

OA 230/98

OA 230/98

CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NOS.: 230/98, 231/98, 232/98,  
233/98 AND 235/98.

Dated the 8<sup>th</sup> day of September, 1998.

CORAM : Hon'ble Shri Justice R. G. Vaidyanatha,  
Vice-Chairman.

Hon'ble Shri D. S. Baweja, Member (A).

Rakesh Kumar  
(Rakesh Kumar(II).P.O I  
(Custom House-Gr. C)

Residing at -

2/604, Radhakrishna Nagar,  
Malpa Hills No. 3,  
Off Mahakali Caves Road,  
Andheri (E),  
Mumbai - 400 093.

(By Advocate Shri G. R. Masand  
alongwith Shri S. Natrajan).

Prabir Kumar Mohapatra,  
Preventive Officer,  
Customs Department, Mumbai.

C/o. Posting Section,  
New Customs House,  
Ballard Estate,  
Mumbai - 400 038.

Residing at -

Flat No. 1295, Bldg. No. 35,  
Sector-VII, C.G.S. Colony,  
Antop Hill, Mumbai.

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

Yog Raj Karwasara  
(Supdt. Customs - Gr. B).

Residing at -

B-204, Archer Park,  
Village Hall Road,  
Kurla (West),  
Mumbai - 400 070.

(By Advocate Shri S. Natrajan).

.. Applicant in  
O.A. No. 230/98.

.. Applicant in  
O.A. No. 231/98.

.. Applicant in  
O.A. No. 232/98.

Om Prakash Yadav  
(Preventive Officer  
Custom House - Gr. C.).

Residing at -

C/o. Shri R. K. Kamra,  
2/604, Radhakrishna Nagar,  
Malpa Hills No. 3,  
Off. Mahakali Caves Road,  
Andheri (East),  
Mumbai - 400 093.

... Applicant in  
O.A. No. 233/98.

(By Advocate Shri G. K. Masand  
alongwith Shri S. Natrajan).

Tapan Kumar Nayak,  
Preventive Officer in  
Customs Department in Mumbai.

C/o. Posting Section,  
New Custom House,  
Ballard Estate,  
Mumbai - 400 038.

... Applicant in O.A.  
No. 235/98.

Residing at -

9-C/301, Neelam Nagar,  
Mulund (East),  
Mumbai - 400 081.

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

VERSUS

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

2. The Commissioner of Customs,  
New Custom House,  
Ballard Estate,  
Mumbai - 400 038.

... Respondents in all  
the O.As.

3. The Deputy Commissioner of  
Customs, Personnel &  
Establishment Department,  
New Custom House,  
Ballard Estate,  
Mumbai - 400 038.

4. The Chief Commissioner of  
Customs, New Custom House,  
Ballard Estate,  
Mumbai - 400 001.

... As Respondent No. 2  
in O.A. No. 232/98.

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

: 3 :

O R D E R

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

All these applications are filed under Section 19 of the Administrative Tribunals Act. Respondents have filed reply. Since common questions are involved in all these cases, they are being heard and disposed of by this common order. We have heard the Learned Counsels appearing on both sides.

2. All the applicants came to be appointed as Preventive Officers in the Customs Department on the basis of a competitive examination held by the Staff Selection Commission.

The applicant, Rakesh Kumar, in O.A. No. 230/98 was given the offer of appointment by letter dated 25.09.1985 and he actually joined service on 08.07.1986.

The applicant, P.K. Mohapatra, in O.A. No. 231/98 was given the offer of appointment by letter dated 25.09.1985 and he actually joined service on 03.09.1986.

The applicant, Yog Raj Karwasara, in O.A. No. 232/98 was given the offer of appointment by letter dated 27.04.1983 and he actually joined service on 04.07.1986.

The applicant, Om Prakash Yadav, in O.A. No. 233/98 was given the offer of appointment by letter dated 25.09.1985 and he actually joined service on 07.08.1986.

The applicant, Tapan K. Nayak, in O.A. No. 235/98 was given the offer of appointment by letter dated 25.09.1985 and he actually joined service on 04.08.1986.

Admittedly, in all these cases the applicants have joined service after the expiry of nine months. It is applicants' case that as per the letter of appointment, their seniority has to be maintained as per the merit list and not on the basis of date of joining service. It is also their case that right from 1986 they are shown in the seniority list published from time to time as per their position in the merit list. The same position was again shown in the draft seniority list of 1997. However, when the recent final seniority list was published on 25.02.1998, the position of the applicants have been changed and their seniority has been seriously affected.

3. It is pointed out that Rakesh Kumar's seniority has come down by 164 places from position at Sl. No. 730 in the draft seniority list of 1997 to position no. 994 in the final seniority list dated 25.02.1998. Similarly, R. K. Mohapatra has come down from Sl. No. 735 to Sl. No. 898, Shri Yog Raj Karwasara has come down from sl. no. 689 to 893, Om Prakash Yadav has come down from 749 to 897 and Tapan Kumar Nayak, applicant in O.A. No. 235/98 has been shifted from sl. No. 745 to 895 in the impugned seniority list. It is alleged by all the

applicants that the impugned seniority list dated 25.02.1998 is illegal and liable to be quashed so far as the position of the applicants is concerned. That is why, the applicants have approached this Tribunal praying for restoration of their seniority place as shown in the earlier seniority list of 1986-87 and again in the draft seniority list of 1997.

4. The respondents have filed reply justifying the action taken in issuing the impugned seniority list. Their case is that, since all the applicants joined service after a period of nine months, they cannot claim seniority as per the merit list but their place will have to be shown as indicated in the official memorandum dated 06.06.1978 issued by the Ministry of Personnel. That the respondents have correctly shown the seniority position of the applicants in the impugned seniority list as per O.M. of 1978.

5. The Learned Counsel for the applicants contended that as per rules and offer of appointment, the applicants are entitled to their seniority position as per the merit list. Their further contention is that, the respondents never thought of taking any action on the basis of the 1978 circular and such a contention was never inserted either in the offer of appointment or in the appointment order and further, no action was taken for the last 10 years and for the first time the applicants' seniority position is affected without even giving them any show cause notice and therefore,

the impugned seniority list is bad in law. The Learned Counsel for the respondents maintained that in view of the 1978 official Memorandum, the respondents have correctly shown the seniority position of the applicants in the 1998 seniority list. It is also stated that the applications are not maintainable since the applicants have not exhausted the departmental remedies. It was also argued that affected parties are not impleaded and, therefore, the applications are bad for non-joinder of necessary parties.

6. In the light of the arguments addressed before us, the points that fall for determination are -

- (i) Whether the applications are not maintainable for not exhausting statutory remedies?
- (ii) Whether the applications are bad for non-joinder of necessary parties?
- (iii) Whether the change of seniority position of the applicants in the 1998 seniority list is not sustainable and that they are entitled to the same seniority position as shown in the 1997 draft seniority list?
- (iv) What order ?

7. POINT NO. 1

It is true that Section 20 of the Administrative Tribunals Act provides that an official has to exhaust statutory remedies available to him, but there is no blanket bar of receiving an application without exhausting statutory remedies. What section 20 of the Administrative Tribunals Act says that - "ordinarily the Tribunal shall

not admit an application unless the official has availed the remedies available under the service rules." It is only an enabling provision and not a mandatory provision. There is no blanket bar for filing an application by a party who has not availed of alternate statutory remedies.

In the present case, the impugned seniority list was published on 25.02.1998. The D.P.C. meetings were scheduled to be held in March 1998 when promotions would take place as per the impugned seniority list. That means, the promotions had to take place in a week or two after the issuance of the impugned seniority list. If the applicants had given representations and waited till the orders were passed, then mischief would have been done in the D.P.C. proceedings to consider promotions on the basis of the impugned seniority list. That is why, the applicants were forced to approach this Tribunal immediately after the impugned seniority list was published, to challenge the same and seeking an interim order to stall any promotions on the basis of the impugned seniority list. Infact, the Tribunal passed an interim order directing that four posts of Superintendent of Customs should be kept vacant and not to be filled up till further orders. This was to safeguard the interest of four of the applicants who were hoping to get promotions on the basis of 1997 draft seniority list. As far as one of the applicants, namely - Yog Raj Karwasara is concerned, he had already been promoted as per the old seniority list and he was running the risk of being reverted on the basis of the new seniority list and, therefore, he had to rush to the Court. The Tribunal passed an interim order that he should not be reverted till further

orders. In these circumstances, the applicants were well advised to rush to the Tribunal without exhausting the remedies available under the service rules in Rule 20 in view of the urgency in the matter. Hence, in such a situation, the ~~applicant~~<sup>applications</sup> cannot be thrown out with a direction to the applicants to exhaust the remedies under Service Rules. Even otherwise, one of the Learned Counsel for the applicants brought to our notice that one of the applicants had given a representation against the new seniority list and it has been rejected by the department. Hence, no useful purpose will now be served by directing the applicants to make formal representation against the seniority list and then come to this Tribunal after the representations are rejected by the respondents. We know the stand of the respondents, as could be seen from the reply. It would be an empty formality to now direct the applicants to approach the department by giving representation and then come to this Tribunal, either after the expiry of six months or after the representation is rejected, whichever is earlier.

Having regard to the facts and circumstances of the case, we do not find any merit in the submission of the Learned Counsel for the respondents about maintainability of the applications and hence, point no. 1 is answered in the negative.

8. POINT NO. 2

It was argued on behalf of the respondents that since the applicants are challenging the seniority list, they should make either all the officials shown in the

seniority list or atleast some of them as party-respondents. It was therefore submitted that if persons to be affected are not made parties, then the applications are not maintainable due to non-joinder of necessary parties.

In these cases, the applicants have no grievance against any officials who are shown above or below them, either in the 1997 seniority list or in the impugned seniority list. The applicants are challenging the validity of the impugned seniority list only on the ground of principle, namely - whether seniority should be given on the basis of the merit list or not. According to the applicants, they are entitled to seniority position as per the merit list but according to the respondents, the applicants delayed in joining the services beyond nine months and therefore, their position is liable to be altered as mentioned in the O.M. of 1978. Here the question of seniority fully depends upon a legal principle and not due to any personal claims against any of the officers who are shown above the applicants in the impugned seniority list. In such a case, the impleading of other officials who are shown above the applicants in the impugned seniority list does not arise. If any authority is necessary for this proposition, that may be found in a decision of the Supreme Court reported in 1996 (1) SC SLJ 253 [ V.P. Shrivastava & Others V/s. State of M.P. & Others ] where the Supreme Court has clearly observed that - when the seniority list is challenged on a ground of principle, there is no necessity to implead other persons who are to be affected, as parties to the case. Hence, we find no merit on this point canvassed by the Learned Counsel for the respondents.

Accordingly, point no. 2 is answered in the negative.

9. POINT NO. 3

It is not disputed that right from 1986 till the date of the impugned seniority list, the applicants are being shown in the seniority list as per their position in the select merit list. It is only for the first time in 1998 the applicants' seniority is depressed and they are brought down very lower in the seniority list by applying the 1978 Official Memorandum.

No doubt, the applicants have not joined the service within nine months as mentioned in the 1978 Circular. Four of the applicants have given reasons as to why there was delay on their part in joining the service. The department has accepted their explanation and went on extending the time and ultimately, issued the appointment order and took the applicants to service. One of the applicants, Yog Raj Kawasara, his appointment was delayed due to police verification and pendency of criminal case and subsequently, he came to be appointed after the termination of the criminal case. It is not a case where because of the delay on the part of the applicants in joining service, the department declined to take them on duty or allowed the offer of appointment to lapse. It is nobody's case. It is common ground that applicants went on writing letters asking for extension of time due to personal reasons and the department went on accepting the explanation and gave extension of time and ultimately issued the appointment order and took the applicants to service. The department never thought of existence of 1978 O.M.,

much less, invoking the same at the time of appointing the applicants in 1986. Even as late as 1997 when the draft seniority list was published, the department never thought of invoking the 1978 O.M. and that is why the applicants' seniority position was correctly shown in the 1997 draft seniority list. We do not know as to how for the first time, after 11 years, wisdom dawned on the respondents to suddenly wake up in 1998 and apply the 1978 O.M. to depress the seniority position of the applicants. The question of delay and laches, particularly, in the matter of seniority list, assumes importance. It is one of the fundamental <sup>principle</sup> right in service jurisprudence that there should be some finality and some certainty in a matter like seniority list. Seniority list cannot be allowed to be hanging for years together. A seniority list cannot be re-opened or cannot be altered after lapse of considerable time. The respondents have not given any explanation or any reason as to why all of a sudden after 12 years they thought of changing the seniority position of the applicants and that too, without even giving them a show cause notice and asking their explanation and then passing an order. We are not impressed by the argument of the Learned Counsel for the respondents that there is no estoppel against a statute. It is not a case that mere applying a statutory rule. Change of seniority list after 12 years and that too, without hearing the affected parties, is a serious matter. Atleast in the 1997 Draft Seniority List the respondents could have shown their

intention to alter the position of the applicants on the basis of 1978 O.M. That atleast would have put the applicants on guard and call upon them to give explanation as to why their seniority position should not be depressed. There are many cases where Courts and Tribunals have refused to interfere in respect of disputes regarding seniority list after lapse of time (vide A.I.R. 1974 SC 2271 .. P.S. Sadasivaswamy V/s. State of Tamil Nadu, AIR 1975 SC 1269 .. Malcorm Lawrence Cecil D'Souza V/s. Union Of India & Others ). The Learned Counsel for the applicant also invited our attention to a decision of Kerala High Court reported in 1988 (3) SLJ 212 where the Kerala High Court has held that a department cannot re-open the question of seniority after lapse of decade.

10. Now we come to the main point pressed into service by Shri M.I. Sethna, the Learned Senior Counsel appearing for the respondents. He placed strong reliance on the 1978 O.M. The Official Memorandum is dated 06.06.1978. It could be found in Swamy's Book on Seniority and Promotion at Page 19. It is mentioned in the O.M. that some instances have come to the notice of the Government that candidates selected for appointment are delaying in joining the services. Then a question is posed as to what should be done, in case there is long delay in joining service by the candidates, on the point of seniority. Then the procedure is mentioned by putting five clauses in the said O.M., which are as follows :

- (i) In the offers of appointment issued by different Ministries/Departments, it should be clearly indicated that the offer would lapse if the candidates did not join within a specified period not exceeding two or three months.
- (ii) If, however, within the period stipulated, a request is received from the candidates for extension of time, it may be considered by the Ministries/Departments and if they are satisfied, an extension for a limited period may be granted but the total period granted including the extension during which the offer of appointment will be kept open, should not exceed a period of nine months. The candidates who join within the above period of nine months will have their seniority fixed under the seniority rules applicable to the service/post concerned to which they are appointed, without any depression of seniority.
- (iii) If, even after the extension(s), if any, granted by the Ministry/Department, a candidate does not join within the stipulated time (which shall not exceed a period of nine months), the order of appointment should lapse.
- (iv) An offer of appointment which has lapsed should not ordinarily be revived later, except in exceptional circumstances and on grounds of public interest. The Commission should in all cases be consulted before such offers are revived.
- (v) In a case where after the lapsing of the offer, the offer is revived in consultation with the Commission as mentioned in sub para (iv) above, the seniority of the candidates concerned would be fixed below those who have already joined the posts concerned within the prescribed period of nine months and if the candidate joins before the candidates of the next selection examination join, he should be placed below all others of this batch. If, however, the candidate joins after some or all the candidates of the next selection examination have joined, he should be -
  - (a) in cases of selection through interview, placed at the bottom of all the candidates of the next batch;
  - (b) in the case of examination, allotted to the next year's batch and placed at the bottom. "

The procedure says that an order of appointment should contain a clause that the appointment would lapse if the candidate does not join service within the specific period. Then clause (ii) provides for extension of time on the request of the candidate from time to time. Then clause (iii) says that appointment shall lapse if the candidate does not join within the stipulated time.

In the present case, the respondents never invoked clause (iii) and treated the appointment as lapsed due to delay on the part of the five applicants in joining service. No doubt, in the offer of appointment, there is a condition that the offer of appointment will be cancelled if it is not complied within the stipulated time. We have already seen that on the request of the applicants, time to join service was extended from time to time. At no time the respondents enforced clause (iii) of 1978 O.M. by declaring that the appointment has come to an end or it has lapsed.

Then comes clause (iv) which says that an appointment which is lapsed should not be revived later except in exceptional cases. Then we come to clause (v) which speaks of depression of seniority. It is only in clause (v) it is mentioned that seniority of the officers should be depressed if they joined service beyond the permissible period. Clause (v) clearly says that where an order of appointment has lapsed and it is revived in consultation with the Commission, then the seniority of the candidate will be depressed as mentioned in sub-clause (a) and (b).

In our view, clause (v) was never attracted to this case, since it is nobody's case that the order of appointment lapsed and subsequently it got revived by consulting the Commission. As already stated, the respondents did not treat the appointment having lapsed by enforcing clause (iii). Therefore, the question of reviving a lapsed appointment order never arose in this case. If there is no question of reviving a lapsed order, then clause (v) is not attracted to the case at all and, therefore, the question of depression of seniority does not arise in the peculiar facts and circumstances of these five cases.

11. It was open to the respondents to deny the request of the applicants for extension of time to join the service. It was open to the respondents to treat the appointment offers as lapsed as per clause (iii) after the expiry of the extended period or after the expiry of nine months. Then it was open to the respondents to revive the lapsed appointment order by consulting with the Commission and then only they could have applied clause (v) to depress the seniority positions of the applicants.

Since it is common ground that the appointment offers of the applicants never lapsed and it was never revived, the respondents have no right to invoke clause (v) for depressing the seniority position of the applicants. Hence, even if we apply the 1978 O.M., still clause (v) cannot be enforced,

since the applicants' offer of appointment was never treated as lapsed and revived later. Hence, our considered view is that, the respondents' action in depressing the seniority of the applicants in the impugned seniority list is illegal and unjustified. As already seen, the respondents did not take any action for eleven years and for the first time they sought to invoke O.M. of 1978 in 1988 and even then, their action is not as per the procedure mentioned in the O.M. and the action is not sustainable in law.

Hence, taking any view of the matter, we hold that depression of the seniority of the applicants in the impugned seniority list is not sustainable in law and liable to be set aside. The applicants are entitled to get their original seniority position as per 1987 seniority list and the draft seniority list of 1997.

Point No. 3 is answered accordingly.

12. POINT NO. 4

In view of our findings on points 1 to 3, the applications are to be allowed with a direction to the respondents to maintain the seniority position of the applicants as per merit list and as correctly shown in the seniority list of 1987 and draft seniority list of 1997. In all these cases, the applicants had sought interim relief for a direction to the respondents to consider their case for promotion.

An interim relief was granted directing the respondents to keep four posts vacant and then, in the case of Yog Raj Karwasara, that he should not be reverted on the basis of impugned seniority list. It was also brought to our notice that during the pendency of the O.A., D.P.C. meetings are held and promotions of other officers are considered, therefore, we have to take notice of the subsequent event and mould the relief accordingly.

As far as Yog Raj Karwasara, applicant in O.A. No. 232/98 is concerned, since we are upholding his seniority position as per the 1997 draft seniority list, his promotion should not be affected and he should not be reverted on the basis of the impugned seniority list.

As far as other four applicants are concerned, since four posts are ordered to be kept vacant as per the interim order passed by us, we will have to now direct the respondents to hold a review D.P.C. and consider the case of these four applicants for promotion to the post of Superintendent of Customs and in case these four applicants are found fit and get promoted, then their promotions should take effect from the date their immediate junior came to be promoted. They will be entitled to actual monetary benefits from the date of assuming charge in the promotional post, though they will be entitled to seniority and notional fixation of pay from the date their immediate junior came to be promoted.

13. In the result, all the five applications are allowed as follows :-

- (i) The depression of the seniority position of all the five applicants in the impugned seniority list dated 25.02.1998 is hereby held to be illegal and set aside.
- (ii) All the five applicants shall be given seniority position as per their merit list and as shown correctly in the seniority list of 1987 and in the draft seniority list of 1997.
- (iii) The respondents are directed to hold review D.P.C. meeting within a period of three months from the date of receipt of this order and consider the case of four applicants in O.A. No. 230/98 (Rakesh Kumar), O.A. No. 231/98 (Prabir Kumar Mohapatra), O.A. No. 233/98 (Om Prakash Yadav), and O.A. No. 235/98 (Tapan Kumar Nayak) for promotion to the post of Superintendent of Customs and then, if they are within the zone of consideration and suitable for promotion, then they should be given promotion from the date of promotion of their immediate juniors with notional fixation of pay from that date but they should be given actual monetary benefits from the date they actually joined the promotional post.

: 19 :

(iv) As far as applicant Yog Raj Karwasara in O.A. No. 232/98 is concerned, he should be continued in the promotional post and shall not be demoted or reverted on the basis of the impugned seniority list and he is also entitled to the same position as correctly shown in the seniority list of 1987 and draft seniority list of 1997.

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

(D. S. BAWAL)  
MEMBER (A).

( R. G. VAIDYANATHA )  
VICE-CHAIRMAN.

os\*