line of promotion unless he would have a minimum service of three months before retirement. Where, however, a longer minimum service is already prescribed, the same will apply. These instructions are hereby reiterated for compliance by all

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Ministries/Departments. In order that officers approaching superannuation are not denied the promotion due to them subject to this limitation on account of the delay in processing of their cases for promotion, Ministries/Departments are requested to ensure that the meetings of DPC are held well in time and proposals for submission to the Establishment Officer in the Department of Personnel and Training well in advance before the date of occurrence of the vacancy."

In absence of any other guidelines <sup>we hold that</sup> this O.M. becomes applicable. We have already observed that the post of a Member is not a promotional post. In the absence of any other guidelines, COS should have proceeded in accordance with O.M. The O.M. dt. 25.1.1990, so far recommendations are concerned, specifically states in respect of all appointments by ACC and therefore, we hold that non-consideration of S.K.Choudhary by the COS and approved by ACC cannot be sustained. <sup>and it requires</sup> consideration. <sup>fresh</sup> We make it clear that as reason for non-consideration of applicant has been assigned, which according to us is not valid in law, we are unable to sustain that part of the selection process.

POINT NO - 3 :

22. This takes us to the question as to what relief, if any, applicant is entitled. The applicant has claimed that he is senior to D.K.Acharya and therefore, he was entitled to be considered for the post which was likely to fall vacant on 1.11.2001, as he had clear three months period.

23. The Learned Counsel for D.K.Acharya, Mr. M.I.Sethna disputes it. We cannot allow this dispute to be raised here. We are to be guided by the record which is before us. The record before us indicates that the COS has prepared a list of Officers who are in the zone of consideration and has confined the selection and *prima facie* we are satisfied that it was done by placing name in accordance with seniority for consideration. The *dispute*

name of S.K.Choudhury is above D.K.Acharya. While considering these persons, we find that the consideration has also ended with empanelling D.K.Acharya and none of the persons who is below him appears to have been considered before <sup>amongst</sup> those put on panel. The COS appears to have recommended four names from earlier part of the list <sup>for</sup> the vacancies which it intended to fill up. Although, we are not determining the seniority amongst S.K.Choudhury and D.K.Acharya and it is open for D.K.Acharya to dispute, if it is brought to his notice by the Department provided it has not been brought as yet, but our observation is limited in view of list prepared by COS and on that basis applicant is to be considered against post of 1.11.2001.

24. Mr. Sethna was in doubt that if D.K.Acharya, who has already joined as Member, C.B.E.C. is not considered against the post of 1.11.2001, then D.K.Acharya will be prejudiced as he then could ~~not~~ have been appointed against vacancy likely to occur on 1.12.2001. That situation does not arise in this case, as a vacancy <sup>has occurred</sup> as one of the Member namely, A.K.Pandey, has relinquished office on 31.10.2001. Mr.Rege states, that there can be no question of reverting Acharya as a chance vacancy on relinquishing office by A.K.Pandey has arisen. He accepts that if a chance vacancy occurs then next officer on the panel is to be appointed. In view of the statement of Mr.Rege, there can be no prejudice to Acharya. Thus, we hold that S.K.Choudhury, has been wrongly kept out of consideration.

25. Mr. Ramamurthy has argued that Reddy was served with a notice for minor penalty under Rule 16 of CCS (CCA) Rules. We are constrained to say before parting with the case that there has been undue delay on the part of the Disciplinary Authority in keeping hanging the matter of Reddy for over six years and more than 3 1/2 years even after issue of show cause notice. There has been much delay on the part of

*B. S. Srinivas*

authorities in disposing of the matter due to which the controversy before us has arisen. The public authorities should be careful to dispose of disciplinary proceedings against high officials expeditiously so that officers holding high posts are not dragged to the kind of litigation with which we have been called upon to deal.

26. For above reasons we allow the OA, set aside the empanelment of M.V.Reddy and direct the Union of India to reconsider the case of S.K.Choudhury. We hope that the Union will dispose of the matter within two weeks from the date of receipt of copy of this order. No costs.

*Bn Bahadur*

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

*B. Dikshit*

(BIRENDRA DIKSHIT)  
VICE-CHAIRMAN

B.

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2/11/

CENTRAL ADMINISTRATIVE TRIBUNAL  
MUMBAI BENCH

C.P. No. 5/2002 in  
O.A. No. 704/2001

Dated this Monday the 14th Day of January, 2002.

Hon'ble Shri Justice Birendra Dikshit, Vice Chairman  
Hon'ble Shri B.N. Bahadur, Member (A).

Sunil Kumar Choudhury,  
working as Chief Commissioner,  
Central Excise & Customs,  
ICE House, 41A Bund,  
Garden Road, Pune-411 001.

.. Petitioner/  
Applicant.

(By Advocate Shri G.K. Masand)

Versus

1. Union of India, through  
Secretary, Department of  
Revenue, Ministry of Finance,  
North Block, New Delhi-110001.
2. Shri M.V. Reddy, working as  
Chief Commissioner, Central  
Excise, No.121, Mahatma Gandhi  
Salai, (Nungambakkam, High Road),  
Chennai-600034.
3. Shri D.K. Acharya, working as  
Chief Commissioner of Customs,  
New Customs House,  
Ballard Estate, Mumbai-400038.

.. Respondents.

And

Dr:S. Narayan, Secretary,  
Department of Revenue,  
Government of India, North Block,  
New Delhi.

.. Opponent/  
Contemner.

(By Advocate Shri V.G. Rege)

ORDER (Oral)

Shri G.K. Masand, Counsel for the applicant  
states that he has instructions from the applicant not to

pursue the contempt petition. Shri V.G. Rege, Sr. Standing Counsel to Government of India stated before this Tribunal that Committee of Secretaries made the necessary recommendations on 20.12.2001 and ACC approved the same on the same date. The letter of appointment have been issued to the applicant as Member, CBEC. We are fully satisfied that the order of the Tribunal has been duly complied with and there is no need to proceed any further in the matter. For the aforesaid reasons we dismiss the Contempt Petition as not pressed. The Contempt Petition stands disposed of, with no order as to costs.

*B.N. Bahadur*

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

*B. Dikshit*

( Birendra Dikshit )  
Vice Chairman.

H.