

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 4855 OF 2004

All India Customs Appraising Officers Federation & Anr.	...Petitioners
Versus	
Union of India & Ors.	...Respondents

**WITH
CIVIL APPLICATION (STAMP) NO. 19468 OF 2011
IN
WRIT PETITION NO. 4855 OF 2004**

Union of India & Anr.	...Applicants
versus	
All India Customs Appraising Officers Federation & Ors.	...Respondents

None present for Petitioners in WP.
Mr. Y. S. Bhate with Mr. S. P. Bharati for Respondents – UOI
in WP and for Applicants in CA.

**CORAM: SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

Date of Reserving the Judgment : 30 July 2018
Date of Pronouncing the Judgment : 02 August 2018

JUDGMENT :

1] On 26th July 2018, after noticing that the petitioners have not been appearing in the matter either through their representatives or their Advocates, we made the following order:

“1. None present for the petitioners. As a last chance, adjourned to 30th July, 2018. It is made

clear that on the next date, even if none appears for the petitioners, the petition may be disposed of.”

2] On 30th July 2018, when the matter was called out for final hearing, again, neither any representatives of the petitioners nor any Advocate on their behalf appeared in the matter. Taking into consideration that this is an old matter and since the petitioners were already put to notice, we proceed to dispose of this matter finally.

3] The challenge in this petition is to the judgment and order dated 18th June 2003 made by the Central Administrative Tribunal (CAT), Mumbai Bench, partly allowing Original Application No. 855 of 1998 instituted by All India Customs Officers (Direct Recruit Appraisers) Association - respondent no. 3 herein. The CAT, by the impugned judgment and order, has made the following operational order :

“16. Having regard to the discussion made and reasons recorded above, this OA is partly allowed and the impugned seniority list dated 12.11.1997 (Ex. 'A') is quashed and set aside directing the respondents to review positions of those who had been promoted beyond 50% of their quota on adhoc basis which is violative of the terms of Rule 4 (c) 1961 Recruitment Rules and General Principles of Seniority, 1959. The respondents are further

directed to complete the above exercise within a period of six months from the date of communication of these orders. No costs."

4] The records indicate that no interim relief restraining the implementation of the impugned judgment and order was made by this Court. However, it was made clear that the seniority list of appraising officers, which had since been finalised in pursuance of the impugned judgment and order would be subject to a decision in this writ petition. In this regard, reference can be made to the order dated 29th April 2005 in civil application no. 1937 of 2004, which reads as follows :

"The learned counsel for the applicants pressed for interim relief in this civil application. He invited our attention to the order dated 12th January, 2005 and submitted that liberty was granted to the petitioners to seek orders on civil application if the writ petition was not heard on 14.2.2005.

2. Suffice it to observe that the writ petition is not ripe for hearing as the petitioners have not yet served respondent No. 4 and, therefore, they cannot take shelter of the fact that since the writ petition was not heard on 14.2.2005, they are entitled to the interim relief.

3. As a matter of fact, the order dated 12th January, 2005 clarifies that any action taken shall be subject to the result of the writ petition. We are informed that now the seniority list of the appraising officers has been finalised. The said seniority list has been made subject to the decision in the writ petition. This fully protects the interest

of the appraising officers represented by the petitioners.

4. No further interim order needs to be passed in the civil application. It is disposed of accordingly."

5] Mr. Bhate, the learned counsel for the Union of India submits that the issue raised in this petition is squarely covered by the decision of the Hon'ble Supreme Court in the case of ***Chennai Customs Appraising Officers Association vs. Union of India & Ors. (2008) 7 SCC 278***. He submits that it is perhaps for this reason that the petitioners may not be interested in pursuing the present matter. Mr. Bhate submits that this petition warrants dismissal in the light of the ruling of the Hon'ble Supreme Court in the case of *Chennai Customs Appraising Officers Association* (supra).

6] On perusal of the ruling of the Hon'ble Supreme Court in the case of *Chennai Customs Appraising Officers Association* (supra), we find that the same, substantially answers the main contention raised by the petitioners in the present petition. However, at paragraph 44 of the SCC Report, the Hon'ble Supreme Court, has observed thus :

“44. We may, however, observe that we have not gone in to the merit of the matter which is pending before the Bombay High Court.”

7] In view of the aforesaid, even though, neither the petitioners representatives nor their Advocates are present, we have taken upon ourselves to examine the contentions raised by the petitioners in the present petition.

8] From the perusal of the averments as well as the grounds in the petition, it is apparent that the main grievance of the petitioner is that the CAT, in making the impugned judgment and order, has not followed the ruling of the Hon'ble Supreme Court in the case of ***Gaya Baksh Yadav vs. Union of India & Ors. (1996) 4 SCC 23***. Time and again, the petitioners have contended that the impugned judgment and order made by the CAT warrants interference because it misinterprets *Gaya Baksh Yadav* (supra) and the final conclusions are inconsistent with the directions issued by the Hon'ble Supreme Court in *Gaya Baksh Yadav* (supra).

9] If we compare these contentions with the contentions raised by the appellants in *Chennai Customs Appraising*

Officers Association (supra), then, it is quite clear that there is no significant or qualitative difference between the two sets of contentions. The contentions of the appellants in *Chennai Customs Appraising Officers Association* (supra), have been paraphrased in paragraph 13 of the SCC report and they read as follows :

“13. Mr. J.L. Gupta, learned Senior Counsel appearing on behalf of the appellants, in support of these appeals would raise the following contentions:

(i) In terms of the 1961 Rules, the promotees could be appointed upto 50% of the total cadre strength and their seniority in terms of Gaya Baksh Yadav (supra), was required to be determined on the basis of the doctrine of continuous officiation and not otherwise.

(ii) Gaya Baksh Yadav (supra) having clearly interpreted the 1961 Rules and having laid down the law that quota and rota rule would not apply and only the principles of continuous officiation would, no seniority list could have been published in contravention thereof.

(iii) The impugned seniority list should have been issued directly in terms of the 1961 Rules as the same did not contemplate any year-wise seniority list.

(iv) The seniority list would clearly show that whereas the names of persons stated in Serial Nos. 1 to 72 were mentioned in terms of the 1961 Rules, from Serial No. 73 onwards they have been prepared on year-wise basis which is not postulated under the 1961 Rules.

(v) 171 persons whose names appeared in the said

list and who had been officiating in the said posts on the basis of the orders of promotion issued pursuant to the recommendations made by the DPC, could not have been excluded therefrom.

(vi) Serial No. 235 onwards having been based on year-wise seniority is clearly violative of the dicta laid down in Gaya Baksh Yadav (supra) which would clearly go to show that they have been prepared on the basis of the existing vacancies and not the number of posts.

(vii) The seniority list containing the names of more than 1500 persons evidently cannot be said to be correct as even according to the Central Government, the sanctioned strength of the cadre of Appraiser is only 809.

(viii) The Tribunal has wrongly proceeded on the basis that the promotions had been made on an ad hoc basis and in excess of 50% quota."

10] The aforesaid contentions, are in no manner different or in any case, significantly or qualitatively different than the contentions set out in grounds A, B, C, D, E and F of the present petition. From the perusal of the grounds, the main contention of the petitioners is that the impugned judgment and order made by the CAT is not in consonance with the ruling of the Hon'ble Supreme Court in the case of *Gaya Baksh Yadav (supra)*.

11] In *Chennai Customs Appraising Officers Association (supra)*, the Hon'ble Supreme Court, in the context of the Rules 3 and 4 of the Customs Appraisers' Service, Class II

Recruitment Rules, 1961 (for short “the 1961 Rules”) has held that separate quotas for different categories of employees have not been fixed. If there is to be no ‘*quota*’, indisputably, the principles of ‘*rota*’ will have no application. Rule 4 of the 1961 Rules empowered the Board to determine the method of recruitment to be employed. Appointment was to be made for the purpose of filling up of vacancies in the services. It will depend upon the requirements for any particular period. The number of candidates required to be appointed by applying the methods envisaged under Rule 3 of the 1961 Rules is again a matter which was within the domain of the Board. Otherwise unguided jurisdiction of the Board, however, was sought to be controlled by clause (c) of Rule 4 providing that the percentage of posts to be filled by direct recruitment shall not be less than 50 per cent of the total cadre of appraisers. The 1961 Rules, therefore, seek to maintain a distinction between ‘*cadre*’ and ‘*vacancy*’. The cadre indicates the strength in the service which in turn would depend upon the determination by a competent authority on a periodical basis including the vacancies arising for various reasons including death, retirement, imposition of

punishment, etc. The Board was required to take a decision on a periodical basis as to how and in what manner the vacancies were to be filled up. The decision of the Board was required to be based on some rational criteria. It was also required to take into consideration the interest of the Department. The purpose for making recruitments was to be taken into consideration by the Board itself.

12] Further, in the context of Clause (c) of Rule 4 of the 1961 Rules, which is again, the most important provision relied upon by the CAT in the impugned judgment and order, the Hon'ble Supreme Court in the case of *Chennai Customs Appraising Officers Association* (supra) has held that apart from the restrictions on the power of the Board as contained in Clause (c) of Rule 4 of the 1961 Rules, if a decision had been taken by it to fill up even more than 50 per cent of the total cadre of Appraisers through direct recruitment, in absence of any allegation of *mala fide* or unauthorized purpose or fairness or reasonableness on its part, the same cannot ordinarily be called in question. Jurisprudentially there exists a distinction between post and vacancy. But posts have to be filled having regard to the

provisions contained in the 1961 Rules. It is to be made workable. The practice followed by the Board for a number of years cannot be set at naught by a stroke of pen. Let us consider the matter keeping in mind the legal principles as noticed heretobefore. Indisputably, promotions used to take place on a zonal basis. The direct recruits get entry in Class II services. They are appointed on an annual basis. Whereas one is a selection through competitive examination, the other is by direct recruitment by selection. Recruitment process is carried out by the Union Public Service Commission. The entry in service is in a post. However, when it comes to filling up of a post, the same would depend upon existence of vacancy. Rule 4 provides for the method to be adopted therefor. Clause (c) of Rule 4 of the 1961 Rules puts a rider thereupon, namely, how to do it. The mandate being that the percentage of direct recruitment shall not be less than 50%.

13] In *Chennai Customs Appraising Officers Association* (supra), the Hon'ble Supreme Court has discussed the issues of fixation of seniority in the light of its earlier ruling in *Gaya Baksh Yadav* (supra) and ***Direct Recruits Class II***

Engg. Officers' Association (1990) 2 SCC 715 at

paragraphs 35 to 43, which read as follows :

“35. On year to year basis, a requisition has to be made to the Union Public Service Commission intimating them the number of vacancies available. Keeping in view the nature of competitive examination, some posts may still remain vacant. Even in a case where there are, for example, one hundred vacancies, the number of direct recruits available may be much less. Other exercises for recruitment then have to be resorted to for filling up of the rest of the vacancies. It is only for that purpose, the Government takes the yearly vacancy position. For the said purpose, the quota has to be kept flexible. As the number of requisitions may exceed the number of posts which could be filled up through direct recruits, indisputably, the remaining vacancies must be filled up in terms of the Rules. Determination of the mode and manner thereof being flexible, the essential features of the recruitment process cannot solely depend upon the sanctioned strength, i.e., cadre strength. For the said purpose, determining working strength will have some relevance. We have noticed hereinbefore that the said system has been followed for a number of years. The exigibility of the said method is not in question. The exercises undertaken year after year remained unchallenged.

36. Submission of Mr. Gupta, that at no point of time, the promotees have exceeded 50 per cent of the cadre strength must be considered keeping in view the aforementioned statutory provisions. Promotees did not have any fixed quota. Had there been a quota fixed for the promotees, the matter might have been different. Various decisions of this Court whereupon reliance has been placed, thus, cannot be said to have any application whatsoever in a case of this nature. But, when no quota is fixed and from 1976 onwards there has been a progressive increase in the percentage of the direct recruitments, it cannot be said that for the purpose of giving effect

to the 1961 Rules, it was necessary to consider the question of exceeding or non-exceeding the 50 per cent quota.

37. No doubt, this Court in Gaya Baksh Yadav (supra) mandated that seniority had to be counted from the date of continuous officiation. But such a direction was issued keeping in view the fact situation obtaining at that stage. For the purpose of giving effect to continuous officiation doctrine, the entry to the service must be in accordance with law. If in particular years, having regard to the decision of the Board, the percentage of direct recruits were more than 50%, a fortiori the percentage of the promotees would come down. If they were recruited in excess of the vacancies which were required to be filled up in terms of the decision of the Board, the percentage of the promotees for the said year was required to be reduced.

38. Whereas all appointments in the direct recruitment quota being regular in nature, their seniority was to be counted from the date of their appointment, but so far as the promotees who had been promoted on ad hoc basis are concerned, they could not, in terms of the Rules, rank senior to the direct recruits.

39. Strong reliance has been placed by Mr. Gupta on the decision of this Court in Direct Recruit Class II Engg. Officers' Assn. Therein, this Court had no occasion to consider a situation of this nature. We may, however, notice Clauses (A), (C) & (E) of the directions issued by this Court, which have some bearing on the controversy, which are in the following terms: (SCC p. 745, para 47)

"47.(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the

seniority.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date."

As the ratio fixed for recruitment from different sources was not fixed, strict adherence to the principles enunciated therein was not possible to implement the same in a case of this nature. Similarly, no quota rule having been fixed, the question of breaking down thereof shall not apply.

40. Therefore, promotions may have to be continued whether on an ad hoc basis or otherwise so as to enable the Department to function effectively and efficiently. The promotees may continue in their service but when a question arises in regard to determination of seniority, the statutory rules must be given effect to.

41. In Gaya Baksh Yadav (supra), this Court opined: (SCC p. 33, para 16)

"16 ...Both would be entitled to placement in the joint seniority list on the basis of their continuous officiation."

This is subject to Rule 4(a) of the 1961 Rules.

42. In Gonal Bihimappa v. State of Karnataka & Ors.

[(1987) 3 SCR 885], this Court held: (SCC p. 224, para 19)

"19. ...In the present batch of cases the law being clear and particularly the mandate in the rule being that when recruitment takes place the promotee has to make room for the direct recruit, every promotee in such a situation would not be entitled to claim any further benefit than the advantage of being in a promotional post not due to him but yet filled by him in the absence of a direct recruit...."

43. We, therefore, do not find any apparent illegality in the judgment of the High Court. As we have interpreted the 1961 Rules on the touchstone of the decision of High Court in Gaya Baksh Yadav (supra), we do not think it necessary to deal with the individual submissions of the learned counsel for the parties."

14] Mr. Bhate points out that the CAT, in the impugned judgment and order has taken the view which is entirely consistent with the view now taken by the Hon'ble Supreme Court in the case of *Chennai Customs Appraising Officers Association* (supra). No distinguishing facts have been demonstrated. From the perusal of the grounds in the present petition, it does appear that the contentions raised are not significantly or qualitatively different from the contentions raised by the appellants in *Chennai Customs Appraising Officers Association* (supra). Accordingly, there is no case made out to interfere with the impugned judgment and order.

15] This petition is therefore dismissed. Rule is discharged.
There shall be no order as to costs.

16] In view of dismissal of the petition, the civil application taken out by the respondents - Union of India for expeditious disposal of this petition does not survive and is accordingly disposed of.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

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