

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on : November 30, 2010*
Judgment Pronounced on: December 03, 2010

+ **W.P.(C) 1762/2008**

UOI & ORS. Petitioner
Through: Mr.A.S.Chandhiok, ASG with
Mr.R.V.Sinha and Mr.A.S.Singh,
Advocates.

versus

P.R.CHANDRASEKHARAN & ORS. Respondent
Through: Mr.C.Harishankar and
Mr.S.Sunil, Advocates for R-1.
Mr.J.L.Gupta, Senior Advocate with
Ms.Nidhi Gupta, Advocate for R-3.
Mr.Satish Kumar, Advocate for R-7,
8,9,11,21, 23 and 39.

W.P.(C) 1824/2008

UOI & ANR. Petitioner
Through: Mr.A.S.Chandhiok, ASG with
Mr.R.V.Sinha and Mr.A.S.Singh,
Advocates.

versus

SUNIL UKE Respondent
Through: None.

W.P.(C) 4718/2008

UOI & ORS. Petitioner
Through: Mr.A.S.Chandhiok, ASG with
Mr.R.V.Sinha and Mr.A.S.Singh,
Advocates.

versus

C.P.SRIVASTAVA & ORS. Respondent
Through: Mr.C.Harishankar and
Mr.S.Sunil, Advocates for R-1.
Mr.J.L.Gupta, Senior Advocate with
Ms.Nidhi Gupta, Advocate for R-3.
Mr.Satish Kumar, Advocate for R-7,

8,9,11,21, 23 and 39.

W.P.(C) 7419/2008

P.S.PRUTHI & ORS. Petitioner
Through: Mr.J.L.Gupta, Senior Advocate with
Ms.Nidhi Gupta, Advocate

versus

P.R.CHANDRASEKHARAN & ORS. Respondents
Through: Mr.C.Harishankar and
Mr.S.Sunil, Advocates for R-1.
Mr.A.S.Chandhiok, ASG with
Mr.R.V.Sinha and Mr.A.S.Singh,
Advocates for R-4 to 8.
Mr.Satish Kumar, Advocate for R-7,
8,9,11,21, 23 and 39.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. The litigating parties are directly appointed officers in the 50% quota allocable to posts in Grade VI Group A Service under the Customs and Excise Department of the Government of India. The inter-se battle being fought by them pertains to promotions to the post of Deputy Collector now renamed as Joint Commissioner. For a better understanding, the cadre structure of posts in Group A of the 'Indian Customs & Central Excise Group A Services' may be noted in a tabular form. The same is as under:-

<u>Grade</u>	<u>Previous nomenclature</u>	<u>Present nomenclature</u>
Grade VI (Junior Time Scale)	Assistant Collector	Assistant Commissioner
Grade V (Senior Time Scale)	Assistant Collector	Deputy Commissioner
Grade IV (Junior Administrative Scale)	Deputy Collector	Joint Commissioner
Grade III (Non-functional Selection Grade of Junior Administrative Grade)	Additional Collector	Additional Commissioner of Customs & Central Excise
Grade II (Senior Administrative Grade)	Collector	Commissioner of Customs & Central Excise
Grade I	Principal Collector	Chief Commissioner of Customs & Central Excise

2. It may be noted that appointment within Group A Services is 100% by promotion and to the lowest post in Group A i.e. the post of Assistant Collector now redesignated as Assistant Commissioner the method of appointment is 50% by promotion and 50% by direct recruitment. Senior-most officers in Group B are eligible for promotion as Assistant Commissioner and Superintendents of Central Excise Group B, Superintendents of Customs Group B and Customs Appraisers Group B from the feeder channel.

3. Three Original Applications being OA No.2456/2003, OA No.2072/2004 and OA No. 362/2005 filed by Shri Sunil Uke, Shri P.R.Chandrasekharan and Shri C.P.Srivastava, respectively have been allowed by the Central Administrative Tribunal vide impugned order dated 29th March, 2007, holding in the concluding paragraph 19 of the order as under:-

“19. After considering the rival contentions of parties and on perusal of records as well as in view of discussion made herein above, we do not find

justification in respondents' stand taken in their reply. On the other hand, we find weighty reasons and justification in the contention raised by applicants. Accordingly, OAs are allowed and we hold as follows:

(a) Vide order dated 13.08.1990, the Hon'ble Supreme Court directed respondents to fill up 157 posts of Deputy Collectors on the basis of "selection on merit" by constituting appropriate DPC from the list of officers within the zone of consideration and further observed that promotions so effected would be subject to **"review as a sequel to such further or final orders that may be made in these matters."**

(b) While disposing of the said writ petitions on 22.11.1996, All India Federation of Central Excise vs. Union of India & Ors. (1997) 1 SCC 520, the aforesaid interim order was neither varied nor modified. On the other hand, para 19 of said judgment would show that Government was directed to **"rearrange their inter-se seniority and promotions of respective direct recruits and promotees within their quota and consequential promotions in further higher services."**

(c) The Government was directed only to rearrange their inter-se seniority and not to disturb the manner of promotion and sequence in which promotions orders were issued particularly of direct recruit Assistant Collectors, later re-designated as Assistant Commissioners.

(d) The vacancies against which the applicants were promoted were prior to the year 2002. Paragraph 5 of the DOP&T OM dated 08.02.2002 specifically states that the said OM **"shall come into force from the date of its issue"**. In the circumstance, DPC held later while considering the officials was not justified to implement and follow the said OM.

(e) Impugned orders vide which respondents issued notification dated 03.05.2002 as well as rejecting applicants' representation are quashed and set aside.

(f) Respondents are directed to re-convene the DPC particularly for the next higher posts for which earlier DPCs had been held after 22.11.1996 i.e. the date when the Hon'ble Supreme Court pronounced the

aforesaid judgment in All India Federation of Central Excise case, without taking recourse to OM dated 08.02.2002 and as per the DOPT's OM of 10.04.1989 and regulate the promotions accordingly with all consequential benefits."

4. The Union of India has filed the three out of four captioned petitions challenging the said common decisions of the Tribunal disposing of three Original Applications. The aggrieved private respondents have filed the fourth Writ Petition being WP(C) No.7419/2008. For convenience we would be referring to the facts pertaining to the Original Application filed by P.R.Chandrasekharan and for purposes of illustration would be referring to P.S.Pruthi the first writ petitioner of WP(C) No.7419/2008, as agreed to by learned counsel for the parties; and needless to state the said facts are common to the Original Applications filed by Sunil Uke and C.P.Srivastava.

5. The challenge before the Tribunal was to an order dated 3.5.2002 as also an order dated 17.10.2002; the first being a Presidential Order pertaining to 'Indian Customs & Central Excise Service' officers who were officiating on ad-hoc basis as Joint Commissioner of Customs and Central Excise (Junior Administrative Grade) notifying that they stood regularly appointed as Joint Commissioners on regular basis *with effect from the date of commencement of the panel year*; the second being an order rejecting the representation of Shri.P.R.Chandrasekharan regarding seniority in the grade of Joint Commissioner as notified in the order dated 03.05.2002.

6. The origin of the instant dispute has its source to a seemingly unrelated event of the past. The seniority of the feeder cadre i.e. Superintendents of Central Excise Group B, Superintendents of Customs Group B and Custom Appraisers Group B was in dispute and as a result it impacted the

promotions to be effected from the three feeder cadre posts; and in turn the seniority in Group A - Grade VI posts was affected.

7. The issue of seniority on promotion of the Officers in the three feeder cadre posts was the subject matter of various writ petitions which were pending in the Supreme Court and the first one being WP(C) No.4532-33/1978. Thereafter two writ petitions filed in the year 1988 and one in the year 1990 got tagged on to the said writ petition. WP(C) No.4532-33/1978 challenged the existing rule for promotion and the two writ petitions which were filed in the year 1988 questioned the new rules which were promulgated in the year 1987.

8. As a result of non-finalization of the seniority list of the three feeder cadre services and the same having resultant impact as noted hereinabove, promotions to the post of Joint Commissioner (Grade IV) in Group A hitherto-fore called Deputy Collector could not be effected due to interim orders passed by the Supreme Court. Two Interim Applications being IA No.6/1990 and IA No.7/1990 were filed in WP(C) 4532-33/1978 praying for modification of the interim orders, which appear to have been passed from time to time, were filed in which Union of India informed the Court that 157 posts of Deputy Collector i.e. in Grade IV of Group A were vacant having serious effect on the collection of revenue and thus it was prayed that the Union of India be permitted to fill up the said posts and for which the Supreme Court was beseeched to pass appropriate directions. Moved by the pathetic cries of the Union of India, the Supreme Court disposed of both interim applications vide order dated 13.8.1990; noting in para 3 that the learned Additional Solicitor General submitted that some reasonable basis *though ad-hoc and subject to the final result* required to be evolved to fill-up these posts in the larger

interest of administration. Vide order dated 13.8.1990, the Supreme Court permitted filling up of 157 posts of Deputy Collectors by effecting promotions *on the basis of selections on merit* after constituting appropriate Departmental Promotion Committee, so however, that out of the said 157 posts, 57 posts are filled up by officers who are promotees from the feeder line in Group B posts and 100 by directly recruited officers. It was further directed that while so doing it would be ensured that no promotee to the cadre of Assistant Collector (Grade VI post in Group A) will find a place in the list higher than that of an officer directly recruited as Assistant Collector before the promotee and that the promotions would be purely ad-hoc and shall be subject to review as a sequel to such further or final orders as may be made in this regard. This was followed by another order dated 06.08.1991 in which the Supreme Court noted that though DPCs' were constituted and recommendations received, promotions were not made to fill-up 157 posts of Deputy Collectors on ad-hoc basis and finding no justification for the Union of India in not effecting ad-hoc promotions directed needful to be done within 15 days. In the concluding para of the order dated 6.08.1991 the Supreme Court clarified; *'since the assessment by the DPC is only to facilitate the ad-hoc promotion and these promotions themselves are liable to be reviewed pursuant to the final decision on the merits of the pending case, the deliberations of the DPCs' shall not be held conclusive against any person in the event of such review of promotions and that all the promotions will be subject to the final result of the pending cases'*.

9. Relevant would it be to note; and this fact is germane to the controversy which we need to decide, that the Supreme Court had permitted, though as an ad-hoc measure, promotions to be effected and had made it clear that the same was an

interim arrangement, but had clearly directed that the promotions should be on the basis of *selections on merit* and the reason for this appears to be that the Recruitment Rule in question which was in vogue when the interim orders were passed, vide Serial No.20, clearly mandated that appointment to Grade IV posts shall be made by promotion on the principle of Selection on Merit of officers in Grade IV of the service and the contemporaneous Office Memorandum dated 10.03.1989 stipulated the benchmark 'Good' with further clarification that officers graded as 'Outstanding' would rank en-block senior to those who were graded as 'Very good' and officers graded as 'Very good' would rank en-block senior to those who are graded as 'Good' and within same grading would maintain their inter-se seniority as per the feeder post. The result was that ad-hoc promotions made were upon the DPCs' assessing the directly recruited officers as also the promotee officers with reference to merit and with those who achieved 'Outstanding' being placed above those who achieved 'Very good', who in turn were placed above those who achieved 'Good'. Though the recommendations of the DPC are not before us, but evidenced from the fact that P.R.Chandrasekharan, Sunil Uke and C.P.Srivastava are litigating being aggrieved by the Presidential Order dated 3rd May, 2002, though junior to the writ petitioners of W.P.(C) 7419/2008, in the Promotional Order issued on 23.5.1991 were placed higher in ranking.

10. On 23rd May, 1991 an order was issued promoting Assistant Collectors to the post of Deputy Collector, clearly informing that the promotions were on officiating basis. 100 directly recruited officers holding the post of Assistant Collector were listed at seriatim and 36 promotee officers holding the post of Assistant Collector were listed at seriatim for further promotion. The names of Shri C.P.Srivastava, Shri

P.R.Chandrasekharan and Shri Sunil Uke were shown at Serial No.19, 22 and 62 respectively in the list of 100 directly recruited officers. That of Shri P.S.Pruthi is at Serial No.29.

11. The inter-se seniority dispute amongst the officers of the three feeder cadre services i.e. Superintendents of Central Excise Group B, Superintendents of Customs Group B and Customs Appraisers Group B, pending since 1978 was decided by the Supreme Court on 22.11.1996; the decision being reported as All India Federation of Central Excise vs. UOI & Ors. (1997) 1 SCC 520 in which the Supreme Court upheld the decision of the Competent Authority to allocate posts in the combined seniority to the persons holding posts in the three cadre posts in the ratio 6:1:2 for Superintendents of Central Excise Group B, Superintendents of Customs Group B and Customs Appraisers, respectively. The proposal that the rotation would be first six vacancies to Superintendents of Central Excise, the seventh to Superintendents of Customs and the eighth and ninth to the Customs Appraisers was also accepted. Rule 18(2) of the Indian Customs & Central Excise Service Group A Rules 1987 which was under challenge and pertained to the induction in Grade VI posts of Group A Services was directed to be amended to incorporate as aforementioned. All ad-hoc promotions made from time to time were directed to be reviewed. In para 18 and 19 of the decision the Supreme Court observed as under:-

“18. As stated above, we find that the above modified proposal is just, fair and equitable and accordingly we direct the Union of India to amend the impugned Rules so far as Group ‘A’ Service is concerned. Review all post 1979 ad hoc promotions to the post of Senior Superintendent/Assistant Collector in the promote quota in the light of the present proposal, redetermine the respective placement of the promotee officers in the combined Group ‘A’ seniority list and regularize accordingly the posts of ad hoc promotions.

19. In Group 'A' Service of the Customs and Excise Department, 50% of the cadre strength are filled by direct recruitment through Union Public Service Commission and the balance 50% are filled through promotion from Group 'B' cadres. Group 'B' Officers when promoted to Group 'A' Service, obviously have no right to occupy more than 50% of their prescribed quota. It would, therefore, be incumbent upon the Government to rearrange or regularize the seniority list in Group 'A' Service keeping the inter-se quota of the direct recruits and promotees intact and should not allow either to get any promotion in excess of their quota. The ad hoc promotions given to Group 'B' Officers in Group 'A' Service, pursuant to interim orders of this Court, would not, therefore, have any effect or prejudice the interests or rights of the direct recruits of Group 'A' Service while rearranging the seniority in Group 'A' Service as indicated in the judgment. It would, therefore, be of necessity that the Government should rearrange their inter-se seniority and promotions of the respective direct recruits and promotees within their quota and consequential promotions in further higher services. Their seniority be arranged accordingly."

12. Providence had ordained that litigation would continue and indeed it has. The Union of India took excessive time to re-workout the promotions in the 50% promotee quota in Group A Service after amending Rule 18(2) of the Indian Customs & Central Excise Service Group A Rules 1987 to bring the Rule in conformity with the ratio to be maintained, as per the decision of the Supreme Court, inter-se the three feeder cadre posts and seniority to be re-drawn as accepted by the Supreme Court. The list could be re-drawn somewhere in the year 2002 and by then an Office Memorandum dated 08.02.2002 came into existence superseding the Office Memorandum dated 10.03.1989. In regard to posts where mode of promotion was '*selection*' (selection-cum-seniority and selection by merit) the guidelines prescribed were that for Group A posts the benchmark shall be

‘Very Good’ and for the lower grades it would be ‘Good’. The Office Memorandum in question, it is but apparent, made a significant departure from the previous. Those who were ‘Outstanding’ and ‘Very Good’ came at par and all of them had to be clubbed together with inter-se seniority being the same as per the seniority in the feeder post. The ones who achieved the benchmark ‘Good’ could earn no promotion. Relevant would it be to note, we say so for the reason an argument was advanced, that the Office Memorandum dated 08.02.2002 was prospective and contemplated amendment to the Service Rules, evidenced by para 5 and 6 of the Office Memorandum, which two paragraphs read as under:

“5. The instructions contained in this Office Memorandum shall come into force from the date of its issue.

6. Ministries/Departments are requested to give wide circulation to these revised instruction for general guidance in the matter so that immediate steps are taken to amend the Service Rules/Recruitment Rules of various services/post/grades so as to appropriately incorporate the mode of promotion as ‘selection’ (in accordance with these instructions) in place of ‘selection by merit’ and ‘selection-cum-seniority’ (as was hitherto prescribed by the aforementioned OM dated March 27, 1997) as the case may be. The powers to amend Service Rules/Recruitment Rules in this regard are delegated to the Ministries/Departments, DOPT need not be consulted to carry out the required amendments.”

13. Treating the promotions effected on officiating basis pursuant to the Office Order dated 23.05.1991 as an interim measure and for the reason the seniority list (integrated) of Superintendents in the Customs, Excise and Custom Appraisers was revised and promotions allocable to their 50% quota in the promotional post in the lowest rung i.e. Grade VI in Group A

were effected and thereafter a revised seniority list of the promotees and direct recruits in Grade VI posts in Group A was drawn up, the Department reconstituted Departmental Promotion Committee and with reference to the year-wise vacancies for the panel year 1986-87 till the panel year 1991-92 and drew up fresh panel and since by then the Office Memorandum dated 08.02.2002 had come into force, at the DPCs', the benchmark for promotion considered was 'Very Good' and all those who achieved the benchmark were promoted retaining their seniority in the feeder post. Relevant would it be to note that the panel was re-drawn from amongst the eligible promotee and direct recruit officers and zone of consideration was restricted with reference to the vacancies in each panel year. The result was that Shri P.S.Pruthi earned a promotion to the post of Deputy Collector for the panel year 1987-88 and was placed at Serial No.11. Shri C.P.Srivastava and Shri P.R.Chandrasekharan could earn the promotion pertaining to the panel year 1989-90 and were placed at Serial No.8 and 40, respectively. Shri Sunil Uke could earn a promotion for the panel year 1990-91 and found a place at Serial No.43. Aforesaid stands reflected in the order dated 3.5.2002 notifying appointment on regular basis as Joint Commissioners.

14. It is thus apparent that Shri P.S.Pruthi became senior to Shri C.P.Srivastava, who in turn became senior to Shri P.R.Chandrasekharan and in turn who became senior to Shri Sunil Uke.

15. It may be noted that for the various panel years, vacancies filled up were as under:-

<u>Panel Year</u>	<u>No. of vacancies.</u>
1986-87	11
1987-88	11
1988-89	10
1989-90	57
1990-91	67

16. Shri P.R.Chandrasekharan filed a representation questioning his seniority being affected. In a nutshell he claimed that the promotions effected vide order dated 23rd May 1991 were on the basis of scrutiny by a DPC with selection being the criteria followed as per the then existing Office Memorandum dated 10.03.1989 and that the issue of promotion of the direct recruited officers in Grade VI of Group A posts could not be undone. He questioned the seniority of directly recruited officers who had been promoted under said Office Order being now undone. Additionally he pleaded that the year-wise vacancy had to be filled up as per the Rules and executive instructions in vogue for the panel year in question and thus he questioned the criteria for promotion being adopted as per the Office Memorandum dated 8th February 2002. He highlighted that the vacancy panel were for the panel years 1986-87 till 1991-92. Lastly, he submitted that the Office Memorandum dated 8th February 2002, vide paragraph 5 thereof, was clearly and demonstratively prospective in its operation and in the alternative he pleaded, with reference to para 6 of the Office Memorandum dated 08.02.2002, that the same required the Recruitment Rule to be amended for which he highlighted that the existing Rule 20 of the Indian Customs and Central Excise Service Group A Rules 1987, which provided the principle of '*selection on merit*' to be adopted for promotion to Group A posts in the service was not amended even till when the DPC met in the year 2002. He thus pleaded seniority of the directly recruited officers who were promoted as Deputy Collectors to be re-drawn with reference to the merit position as drawn by the DPC which met in the year 1991 and pursuant to the recommendations whereof the Promotional Order dated 23.05.1991 was issued. The representation was rejected vide WP(C) No.1762/08, 1824/08, 4718/08 & 7419/08

order dated 17.10.2002 informing him that the DPC which met in March 2002 was bound to follow the instructions issued by DOPT.

17. It may be noted that the Rejection Order dated 17.10.2002 does not highlight the issue, but as pleaded by the writ petitioners of W.P.(C)7419/2008 in para 4(xi), with reference to its Office Memorandum dated 08.02.2002, DOPT had clarified as under:

“It is clarified that the manner of assessment as prescribed in this Department’s Office Memorandum dated 8.2.2002 will be required to be observed by all original DPCs held on or after 8.2.2002 (including for preparation year-wise panels, where the DPCs could not meet in the relevant years). It is further clarified that ad-hoc promotions made due to non-finalization of seniority list in the feeder grade, are not to be compared with promotions ordered pursuant of an original DPC. Normally a DPC is held to make regular promotions after finalization of the seniority list and in such a case DOPT instruction dated 8.2.2002 will apply.” (emphasis supplied)

18. Being aggrieved by the fact that the promotion order dated 3.5.2002 and the rejection of their representations resulted in they loosing seniority, C.P.Srivastava, P.R.Chandrasekharan and Sunil Uke approached the Central Administrative Tribunal praying that the order dated 3.5.2002 be quashed as also the various communications issued to them rejecting their representation be quashed and directions be issued to the Union of India to maintain seniority in terms of the promotional order dated 23.5.1991. Needless to state the submissions which they urged were the same which they had stated in their respective representation against the promotion order dated 3.5.2002 and which contentions have been noted by us briefly in para 16 above, save and except a further submission urged, being that the promotions effected in the year 1991 were pursuant to interim orders passed by the

Supreme Court and that while disposing of the writ petition the Supreme Court, in para 19 of its decision, had only permitted the department to re-arrange the inter-se seniority of the promotees and the direct recruits and thus within the direct recruits the department could not have re-drawn the seniority.

19. The Tribunal allowed the three Original Applications and the crystallized reasons of the Tribunal are as to be noted in sub-paras (a) to (d) of Para 19 of the decision dated 29.3.2007, contents whereof have been noted by us in para 2 above.

20. Of the 4 reasons given by the Tribunal it is apparent that the first three pertain to the interim orders passed by the Supreme Court and the final directions issued in the writ petitions, lead matter being the writ petition filed by the 'All India Federation of Central Excise'.

21. Before dealing with the reasons given by the Tribunal it would be useful if we highlight a very important circumstance which has escaped the attention of the Tribunal. Though, the facts enwombing the circumstance have been noted by the Tribunal, but the circumstance has unfortunately being ignored.

22. The fact, as noted by the Tribunal, is that the integrated seniority list of the three feeder posts i.e. the post of Superintendent Central Excise, Superintendent of Customs and Customs Appraiser was unsettled, when by way of an interim order dated 13.8.1990, the Supreme Court permitted the department to fill up 157 posts of Deputy Collectors but clearly stated that the same would be ad-hoc and subject to final result. It is no doubt true that the Supreme Court directed that the ad-hoc promotions would be based on selection by merit and thus the persons who were promoted on ad-hoc basis earned the ad-hoc promotion on the basis of the process of selection and since the office memorandum 10.3.1989 was in vogue the assessment of merit was on the basis of the said office

memorandum. It is also a fact that 100 directly recruited officers to the post of Assistant Collector and 36 officers promoted to the said post were promoted, on ad-hoc basis. But the circumstance ignored by the Tribunal is that there is no material to show that the said 136 persons were subjected to the selection process with reference to year wise vacancies in the panel year, which as noted in para 15 above were 11 vacancies each for the panel years 1986-87 and 1987-88; 10, 57 and 67 vacancies pertaining to the panel years 1988-89 till 1990-91. It may be highlighted that $11+11+10+57+67 = 156$ i.e. the vacancies which the Supreme Court permitted to be filled up by ad-hoc promotion. There is no material to show that the individuals were considered with reference to a list of persons eligible to be considered for promotion. This circumstance is a very vital circumstance for the reason a settled seniority list is the sine qua non before a list of eligible persons to be considered for promotion can be drawn up and thereafter the select list prepared; and indeed this is the ethos of the clarificatory memorandum contents whereof have been noted in para 17 above.

23. What is the relevance of the aforementioned circumstance? Rather than being verbose, let us illustrate on the facts of the instant case.

24. For the panel year 1986-87 there were only 11 vacancies to be filled up by promotion from the Assistant Collectors to the post of Deputy Collector. If the panel was drawn as per the requirement of law in the year preceding the panel year 1986-87, for law requires a panel to be ready for the anticipated vacancies in the ensuing year, the department had to list 33 persons who were eligible to be considered for promotion; the reason being the rules required 3 times the number of vacancies to be the number of persons who were eligible to be

considered for promotion. Needless to state, the said 33 persons would be the integrated lot of directly recruited Assistant Collectors and those who had earned promotion to the post of Assistant Collector. These 33 persons had to be picked up with reference to their seniority position in the integrated list of Assistant Collectors, subject to they being eligible to be considered for promotion. Applying the norms to determine merit, select panel would have been prepared in which 11 out of 33 would have earned promotion. The remaining 22 would have to await further consideration the next year. As noted hereinabove for the panel year 1987-88, 11 vacancies existed and thus the process followed for the preceding year would have been re-run; and likewise when 10, 57 and 67 vacancies were filled up in the next 3 years. Relevant would it be to note that while so doing, the integrated seniority list of Assistant Collectors; having within its integrity the directly recruited Assistant Collectors and the promotee Assistant Collectors had to form the basis for drawing up the panel of the eligible candidates falling within the zone of consideration and further the select panel.

25. Admittedly, this did not happen when the promotion list dated 23.5.1991 was issued. It could not have so happened because the inter-se integrated seniority of the three feeder cadre posts who would have filled up 50% of the reservoir of Assistant Collectors was in litigation. Further, after the Supreme Court decided the pending matters on 22.11.1996, the position of the seniority of the persons from the three feeder cadre posts got settled and re-working the integrated seniority at the feeder cadre level, persons earned their respective place in the promotional post of Assistant Collector (re-designated as Assistant Commissioner) and in turn these persons got integrated with their directly recruited brothers. Thus, the

effect of the aforesaid circumstance noted by us would be as illustrated by us and we feel that the illustration would be sufficient to bring home the effect of the circumstance and we need not theorize any further save and except to reiterate that the select panel for the year-wise vacancies could not have been worked upon till the inter-se seniority dispute of the Superintendents Excise, Superintendents Customs and Customs Appraisers was settled and which came to be settled only in the year 1996 and thus obviously whatever happened prior thereto pursuant to the interim orders passed by the Supreme Court had to be an ad-hoc arrangement. The said ad-hoc arrangement could not have lasted beyond when the dispute got settled before the Supreme Court and as a result thereof the seniority in the feeder cadre was redrawn and resultantly the persons who came to be promoted as Assistant Collectors were known and thereafter these promoted officers were integrated with the directly recruited officers. The current events which took place in the year 1996 required a reflection back; to make the past conform to the present and the present to be the basis for the future. Ignoring the present and directly connecting the future with the past would not be acceptable.

26. Thus, the reference by the Tribunal, in the first three reasons advanced by the Tribunal, to the language of the interim orders and the final order passed by the Supreme Court is out of context and additionally for the reason, decisions by a Court are never treated as theorems or as statutes. Further, it is settled that a ratio of a decision is what is decided by a Court and not what can be logically deduced. In this connection we may highlight that nobody informed the Supreme Court that the ad-hoc promotions were affected not on the basis of a year wise vacancy panel and indeed there was no need to inform said fact to the Supreme Court because the ad-hoc promotions were by

way of an ad-hoc interim arrangement. It is true that in the interim order dated 13.8.1990 the Supreme Court had observed that the interim arrangement would be reviewed as a sequel to such further or final orders that may be made by the Supreme Court and that while finally deciding the writ petitions the Supreme Court directed to re-arrange the inter-se seniority of the promotees and direct recruits, within their quota, for further promotion. But the said observations and directions have to be understood in the context in which they were made. The context before the Supreme Court was the inter-se dispute between Superintendent Central Excise, Superintendent Customs and Customs Appraisers. Their inter-se dispute was having a resultant impact on the directly recruited Assistant Collectors for the reason two streams i.e. the stream of promotees and the stream of direct recruits were filling up the common reservoir of Assistant Collectors. The reservoir had to be filled up by water flowing from the two streams in the same proportion and then it had to flow ahead. It was not that the reservoir could be half filled by the direct recruits and made to flow ahead and then filled up half by the promotees and made to flow ahead. The further flow was hand in hand. It is in this context that the observations/directions of the Supreme Court which have been extracted by the Tribunal in sub-para (b) of Para 19 of its decision have to be understood and not as if the Supreme Court had in its mind that the inter-se seniority of persons promoted on ad-hoc basis as Deputy Collector/Joint Commissioner from amongst the direct recruits stood settled. We re-emphasize that the issue which confronted the Tribunal was not even born when the Supreme Court adjudicated the pending matter decided by it on 22.11.1996 and thus the decision of the Supreme Court could not be the foundation of any right in favour of any person, save and except the right

which Supreme Court settled inter-se the Superintendents of Excise, Superintendents of Customs and Customs Appraisers.

27. Dealing with the fourth reason given by the Tribunal in sub-para (d) of para 19 of its decision, it is no doubt true that till OM dated 8.2.2002 was issued, the field was occupied by the OM dated 10.3.1989 and it is no doubt true that the applicable Recruitment Rule lists the basis of selection to be merit for promotion to the post of Deputy Collector/Joint Commissioner and that merit had to be reckoned as per the OM dated 10.3.1989 and as extracted by us in para 9 above. Further undoubtedly it is settled law that vacancies have to be filled up as per the applicable Recruitment Rule or an office instruction or an office memorandum in force in the year when the vacancy accrued and unless a rule is amended with retrospective effect or an office instruction on an office memorandum is made applicable retrospectively, the vacancies have to be filled up from amongst the eligible persons and applying the law in force in the year of the vacancy. The legal position being settled, we may simply note that learned counsel for Sh.P.R.Chandrasekharan had cited numerous decisions of the Supreme Court which hold so and in respect whereof Sh.J.L.Gupta learned Senior Counsel and Sh.Amarjit Singh Chandhiok learned Additional Solicitor General conceded that the law is as noted by us and thus we do not note the said decisions. It is also correct that the OM dated 8.2.2002, far from being retrospective, vide para 5 thereof, clearly states that it has to apply prospectively and it is also true that Rule 20 of the Indian Customs & Central Excise Services Group A Rules 1987 has not been amended and the Rule continues to list the post of Deputy Collector/Joint Commissioner as requiring to be filled up by promotion on the principle of *selection on merit*.

28. Now, the principle of *selection on merit* is not a

jurisprudential concept, but flows out of the office memorandums issued by the Government from time to time and we highlight this with reference to the office memorandum dated 10.3.1989, which deals with criteria to be followed to determine merit for posts where promotion is made by the method of selection. In other words, what should be the principle to determine merit is a matter of policy and the Government/Executive is free to lay down a criteria subject of course to the same being reasonable and reasonableness as understood on the well-known '*Wednesbury's*' principle. Thus, it hardly matters whether the applicable Recruitment Rule was amended, notwithstanding paragraph 6 of the office memorandum dated 8.2.2002.

29. But the last limb of the argument needs to be dealt with and for which we find good logic advanced by Shri C.Harishankar, learned counsel who very ably espoused the cause of Shri P.R.Chandrasekharan and Shri C.P.Srivastava, with Shri Sunil Uke getting free benefit of good counsel. The submission was that in any case the vacancy panel had to be redrawn with reference to the law in force in the panel years and that 157 vacancies pertaining to the panel year 1990-91 and prior, up to the year 1986-87 had to be filled up on the criteria for selection as per the office memorandum dated 10.3.1989.

30. Logically and rationally the argument is correct. But, the lifeline of law is not logic or reason but life's experience and commonsense. Rules of law are meant to sub-serve the cause of justice and it is not unknown to judges to be encountering situations where logic and reason have to be abandoned and a practical approach adopted to resolve an issue. Problems encountered by Judges as aforementioned are also encountered by the Executive and faced with a situation where the logic or the

reason of a rule of law leads to a breakdown situation, the executive decision to ignore the applicable rule and craft a decision which does justice has been accepted by the Courts.

31. In the decision reported as 1990 (2) SCC 715 Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra & Ors., in para 23 it was observed: *'But if it becomes impractical to act upon it (? The rule) it is no use insisting that the authorities must continue to give effect to it. There is no sense in asking the performance of something which has become impossible. Of course, the Government, before departing from the rule, must make every effort to respect, and only when it ceases to be feasible to enforce it, that it has to be ignored'*. In the decision reported as AIR 1977 SC 2051 S.B.Patwardhan & Anr. Vs. State of Maharashtra & Ors., in para 51 the Court observed that Judges should not be unmindful of administrative difficulties faced by the executives and as long as there is fairness in action, executive decisions must be respected. We may only add that the decisions of the Courts where quota rota rule have broken down are best illustration of how Courts have accepted the practical reality of life and have ignored strict compliance with the letter of the law. Indeed, no Judge can put himself in a straitjacket, much less apply known and existing formula to remedy all ills. If the demand of a situation is to be rationalist, the Judge must wear the robes of a rationalist and where a situation demands, the Judge has to wear the robes of a situationalist Judge.

32. The extreme, could be the argument that the department should be called upon to re-work the panels commencing from the panel year 1986-87 after the integrated seniority list of the Superintendents Excise, Superintendents Customs and Customs Appraiser and from the three feeder cadre posts, 50% quota to the post of Assistant Collector/Assistant Commissioner be filled

up and further integrated seniority list of promotees and direct recruits as Assistant Collector be drawn up and then applying the norms as per O.M. dated 10.3.1989 fresh select panel be prepared year wise. Thus, it can be urged that in this way the letter as also the spirit of the law can be enforced.

33. But, we have a problem at hand. The three original applicants before the Tribunal have not questioned the promotions given to the promotee Assistant Collectors. In the absence of said persons being impleaded as parties, we cannot grant any relief which would be to their prejudice. We may note that it is not in dispute that the select panel prepared and notified on 3.5.2002 is with reference to the year-wise vacancy and contains the integrated names of Assistant Commissioners who reach the post by way of promotion and those who were directly recruited. It is also not in dispute that while drawing up the select panel the DPC considered the requisite number of eligible persons and all those who achieved the benchmark 'Very Good' were placed in the panel with reference to their seniority as Assistant Collector. This has happened for 6 successive panel years. It would thus be a contradiction in terms to retain the said select panel vis-à-vis the Promotee Officers and have a different panel for the Direct Recruited Officers. This would run contrary to the Jurisprudence of Service Law which makes it impermissible to segregate a homogenous class with reference to their past. It is in this context, we find full justification in the clarification issued by the DOPT as per its memorandum dated 8.2.2002, contents whereof have been noted by us in para 17 above. The office memorandum correctly highlights that regular promotions can only be made after finalization of the seniority list for the reason only when the persons in the zone of consideration are ascertained with clarity, can the further process of evaluating them on a given

criteria be completed. Under no circumstances can it be that directly recruited officers would earn promotion in the same panel year on a different criteria for merit and the promotee officers would earn promotion in the same panel year on a different criteria.

34. Thus, not on the letter of the law or the logic, but guided by the situation and requiring a situationalist approach to be adopted, we are of the opinion that the promotion order dated 3.5.2002 has to be upheld and maintained.

35. The writ petitions are allowed. The impugned judgment and order dated 29.3.2007 is set aside and OA No.2456/2003, OA No.2072/2004 and OA No.362/2005 filed by Sunil Uke, P.R.Chandrasekharan and C.P.Srivastava are dismissed, but without any orders as to costs. Parties shall bear their costs throughout.

PRADEEP NANDRAJOG, J.

SIDDHARTH MRIDUL, J.

DECEMBER 03, 2010
dk/mm