

# SUPREME COURT OF INDIA

Chennai Customs Appraising Officers Assn

Vs.

Union of India

C.A.No.3630 of 2008

(S.B. Sinha and V.S. Sirpurkar JJ.)

16.05.2008

## JUDGMENT

**S.B. Sinha, J:**

1. Leave granted.

2. Interpretation of the *Customs Appraisers' Service, Class II Recruitment Rules, 1961* (for short "*the 1961 Rules*") and the *Department of Revenue (Customs Appraisers) Recruitment Rules, 1988* (for short "*the 1988 Rules*") vis-à-vis application of the decisions of this Court in *Mervyn Coutindo & Ors. v. Collector of Customs, Bombay & Ors.*<sup>1</sup> and *Gaya Baksh Yadav v. Union of India and Others*<sup>2</sup> is in question in these appeals which arise out of a judgment and order dated 21.04.2006 passed by the High Court of Judicature at Madras.

3. Appellant is the Custom Appraisers Officers Association representing promotee 'Appraisers' who were appointed in the post of 'Examiner' on various dates.

“Customs Department of the Government of India (Department) appoints Appraisers. There was no statutory rule governing the terms and conditions of their services including seniority.”

4. There were two sources of recruitment in the post of Appraisers; one by way of promotion and, the second by direct recruitment.

“In the year 1936, an order was passed by the Central Board of Revenue (Board) laying down that recruitment to the Customs Appraisers' Service would be from two sources, i.e., 50% by promotion, 25% directly from amongst the experts and 25% by way of a competitive examination or selection by Public Service Commission.

Circulars were issued from time to time in regard to inter se seniority between the promotees and the direct recruits.”

5. On or about 12.12.1959, the Government of India issued a circular containing general principle for determining seniority of various categories of persons employed in central services. By reasons thereof, several types of recruitment like war service candidates, which was the subject matter of an earlier circular, were not to be made. Seniority was to be determined in terms of the 1959 Circular whereby it was directed that the instructions contained in the circulars would not operate in preference to the normal principles for determining seniority in future. Only certain general principles were laid down therefor. They were, however, not to be applied with retrospective effect. One of the principles laid down therein was in respect of the relative seniority of the direct recruits and the promotees. It provided that the same shall be determined as per rotation of vacancies between direct recruits and promotees which shall be based on the quota of reservation for direct recruitment and promotion respectively as provided for in the recruitment rules.

6. The dispute in regard to inter se seniority between the direct recruits and the promotees inter alia for the post of Appraisers came up for consideration before this court in Mervyn Coutindo (supra).

“However, the said dispute pertained to the 1961 Rules, which came into force on or about 27.07.1961. Various circulars were issued from time to time thereafter. Seniority lists were also published from time to time. The employees filed several applications before different High Courts. It appears although that one of the matters wherein validity of a circular letter dated 29.10.1982 was in question, has been quashed by the High Court but some other matters are said to be still pending.”

7. Indisputably, recruitments used to take place at zonal level, viz., Bombay Madras and Calcutta. On or about 22.05.1986, the Government of India issued a circular as regards seniority list, viz., "All India Combined List of Appraisers". On the basis of the said list, orders of promotions were issued in favour of the incumbents of the post of Appraisers to the post of Assistant Collector of Customs of Central Excise. The said circular dated 22.05.1986 was initially challenged before this Court through a petition under Article 32 of the Constitution of India by the 'Direct Recruits'. The said petition was permitted to be withdrawn by an order dated 28.10.1986 granting liberty to the petitioners therein to approach the Central Administrative Tribunal (CAT), pursuant whereto an original application was filed before the Principal Bench of the CAT, Madras. The said circular was quashed. The orders of promotions passed in terms thereof were also quashed. The Union of India was directed to prepare a fresh seniority list on the basis of the date of continuous officiation as Appraiser. An appeal thereagainst was filed before this Court leading to pronouncement of the judgment in Gaya Baksh Yadav (supra).

8. These appeals raise a question of interpretation of the said decision. We would, however, deal with the said question a little later.

9. The Central Government issued the 1988 Rules on or about 1.01.1988. Pursuant to or in furtherance of the decision of this Court in Gaya Baksh Yadav (supra), a seniority list of Appraisers was published upto 31.12.1987 on 12.11.1997. The said seniority list again was

challenged by the direct recruits before the Bombay Bench of CAT as also before the Madras Bench. The Madras Bench dismissed the said application being barred by limitation. Despite the same, merit of the matter was gone into by it holding that the ad hoc promotions having been made on the recommendations of the Departmental Promotion Committee (DPC) and the seniority list having been prepared in conformity with the law laid down by this Court in *Gaya Baksh Yadav (supra) as also Direct Recruit Class II Engineering Officer Association v. State of Maharashtra & Ors.*<sup>3</sup>, the same should not be interfered with.

The said order was challenged before the High Court of Madras.

10. In the meantime, however, the Bombay Bench of CAT by a judgment and order dated 18.06.2003 quashed the said seniority list dated 12.11.1997. The Government was directed to review positions of those who had been promoted beyond 50% of their quota on ad hoc basis holding that the same was violative of Rule 4(c) of the 1961 Rules.

A writ petition filed thereagainst, is said to be still pending before the Bombay High Court.

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12. Another original application was filed before the Madras Bench of CAT on or about 23.05.2005 challenging the seniority list dated 16.12.2004. The said application was marked as OA No. 419 of 2005.

13. Sharath Kumar Rath [Appellant in Civil Appeal arising out of SLP (C) No. 17494 of 2006], however, filed another original application which was marked as OA No. 566 of 2005 questioning the validity of the draft seniority list dated 28.02.2005.

14. By reason of a judgment and order dated 9.08.2005, the said original applications were dismissed. A writ petition was preferred thereagainst by the appellants, which by reason of the impugned judgment dated 21.04.2006 has been dismissed.

15. 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 No. 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.”

16. Mr. Vikas Singh, learned Additional Solicitor General appearing on behalf of Union of India, on the other hand, would submit that a bare perusal of the 1961 Rules would clearly go to show that it was for the Board to fix the number of vacancies on a yearly wise basis keeping in view the exigencies of work and as from 1961 onwards the percentage of the direct recruits had gone up substantially, promotion of any person, except the cases of filling up of the permanent vacancies granted in an ad hoc manner, could not have been considered for the purpose of reckoning of the seniority.

17. It was pointed out that in fact from 2002 onwards, the Central Government has not made any appointment against the vacancy arising in the quota of direct recruits at all.

18. Mr. A.K. Ganguly, learned senior counsel appearing on behalf of the respondent no. 4 urged:

“(i) As orders of promotion had been given by the zonal DPCs keeping in view the exigencies of the situation, the same cannot be said to have been passed in accordance with law.

(ii) The decision of this Court in *Gaya Baksh Yadav* (supra) must be interpreted in the factual matrix of the matter obtaining herein so that those who have illegally been promoted remained out of reckoning in the All India Seniority List.

(iii) Although the 1961 Rules speak of cadre, the manner in which the same should be operationalised having been laid down in Sub-Rules (b) and (c) of Rule 4 of the 1961 Rules, must be held to be referable only to the existing vacancies and not the cadre strength which was required to be determined on a year to year basis.”

19. Mr. B. Kumar, learned senior counsel appearing on behalf of the respondent no. 3, supplementing the submission of the Additional Solicitor General and Mr. Ganguly urged that the basis for the judgment of the Tribunal as also the High Court being Exhibit L having not been the subject matter of challenge either before the CAT or the High Court as also before this Court, it is incorrect to contend that the appellants were entitled to figure in the All India Seniority List only on the basis of their continuous officiation. Properly read, it was urged, *Gaya Baksh Yadav* (supra) suggests that the ad hoc promotees who were appointed in violation of Rule 4(c) of the 1961 Rules could not have been considered for reckoning their seniority.

20. Mr. Venkataramani, learned senior counsel appearing on behalf of the impleaded Association would urge that *Gaya Baksh Yadav* (supra) suggests that continuous officiation theory should be applied in cases of promotees irrespective of the manner in which they were promoted. On a proper reading of the 1961 Rules, it would contend that there did not exist any dichotomy between post and vacancy as number of vacancies can only be taken into consideration in terms of the Rules.

21. Ms. Vibha Datta Makhija, learned counsel appearing on behalf of the Group `A' Appraisers (Intervenors), would contend that this Court should not interfere with the impugned judgments as the matter is pending before the Bombay High Court.

22. It is a matter of grave concern that although the parties have filed a large number of original applications and writ applications and the matter had at least once been taken up upto this Court, the Union of India has singularly failed to lay down a proper legal framework for the purpose of determination of inter se seniority between the direct recruits and promotees. Correct facts and figures have also not been placed by the Union of India before the learned Tribunal. It furthermore appears that even they are not in possession of all the relevant documents. If anybody is to be blamed for the messy situation, the Union of India, must take upon it the major chunk of the blame.

23. Before us also, some documents have been filed only when we insisted as to what was the total cadre strength. We were given to understand that the total cadre strength at present

is 809. Before us a chart has also been filed showing total sanctioned and working strength in the three groups of Appraisers from the years 1961 to 1987 and for the years 2004 to 2008.

24. We may notice that when the 1961 Rules came into force, there were 131 total posts in total. Out of total posts of 131, 46 were in Bombay, 19 were in Madras and 66 were in Calcutta, out of which the number of direct recruits in Bombay, Madras and Calcutta were 2, 4 and 8 (totalling 14) and those of the promotees were 37, 12 and 9 (totaling 58). Since then, the percentage of appointments through direct recruitment went up considerably and only in or about 1976 when the sanctioned strength was 418, 198 direct recruits were functioning as against 195 promotees. Yet again the percentage of appointments through direct recruitments went up and as in 1987, out of the total sanctioned strength of 456, 269 direct recruits were working as against 181 promotees.

25. We have noticed hereinbefore that we do not have any figure as to how things proceeded from the year 1988 to 2003. It is, however, of some significance to note that in the year 2004, 164 direct recruits were working as against 520 promotees, and in the year 2005, 163 direct recruits were working as against 539 promotees; the total cadre strength being 809.

26. We have noticed hereinbefore that the situation had undergone a sea change from 2002 onwards as no direct recruitment has taken place at all. Rules have also not been amended.

27. It is in the aforementioned background we may notice the relevant statutory rules.

Rules 3 and 4 of the 1961 Rules read as under:

"Rule 3. Recruitment to the Service shall be made by any of the following methods :-

(a) By competitive examination in India in accordance with Part III of these rules.

(b) By promotion in accordance with Part IV of these rules.

(c) By transfer of an Officer in Government Service in accordance with Part V of these rules.

(d) By direct recruitment by selection otherwise than by competitive examination in accordance with Part VI of these rules. Rule 4

(a) No appointment shall be made to the Service or to any post borne on the cadre of the Service by any method not specified in Rule 3.

(b) Subject to the provisions of Sub-rule (a), the Board shall determine the method or methods of recruitment to be employed for the purpose of filling in particular vacancies in the Service, as may be required to be filled during any particular period and the number of candidates to be recruited by each method.

(c) 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. The remaining posts may be filled by any other method mentioned in Rule 3."

Rules 2 and 3 of the 1988 Rules read as under:

"2. Number of Post, Classification and Scale of Pay: The number of the said post, its classification and the scale of pay attached thereto shall be as specified in columns 2 to 4 of the First Schedule annexed to these rules.

3. Savings : Nothing in these rules shall affect reservations, relaxation of age limit and other concessions required to be provided for the Scheduled Castes, the Scheduled Tribes, the Ex-Serviceman and other special categories of persons in accordance with the orders issued by the Central Government from time to time in this regard."

In the First Schedule appended to the 1988 Rules, in regard to the method of recruitment of Customs Appraisers, it is stated that 50% recruitment would be made by promotion and 50% by direct recruitment (partly through Civil Service Examination and partly on the basis of selection through Union Public Service Commission in case of expert Customs Appraisers).

28. The terminologies used in the 1961 Rules and the 1988 Rules are different. Broadly speaking, the 1961 Rules speak of 'Cadre' whereas the 1988 Rules speak of 'Vacancies'.

29. Before embarking on the interpretation of the said Rules, we may place on record that, according to the learned Additional Solicitor General, there would not be much significant difference between a situation where the seniority list was prepared on the basis of 'Cadre' or where the same was prepared on the basis of 'Vacancy' inasmuch as within a span of 10 to 12 years, the direct recruits ordinarily are promoted to Group A posts and the promotees either have already been promoted as such or retired.

30. Rule 3 of the 1961 Rules provides that the recruitment could be from two sources; one by competitive examination and other by promotion. So far as direct recruitment is concerned, it could be made if competitive examination is held as envisaged under Part III of the 1961 Rules, i.e., Rule 6 or by selection otherwise than by competitive examination in accordance with Part VI, i.e., Rule 16 thereof. \

31. So far as filling up of the posts by promotion is concerned, the same could be done by way of promotion in accordance with Part IV thereof, viz., Rule 14 or by transfer of an officer in Government Service in accordance with Part V of the 1961 Rules, viz., Rule 15. All appointments were to be made strictly in terms of the method specified in Rule 3.

32. In terms of the 1961 Rules, 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.

33. 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. Keeping in view the fact 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 heretofore.”

34. Indisputably, promotion 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%. 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 therefor 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.”

35. 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 is 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.

“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.”

36. 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.

37. Strong reliance has been placed by Mr. Gupta on the decision of this Court in *Direct Recruit Class II Engineering Officer Association* (supra). 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:

"(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."

38. 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.

39. 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.

40. In *Gaya Baksh Yadav (supra)*, this Court opined:

"...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.

41. In *Gonal Bihimappa v. State of Karnataka & Ors.*<sup>4</sup>, this Court held:

"...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...."

42. 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.

43. We may, however, observe that we have not gone into the merit of the matter which is pending before the Bombay High Court.

44. In view of our order aforementioned, no separate order need be passed in IA No. 3 as well as in IA Nos. 5 and 6.

45. For the reasons aforementioned, there is no merit in these appeals which are dismissed accordingly. No costs.

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**S.B. Sinha, J:**

1. Leave granted.

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(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 No. 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.”

16. Mr. Vikas Singh, learned Additional Solicitor General appearing on behalf of Union of India, on the other hand, would submit that a bare perusal of the 1961 Rules would clearly go to show that it was for the Board to fix the number of vacancies on a yearly wise basis keeping in view the exigencies of work and as from 1961 onwards the percentage of the direct recruits had gone up substantially, promotion of any person, except the cases of filling up of the permanent vacancies granted in an ad hoc manner, could not have been considered for the purpose of reckoning of the seniority.

17. It was pointed out that in fact from 2002 onwards, the Central Government has not made any appointment against the vacancy arising in the quota of direct recruits at all.

18. Mr. A.K. Ganguly, learned senior counsel appearing on behalf of the respondent no. 4 urged:

“(i) As orders of promotion had been given by the zonal DPCs keeping in view the exigencies of the situation, the same cannot be said to have been passed in accordance with law.

(ii) The decision of this Court in *Gaya Baksh Yadav* (supra) must be interpreted in the factual matrix of the matter obtaining herein so that those who have illegally been promoted remained out of reckoning in the All India Seniority List.

(iii) Although the 1961 Rules speak of cadre, the manner in which the same should be operationalised having been laid down in Sub-Rules (b) and (c) of Rule 4 of the 1961 Rules, must be held to be referable only to the existing vacancies and not the cadre strength which was required to be determined on a year to year basis.”

19. Mr. B. Kumar, learned senior counsel appearing on behalf of the respondent no. 3, supplementing the submission of the Additional Solicitor General and Mr. Ganguly urged that the basis for the judgment of the Tribunal as also the High Court being Exhibit L having not been the subject matter of challenge either before the CAT or the High Court as also before this Court, it is incorrect to contend that the appellants were entitled to figure in the All India Seniority List only on the basis of their continuous officiation. Properly read, it was urged, Gaya Baksh Yadav (supra) suggests that the ad hoc promotees who were appointed in violation of Rule 4(c) of the 1961 Rules could not have been considered for reckoning their seniority.

20. Mr. Venkataramani, learned senior counsel appearing on behalf of the impleaded Association would urge that Gaya Baksh Yadav (supra) suggests that continuous officiation theory should be applied in cases of promotees irrespective of the manner in which they were promoted. On a proper reading of the 1961 Rules, it would contend that there did not exist any dichotomy between post and vacancy as number of vacancies can only be taken into consideration in terms of the Rules.

21. Ms. Vibha Datta Makhija, learned counsel appearing on behalf of the Group 'A' Appraisers (Intervenors), would contend that this Court should not interfere with the impugned judgments as the matter is pending before the Bombay High Court.

22. It is a matter of grave concern that although the parties have filed a large number of original applications and writ applications and the matter had at least once been taken up upto this Court, the Union of India has singularly failed to lay down a proper legal framework for the purpose of determination of inter se seniority between the direct recruits and promotees. Correct facts and figures have also not been placed by the Union of India before the learned Tribunal. It furthermore appears that even they are not in possession of all the relevant documents. If anybody is to be blamed for the messy situation, the Union of India, must take upon it the major chunk of the blame.

23. Before us also, some documents have been filed only when we insisted as to what was the total cadre strength. We were given to understand that the total cadre strength at present is 809. Before us a chart has also been filed showing total sanctioned and working strength in the three groups of Appraisers from the years 1961 to 1987 and for the years 2004 to 2008.

24. We may notice that when the 1961 Rules came into force, there were 131 total posts in total. Out of total posts of 131, 46 were in Bombay, 19 were in Madras and 66 were in Calcutta, out of which the number of direct recruits in Bombay, Madras and Calcutta were 2, 4 and 8 (totalling 14) and those of the promotees were 37, 12 and 9 (totaling 58). Since then, the percentage of appointments through direct recruitment went up considerably and only in or about 1976 when the sanctioned strength was 418, 198 direct recruits were functioning as against 195 promotees. Yet again the percentage of appointments through direct recruitments went up and as in 1987, out of the total sanctioned strength of 456, 269 direct recruits were working as against 181 promotees.

25. We have noticed hereinbefore that we do not have any figure as to how things proceeded from the year 1988 to 2003. It is, however, of some significance to note that in the year 2004, 164 direct recruits were working as against 520 promotees, and in the year 2005, 163 direct recruits were working as against 539 promotees; the total cadre strength being 809.

26. We have noticed hereinbefore that the situation had undergone a sea change from 2002 onwards as no direct recruitment has taken place at all. Rules have also not been amended.

27. It is in the aforementioned background we may notice the relevant statutory rules. Rules 3 and 4 of the 1961 Rules read as under: "Rule 3. Recruitment to the Service shall be made by any of the following methods:-

“(a) By competitive examination in India in accordance with Part III of these rules.

(b) By promotion in accordance with Part IV of these rules.

(c) By transfer of an Officer in Government Service in accordance with Part V of these rules.

(d) By direct recruitment by selection otherwise than by competitive examination in accordance with Part VI of these rules. Rule 4

(a) No appointment shall be made to the Service or to any post borne on the cadre of the Service by any method not specified in Rule 3.

(b) Subject to the provisions of Sub-rule (a), the Board shall determine the method or methods of recruitment to be employed for the purpose of filling in particular vacancies in the Service, as may be required to be filled during any particular period and the number of candidates to be recruited by each method.

(c) 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. The remaining posts may be filled by any other method mentioned in Rule 3."

Rules 2 and 3 of the 1988 Rules read as under:

"2. Number of Post, Classification and Scale of Pay: The number of the said post, its classification and the scale of pay attached thereto shall be as specified in columns 2 to 4 of the First Schedule annexed to these rules.

3. Savings: Nothing in these rules shall affect reservations, relaxation of age limit and other concessions required to be provided for the Scheduled Castes, the Scheduled

Tribes, the Ex-Serviceman and other special categories of persons in accordance with the orders issued by the Central Government from time to time in this regard."

In the First Schedule appended to the 1988 Rules, in regard to the method of recruitment of Customs Appraisers, it is stated that 50% recruitment would be made by promotion and 50% by direct recruitment (partly through Civil Service Examination and partly on the basis of selection through Union Public Service Commission in case of expert Customs Appraisers)."

28. The terminologies used in the 1961 Rules and the 1988 Rules are different. Broadly speaking, the 1961 Rules speak of 'Cadre' whereas the 1988 Rules speak of 'Vacancies'.

29. Before embarking on the interpretation of the said Rules, we may place on record that, according to the learned Additional Solicitor General, there would not be much significant difference between a situation where the seniority list was prepared on the basis of 'Cadre' or where the same was prepared on the basis of 'Vacancy' inasmuch as within a span of 10 to 12 years, the direct recruits ordinarily are promoted to Group A posts and the promotees either have already been promoted as such or retired.

30. Rule 3 of the 1961 Rules provides that the recruitment could be from two sources; one by competitive examination and other by promotion. So far as direct recruitment is concerned, it could be made if competitive examination is held as envisaged under Part III of the 1961 Rules, i.e., Rule 6 or by selection otherwise than by competitive examination in accordance with Part VI, i.e., Rule 16 thereof.

31. So far as filling up of the posts by promotion is concerned, the same could be done by way of promotion in accordance with Part IV thereof, viz., Rule 14 or by transfer of an officer in Government Service in accordance with Part V of the 1961 Rules, viz., Rule 15. All appointments were to be made strictly in terms of the method specified in Rule 3.

32. In terms of the 1961 Rules, 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.

33. 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. Keeping in view the fact 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 heretofore.

34. Indisputably, promotion 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%. 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 therefor 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.

35. 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 is 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.

“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.”

36. 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.

37. Strong reliance has been placed by Mr. Gupta on the decision of this Court in *Direct Recruit Class II Engineering Officer Association (supra)*. 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:

"(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."

38. 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.

39. 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.

40. In *Gaya Baksh Yadav (supra)*, this Court opined:

"...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.

41. In *Gonal Bihimappa v. State of Karnataka & Ors.*<sup>8</sup>, this Court held:

"...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..."

42. 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.

43. We may, however, observe that we have not gone into the merit of the matter which is pending before the Bombay High Court.

44. In view of our order aforementioned, no separate order need be passed in IA No. 3 as well as in IA Nos. 5 and 6.

45. For the reasons aforementioned, there is no merit in these appeals which are dismissed accordingly. No costs.

<sup>1</sup>[(1966) 3 SCR 600]

<sup>2</sup>[(1996) 4 SCC 23]

<sup>3</sup>[(1990) 2 SCC 715]

<sup>4</sup>[(1987) 3 SCR 885]

<sup>5</sup>[(1966) 3 SCR 600]

<sup>6</sup>[(1996) 4 SCC 23]

<sup>7</sup>[(1990) 2 SCC 715]

<sup>8</sup>[(1987) 3 SCR 885]