

Gaya Baksh Yadav

Vs

Union of India and Others

Civil Appeals No. 257 of 1988

(CJI A. M. Ahmadi, M. M. Punchhi, K. Ramaswamy JJ)

08.05.1996

JUDGMENT

PUNCHHI, J. -

1. This is another manifestation of the never-ending dispute between direct recruits and promotees, arising in this batch of 5 appeals, directed against the judgment and order dated 28-5-1987 [Lal Bulchand Shivdasani v. Union of India, (1987) 4 ATC 402] of the Central Administrative Tribunal, Principal Bench, New Delhi.
2. A representative petition, representing the interests of the promotee officers, belonging to the Customs Appraisers Service Class II, was filed before the Central Administrative Tribunal, Principal Bench, New Delhi, challenging Circular No. A-23011/86-AD-II(A) dated 22-5-1986 issued by the Ministry of Finance (Department of Revenue), Government of India, containing principles regarding "Promotion of Appraisers of Customs to the Indian Customs and Central Excise Service, Group A", for quashing of the pursuant "All India Combined List of Appraisers" circulated therewith, and for a direction to the Government of India to prepare a fresh seniority list in accordance with law, on the basis of length of service, quashing promotions of some of the respondents therein to the post of Assistant Collector of Customs and Central Excise as also for a corresponding direction to promote the promotee-applicants to such posts, giving them the benefit of revised seniority with retrospective effect.
3. A glimpse of the service-related history would be useful for a thorough grasp of the problem. There existed Customs Houses in the metropolitan cities of Bombay, Madras and Calcutta at a given point of time, established by the Government of India, and manned by members of the Customs Appraisers Service. As far back in 1936, the Central Board of Revenue, by order, had established the manner of recruitment to the Customs Appraisers Service to be done from two sources, i.e., 50 per cent by departmental promotion, 25 per cent directly from experts and 25 per cent by means of competitive examination or selection by the Public Service Commission. It was also provided in the said order that the percentage laid down denoted the maximum and the Collector of Customs would not be bound to recruit until the maximum is reached, particularly in the case of recruitment by promotion. In actual practice, however, this order had been acted upon as if providing 50 per cent posts for promotees and 50 per cent for direct recruits, whether they be experts or coming by competitive examination or selection by the Public Service Commission.
4. In 1940, the Government of India issued a general circular for determination of relative seniority of candidates appointed by direct recruitment and by promotion. In that circular, it was demonstrated that :

"Where in a department two permanent or quasi-permanent vacancies occur, even simultaneously, and the first vacancy in accordance with the rotation is for direct recruit, the direct recruit will rank in seniority above the promotee, even though he joined his post after the promotee who had been promoted and confirmed."

On 12-12-1959, the Government of India issued another circular containing amongst others, some general principles for determining the seniority of various categories of persons employed in Central services. Those were effective from the date of their issue and not retrospectively. One of the principles projected in this circular of 1959 was with respect to relative seniority of direct recruits and promotees providing that relative seniority of direct recruits and promotees shall be determined according to the rotation of the vacancies between direct recruits and promotees, which shall be based respectively on the quota of reservation for each given in the recruitment rules. It was further explained that a roster shall be maintained based on the reservation for direct recruits and promotees for promotion in the recruitment rules. Where, for example, the reservation for each is 50%, the roster will run as (i) promotion, (ii) direct recruitment, (iii) promotion, (iv) direct recruitment and so on. Appointments were thus required to be made in accordance with the aforesaid roster and seniority determined accordingly. It is thus deducible that whether it be by the circular of Government of India of the year 1940 or that of the year 1959, seniority was to be determined by working the rotational system depending upon the respective quota reserved for direct recruits and promotees.

5. In accordance with the 1959 Circular, the Collectorate of Bombay Customs House, under orders of the Central Board of Revenue, prepared a seniority list in the year 1963. Certain promotee Appraisers of the Customs Department of the Government of India challenged the seniority list of 1963 by means of a petition under Article 32 of the Constitution before this Court contending that the rotational system had resulted in discriminatory treatment against them with the consequence that promotees of much longer service in the cadre of Appraisers were put in the seniority list below direct recruits with much shorter service, which offended the equality rule with respect to opportunity guaranteed under Article 16(1) of the Constitution. The dispute focussed and resolved can be seen in *Mervyn Coutinho v. Collector of Customs* [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] a decision by a five-Judge Bench. The contention of the Union of India in response was that in a service where recruitment is partly by promotion and partly by direct recruitment, the system of fixing seniority by rotation has been adopted and that this pattern was being followed in a number of services under the Union. It was also urged that there is nothing discriminatory in such a system and no denial of equality of opportunity by following the rotational system, for determining seniority in such circumstances. This Court in *Mervyn Coutinho* case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] agreed with the Union of India and the scheme of the 1959 Circular. This Court held that where recruitment to a cadre is from two sources, namely, direct recruits and promotees and rotational system is in force, seniority is to be fixed as provided in the explanation by alternatively fixing a promotee and direct recruit in the seniority list. By the adoption of the rotational system this Court did not see any violation of the principles of equality of opportunity enshrined in Article 16(1) of the Constitution. The argument that the system resulted in anomalies was rejected and it was viewed that such a situation had developed since direct recruitments had not kept pace with the quota fixed and had they kept pace, there would have been no anomalies in fixing the seniority. This Court then handling the question observed as follows :

"The question therefore narrows down to this : Can it be said that there is denial of equality of opportunity which arises out of the fortuitous circumstance and which is not a vice inherent in the rotational system? We are not prepared to say that the

rotational system of fixing seniority itself offends equality of opportunity in government service. Any anomalies which may have resulted on account of insufficient recruitment of direct recruits in the past cannot in our opinion be a ground for striking down the rotational system, which, as we have said, does not itself amount to denial of equality of opportunity in the matter of employment in government service. It is regrettable that some anomalies have appeared because of insufficient recruitment of direct recruits in the past in this particular service. But that in our opinion can be no reason for striking down the seniority list prepared in 1963 which is undoubtedly in strict accordance with the rotational system based on the fixed quotas for recruitment of direct recruits and promotees. The order of the Board of 1963 on the basis of which the impugned seniority list of Appraisers has been prepared clearly lays down that 'the principle of determination of seniority of the direct recruits and the promotees inter se in the prescribed ratio of 1:1 should be worked out'. This order is in accordance with the circular of 1959 and as we have said already, there is no inherent vice in the principle of fixing seniority by rotation in a case where a service is composed in fixed proportion of direct recruits and promotees."

6. The other grievance of the promotees in Mervyn Coutinho case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] was in relation to the promotional cadre of Principal Appraisers. There was only one source of recruitment thereto, i.e., by promotion from the cadre of Appraisers. It was therefore ruled that when the source of recruitment of Principal Appraiser is one, namely, from the grade of Appraisers, there is, therefore, no question of any quota being reserved for the two original sources and in their cases the rotational system could therefore not apply, and rather the normal rule would apply, i.e., that a person promoted to a higher grade gets his seniority in that grade according to the date of promotion, subject always to his being found fit and being confirmed in the higher grade after the period of probation is over. In such a case it was continuous appointment in the higher grade which determined seniority because of the source of recruitment being one. The departmental method by which seniority in the grade of Principal Appraisers was contrarily fixed was struck down as it denied equality of opportunity.

7. It would not only be relevant but pertinent to note here that even though Mervyn Coutinho case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] was not fought and defended by the promotees and direct recruits respectively in a representative capacity, or even relating to any particular Customs House, it was a decision plainly rendered in relation to the 'Service' as established and governed under the orders of the Government of India, issued from time to time, when there were no statutory rules governing the subject till 1961, when for the first time, the Customs Appraisers Service Class II Recruitment Rules, 1961 appeared on the scene. This Court in Mervyn Coutinho case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] was seemingly aware of the existence of those rules, since those had been referred to in the counter then filed by the Union of India, but those apparently were not employed in determining the spectrum of the seniority dispute then existing. There is, therefore no reference to them at all in that judgment. One of the reasons perhaps could be that in the 1961 Rules, there is no specific rule for determination of seniority. Though Rule 3 thereof lays down four methods for recruitment to the service, Rule 4 mandates that no appointment shall be made to the service, or to any post borne on the cadre of the service, by any method not specified under Rule 3. Additionally, clause 3 of Rule 4 provides that the percentage of posts to be filled by direct recruitment by competitive examination, or by selection otherwise than by competitive examination, shall not be less than 50 per cent of the total cadre of Appraisers and the remaining posts may be filled by any other method mentioned in Rule 3. The

rule having forbidden direct recruitment getting less than 50 per cent, necessarily direct recruitment, could, in some events, be even more than 50 per cent. The rule casts a preference and leaning towards direct recruitment and guarantees 50% allocation. The promotees have to remain content with the remainder, if any, left after satisfying the 50% allocation or more to the direct recruits. Here discernibly lies the shift and the discardance of the rotational rule, the rule accepted in Mervyn Coutinho case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749], in the given event, valid from 15-8-1947 (earlier confirmed Appraisers being left undisturbed) upto the coming into force of the 1961 Rules and questionably afterwards.

8. It is not disputed that on the basis of the orders of the Central Board of Revenue of the year 1963, as approved by this Court in Mervyn Coutinho case, seniority lists were drawn by the respective Customs Houses established in the country. The next promotional avenue then respectively available to Appraisers was the post of Principal Appraiser which was a Grade D post, promotion to which was made on regional basis by the respective Customs Houses. The Grade of Principal Appraiser however was abolished on 14-9-1970. The Appraisers thenceforth were made eligible for promotion directly to the post of Assistant Collector of Customs, a Group A post, in the Indian Customs and Central Excise Service. Since the said service was an All India Service need arose to prepare an all-India list of Appraisers working in the Customs Houses. A decision in that direction was made by the Ministry of Finance, Department of Revenue and Insurance, vide circular dated 28-2-1973. The following principles were laid down for the preparation of an All India list of Appraisers for promotion to the Class I service :

1. Direct recruitment Appraisers belonging to three different cadres were arranged in the order of their rank in the select list prepared by the Union Public Service Commission. This was done taking into consideration that direct recruits' list is made on all-India basis.
2. The name of promotee Appraisers belonging to the different cadres were so placed in the all-India list of direct recruits that their relative seniority vis-a-vis the direct recruits, as obtaining in their respective cadres, to which the promotees and the direct recruits, belonging to the year, were maintained.
3. In case more than one promotee officer belonging to different cadres got placement between two direct recruits, names of such promotees were arranged in the order of their length of continuous service as Appraiser.

9. The basic principle employed for preparing the all-India list was in preserving the inter se seniority of Appraisers in each Customs Houses or in other words in the original cadre. The employment of such calculation became a disquieting factor. Some promotee Appraisers belonging to the Bombay Customs House cadre found themselves to have become junior to the promotee Appraisers of Calcutta and Madras Customs Houses cadres. The seniority list thus prepared on this principle was challenged before the Bombay High Court by some promotee Appraisers of Bombay Customs House vide Writ Petition No. 2699 of 1972 which was allowed on 18-10-1979 setting aside the promotions made on the basis of All India Service prepared in pursuance of the principles contained in the circular dated 28-2-1973. Direction was issued to the Government to prepare a combined seniority list of Appraisers all over India on the basis of continuous length of service rendered by them as Appraisers or any other legal or valid principle. No opinion was however expressed by the Bombay High Court with regard to the validity of the principle set out in the circular dated 28-2-1973. Rather in so many words the High Court left the validity of these

principles expressly open conceding that if occasion arose the principles rejected in the decision dated 28-2-1973 might have to be fully considered and adjudicated upon. The Government was left to its own to devise any other legal and valid principle, if not the principle of continuous length of service rendered. The special leave petition of the Union of India, so as to challenge the judgment and order of the Bombay High Court, was rejected on 22-2-1982.

10. The Government then went into another exercise to untie the knot. It made a decision on 29-10-1982 that the direct recruits and the promotee Appraisers would be brought on two different lists on All India Service basis and the promotional posts of Assistant Collector of Customs/Central Excise falling in the share of Appraisers will be divided equally between the direct recruits and the promotees. The circular inter alia provided that promotee Appraisers of all the Customs Houses could be brought on one list on the basis of their continuous length of service, subject to the order on which they were included in the panel, prepared by the departmental promotion committees in the respective Customs Houses. Further it was provided that vacancies in Group A meant for Appraisers would be filled up from the two panels i.e., one meant for direct recruits and the other for the promotee Appraisers, in the ratio of 1:1, alternative vacancies going to the promotees and direct recruits. This principle too was unacceptable to some. This time challenge came in the Madras region. The circular was challenged in the Madras High Court in two Writ Petitions Nos. 9925 of 1982 and 3-77 of 1983 which were allowed on 12-9-1985 quashing the circular dated 29-10-1982 giving a direction to the Union of India to fix the seniority of the promotees and direct recruit Appraisers on some fair and just principle without causing serious prejudice to either of them. The Court took the view that the Appraisers as a class stood integrated and thus no distinction could be kept alive between direct recruits and the promotees. Letters patent appeal in that Court filed by the Government was withdrawn but, statedly one letters patent appeal at the instance of the direct recruits was pending in the Madras High Court when the Central Administrative Tribunal became in seisin of the matter.

11. Final venture was made by the Government by issuing a circular dated 22-5-1986 deciding that the promotees of all the three cadres/regions/customs houses may be placed together on the basis of their continuous length of service and the direct recruits correspondingly on the basis of their inter se ranking assigned by the UPSC and then an all-India list be prepared by rotating the officers in the two lists in the ratio of 1:1. The basis of the decision apart, the circular provided that this method would be applicable only to those Appraisers who were in position on 15-9-1970 and were recruited/promoted to the grade on regular basis up to 28-2-1986. The circular further provided that suitable modifications will be made in respect of those promoted/recruited to the grade on or after 1-3-1986, keeping in view the principles contained in the earlier circular of 7-2-1986. The said circular dated 7-2-1986, amongst others, provided that the practice of keeping vacant posts for being filled up by direct recruits of later years, thereby giving them intended seniority over promotees, already in position would be dispensed with. It was conceded that when the direct recruits are not available, the promotees would be bunched together at the bottom of the seniority list below the last position up to which it is possible to determine seniority, on the basis of rotation of quotas with reference to actual direct recruits who become available. Further the unfilled direct recruits' quota vacancies were to be carried forward and added to the corresponding direct recruit vacancies of the next year (to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice.

12. The circular of 22-5-1986 made two different provisions/basis for two cadres. One commenced for those Appraisers who were in position from 15-9-1970 and were promoted to the grade on regular basis up to 28-2-1986 and the other in respect of those promoted/recruited to the grade on or

after 1-3-1986. This circular too was put to challenge in this Court by means of a writ petition under Article 32 of the Constitution but the same was allowed to be withdrawn on 28-10-1986 giving liberty to the writ petitioners to move the Central Administrative Tribunal declaring that the Tribunal had authority to entertain petitions in a representative capacity. Thus the matter before the Tribunal was projected as also defended in a representative way in order to determine whether the impugned circular of 22-5-1986 was fair and reasonable, not violating the equality rule and if so to ascertain what could be the basis to settle this otherwise never-ending dispute.

13. The Central Administrative Tribunal by an elaborate judgment dated 28-5-1987 [Lal Bulchand Shivdasani v. Union of India, (1987) 4 ATC 402] quashed the circular dated 22-5-1986 setting aside any promotions made to the posts of Assistant Collector of Customs and Excise Group A on the basis of the said list. The Union of India was directed to prepare afresh an all-India combined list of Appraisers on the basis of continuous officiation of the incumbent in the post of Appraisers leaving a niche that should the Madras High Court reverse the decision of the Single Bench in the letters patent appeal, the Union of India would no longer be under an obligation to prepare a combined list. The Tribunal recorded that the debate had proceeded on the footing that the combined eligibility list of Appraisers on all-India basis has necessarily to be prepared. The Tribunal expressed no opinion as to on what principle the combined eligibility list should be prepared in such a contingency. It is this decision of the Tribunal which is the subject-matter of challenge in this bunch of appeals.

14. Having travelled thus far let us take stock of the situation, try to grasp it and smoothen its rough edges :

(i) The Rule of Mervyn Coutinho [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] does not touch those Appraisers who were appointed prior to 15-8-1947.

(ii) As and from 15-8-1947 the Rule of Mervyn Coutinho [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] applied till such date from which the Customs Appraisers Service, Class II Recruitment Rules, 1961, came into force. In accordance therewith there was a quota system operating rotationally. The anomalies pointed out by the promotees in working the quota system were ordered to be tolerated.

(iii) As per mandate of Rule 4-C of the above Rules the percentage of posts to be filled by direct recruitment, either by competitive examination or by selection otherwise than by competitive examination, could not be less than 50% of the total cadre of Appraisers and the remaining posts could be filled by any other method mentioned in Rule 3. 50% allocation is thus assured to direct recruits in the total cadre. They may get even more; there is no limit to it.

(iv) The above Rules expressly do not provide a fixed unalterable quota for the promotees (remaining sources) which can keep fluctuating.

(v) In the absence of specific quotas being fixed in the Rules it becomes evident that the quota rule stands discarded. When there is no quota provided in the Rules the rotational system cannot function.

(vi) Mervyn Coutinho case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] could have kept applied to the post-Rules period had the quota and rotational rule been preserved. Since earlier to the Rules the quota and rota principles were in

vogue, this Court in the light of the Government's Orders then existing, and in particular that of the year 1959, gave its approval.

(vii) That the service knit up under the Rules is an All India Service.

(viii) Inter se seniority in the said Rules between the direct recruits inter se is determinable in the order of selection prepared by the Union Public Service Commission from time to time. Direct recruits on selection are allocable to any of the Customs Houses functioning in the country.

(ix) Promotee Appraisers get to the service by promotion on selection by the Regional Departmental Promotion Committees, becoming members of the All India Service from the date of promotion.

(x) Within the Regional Customs Houses, seniority inter se between promotees and direct recruits, as also on all-India basis, prior to the coming into force of the Rules had to be regulated by the rotational principles in accordance with Mervyn Coutinho case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] irrespective of the length of continuous officiation.

(xi) In view of the five-Judge Bench decision of this Court in Direct Recruit Class II Engineering Officers' Assn. v. State of Maharashtra [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348], no argument can be entertained merely on a ground of unfairness and unreasonableness to question the ratio in Mervyn Coutinho case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] as that is a binding service precedent. The Rule of Mervyn Coutinho case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749], however, would apply up to the date when the Rules came into force.

(xii) Mervyn Coutinho case would thus hold the field to regulate inter se seniority between the direct recruits and promotee Appraisers on the basis of quota and rotation, irrespective of continuous length of service of the promotee. This rule would have, however, to stop w.e.f. the date when the Rule of 1961 came into force.

(xiii) The Direct Recruit case [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] is the amalgamation of all streams of thought, confluencing the entire case-law on the subject and given appropriate placement. Individual reference of each case as cited therein and at the bar need not be made herein. Reference may be had with advantage to the report in the Direct Recruit case [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348].

15. We are not expected to unsettle the principle of Mervyn Coutinho [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] or to discover instances of the breaking down of the rotational rule on the basis of some anomalies having arisen, because of direct recruitment not keeping pace with the situations arising from time to time. We are equally not expected to discover any "deemed relaxation" of the Rule on the supposition of the quota rule having been broken down. We have to proceed on the supposition that in the respective Customs Houses, termed as cadres, there is no inter se dispute of seniority amongst the allocated direct recruit Appraisers and departmentally promoted Appraisers. The dispute is narrow and centres on the need to prepare an all-India seniority list. On

every occasion when the Government of India has made an effort to draw one, its effort was thwarted by decisions in succession by the Bombay High Court, the Madras High Court and the Central Administrative Tribunal. The matter has again been left to the Government of India to devise a proper principle for drawing a combined seniority list and the placement of the respective personnel on that list.

16. We must bear in mind and strive that there should, in the interests of justice, be an end to litigation. It has also to be borne in mind that the attempt herein is not to amalgamate separate services. Here the service was and is one i.e., an All India Service of Appraisers. Prior to the Rules 50% posts in the service were filled by direct recruitment and the seniority of the selectees was fixed by the UPSC in the order of selection. Inter se seniority amongst direct recruits was thus a sealed event. That was the foundation. Entry into service by promotion was fortuitous dependent on the exercise by the departmental committees in the respective Customs Houses and the outcome. Mervyn Coutinho case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] tells the way to work it out. In their respective quotas direct recruits as well as promotees rotate the quota system as (sic was) 1:1 as mentioned in Mervyn Coutinho case [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749]. But after the Rules of 1961, when the quota system has been discarded Mervyn Coutinho [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] rule cannot apply. As per Rule 4-C of the 1961 Rules, the allocation of at least 50% posts in favour of direct recruits is ensured at all times. The enlistment of the direct recruits, allocated to Customs Houses on the basis of their selection, would obviously present no difficulty. Equally enlistment of promotee Appraisers, since coming from feeder sources of Customs Houses, from the date of their promotion, would present no difficulty. Both would be entitled to placement in the joint seniority list on the basis of their continuous officiation.

17. We thus go to uphold the orders of the Tribunal to this extent that a fresh All India Combined List of Appraisers be prepared by the respondents on the basis of continuous officiation of the incumbent in the post of Appraiser appointed on and from the date of the Customs Appraisers Service, Class II Recruitment Rules, 1961. But for appraisers appointed prior to that date the rule of Mervyn Coutinho [(1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749] would be the basis to work out the inter se seniority of the incumbents to operate the quota and rotational rule.

18. The appeals stand disposed of accordingly. No costs.