

In the High Court of Judicature at Madras

Dated:-30-06-2008

Coram:

The Honourable Mr.Justice P.K.MISRA  
and  
The Honourable Mr.Justice M.SATHYANARAYANAN

Writ Petition No.34560 of 2004

1. M.Malathi  
2. G.Kumaraguruparan  
3. R.Sarangarajan .. Petitioners

Versus

1. P.Manikandan  
2. S.Nagamalai  
3. N.Pradeep  
4. G.Suryakumar  
5. Alexander Louis Basker  
6. Y.R.Venkatkumar  
7. M.Chelladurai  
8. Union of India rep. by  
Additional Commissioner  
(P&V) Office of the  
Commissioner of Customs,  
Custom House,  
Chennai.  
9. Commissioner of Customs  
Customs and Excise,  
Custom House, Chennai.  
10.The Registrar,  
Central Administrative  
Tribunal, Madras Bench,  
Chennai. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Certiorari to call for the records of the impugned order dated 3.9.2002 made in O.A.No.1077 of 2001 by the Central Administrative Tribunal (in short "Tribunal") and quash the same.

For Petitioner .. Mr.Vijay Narayan, S.C.  
for M/s.R.Parthiban.  
For Respondents .. Mr.P.V.S.Giridhar for R1 to R7.  
Mrs.R.Priya Kumar for R8 & R9.  
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O R D E R

M.SATHYANARAYANAN, J

The writ petition is filed for the issuance of writ of certiorari to quash the order dated 3.9.2002 passed by the Central Administrative Tribunal (in short "Tribunal"), made in O.A.No.1077 of 2001.

2. The petitioners herein who are not parties to the said Original Application obtained leave and filed this writ petition.

3. The facts in brief which are necessary for the disposal of this writ petition are as follows:-

The petitioners herein joined the services of the -Department of Customs and Central Excise, Mumbai Customs House. In Chennai Customs House, certain 100% "Export Oriented Units" (EOU) and "Container Freight Stations" are functioning on cost recovery basis and Preventive Officers and Examiners of the Customs Department are being posted in those places and the cost of posting these officers being recovered from the Container Freight Stations and Export Oriented Units. Consequent upon the said requirement, there were short term vacancies and the same were filled by promoting officers the feeder cadres namely Tax Assistants, Upper Division Clerks and Stenographers on ad-hoc basis.

4. In view of the vacancies created in the feeder cadre, the same were filled up by making promotions on ad-hoc basis and Lower Division Clerks with prescribed qualifying service were promoted as Upper Division Clerks on ad-hoc basis. The said arrangement has been done only to tide over the urgent situations and it is purely temporary in nature and it would not confer any permanent right to continue in the said post.

5. The respondents 1 to 7 herein were initially appointed as Lower Division Clerks in the year 1988 and in the year 1995 and they were appointed as Upper Division Clerks on ad-hoc basis due to ad-hoc promotion of regular Upper Division Clerks as Preventive Officers.

6. The respondents 1 to 7, whose services as Upper Division Clerks on ad-hoc basis were not regularised, filed O.A.No.1077 of 2001 before the Tribunal, praying for the relief of regularisation of their services in the post of Upper Division Clerk with effect from their initial date of ad-hoc promotion in the year 1995 with all consequential benefits. The Tribunal by its order dated 3.9.2002, allowed the said application and directed the respondents 8 and 9 to regularise the services of respondents 1 to 7 from the date of their

initial date of ad-hoc promotion and it was implemented on 1.10.2002. Therefore, by virtue of the order of regularisation, respondents 1 to 7 along with 43 others were regularised with retrospective effect. The respondents 8 and 9 placing reliance upon the above said order of the Tribunal, further regularised the services of 55 Lower Division Clerks as Upper Division Clerks from the date of their initial ad-hoc promotion on the ground that they are similarly placed like that of respondents 1 to 7. Thereafter, respondents 1 to 7 along with other Upper Division Clerks were promoted as Preventive Officers on ad-hoc basis vide order dated 20.12.2002. The petitioners herein aggrieved by the above said order of the Tribunal has filed this writ petition.

7. Mr. Vijay Narayan, learned Senior Counsel appearing for the petitioners submitted that respondents 1 to 7 cannot be granted regularisation from their initial date of ad-hoc promotion since there were no substantive vacancies in the cadre of Upper Division Clerk in the year 1995. It was further submitted by the learned senior counsel that the Upper Division Clerks on regular basis had been promoted on ad-hoc basis as Preventive Officers in the year 1995, but their services were regularised only in the year 2002 and therefore it is clear that they were holding the post of Upper Division Clerk till the year 2002 and substantive vacancies in the said cadre arose only after their regularisation in the higher post of Preventive Officer in the year 2002.

8. The learned senior counsel appearing for the petitioners also submitted that the ad-hoc post of Preventive Officer/Examiner on cost recovery basis is purely a temporary arrangements and it is always possible for those Container Freight Stations and Extra Oriented Units to become sick and in that event, persons holding the ad-hoc post are liable for reversion. The learned senior counsel appearing for the petitioner stressed the point that total number of Upper Division Clerks working on ad-hoc basis and regular basis did not exceed the sanctioned strength and the impugned order of the Tribunal is contrary to law. The learned senior counsel further contended that the regularisation with effect from the date of their initial promotion, is contrary to Recruitment Rules for the reason that in the year 1999 itself the issue was examined and since there were no regular vacancies in the cadre of Upper Division Clerks, regularisation of Upper Division Clerks promoted on ad-hoc basis could not be done. The sum and substance of the arguments advanced on behalf of the petitioners is that the Tribunal ought not to have ordered regularisation as the regular vacancies are not available and that the ad-hoc promotion is purely temporary in character, regularising the candidates promoted on ad-hoc basis amounts to actual promotion to the post, which is not at all possible.

9. The learned senior counsel appearing for the petitioners placed reliance upon the judgments of the Hon'ble Supreme Court of



India reported in

(i) 1992 Supp (1) Supreme Court Cases 272 - Keshav Chandra Joshi and others vs. Union of India and others,

(ii) 1992 Supp (1) Supreme Court Cases 304 - A.N.Sehgal and others vs. Rajeram Sheoran and others,

(iii) (2004)10 Supreme Court Cases 734 Sanjay SK.Sinha-II and others vs. State of Bihar and others and

(iv) (2006)10 Supreme Court Cases 346 Uttaranchal Forest Rangers' Association and others vs. State of U.P. and others.

In those decisions it has been held that fortuitous circumstances of their holding the grade post carrying the same designation or scale of pay or discharging the same duty, would not entitle them to be included in the service and that criteria followed in ad-hoc promotions was not same as that for regular promotions. It was also held that when the promotion is outside the quota, the seniority has to be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous and the previous promotion would be regular only from the date of the vacancy which arose within quota and seniority is to be counted from that date and not from the date of his earlier promotion or subsequent confirmation. The ad-hoc/stopgap promotion made in case of promotion quota and regularisation of such promotion was also held to be invalid.

10. In the judgment reported in (2004)10 Supreme Court Cases 734 Sanjay SK.Sinha-II and others vs. State of Bihar and others it has been held that "when the posts to which appointments were to be made were not available or non-existent, there was no appointment to the service, much less substantive appointment and, therefore, such appointees cannot be given seniority from the purported date of their appointment".

11. In the judgment reported in (2006)10 Supreme Court Cases 346 Uttaranchal Forest Rangers' Association and others vs. State of U.P. and others it has been held that "promotion given in excess of quota must be treated as ad hoc and seniority cannot be given on the basis of such ad hoc promotion and retrospective seniority cannot be granted to promotees from the date vacancies arose when they had not even borne on the cadre so as to adversely affect direct recruits, who had been appointed validly in the meantime". Therefore, according to the learned senior counsel for the petitioner the impugned order passed by the Tribunal is unsustainable in law and is against the service jurisprudence.

12. Per contra Mr.P.V.S.Giridhar, learned counsel appearing for the respondents 1 to 7 submits that the official respondents

aggrieved by the order dated 3.9.2002, made in O.A.No.1077 of 2001 had filed W.P.No.19871 of 2004 and the same was dismissed by this Court on 13.9.2004 holding that respondents 1 to 7 were promoted to the post of Upper Division Clerks on ad-hoc basis in accordance with Rules only after they were selected by DBC. The official respondents aggrieved by the dismissal of writ petition No.19871 of 2004 had filed Special Leave Petition in S.L.P.No.15828 of 2005 before the Hon'ble Supreme Court of India and the same is pending adjudication and the writ petitioners herein have also been allowed to intervene in the said S.L.P. The learned counsel appearing for the respondents 1 to 7 further submitted that various pronouncements of the Hon'ble Supreme Court of India reported in

(i) AIR 1987 SCC 1399 - State Bank of India vs. Yogendra Kumar Srivastava and others,

(ii) (1998) 4 Supreme Court Cases 456 - Jagdish Ch.Patnaik and others vs. State of Orissa and others,

(iii) V-1990 (2) - The Direct Recruit Class (II) Engineers Officers' Association and others vs. State of Maharashtra and others,

(iv) (2008) 8 Supreme Court Cases 25 - Rudra Kumar Sain and others vs. Union of India and others and

(v) (2004) 1 Supreme Court Cases 245 - P.N.Premachandran vs. State of Kerala and others, wherein it has been held that "a person who was not part of a particular cadre, has no locus standi to assail the promotion or seniority of a person in that cadre". The learned counsel appearing for the respondents 1 to 7 further submits that respondents 1 to 7 belonged to ministerial cadre during the relevant period and even though there was restructuring of post whereby two cadres have been merged into restructured post of Tax Assistant on 13.1.2003, the writ petitioners herein were not part of the Ministerial cadre either in the year 1995 or when the respondents 1 to 7 were initially promoted as Upper Division Clerks or on 3.9.2002, the date on which the Tribunal directed their regularisation with effect from 1995. The learned counsel for the respondents 1 to 7 also submitted that in view of the judgment reported in (2000) 8, Supreme Court Cases 25, even if a person is promoted to a post in accordance with the Rules, the entire period of his service would count for seniority unless the initial appointment is a stop-gap arrangement. It was further submitted by the learned counsel appearing for the respondents 1 to 7 that the writ petitioners are guilty of delay and laches as they have chosen to invoke jurisdiction of this Court after an unexplained delay of four years. Therefore, it was prayed that the writ petitions deserve to be dismissed.

13. We have carefully considered the rival submissions and also perused the materials available on record. The fact remains that challenging the vires of the impugned order passed by the Tribunal in O.A.No.1077 of 2001, the respondents 8 and 9 herein had filed W.P.No.19871 of 2004 and this Court vide order dated 13.9.2004 has dismissed the same and challenging the vires of the same, a Special Leave Petition was filed in S.L.P.No.15828 of 2005 and is pending adjudication and the writ petitioners herein were also allowed to intervene in the said S.L.P., since the challenge to the vires of the order passed in O.A.No.1077 of 2001, which is also the subject matter of challenge in this writ petition, has ended in finality in the form of dismissal by this Court, we are not inclined to interfere with the order passed by the Tribunal. Moreover, the order dated 13.9.2004 in dismissing the W.P.No.19871 of 2004 filed by the official respondents challenging the vires of the order passed in the said original application is pending adjudication before the Hon'ble Supreme Court of India in S.L.P.No.15828 of 2005, in which the petitioners herein were also allowed to intervene, they can work out their remedy in the said Special Leave Petition.

14. Therefore, the writ petition is dismissed. But in the circumstances, there will be no order as to costs.

Sd/-  
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

gr.

To

1. The Additional Commissioner (P&V) Office of the Commissioner of Customs, Custom House, Chennai.
2. Commissioner of Customs Customs and Excise, Custom House, Chennai.

3.The Registrar, Central Administrative Tribunal, Madras Bench,  
Chennai.

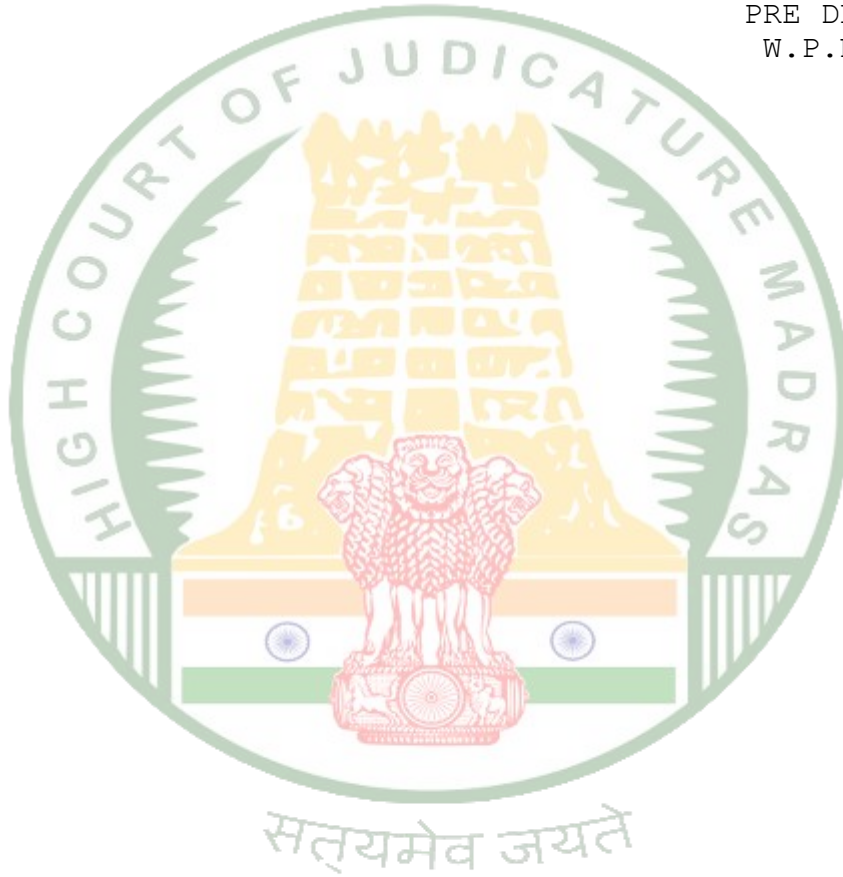
+ 1 CC To Mr.R.Parthiban Advocate SR NO.33117

+ 1 CC To Mr.P.V.S.Giridhar Associates, Advocate SR NO.33271

+ 1 CC To M/s.R.Priyakumar Advocate SR NO.33947

PRE DELIVERY ORDER IN  
W.P.No.34560 OF 2004

SS {CO}  
TP/7.7.08.



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