CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

ORIGINAL APPLICATION NOS.: 581/97, 762/97, 768/97 and 786/97.

Miscellaneous Petition Nos.: 697/97 in O.A. No. 762/97.
698/97 in O.A. No. 768/97.
703/97 in O.A. No. 786/97.

Dated this Monday the 19th day of January 1998.

CORAM : HON'BLE SHRI JUSTICE R. G. VAIDYANATHA, VICE-CHAIRMAN.

HON'BLE SHRI P. P. SRIVASTAVA, MEMBER (A).

Maheshchandra Gahatyari,
Preventive Officer under
Chief Commissioner of
Customs,
Mumbai.
(By Advocate Shri M.S. Ramamurthy)

Applicant in O.A. No. 581/97.

Jaspal Singh,
Preventive Officer in
Bombay Customs Commissionerate,
Working in Airport,
Sahar Airport, Sahar,
Mumbai.

(By Advocate Shri M.S. Ramamurthy)

Applicant in O.A. No. 762/97.

Narendra Singh,
Preventive Officer, in
Bombay Customs Commissionerate,
Working in Disposal section,
Bombay Docks, Masjid Bunder,
Mumbai.

(By Advocate Shri M.S. Ramamurthy)

Applicant in O.A. No. 768/97.

Dinesh Bhardwaj,
Preventive Officer in
Bombay Customs Commissionerate,
Working at Sahar Airport,
Sahar International Airport,
Mumbai.
(By Advocate Shri G. S. Walia)

Applicant in O.A. No. 786/97.

VERSUS

1. Union Of India through the Secretary, Government of India, Ministry of Finance, Department of Revenue, North Block, New Delhi - 110 011.	Respondents in all the four O.As.
2. Additional Commissioner of Customs (Personnel and Establishment), New Customs House, Ballard Estate, Mumbai - 400 038.	
3. Commissioner of Customs, (I) New Customs House, Ballard Estate, Mumbai - 400 038.	Respondents in O.A. Nos. 762/97, 768/97 and 786/97.
4. The Chief Commissioner of Customs, New Customs House, Ballard Estate, Mumbai - 400 038.	As Respondent No. 3 in O.A. No. 581/97.

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

INTERVENORS.

1. Nawal Kishor Singh 2. Vijay Bahadur Singh	Intervenors in O.A. Nos. 762/97, 768/97 and 786/97.

(By Advocate Shri M.P. Vashi.)

: ORDER :

| PER.: SHRI R. G. VAIDYANATHA, VICE-CHAIRMAN |

These are four applications filed under Section 19 of the Administrative Tribunals Act, 1985. The respondents have filed reply in one of the cases. In view of the urgency, namely the operation of the interim order, there is a request from both sides to pass final orders as early as possible. Hence, the Learned Counsel Mr. M.I. Sethna, appearing for the respondents, adopted the reply filed in one case as reply in all cases. Since the point involved is a common point, we have heard common arguments and we are disposing of these four applications by this common order. We have heard the Learned Counsel appearing for the applicants and also the Learned Counsel appearing for the respondents.

2. In all these four cases the applicants have come on transfer to Bombay as Preventive Officers from different places like Calcutta and Vishakapatnam. It is a case of these applicants making a request for transfer on compassionate grounds. The request was granted by the department subject to the condition that each applicant should give a written undertaking that he will forego his seniority in the present post and he will not claim the same in the new transferred place. Accordingly, all the applicants gave the undertakings and then they were transferred to Bombay Custom House.

It appears that the Government decided for upgradation of number of posts of Preventive Officers in order to remove stagnation in the grade of Preventive Officers and as a result, equal number of posts of Preventive Officers came to be abolished. According to the applicants, they have put in number of years of service in the previous Collectorate and they are entitled to the benefit of the same, both for the purpose of eligibility and for the purpose of seniority. Their case is that the department is denying them the past service and they are counting their service only from the date of posting at Bombay by relying on the undertaking given by the applicants and the Administrative Instructions of 1980.

3. It is the common case of the applicants that the undertaking given by them were taken by force or pressure and even otherwise, the undertakings are contrary to rules and they are illegal and cannot be enforced, as the transfer is governed by the 1958 instructions. It is, therefore, stated that not withstanding the 1980 instructions and the undertakings given by the applicants, they are entitled to claim the past services both for the purpose of eligibility and seniority.

(i) O.A. No. 581/97 is filed by Mahesh Chandra Gahatyari. He was originally appointed as a Preventive Officer at Calcutta Vishakapatnam on 18.11.1985. On his request for transfer on compassionate grounds, he was transferred to

Vide order dt 20/2/98.

Bombay as per orders dated 03.05.1989. Accordingly, he reported to duty at Bombay on 09.05.1989. He therefore wants his services, right from 18.11.1985, to be counted both for the purpose of eligibility and seniority for the purpose of promotion.

(ii) O.A. NO.: 762/97 is filed by Jaspal Singh, who was originally appointed on Sports Quota as Preventive Officer at Calcutta on 21.02.1975. On his request for transfer on compassionate grounds, he was transferred to Bombay as per Order dated 21.04.1989. He reported to duty at Bombay Custom House on 24.04.1989. He also wants his services from 1975 to be counted both for the purpose of eligibility and seniority.

(iii) O.A. NO.: 768/97 is filed by Narendra Singh. He was initially appointed as Preventive Officer at Vishakapatnam on 15.07.1985. On his request for transfer on compassionate grounds, he was transferred to Bombay as per Order dated 21.04.1989. He reported to duty at Bombay on 24.04.1989. He wants his services to be counted from 1985, both for the purpose of eligibility and seniority.

(iv) O.A. NO.: 786/97 is filed by Dinesh Bhardwaj. He was also appointed at Vishakapatnam as Preventive Officer on 18.11.1985. He was transferred to Bombay as per Order dated

03.05.1989 on his request on compassionate grounds. He joined duty at Bombay on 09.05.1989. He also wants his services to be counted from 1985, both for the purpose of eligibility and seniority.

4. The respondents have filed reply in only one case i.e. O.A. No. 762/97 and the same has been adopted in other cases, in view of the urgency as already stated. It is stated that, in view of the applicants being transferred on compassionate grounds on their own request and after they gave an undertaking, they cannot now claim the benefit of past service. The applicants are bound by the undertaking given by them. It is further stated that these transfer orders are made and undertakings are given in pursuance of the Board's instructions as per letter dated 20.05.1980. The applicants having accepted the terms of transfer and after having given the undertaking, they cannot now approach the Court for claiming the benefit of past service. It is stated that the promotion to the upgraded post is to be done as per rules, based on seniority. It is asserted that the applicants are not entitled to the benefit of past services for the purpose of seniority. It is, therefore, stated that the applicants are not entitled to any reliefs and all the applications are liable to be dismissed.

5. At the time of arguments, the Learned Counsel for the applicants questioned the correctness, legality and validity of the undertakings given by the applicants. It was submitted that these undertakings are contrary to rules and are invalid and illegal. It is asserted that the transfers are governed by the 1958 Rules and any undertaking taken in contravention of that rule is illegal. On the other hand, Mr. M.I. Sethna, the Learned Counsel appearing for the respondents fairly conceded that in view of the decisions of the Apex Court, the applicants are entitled to the benefit of past service only for the limited purpose of satisfying the eligibility criteria of 8 years. However, he maintained that the applicants cannot get the benefit of past services for the purpose of seniority and for the purpose of coming within the zone of consideration. He argued that sine this is a selection post, the department will short-list the candidates as per the guidelines given by the Ministry of Personnel and for the purpose of short-listing, the seniority is the criterion. Both the sides have relied on number of decisions in support of their rival contentions.

6. As already stated, now there is no dispute so far as the question of taking the past service for the purpose of eligibility is concerned. Under the 1983 Rules, one must have minimum of 8 years service in the feeder cadre, namely; Preventive Officer, to be eligible for being considered for promotion to the post of Superintendent (Preventive) in the Customs

Department. All the applicants have no doubt put in more than 8 years of service, if their total service is taken into consideration, both at Bombay and the previous place, therefore all of them are eligible for being considered for the purpose of promotion but for short-listing officers for the purpose of zone of consideration, the dispute is, whether only the service at Bombay should be taken into consideration or whether the total length of services should be taken into consideration.

7. In the light of the arguments addressed before us, the only question which falls for determination in these application is :

> Whether the applicants are entitled to the benefit of their past service for the purpose of counting their seniority for the purpose of promotion ?

8. As already stated, there is no dispute and infact, there cannot be any dispute about the previous service as Preventive Officer to be taken into consideration for the purpose of eligibility. There are number of decisions of the Supreme Court and also Full Bench decision of this Tribunal, where it has been consistently held that not withstanding compassionate transfer from one Collectorate to another Collectorate, the

service rendered in the previous Collectorate should be taken into consideration for the purpose of determining the eligibility for promotion. In the present case, the eligibility criteria is, one must have minimum 8 years service as Preventive Officer. Therefore, the applicants can add their service in the previous Collectorate to show that they have put in 8 years service for the purpose of eligibility. We will refer to some of the decisions of the Supreme Court bearing on the point. But there is serious dispute between the parties about the previous service being taken into consideration for the purpose of seniority or for the purpose of being considered for promotion to the next cadre.

9. The Learned Counsels appearing for the applicants placed reliance on some authorities in support of their argument that their previous service should be taken into consideration for the purpose of promotion. Strong reliance was placed on a decision of this Tribunal in Deshpande's case. which is an unreported judgement and it was rendered by this Tribunal in T.A. No. 511/86 dated 19.11.1987. In that case, the Bombay Collectorate of Excise was sub-divided into Bombay Collectorate and Pune Collectorate. The officials were not given option to remain in any one of the Collectorate. Then it was found that Mr. Deshpande, the applicant therein, had been transfered on request from Pune

Collectorate to Bombay Collectorate in the year 1972. He was asked to give an Undertaking that he will forego his entire past service for the purpose of seniority in the new Collectorate. Since he was denied promotion in the new Collectorate, he filed a Writ Petition in the High Court, which came to be transferred to this Tribunal after the Central Administrative Tribunal was constituted at Bombay. The question was, whether in view of the undertaking given by the applicant that he will forego his past service for the purpose of seniority, can he now get the benefit of his past seniority for the purpose of promotion. This Tribunal found that the said Undertaking given by the applicant was contrary to the then rules which were in force, namely 1958 Rules, and therefore, it has no legal validity and hence it should be ignored and he is entitled to the benefit of past services for the purpose of seniority and promotion. No doubt, this decision of this Tribunal came to be confirmed by the Supreme Court by Order dated 16.01.1990 in Civil Appeal No. 1697 of 1988. The Supreme Court has also observed that the Undertaking given by the applicant was contrary to the 1958 Government instructions.

In our view, this decision of this Tribunal or of the Supreme Court has no application to the facts of the present case. In that case it was found that the undertaking given was contrary to the Rules of 1958 which were in force at that time.

The transfer was effected in 1972 when the Rules of 1958 were operating but all the present transfers are effected subsequent to 1980 and after coming into force of the 1980 Instructions or Rules or guidelines.

10. It was argued on behalf of the applicants that the 1980 Rules do not supersede the 1958 rules. It may be that in so many words the 1980 Rules do not supersede the 1958 Rules, but according to us, the 1980 Rules holds the field and it has been accepted by the applicants and the Government and it is too late in the day to say that 1980 rules are not applicable. The 1958 Rules concerns itself only with transfer from one Collectorate to another. It does not specifically provide for compassionate transfer on request and about any officer being asked to give an undertaking to forego the past seniority but the 1980 Rules clearly provides for compassionate transfer on request of the officers, subject to giving an undertaking that he will forego the previous service. When new rules have come into force on a particular point, by necessary implication and inference, the 1958 Rules cannot be applicable in case of request on transfer when the Government has laid down specific rules in 1980. We must bear in mind that the 1958 Rules or Guidelines or Instructions are issued by the Central Board of

Central Excise and Customs and the same Board has issued the 1980 Rules. In the 1980 Rules it is clearly stated that it has now been decided to delegate the powers of inter-collectorate transfer on compassionate grounds to the heads of departments, then guidelines are given as to how such transfers should be effected. One of the important condition in these Instructions is - that the transferee will lose the benefit of past service for the purpose of seniority in the new place. In other words, he will be treated as a "new entrant" and he shall be placed at the bottom of the list of temporary employees in the new Collectorate. Then it also provides for the officer to give an Undertaking accepting these conditions.

In our view, the decision in the Deshpande's case mentioned above was rendered in view of the 1958 Rules and the transfer was in 1972, but we are concerned with the transfers of all the applicants subsequent to 1980 and the transfers were given as per the Instructions of 1980 guidelines. Therefore, our considered view is, that the applicants are bound by the transfer guidelines of the 1980 Circular and according to which, they cannot claim the benefit of past service for the purpose of seniority and promotion. We will presently point out that this position has been settled in view of number of decisions of the Apex Court, the Full Bench of the Tribunal and number of judgements of other Division Benches of this Tribunal.

11. At one stage, Mr. Ramamurthy, the Learned Sr. Counsel appearing for some of the applicants contended that the point canvassed by him is supported by the Full Bench decision in Balasubramaniam's case, by the Supreme Court in Renu Mallick's case and Poonappan's case, etc. We presently point out that none of these decisions help the applicants in any way so far as the question of seniority is concerned.

We will start with the Full Bench decision in Balasubramaniam's case, which is reported in 1987 (4) ATC 805. That was a case where the question was, in the case of a transfer, whether the service in the previous post should be counted for the purpose of eligibility. There was conflict of opinion between the Benches of Madras and Bangalore. This conflict was resolved by the Full Bench by stating that the service in the previous post should be considered alongwith the service in the new post for the purpose of eligibility, namely, to find out whether the official had minimum 8 years of service in that particular grade for being considered for promotion. As far as the question of seniority is concerned, the Full Bench has referred to 1973 Circular, which was produced in that case and held that in cases of transfer on compassionate grounds, the benefit of previous service will not be given to the transferee in the matter of fixation of seniority. The Full Bench clearly held that the 1973 Circular applies only to the question of seniority and it will not affect taking the past service for consideration regarding eligibility.

Even in para 8 the Full Bench's categorical findings is as follows :-

> "We are, therefore, of the view that on transfer, while the applicant would become the junior most L.D.C. in the Cochin Unit, he does not lose the benefit of his past service in the Bangalore Unit for the purpose of his promotion to the cadre of U.D.C."

In the same para the judgement clarified that the past service can be counted only for deciding eligibility.

The above Full Bench decision of this Tribunal came to be approved by the Supreme Court in the case of Union Of India V/s. C.N. Poonappan 1996 (1) SC SLJ 128. The Supreme Court has also clearly held that the past service could be counted in the case of a compassionate transfer only for the purpose of eligibility. It is pointed out that the previous service is not wiped out but it can be taken into account for the purpose of eligibility for promotion. Infact, the Supreme Court has observed in para 4 as follows :-

> "The fact that as a result of transfer he is placed at the bottom of the Seniority List at the place of transfer,does not wipe out his service at the place from where he was transferred."

Then it is pointed out that though he has lost the seniority, as mentioned above, the officer can get the benefit of past service only for the purpose of eligibility.

Therefore, we find that both the Full Bench and the Supreme Court have clearly ruled that the benefit of past service in the case of request transfer is available only for the purpose of eligibility and not for the purpose of seniority.

12. Then we have the decision of three Judges of the Supreme Court in the case of Gursharan Singh reported in 1995 (29) ATC 109. That was also a case where the dispute was about seniority in the case of official transferred on compassionate grounds. It appears, the department showed the transferred official on compassionate grounds as senior to Gursharan Singh. Then, Gursharan Singh filed a suit claiming that he is entitled for promotion by seniority and he was wrongly placed below the official who came on transfer on compassionate grounds. Reliance was placed on 1973 Circular, which clearly provided that in the case of transfer on compassionate grounds, the transferee will not get the benefit of past service for the purpose of seniority. The Supreme Court clearly held that on a plain reading of 1973 Circular, the transferred employee would not be entitled to carry his seniority from the original Unit to the new unit. It is further observed that the transferee would rank junior to the junior-most in the transferred unit. The Supreme Court also noticed that the past service may be considered for some purpose like retirement benefits, fixation of pay, etc. but for the purpose of seniority, the Supreme Court observed, the transferee employee would be treated as 'new entrant' in the Unit to which he is transfered on compassionate grounds.

13. The same view has be reiterated by the Apex Court in the recent judgement in the case of Renu Mallick V/s. Union Of India reported in 1994 (26) ATC 602. Here the Supreme Court was directly concerned with the 1980 Circular, with which we are now concerned in the present case. Renu Mallick's case was also a case from the Excise Department. The Supreme Court has quoted in the judgement the Circular of the Board dated 20.05.1980, which provides the guidelines for transfer on compassionate grounds including an Undertaking to be given by the officer. The Supreme Court interpreted the 1980 Circular and observed that the transferee is not entitled to count the services rendered in the former Collectorate for the purpose of seniority in the new charge. The transferee, observed the Supreme Court, should be treated as a new entrant in the Collectorate to which he is transferred for the purpose of seniority. Then, it is further observed by the Supreme Court as folbws :-

> "It means that the appellant would come up for consideration for promotion as per her turn in the seniority list in the transferred unit and only if she has put in two years service in the category of U.D.C"

Then, ofcourse, the Supreme Court observed that the past service can be taken into consideration for the purposes of determining eligibility. It is clearly declared that her seniority in the previous Collectorate is taken away for the purpose of counting seniority in the new charge.

In our view, Renu Mallick's case is directly on the point, since it has interpreted and given effect to the 1980 Circular with which we are concerned in all these cases. The Supreme Court has made it clear that the past service can be considered for eligibility and never for the purpose of seniority for promotion. It may be that in Balasubramaniam's case the Full Bench was concerned with 1973 Circular of a different department and in Gursharan's case the Supereme Court was concerned with 1973 circular of another department, but almost all the circulars touching the question of transfer on compassionate grounds lay down similar guidelines, namely, the transferee would become a new entrant in the new place and has to forego the past service for the purpose of seniority. But in Renu Mallick's case, we are concerned with 1980 Circular, which is directly applicable to all the applicants. All the applicants were transfered under the guidelines of 1980 Circular after taking undertaking by them, as provided in the 1980 Circular. The Supreme Court has given effect to 1980 Circular and declared the law that in view of the circular, benefit of past services cannot be given consideration for the purpose of seniority. In the face of this unequivocal and unambiguous declaration of the law by the Apex Court interpreting the 1980 Circular, the applicants cannot claim the benefit of past service in the previous Collectorate for the purpose of seniority for the purpose of promotion. It may be

that the past service holds good for other purposes like eligibility for promotion, retirement benefits, gratuity, fixation of pay, leave, etc.

14. Now we may notice some Division Bench decisions of this Tribunal of different Benches on the point under consideration.

In 1996 (32) ATC 17 (V.P. Joshi's case), the Bench of this Tribunal at Jaipur had occasion to consider a similar question where an officer had been transferred from Bombay Collectorate to Jaipur Collectorate belonging to Central Excise department on compassionate grounds. Identical question arose for consideration about the past service being considered for the purpose of promotion. The Bench considered the 1980 Circular dated 20.05.1980 and gave finding that the past service in such a case is available only for the purpose of eligibility and not for the purpose of seniority.

In another unreported judgement dated 25.07.1997 in O.A. No. 251/91 (Mihir Ranjan Chaudhari & Others V/s. U.O.I. & Others) and other cases, the C.A.T. Bench of Calcutta also had occasion to consider the 1980 Circular and held that the past service is admissible only to decide the question of eligibility for promotion and not for the purpose of seniority for the purpose of promotion. That was also a case where a Central Excise Inspector had

been transferred from Shilong to Calcutta on compassionate grounds.

In another case reported in 1997 (1) ATJ 113 (Manhoor J. Motiramni case) , the C.A.T. Bench of Jabalpur considered an identical case where an officer had been transferred from Bombay Collectorate to Indore Collectorate and took similar view that past service cannot be considered for the purpose of seniority.

15. The Learned Counsel for the applicants placed reliance on Deshpande's case, which we have already pointed out, is not applicable to this case since it was a case of transfer prior to the 1980 Circular and therefore, interpretation or application of 1980 Circular was not involved there. The Learned Counsel for the applicant also relied on some decisions which we will consider now.

In O.A. No. 601/93 (Damodar Singh V/s. Union Of India) on the file of C.A.T. Patna Bench, by judgement dated 20.07.1995 (unreported), the C.A.T. Bench at Patna considered the case of a transfer order of 1978 and granted the relief by following Deshpande's case, since that case was also concerned with the guidelines of 1958 Circular and therefore, the transfer being prior to 1980, the question of considering or applying the 1980 Circular

did not arise for consideration. Hence, that decision has no application to the facts of the present case.

16. Strong reliance was placed on a decision of the Division Bench of the Principal Bench, New Delhi. It is an unreported judgement dated 26.08.1997 in O.A. No. 651/97 filed by I.C. Joshi & Others. Even in this case, the Division Bench referred to Renu Mallick's case of the Supreme Court in para 5 of the judgement wherein it has been observed that the past services in the previous Collectorate can be used only for determining eligibility and it cannot be used for the purposes of giving seniority in the newly transferred Collectorate. Having observed like this, the Division Bench further observed in the subsequent paras of the judgement and in the operative portion that total length of service in the cadre should be taken into consideration for the purpose of granting promotion.

The Learned Counsel for the applicants made a suggestion at the bar, as a part of their argument, that this Tribunal should follow the decision of the Principal Bench or if it disagrees with it's view, then the matter may be referred to a Full Bench or a Larger Bench for appropriate decision. We have given our anxious consideration to this argument made by the Learned Counsels appearing

for the applicants. Our answer to this submission is in the negative for the reasons to be given hereafter.

17. The question of referring a matter to a Larger Bench arises when the law is unsettled and one Bench has taken one view and the other Bench is inclined to take a different view. The object of referring the matter to a Full Bench is to have a authoritative decision on a particular disputed point. But if it is a settled position of law on the basis of Supreme Court judgements and Full Bench judgements and other judgements of Division Benches of the Tribunal, then the question of again referring the same point to another Full Bench may not be necessary. Further, it may be pointed out that in this case, we have heard length arguments by more than half-a-dozen advocates for three or four days, which consumed more time and energy. Having done that exercise, it may not be desirable to leave the matter without expressing our opinion. There is also one more difficulty in accepting the suggestion made by the Learned Counsel for the applicant. We have passed an interim order directing the department not to hold the D.P.C. and not to make any promotions to the upgraded post till further orders.This order has been in existence for more than 6 to 8 months now. The order is affecting many of the officers of the department who have not appeared before this Tribunal. Infact, some of the officers of the department have

filed intervening applications in some of these cases requesting this Court to vacate the interim order since it is coming in the way of their promotions who are not parties to these cases. There are hundreds of other officers who are affected by the interim order and who are not parties before this Tribunal. In view of both sides pressing us for vacating the interim order or otherwise to dispose of the applications finally, by consent, we have taken all these applications of 1997 out of turn and heard length arguments. If now the matter is referred to a Full Bench and if the interim order is continued, then it may paralyse the department and affect the promotional prospects of many of the officers of the department, who are not parties to these cases. It is our experience that once the matter is referred to a Full Bench, it may take number of months for the Full Bench being constituted and then notice being sent to all the Tribunals and then the matter is heard and decided. It may go on for few months more or even a year. If such procedure is adopted, then the interim order will have to be continued for such a long time, which may affect the department and also other officers who are not parties to these cases. Some of the applicants have already got promotions by virtue of the interim order passed in some cases. If the interim order is continued, then they will have the benefit of continuing in the promoted post, though they are not entitled to the same in view of the 1980 Circular, which clearly says that past service has to be ignored for the purpose of seniority. This is one of the reasons which has weighed with us for not referring the matter to the Full Bench.

We have already seen that the Full Bench has already decided in Balasubramaniam's case, referred to earlier, that past service could be counted only for the limited purpose of eligibility and not seniority. When the matter is already settled by a Full Bench which has not been noticed by the Principal Bench,where is the necessity of referring the matter again to the Full Bench to decide whether past service should be counted only for eligibility or both eligibility and seniority? Further, the matter is now concluded by number of decisions of the Supreme Court in the case of Renu Mallick, in the case of Gursharan Singh and in the case of Poonapan. The decision in Poonapan's case and decision of the Apex Court in Gursharan Singh's case, have not been brought to the notice of the Principal Bench. When the decision of the Full Bench and when three decisions of the Apex Court are operating in the field, and ther is no doubt about the legal position that past service in the case of compassionate transfer could be considered only for eligibility and not for seniority, it would be waste of public time and money to again refer the matter to a Larger Bench when the matter is concluded by the Full Bench and three decisions of the Apex Court.
In addition to this, we have already referred to three decisions of the Division Benches of Jaipur. Calcutta and Jabalpur, where also consistent view is taken that past service is eligible only for

eligibility and not seniority. In view of this state of Law declared by the various Division Benches of this Tribunal, Full Bench of this Tribunal and three decisions of the Apex Court, we feel that no case is made out for again referring the same point to another Full Bench or Larger Bench for consideration.

18. As already stated, the applicants are entitled to count their past service in the previous Collectorate for the purpose of eligibility. Even if they have 8 years of Service as Preventive Officers and thereby get a right to have eligibility, the question is, whether they should be considered for promotion. In our view, mere eligibility criteria itself is not sufficient for one to be considered for promotion. Let us say that there are only 10 posts. About 200 officers may have the minimum criteria of 8 years service. Then can we say that all 200 persons who are eligible should be considered for 10 posts. The answer should be certainly in the negative. In such a case the principle of "zone of consideration" comes into play. The administration can limit the zone of consideration by adopting a reasonable multiple like 3 times or 4 times the number of vacancies. This principle has been provided in the Service Rules and has been judicially recognized and accepted in number of decisions. We only refer to one decision in S.B. Mathur's case reported in 1989 SCC (L&S) 183 where the Apex Court has observed that the administration can provide for limiting the zone of consideration

by proper multiples of vacancies on the basis of seniority. Now suppose, in the case of 10 vacancies if multiple of 3 is adopted, then only the first 30 persons as per seniority list would be considered for promotion, though 200 persons may be eligible.

19. As far as the present posts are concerned, the Learned Counsel for the respondents brought to our notice that as per Administrative Instructions and practice, 2 X + 4 is the criteria for limiting the zone of consideration on the basis of seniority. That means, if there are 100 vacancies, then 204 persons will be considered for promotion, though there may be 700 or 800 officers who have the minimum criteria of 8 years as far as eligibility is concerned. Here the seniority plays an important part. Even if all the applicants are eligible for consideration, they must come within the zone of consideration of of 2 X + 4 for being considered for promotion and this zone of consideration is prepared only on the basis of seniority. If the applicants' previous service cannot be counted for seniority, then they will be very much below in the seniority list and may not reach the zone of consideration.

20. The one and only contention which merit consideration is an interesting argument addressed by the Learned Counsel for the applicants that even if the applicants do not get seniority in the new Collectorate on the basis of 1980 Circular, still the

applicants total length of service in both the Collectorate should be taken into consideration in the case of promotion to upgraded post. The argument is that, these upgraded posts were created in order to remove stagnation in the post of Preventive Officers who could not get promotion for 14 years or 15 years or more. The Government prepared a scheme of upgradation by upgrading number of posts of Preventive Officers as Superintendent and simultaneously abolishing equal number of posts of Preventive Officers. Further, the scheme was prepared after taking statistics of the number of Preventive Officers who are remaining in the same cadre for 12 years or 13 years or 14 years or so. It was therefore argued that whatever may be the rules for normal promotion on the basis of seniority, for the purpose of promotion to upgraded posts, the total length of service should be the sole criterion or otherwise the very object of preparing that scheme is frustrated. The argument is no doubt attrative but after deeper scrutiny, we find that the argument cannot be accepted.

21. It may be that the upgraded scheme was prepared in order to remove stagnation in the post of Preventive Officers. It is only in the case of few officers who have gone from one Collectorate to another Collectorate on compassionate grounds, they are losing the benefit of previous service, but all other officers will get the benefit of upgraded scheme.

The upgraded scheme was not prepared to help officers transferred on compassionate grounds, on the other hand, the upgraded scheme is for the betterment of all the Preventive Officers. Therefore, the fact that some of the officers who are transferred on compassionate grounds cannot get this benefit, it cannot be said that the entire scheme is frustrated if the past service is not taken into account. This will apply only in the case of few officers who have gone from one Collectorate to another on compassionate grounds under the 1980 Circulars. Therefore, the argument that the entire scheme is frustrated has no force, since our decisions applies to only few officers who are transferred on compassionate grounds.

22. The Court or Tribunal cannot decide the recruitment procedure or the policy of promotion. It is for the Government to decide as to how promotions are to be done. The Government has issued different circulars and different recruitment rules for recruitment, promotion, etc. in different services from time to time. When making an upgradation scheme, it is open to the Government to modify the procedure to promotion to upgraded post. It is not for the Court or Tribunal to suggest that promotion to upgraded post must be in a particular manner. That is not the province or the jurisdiction of the Tribunal. The Supreme Court has in many cases held that on matters of policy, the Courts or Tribunal cannot interfere.

23. In the upgradation scheme, there is no such modified or changed procedure for purpose of making promotion. The restructuring order is dated 29.05.1997. In this letter, in para 1, the Government has stated about upgradation of 913 posts of Inspectors to the level of Superintendent in the Central Excise department and upgradation of 114 posts of Preventive Officers in the Customs Department to the level of Superintendent of Customs. Then it is provided that corresponding posts of Inspectors or Preventive Officers shall be abolished. The mode of promotion is provided in para 2, which reads as follows :

> "The promotion for filling up the upgraded posts of Superintendents of Central Excise/ Superintendents (Preventive) Customs shall be made after following the laid down procedure by the Commissionerates/Customs Houses. Also, the necessary exercise for effecting promotions would be held in such a way that it is completed immediately and all promotions are effected on the same date, i.e. 30.06.1997."

The Government has indicated that promotion should be made as per the laid down procedure. In other words, the Government order does not provide any new procedure or new modalities for promotion to upgraded posts. It simply states that promotion shall be made as per rules. Therefore, the Government will have to follow the existing rules for purpose of promotion and no new procedure or modified procedure is prescribed for the upgraded posts. How can the Tribunal suggest to the department to promote persons on the basis of total length of service when the normal rule for promotion is on the basis of seniority!?

24. We may take judicial notice that in some cases the Government has relaxed and prescribed modified procedure whenever it deems fit. For instance, we may refer to a case reported in 1988 (6) ATC 888 (R. Vishwanathan & Others V/s. Union Of India), where the Madras Bench of the Tribunal has noticed that in case of promotional avenue of Inspectors, the Government relaxed the rules and permitted some officers to be promoted, though they had not passed the departmental test. The Government, taking into consideration that certain officers are frustrated and are stagnating in a particular post, relaxed the rules in favour of senior most employees and permitted them to be promoted without passing the departmental test. This rule has been upheld by the Madras Bench. This clearly shows that whenever the Government wants, it will always relax the rules to a particular recruitment or to a particular promotion at any given point of time.

We may take judicial notice that we have come across many cases in our Tribunal where some restructuring was done in the Railways and in such cases, the rules were amended by providing promotions only on the basis of entries in the confidential reports without any written exams or tests. We have also come across the judgement of the Supreme Court reported in 1973 SCC (Lab) 1 [Bishan Sarup Gupta V/s. Union Of India & Others]. As can be seen from the facts of the case, the earlier rule was, promotion to be made on the basis of 2:1 ratio between direct recruits

and promotees. But subsequently, the Government passed an order to fill up 211 upgraded posts to Class-I post only by promotion from Class-II officers. The argument before the Supreme Court was that the Government could not have changed the policy of promotion of 2:1 between direct recruits and promotees by providing only one mode of selection, normally by promotion only. The Supreme Court pointed out that under the rule, promotions can be made by direct recruitment or promotion or by both and if the Government takes a policy decision to fill up certain upgraded posts only by promotion, it cannot be invalid. That means, even in the case of upgraded post, the Government can modify the procedure by taking a policy decision.

But if the Government does not take away policy decision regarding mode of filling up of upgraded posts and simply says that the upgraded post should be filled up by the ordinary existing rules, we have to follow the ordinary rules under the 1983 Recruitment Rules, which says that for the post of Superintendent, the promotion is by selection and the minimum criteria is 8 years service in the cadre of Preventive Officers. Then, for limiting the zone of consideration, one has to fall back on seniority. Unless and until the government modifies the procedure or prescribes a new procedure for filling up the upgraded post, the department has to follow only the normal procedure of selection based on seniority. We cannot interfere in a policy matter and direct the Government to ignore the seniority rules and take only

actual total length of service. We make take judicial notice that in many cases of restructuring of posts or upgradation of posts or in case of urgent necessity, recruitments/promotions are done on modified procedure or new rules issued by the Government. Unless such a modified procedure is issued by the Government, the normal rule of promotion by selection on the basis of seniority must be followed. In this connection, we may also refer to another recent judgement of the Apex Court which we have come across, which is reported in 1997 (1) SC SLJ 492 (Sandeep Kumar Sharma V/s. State of Punjab & Others). It appears that some of the Police officers in Punjab had died due to terrorist activities. In this connection, the Government of Punjab took a policy decision that in cases of such deaths of police officers due to terrorism, their relations should be given the benefit of joining the police force relaxing the recruitment condition. One such case of relaxation of service condition was challenged before the Punjab High Court. The Punjab High Court held that the relaxation was bad in law and quashed the appointment. Then the selected officer filed an appeal in the Supreme Court, which came to be allowed. The Supreme Court held that there is nothing wrong in the Government giving relaxation by taking a policy decision by recognizing the services rendered by those police personnel, who suffered at the hands of terrorists. They referred to the rules of recruitment where there was a specific clause empowering the Government to

relax the rules. In para 14 of the judgement, the Supreme Court observed as follows :

> "The power of relaxation even if generally included in the service rules could either be for the purpose of mitigating hardships or to meet special and deserving situations. ..... We too are of the view that the rule of relaxation must get a pragmatic construction so as to achieve effective implementation of a good policy of the government."

Therefore, the Supreme Court has conceded the power of the Government to relax the rules as a matter of policy. But in the present case, it is not shown to us, regarding upgradation posts, the Government has taken any policy decision as to how the promotion should be done in the upgraded post.

In this case we may also refer to the 1983 Recruitment Rules, on which reliance was placed by both the parties for different purposes. In particular, we may point out that Rule 8 of the 1983 providing promotion to the post of Superintendent of Customs clearly empowers the Government that it can relax any of the provisions of these rules with respect to any class or category.

It was, therefore, upto the Government to pass an order under Rule 8 that for the purpose of promotion to the upgraded post, the total length of service in all the Collectorates would be the sole criterion and not seniority only. Admittedly, no such

policy decision is taken by the Government and there is no order of relaxation issued under Rule 8 of 1983 Rules. Therefore, it is not for this Tribunal to evolve a new rule to direct the Government to take total length of service for promotion to the upgraded post. As already stated, the Tribunal has no power to enter into the arena of policy matter. It is entirely for the Government and Government alone to decide the policy of promotion to the upgraded post. If no such policy decision is taken by the Government, then ordinarily, the rule of promotion on the basis of seniority should be respected and followed. Hence, we reject the argument urged on behalf of some of the applicants that for the purposes of promotion to upgraded post, seniority should be ignored and only total length of service from all the Collectorates should be taken into consideration.

25. Mr. Walia who appeared for some of the applicants in these cases, also invited our attention to the decision of the Supreme Court reported in 1 LLJ (1991) SC 492 (Devdatta & Others V/s. State of M.P. and others) and contended that the Supreme Court has upheld the total length of service as the criteria for the purpose of seniority. According to us, that decision has no application to the facts of the present case. In that case, the question of request transfer from one Collectorate to another Collectorate or the case of technical resignation was neither raised nor

considered. It was a case where the post of some Development Officers were considered surplus and they were absorbed in the Sales Tax Department as Sales Tax Inspectors. The dispute was regarding inter se seniority between the existing Sales Tax Inspectors and these newly absorbed Sales Tax Inspectors. Further, a meeting was held by the heads of different departments and they decided as to how the seniority should be decided. In those circumstances, the Supreme Court observed that the total length of service should be taken into consideration. It was a special case where some officers from Revenue Department were brought into Sales Tax Department after declaring them as surplus and it was treated as a transfer from one department to another department. It was not a case of transfer on request on compassionate grounds. It was not a case of technical resignation. It was a case of absorption in one department and by a fiction to treat them as being transfered from the former department. Hence, this decision has no bearing on the point under consideration.

For the above reasons, we hold that the theorey of considering the total length of service from both the Collectorates for the purpose of promotion to the upgraded posts cannot be accepted and is liable to be rejected.

26. As rightly argued on behalf of the Intervenors by M.P. Vashi and the Learned Counsel

appearing for the official respondents, the applicants have no where challenged the vires of the 1980 Rules. Many of the applicants have referred to 1980 Rules under which they came to be transferred. As long as the 1980 rules holds the field, the applicants having given the Undertaking under the 1980 Rules agreeing to forego their past service, cannot now turn round and contend that the past service should be taken into consideration for the purpose of promotion. If they had not given the undertaking, they would not have been transfered at all. They cannot have the benefit of transfer to their place of choice and then want the previous service to be tagged on to the new service, contrary to the 1980 Rules. Therefore, the applicants' claim for promotion on the basis of service in the previous Collectorate cannot be accepted.

27. We may also mention that in three of these cases, third parties have filed applications as Intervenors, which are numbered as M.P. Nos. 697/97, 698/97 and 703/97. These intervenors have approached this Court since they are affected by the interim order passed in these cases. They have filed the intervening applications only to request this Tribunal to vacate the interim order. Now, today we have reached the conclusion that the applicants in all these cases are not entitled to

the benefit of past service for the purpose of promotion, though they are entitled to get the benefit of past service for the purpose of eligibility, the earlier interim order passed has to be vacated. Hence, the miscellaneous petitions are disposed of with the said observations.

28. In the result, O.A. Nos. 581/97, 762/97, 768/97 and 786/97 are hereby dismissed. However, it is made clear that the applicants are entitled to the benefit of service in the previous Collectorate only for the limited purpose of eligibility, as explained in the judgement. The interim order passed in these cases is hereby vacated. Miscellaneous Petition Nos. 697/97, 698/97 and 703/97 are disposed of subject to the observations made in para 27 above. In the circumstances of the case, there will be no order as to costs.

MEMBER (A). VICE-CHAIRMAN.

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