O.A. No. 386/97

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,

MUMBAI BENCH, MUMBAI.

1. Original Application No. 386 / 1997.
2. Original Application No. 760 / 1997.
3. Original Application No. 761 / 1997.
4. Original Application No. 528 / 1998.
5. Original Application No. 529 / 1998.
6. Original Application No. 530 / 1998.
7. Original Application No. 531 / 1998.
8. Original Application No. 532 / 1998.

Pronounced, this the 14 day of December 1998.

Coram: Hon'ble Shri Justice R.G.Vaidyanatha, Vice-Chairman,
Hon'ble Shri D.S.Baweja, Member(A).

1. Original Application No.386 / 1997.

1. P.K.G.Kurup
2. A.D.Gandhi
3. Smt.S.V.Belhe
4. R.V.Apparav
5. M.G.Gaikwad
6. Smt.V.S.Chitnis
7. S.Anthony
8. T.V.Jose
9. B.S.Ram
10. Smt.S.B.Nair
11. C.J.Rozario
12. K.K.Nair
13. Smt.S.S.Jadhav
C/o.Mr.Ramesh Ramamurthy,
A/6, Bhagirath, 2nd floor,
Pahadi School Road No.2.,
J.P.Nagar, Goregaon (East),
Mumbai. ... Applicants.

(By Advocate Shri M.S.Ramamurthy)

V/s.

1. Union of India,
through the Secretary,
Ministry of Finance,
Government of India,
Department of Revenue,
New Delhi - 110 011.
2. The Chief Commissioner of
Customs, New Custom House,
Ballard Estate,
Mumbai - 400 001.
3. Commissioner of Customs,
Mumbai Commissionerate,
New Custom House,
Ballard Estate,
Mumbai - 400 001.

4. Additional Commissioner of Customs
(P & V), New Custom House,
Ballard Estate,
Mumbai - 400 001. ... Respondents.

(By Advocate Shri M.I.Sethna along
with Shri V.D.Vadhavkar).

And

5. Bikas Chandra Mohanty,
Preventive Officer,
Bombay Customs,
Mumbai, & 14 Others. ... Interveners.

(By Advocate Shri M.M.Vashi)

2. Original Application No. 760 / 1997.

M.I.Shaikh,
MMTC, S/Room,
Sahar Airport,
Mumbai - 400 091. ... Applicant.

(By Advocate Shri M.S.Ramamurthy)

V/s.

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

2. The Additional Commissioner
of Customs, Personnel and
Establishment Department,
New Customs House,
Ballard Estate,
Mumbai - 400 001.

3. Commissioner of Customs
(General) (I),
New Customs House,
Mumbai - 400 001. ... Respondents.

(By Advocate Shri M.I.Sethna along with
Shri V.D.Vadhavkar.)

4. Bikas Chandra Mohanty,
Preventive Officer in the
Bombay Customs House,
Mumbai & 14 Others. ... Interveners.

(By Advocate Shri M.M.Vashi)

3. Original Application No.761/97.

Annamma Yaunan,
Air Intelligence Unit,
Sahar Airport,
Mumbai. ... Applicant.

(By Advocate Shri M.S.Ramamurthy)

V/s.

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

..3.

2. The Additional Commissioner
of Customs, Personnel & Establish
Department,
New Customs House,
Ballard Estate,
Mumbai - 400 001.

3. Commissioner of Customs,
(General) (I) New Customs
House,
Mumbai - 400 001. ... Respondents.

(By Advocate Shri M.I.Sethna along
with Shri V.D.Vadhavkar)

And

4. Bikas Chandra Mohanty,
Preventive Officer,
Bombay Customs House,
Mumbai, & 14 Others. ... Interveners.

(By Advocate Shri M.M.Vashi)

4. Original Application No.528/1998.

C.B.Maryapgol,
Shramik Hsg. Soc.,
Room No.7,
Shastri Nagar,
Kanjurmarg (E),
Mumbai - 400044. ... Applicant.

(By Advocate Shri V.S.Masurkar)

V/s.

1. Union of India,
through Secretary,
Ministry of Finance,
Department of Revenue,
Government of India,
North Block,
New Delhi - 110 011.

2. Commissioner of Customs (General)
Mumbai New Customs House,
Ballard Estate,
Mumbai - 400 038.

3. Dy. Commissioner of Customs (P & V),
New Customs House,
Ballard Estate,
Mumbai - 400 038. ... Respondents.

(By Advocate Shri M.I.Sethna along
with Shri V.D.Vadhavkar).

5. Original Application No.529/1998.

Y.Satyanarayan,
36/831, Adarsh Nagar,
Worli,
Mumbai - 400 025. ... Applicant.

(By Advocate Shri V.S.Masurkar)

V/s.

1. Union of India through
Secretary, Ministry of Finance,
Department of Revenue,
Government of India,
North Block,
New Delhi - 110 011.

2. Commissioner of Customs
(General), Mumbai New
Customs House,
Ballard Estate,
Mumbai - 400 038.

3. Dy. Commissioner of Customs(P&V),
New Customs House,
Ballard Estate,
Mumbai - 400 038. ... Respondents.

(By Advocate Shri M.I.Sethna along
with Shri V.D.Vadhavkar)

6. Original Application No.530/1998.

Sudhir Sitaram Kadam,
102, Aarti Appts.,
L.T.Road, Vazira Naka,
Borivili (W),
Mumbai - 400 092. ... Applicant.

(By Advocate Shri V.S.Masurkar)

V/s.

1. Union of India,
through Secretary,
Ministry of Finance,
Department of Revenue,
Government of India,
North Block,
New Delhi-110 011.

2. Commissioner of Customs(General)
Mumbai, New Customs House,
Ballard Estate,
Mumbai - 400 038.

3. Dy.Commissioner of Customs(P&V),
New Customs House,
Ballard Estate,
Mumbai - 400 038. ... Respondents.

(By Advocate Shri M.I.Sethna along
with Shri V.D.Vadhavkar)

7. Original Application No.531/1998.

Ashok Arjun Salkar,
Bhima-9-401,
Shantivan,
Borivili (E),
Mumbai-400 066. ... Applicant.

(By Advocate Shri V.S.Masurkar)

V/s.

1. Union of India through
Secretary, Ministry of Finance,
Department of Revenue,
Government of India,
North Block,
New Delhi - 110 011.

2. Commissioner of Customs(General)
Mumbai, New Customs House,
Ballard Estate,
Mumbai - 400 038.

3. Dy. Commissioner of Customs (P&V),
New Customs House,
Ballard Estate,
Mumbai - 400 038. ... Respondents.

(By Advocate Shri M.I.Sethna along with Shri V.D.Vadhavkar)

8. Original Application No.532/1998.

Krishnakumar Sitaram Dhuri,
B/3/009, Vrindfaram Dham,
V.B.Phadke Marg,
Mulund - (E),
Mumbai - 400 081. ... Applicant.

(By Advocate Shri V.S.Masurkar)

V/s.

1. Union of India,
through Secretary,
Ministry of Finance,
Department of Revenue,
Government of India,
North Block,
New Delhi - 110 011.

2. Commissioner of Customs (General)
Mumbai, New Customs House,
Ballard Estate, Mumbai - 400 038.

3. Dy. Commissioner of Customs(P&V),
New Customs House,
Ballard Estate,
Mumbai - 400 038. ... Respondents.

(By Shri M.I.Sethna along with Shri Vadhavkar).

O R D E R

(Per Shri Justice R.G.Vaidyanatha,Vice-Chairman)

These are eight cases filed by Preventive Officers of the Customs House, Mumbai under Section 19 of the Administrative Tribunals Act, 1985. The official respondents have filed reply in most of the cases. These cases were expedited by the order of the High Court. Hence we directed the respondents to file reply within a short time. But, we find that replies are not filed in two or three cases, but the learned counsel for the respondents submitted that reply filed in one case may be treated as reply filed in all cases since common question arises for consideration in all these cases.

In Original Applications No.386/97, 760/97 and 761/97 Shri M.M.Vashi has filed M.Ps. 492/98, 493/98 and 495/98 on behalf of Interveners. We have already allowed the Miscellaneous Petitions and permitted Shri M.M.Vashi to address arguments on behalf of Interveners. We have heard Shri M.S.Ramamurthy and Shri V.S.Masurkar, learned counsels for the applicants, Shri M.I.Sethna along with Shri V.D.Vadhavkar, learned counsels for the respondents and Shri M.M.Vashi on behalf of the interveners. We are disposing of all these cases by this common Judgment since Identical questions arise for consideration in all these cases.

2. (1) O.A. No.386/97 is filed by P.K.G.Kurup and 12 Others. All of them were either UDCs or Stenos in the Customs Department and came to be selected and promoted as Preventive Officers. The applicants at Sl.No.1 to 9 came to be promoted by order dt. 4.6.1983 and applicants at Sl.No.10 to 13 came to be promoted by order dt.3.11.1983. The promotions were styled as ad-hoc promotions.

(2) O.A. No.760/97 is filed by M.I.Shaikh. He came to be promoted as Preventive Officer on 3.11.1983.

(3) O.A. No.761/97 is filed by Smt.Annamma Yaunan. She was promoted as Preventive Officer on 3.6.1983.

(4) O.A. No.528/98 is filed by C.B.Maryapgol. He was promoted as Preventive Officer on 4.6.1983.

(5) O.A. No.529/98 is filed by Y.Satyanarayan. He was promoted as Preventive Officer on 3.11.1983.

(6) O.A. No.530/98 is filed by S.S.Kadam. He was promoted as Preventive Officer on 3.11.1983.

(7) O.A. No.531/98 is filed by A.A.Salkar. He was promoted as Preventive Officer on 19.2.1985.

(8) O.A. No.532/98 is filed by K.S.Dhuri. He was promoted on 19.2.1985.

3. The grievance of all the applicants is that though their promotions were styled as ad-hoc, they came to be promoted as per their seniority and after the prescribed test and verification of the Confidential Reports and interview by regularly constituted Departmental Promotion Committee. The applicants were promoted against the promotional quota, but for the post of Preventive Officers the promotional quota is $\frac{1}{4}$ th and quota for direct recruitment is $\frac{3}{4}$ th. All the applicants have been working continuously as Preventive Officers from the dates of their respective promotions. But, however, the respondents have issued an order dt. 4.6.1991 purporting to regularise the promotions of many officers as Preventive Officers including all the Officers. It is stated that the applicants are entitled to seniority in the cadre of Preventive Officers from the date of their initial promotion on the theory of "continuous officiation". The promotion of applicants was not for a short time affair or a stop gap arrangement. It was a regular promotion by a DPC as per the Recruitment Rules, though wrongly styled as ad-hoc promotion. It is alleged in all these cases that respondents have since published a draft seniority list in 1997 where the applicants are correctly shown except one or two applicants as per their initial ad-hoc promotion. But, however, subsequently final seniority list is published, where the seniority position of some of the applicants is depressed and names of some of the applicants are not at all shown.

On these allegations, the applicants have approached this Tribunal for a declaration that they must be deemed to have been regularly promoted from the date of

their initial date of promotion and entitled to seniority from the dates of initial promotion and they are entitled to be considered for promotion to the post of Customs Superintendent.

We may also mention that one of the applicants Smt.S.S.Jadhav, (applicant No.13 in O.A. 386/97) has already been promoted as Superintendent on the basis of initial date of promotion as Preventive Officer.

4. The respondents have in their reply justified the action of regularising the promotions of the applicants in 1991. It is stated that the applicants were promoted in 1983 or 1985 on ad-hoc basis, they came to be regularised by order dt. 17.5.1991. It is therefore, stated that applicants are entitled to claim seniority in the cadre of Preventive Officers only w.e.f. 17.5.1991. The earlier ad-hoc promotion will not confer any seniority to the applicants. The respondents have also relied on a DOPT Circular dt. 10.4.1989 which says that the promotion would give seniority from the date of the panel or from the date of actual promotion, whichever is later. In the case of officials who have already held higher post on ad hoc basis, the date of promotion will be the date of DPC meeting. It is admitted that all the applicants went through the process of selection as per the Recruitment Rules and then promoted on ad-hoc basis as per orders issued to them. It is made clear in the said orders that the promotions are ad-hoc and provisional and it will not confer any seniority in the cadre on the promotees. It is therefore, stated that the applicants cannot claim any seniority in the cadre of Preventive Officers prior to

17.5.1991 and hence they are not entitled to any reliefs prayed for. It is therefore, prayed that all the applications be dismissed.

5. The interveners have filed Miscellaneous Petitions in three O.As. viz. M.P. 492/98 in O.A. 386/97, M.P. 493/98 in O.A. 760/97 and M.P. 495/98 in O.A. 761/97 for the limited purpose of vacating interim orders passed in these cases. As could be gathered from Miscellaneous Petitions filed by them, their defence appears to be that they are direct recruits and all the applicants are promotees. The ratio between direct recruits and promotees in the cadre of Preventive Officers is 3:1. There were no promotional posts at all. But, however, the applicants were given promotions on ad-hoc basis. It is also alleged that the applicants got ad-hoc promotion by the department without holding the Departmental Promotion Committee and without there being required number of posts available for promotion from Ministerial cadre. The main thrust of the interveners is that there were no posts available for the promotees, therefore their promotion on ad-hoc basis will not confer any rights on them and it is only in 1991 the promotional posts were identified and accordingly applicants were regularly promoted in 1991. Hence it is stated that the applicants cannot claim any seniority on the basis of their ad-hoc promotion, but are entitled to seniority in the cadre of Preventive Officers only on and from 17.5.1991.

6. The learned counsel for the applicants contended that the applicants are entitled to seniority from the date of their initial dates of promotion though styled as ad-hoc.

It was argued that the promotions of the applicants though styled as ad-hoc was done as per the Recruitment Rules and on the basis of "continuous officiation" principle, the applicants are entitled to seniority from the date of initial promotion. The learned counsel for the respondents contended that the applicants cannot get any seniority till they are regularised and they are entitled to seniority only from 17.5.1991 when they came to be regularised in the cadre of Preventive Officers. He also relied on DOPT Circular dt. 10.4.1989. The learned counsel for the interveners also supported the stand of the learned counsel for the respondents and further contended that the applicants being promotees had no promotional vacancies or promotional quota when they were initially promoted on ad-hoc basis. It was therefore, submitted that applicants were in excess of the promotional quota and they were promoted on ad-hoc basis in the vacancies of direct recruits and hence the applicants cannot get any seniority till their slot viz. quota of promotees arises. It was therefore, submitted that it is only in 1991 the promotional posts were identified and therefore the applicants were regularly promoted in 1991 and hence they cannot claim any seniority prior to 1991.

7. The question is whether the ad-hoc promotion of the applicants should be treated as ad-hoc till the date of regularisation or the ad-hoc promotion if done as per Rules should be treated as regular promotion from the date of the initial ad-hoc promotion.

8. It is true that as per the orders of promotion it was intended to be an ad-hoc promotion. The order of promotion also indicates that it is purely provisional and will not confer any seniority in the cadre and the promotees

will not get any right of absorption in the cadre on the basis of such ad-hoc promotion. Such a condition finds a place in the order of promotion (vide one of the orders of promotion which is at page 24 of the paper book in O.A. No.386/97).

We need not ~~go into to~~ decide the question on first principles or on the basis of Rules since the question is no longer res-integra, but is covered by a direct authority of a Constitutional Bench of the Supreme Court.

In the case of Direct Recruit Class II Engineering Officers' Association V/s. State of Maharashtra and Others reported in (1990 SCC (L&S) 339), a Constitutional Bench of the Supreme Court consisting of five Hon'ble Judges went into the question in detail and referred to all the earlier decisions on the point and expressed opinion as follows :

> "We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service (para 13 of the Judgment)".

Again, in para 47 of the reported Judgment at page 369, the Supreme Court summed up their conclusions. For our present purpose, the conclusion at 'A' is relevant and it reads as follows :

> "(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.
>
> The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority."

That was also a case where there was dispute between the interse seniority between direct recruits and promotees. The Supreme Court has observed that if the

promotion or appointment is done according to Rules though styled as ad-hoc then the seniority will count from the date of initial appointment and not from the date of confirmation.

In the present case also the respondents and the interveners are contending that applicants promotion was ad-hoc and the promotions were regularised only in 1991 and therefore the applicants will get seniority from the date of regularisation and not from the date of initial ad-hoc promotion. But, Supreme Court has rejected this argument and observed that confirmation or regularisation is of no consequence to decide the point of seniority provided, of course, the initial promotion or appointment was done as per Rules.

If the applicants ad-hoc promotion had not been done as per the Recruitment Rules, then of course, the applicants cannot get the benefit of ad-hoc promotion to claim seniority.

Similar question arose for consideration before the Apex Court in a case reported in(1997)6 (SCC) 406 in the case of I.K.Sukhija and Ors. V/s. Union of India and Ors. That was a case where the promotions were shown as ad-hoc since the Recruitment Rules had not yet been finalised. It was found that it was a case of promotion as per seniority and not by way of stop gap arrangement. It was noticed that the promotees had been promoted though on ad-hoc basis against regular vacancies in the promotional quota. It was further seen that the ad-hoc promotions were not contrary to any statutory rules. The promotions had been done by a DPC and made on the basis of merit list and not only on the basis of seniority. The promotions ~~have~~ had

been made against regular vacancies. It was therefore, held that though the promotions were styled as temporary and ad-hoc, cannot be said to be a stop gap arrangement.

Then, we can make useful ~~use of a~~ reference to another decision of the Apex Court in the case of Delhi Water Supply and Sewage Disposal Committee and Ors. V/s. R.K.Kashyap and Ors. reported in AIR 1989 Supreme Court 278. It was observed that the earlier ad-hoc appointments, when followed by regularisation of service, the seniority should count from the initial ad-hoc appointment. It is further pointed out that if the ad-hoc appointment is made without considering the claims of seniors then the ad-hoc service cannot be counted for seniority. It is further observed that if the ad-hoc promotions are made in violation of statutory rules or Executive Orders then also ad-hoc service will not count for seniority.

From the above decisions what follows is that it is not material whether the promotions are styled as ad-hoc or stop gap or temporary. The test is whether the initial appointments were really a stop gap in nature or not. The further test is whether the initial promotions were made after considering seniority and as per the Recruitment Rules. If the answer to the question is in the affirmative, then the ad-hoc service will count for seniority. If the promotions are made ignoring the claims of seniors or if the promotions are made contrary to the Recruitment Rules or not following the Recruitment Rules or in excess of the promotional vacancies then, of course, the ad-hoc promotion will not count for seniority.

9. The learned counsel for the interveners and respondents invited our attention to some decisions.

In the case reported in 1998(2) SC SLJ 49 (Dr.Anuradha Bodi V/s. Municipal Corporation of Delhi), the question was whether ad-hoc service will count for seniority. In that case it was pointed out that the appointments have been made contrary to the Recruitment Rules and therefore it was held that the ad-hoc service will not count for seniority. It was later found that the services had been regularised in consultation of the UPSC on 27.6.1991 and therefore, it was held that seniority will count from the date of regularisation. The reason given is that prior to regularisation, their ad-hoc appointment was contrary to the Recruitment Rules. Even if, in the present case, if on examining the facts we hold that the applicants ad-hoc promotions were contrary to the Recruitment Rules, then certainly the applicants cannot get the benefit of ad-hoc service for the purpose of seniority.

Similarly, in the case reported in 1993(2) SCC 213 (Dr.M.A.Haque and Ors. V/s. Union of India and Ors.), the question was about counting of ad-hoc service for the purpose of seniority. The earlier Constitutional Bench decision in the Direct Recruits case was referred to in this case also. It was found that the appointments in that case were irregular and contrary to rules and further by bypassing the UPSC. It was thefore, held that since it is back door entry contrary to Recruitment Rules the ad-hoc service cannot count for the purpose of seniority.

In the case of Davinder Bhatia and Ors. V/s. Union of India & Ors. (1998) 5 SCC 262), similar question arose for consideration about counting of ad-hoc service for the purposes of seniority. It was also a case where

ad-hoc appointments had been made, subsequently the ad-hoc appointments were regularised. It is pointed out that the seniority will count from the date of regularisation and therefore, the learned counsel for the respondents and the interveners want us to hold that regularisation of service is necessary for the purpose of counting seniority. If we peruse the facts of that case, ~~that~~ it is seen the earlier ad-hoc promotion was not as per Rules, there was no process of selection when earlier ad-hoc promotion was done. The appointments were made on ad-hoc basis as a stop gap arrangement, though the post was a selection post; this is what the Supreme Court observed at page 267 in para 6 of the reported Judgment :

> "The appellants, no doubt, have been brought to the reservation side prior to 1978 but admittedly there had been no process of selection in their case and they were posted as Enquiry-cum-Reservation Clerks merely on ad hoc basis as a stopgap arrangement. The post of Enquiry-cum-Reservation Clerk being a selection post, the person like the appellants who were posted against those posts without going through the process of selection on ad-hoc basis do not have a right to be in the cadre until and unless they are duly regularised after going through a process of selection. In the case in hand, this process of selection was made only in the year 1982 and the appellants have been absorbed in the cadre of Enquiry-cum-Reservation Clerks after being duly selected. In this view of the matter, their continuance on ad hoc basis from 1978 to 1982 cannot be counted for the purpose of their seniority in the cadre of Enquiry-cum-Reservation Clerk nor can they be held senior to the women candidates who were directly recruited as Enquiry-cum-Reservation Clerks under the changed policy by undergoing a process of selection."

Therefore, from the above observation we can clearly gather that the initial ad-hoc promotion was not as per the Rules and not after subjecting the candidates to selection process, the post being selection post. It is only later the candidates were subjected to selection

process and then formally selected and thereafter orders of regularisation were issued.

The applicants have also relied on two unreported Judgments of this Tribunal pertaining to the same department.

The copies of the Judgments are annexed to the O.A. in O.A. No.386/97.

At page 43 we have the unreported Judgment dt. 13.9.1991 in T.A. No.390/87 (V.C.Jagwani & Ors. V/s. Union of India & Ors.). In that case the applicants had been promoted as Examiners in the Customs Department on ad hoc basis and the application was filed to direct the Government to regularise their services from the date of initial promotion. The Tribunal examined the facts of the case and found that the regular DPC had considered the claim of all the eligible Officers for promotions as Examiners and then selected the applicants of that case, though the order was issued as an ad hoc promotion, ~~though~~ all of them were working for nearly 10 years, the Tribunal held that since the applicants had been selected and promoted by a duly constituted DPC their ad hoc promptions was ordered to be regularised from the date of their initial selection.

Then at page 53 of the same paper book in O.A. 386/97, we have another unreported Judgment of the same department dt. 18.7.1991 in O.A. 362/90 and connected cases (P.H.Mahajan & 10 Ors. V/s. Union of India), where the question was about seniority and regularisation of the services of Appraisers. It was found that the DPC had considered the claim of the eligible officers and promoted the applicants as per Rules and therefore it was held that they are entitled to claim seniority from the date of initial promotion and not from the date of regularisation.

10. Therefore, the decisions relied on both the sides lead us to one and only one ~~inference~~ conclusion. If the ad hoc promotions or ad hoc appointments were done as per Rules and after considering the seniority, then the promotions must be held to be regular from the initial ad hoc appointment itself. If, however, the ~~appoints~~ appointments or promotions are made ignoring the claims of seniors or contrary to the Recruitment Rules or in excess of the quota, then the ad hoc service will not count for seniority. This is the law laid down by the Apex Court. Now, therefore, we will have to apply the above test to the facts of the present case and find out whether the initial ad hoc promotions of the applicants was on the basis of seniority, on the basis of rules and within the quota of promotees. If the answers to these questions are in the affirmative, then the applicants ad hoc service will be deemed to be regular service for the purpose of seniority. If the answers ~~is~~ are in the negative, then, of course, the applicants cannot get the benefit of ad hoc service for the purpose of seniority, but they are entitled to claim seniority only from the date of regularisation in 1991.

11. Now, coming to the facts of this case, we find that most of the facts are not in dispute. The fact that all the applicants were promoted on ad hoc basis either in 1983 or in 1985 is not in dispute. It is also an admitted fact that eversince the ad hoc promotions, all the applicants have been working in that capacity, without any break even for a single day. Now, we have to find out whether the ad hoc promotions were as per rules. The applicants are governed by the Customs Department(Group 'C') Recruitment Rules, 1979. All the applicants were promoted as Preventive Officers Gr.I (O.G.). Item No.4 in the

Recruitment Rules pertains to Preventive Officer (O.G.). It is a Group 'C', Non-gazetted post. The mode of promotion in column No.6 is shown as "Selection". There is also a note that the candidate should be required to possess such physical standard as may be prescribed and should pass such written and physical test as may be prescribed. The mode of Recruitment in column No.11 is shown as 75% by direct recruitment and 25% by promotion. The feeder cadre is mentioned in column No.12 as UDCs, Stenographers with 5 years service in the grade. Column No.13 shows that the selection should be made by a DPC consisting of the Collector of Customs as the Chairman with two Members who should be two Group 'A' Officers of the Customs House and one Assistant Commissioner of Income-tax.

The learned counsel for the respondents has placed before us the Departmental Promotion Committee Proceedings. We find that a regularly constituted committee has considered the selection of the applicants for the post of Preventive Officer.

For instance in the first DPC pertaining to the applicants which was held in February, 1983, we find that the DPC consisted of Collector of Customs as Chairman, one Deputy Collector of Customs, two Assistant Collectors of Customs and an Assistant Commissioner of Income-tax. Similarly, in all the DPCs with which we are now concerned we find such regularly constituted DPC has considered the claim of all the applicants for the purpose of promotion to the grade of Preventive Officers. It is not an ordinary committee or the appointing officer who has just made some ad hoc promotion on the basis of seniority. But, it is a case of promotions of the applicants being considered by a

regularly constituted DPC as per the Recruitment Rules consisting of Collector of Customs as its Chairman, three members including an Assistant Commissioner of Income-tax.

12. Then we find that the DPC has considered the claim of all the eligible Officers by holding a test and by conducting an interview and giving marks, that means all the Officers in the zone of consideration have been considered on the basis of their seniority and also on the basis of their merit viz. written test and interview in addition to physical test. This, we could gather from all the DPC proceedings pertaining to these cases which are placed before us. The DPC proceedings also give us the marks allotted to each candidate and then on the basis of the marks, select panel has been prepared. We have seen the DPC proceedings of February, 1983, October, 1983 and the DPC of 1985 which pertain to the applicants in all these cases. Therefore, it is ~~the~~ or case of a regularly constituted DPC and it has selected the Officers for the purpose of promotion on the basis of requirement prescribed in the Recruitment Rules. In fact, this position is not disputed by the Official Respondents. We find there is clear admission in the written statement of the respondents that the candidates were selected after observing the formalities as per the Recruitment Rules.

13. In O.A. 386/97, we have the affidavit of Gurbans Singh, Dy. Commissioner of Customs, as affidavit in reply to the application. At page 111 of the paper book, in para 9 of the affidavit, it is stated as follows :

> "9. With reference to paragraph 5(d), I say that the ad hoc promotion of Preventive Officer are on the basis of selection basis i.e. seniority-cum-fitness wherein a candidate has to qualify the :-
>
> (i) Physical test,
>
> (ii) ACRs for the qualifying period, i.e. 05 years.
>
> (iii) Oral interview by the Committee.

> I say that the regular promotion of ad hoc Preventive Officer are held on selection basis i.e. seniority-cum-merit wherein the ACRs have to be considered. Thus, for the regular promotion held on 17.5.1991 the facts of selection are different from that of the time of ad hoc promotion in view of instructions as stated above."

Ofcourse, later he has stated that for a regular promotion different considerations apply. But, no material is placed before the Tribunal in the form of pleadings or any document to show what other materials or considerations were taken into consideration for regular selection.

In O.A. No.760/97 we have the affidavit in reply of Gurbans Singh, Deputy Commissioner of Customs and at page 87 it is stated as follows :

> "In the E.O.O. No.366/83 dt. 3.11.1983, a total of 24 UDC/Stenos were promoted as Preventive Officers on ad-hoc basis (the Applicant is figuring at Sr.No.23 (Ex.B to the Petition). The said promotion was made after the candidates successfully got through the oral Interview and on consideration of their past A.C.R.s. These applicants were called for the interview only when they qualified the Physical Test laid down for the said promotion. The successful candidates were promoted to officiate in the grade of Preventive Officers on purely ad-hoc basis w.e.f. the date they assumed charge and until further orders. The DPC which met on 17.5.1991 for regularising the Preventive Officers who were working on ad hoc basis from 1983-90, considered the Officers in chronological order."

In O.A. 528/98 we have the affidavit in reply of O.A. D'souza, Assistant Commissioner of Customs and the relevant portion is in para 8 (at page 142 of the paper book), which reads as follows :

> "The said promotion was made after the candidates successfully got through the oral interview and on consideration of their past ACRs these applicants were called for the interview only when they qualify the physical test laid down by the said promotion. The successful candidates were promoted to officiate in the grade of Preventive Officer purely on ad hoc basis w.e.f. the date they assume charge and until further orders."

It is therefore, seen that the respondents have admitted that the applicants promotions were done by holding

written test, interview, passing of physical test and on examination of C.Rs. for 5 years. These are all the requirements under the rules, nothing more need be done. The argument of Mr.M.M.Vashi, the learned counsel for the interveners that regular promotions can be done only by a DPC and without being processed by a DPC the applicants cannot claim regular promotion from 1983, has no merit. We have seen from the records that a regularly constituted DPC as provided in the Recruitment Rules consisting of Collector as Chairman and Members etc, the applicants have been selected for promotion. The applicants have been subjected to the same selection process as mentioned in the Recruitment Rules and that too by a regularly constituted DPC as provided in the Recruitment Rules. From the above discussion and the materials on record, we can safely conclude that the initial ad hoc promotions of the applicants was as per the Recruitment Rules. It was not a case of mere ad hoc or stopgap arrangement made dehors the Rules.

14. Now the only point of controversy is whether the applicants promotion was within the quota of promotees or in excess of their quota. It cannot be disputed that if the promotion of the promotees is in excess of their quota then normally they cannot claim seniority over direct recruits to the extent their quota has exceeded. This conclusion is subject to one explanation viz. when promotees though promoted in excess of their quota have continued on ad hoc basis for number of years and that direct recruitment has not taken place for number of years resulting in breaking of the rota quota Rule. But in the present case such a situation does not arise. The thrust of the argument of the interveners and also the learned counsel for the respondents

is that the applicants have exceeded the promotional quota and they have occupied the slot meant for direct recruits and therefore they cannot get seniority from the date of ad hoc promotion and they will get seniority only when their promotion is regularised within their quota depending upon the vacancies from time to time. The argument of the respondents and the interveners, is no doubt attractive, but it is not based on any material on record. The respondents or the interveners have not placed any material on record to show that the promotion of the applicants was in excess of the quota of promotees.

15. On the other hand, we have seen the DPC proceedings placed before us which belies any such thing of the promotees being in excess of their quota.

In the DPC proceedings of February, 1983 it is mentioned by the Committee that there are 19 existing vacancies and 16 anticipated vacancies "to be filled in by promotion from amongst UDCs/Stenographers and Women Searchers." Therefore, the committee had taken into consideration only vacancies which are to be filled only by promotion. There is nothing in the DPC record to show that any promotee is considered for a direct recruit quota. The order of promotion also shows that the promotions are against substantive vacancies vice Officers further promoted as Appraisers. The DPC minutes are in two files. In one file the vacancies are calculated, the office Note dt. 21.3.83 clearly mentions that in the cadre of Preventive Officer Gr.I (OG), for the departmental candidates viz. 25% of the total vacancies occurred since the last DPC in 1982 are existing 19 and anticipated 6. Then, it is further mentioned that the direct recruits are already in excess of their quota.

Therefore, from the two files of DPC of February, 1983 we can safely conclude that the promotees are considered only for promotion to their quota and not to the quota of direct recruits and further it is seen that the direct recruits were already in excess of their quota.

16. Then, we come to the next DPC which is relevant for our present purpose viz. DPC held in October, 1983. In the first sheet itself we find that there were 72 vacancies of which it has calculated that 58 belongs to promotion quota and 17 belongs to direct recruit quota, then they have anticipated three vacancies. Out of the 58 vacancies in the promotees quota in the selection process only 35 candidates passed. It is therefore, seen that it is a case of there being 58 vacancies for promotees and only 35 candidates were selected after the selection process. Instead of there being any excess promotion of promotees, it is a case of there being short fall in the promotees quota due to the selection process.

Then, we come to the last DPC with which we are concerned which took place in February, 1985. Here also we find from the DPC record that in February, 1985 there were 62 vacancies. Then it was found that direct recruits were already in excess and therefore, the promotees are entitled to 41 vacancies. We have already seen from the Recruitment Rules that the ratio between direct recruits and promotees is 3:1, therefore for 62 vacancies promotees are entitled to 15 or 16 posts only, but since direct recruits were already in excess of their quota, it has to be adjusted by giving more promotion to promotees. The details have been worked out and 41 vacancies were ear-marked for promotees. Therefore, even in this DPC also there is no Recruitment of promotees in excess of their quota. On the other hand,

we find that the direct recruits were in excess of their quota and not the promotees.

Therefore, from all the 3 DPCs pertaining to the present applicants we find that their promotions were not in excess of their quota at all and their promotions were well within the promotees quota. In such a case, the direct recruits cannot have any grievance about the promotion of the applicants and about treating their promotions as regular from the date of their initial ad hoc promotion.

17. The reason why the promotion of the applicants were shown ad hoc was that in the earlier 1982 DPC the promotees were shown as ad hoc. Therefore, the subsequent DPCs also showed the promotions of promotees as ad hoc only. No other reasons could be gathered or infered from the records as to why the promotions of the present applicants were shown as ad hoc. It was a case of promotion within quota, it was a case of promotion as per rules and by a regularly constituted DPC prescribed under the Recruitment Rules and the promotions were made against regular substantive vacancies and hence there was no rhyme or reason to show the promotion as ad hoc. As already stated the applicants have been continuously working in their promotional post from 1983 till now for the last 15 years. As pointed out by the Constitution Bench of the Supreme Court in the Direct Recruits case, if the promotions have been made as per Rules and continued for a number of years it must be held to be regular promotion or regular selection and the applicants are entitled to claim seniority from the date of their initial promotion though styled as ad hoc.

18. The only other point which requires to be considered is the strong reliance placed by the interveners and by the respondents on the official memorandum dt. 10.4.1989 issued by the Department of Personnel. That circular only says that in case of promotions, seniority counts either from the date of DPC or from the date of actual promotion whichever is later. The argument is that since the applicants were regularised by a DPC held in 1991, as per the Circular, the applicants will get seniority only from the date of DPC and not from the date of their earlier ad hoc promotion.

In our view, the argument is mis-placed. Even if we accept this argument as correct, it does not affect the applicants in any way. We have now held that the earlier DPC held in 1983 and 1985 was a valid and regular DPC. The subsequent DPC held in 1991 is of no consequence. If on the basis of the Judgment of the Supreme Court we hold that the applicants initial promotion itself was a regular promotion and the earlier DPC proceedings must be held to be regular DPC proceedings, then the 1989 circular makes no difference. If 1983 DPC is deemed to be a regular DPC and if 1983 promotion is held to be regular promotion then naturally, even if we apply 1989 circular, applicants will get seniority either from the date of DPC of 1983 or actual promotion of 1983. If we had accepted the respondents contention that the 1983 promotions was purely stopgap arrangement and was done dehors the rules and cannot give seniority to the applicants, then, of course the 1991 DPC would become regular DPC and then naturally the seniority will have to count from the date of regularisation. But

in view of our earlier finding that the initial promotions of 1983 or 1985 was done as per rules and by a regularly constituted DPC and in view of the law declared by the highest Court of the land in Direct Recruits case, the applicants are entitled to get seniority from the date of their initial promotion though styled as ad hoc. That is the dictum of the Supreme Court which is binding on everybody under Article 141 of the Constitution, the Circular of 1989 notwithstanding.

Taking any view of the matter, the applicants are entitled to claim their seniority from the date of their initial promotion and not from the date of the alleged regularisation in 1991.

19. In view of this finding of the applicants are entitled to succeed.

20. In the result, all the eight applications viz. (1) OA No.386/97, (2) OA No.760/97, (3) OA No.761/97, (4) OA No.528/98, (5) OA No.529/98, (6) OA No.530/98, (7) OA No.531/98 and (8) OA No.532/98 are hereby allowed as follows :

(1) All the applicants are entitled to get their seniority in the cadre of Preventive Officer Gr.I (OG) from the date of their initial ad hoc promotions.

(2) Since the applicants have put in the qualifying service of 8 years they are entitled to be considered for the promotion to the post of Superintendent of Customs on the basis of their seniority and if they are ~~out of~~ in the zone of consideration and otherwise found suitable.

(3) The interim order passed in all these cases keeping certain posts of Superintendents vacant is hereby vacated.

(4) The Respondents are at liberty to hold review DPCs for selecting candidates for the post of Superintendent of Customs and if applicants are within the zone of consideration and if they are found eligible and suitable for promotion they must be given promotion from the date of their immediate junior being given promotion subject to giving notional benefit of seniority in the cadre of Superintendent of Customs from the date junior got promotion and to grant whatever consequential benefits that are due to them as per rules.

(5) In the circumstances of the case there will be no order as to costs.

(D.S.BAWEJA)
MEMBER(A)

(R.G.VAIDYANATHA)
VICE-CHAIRMAN

B.