
(2009) 10 KL CK 0029

In the High Court Of Kerala

Case No : Writ Petition (C) No. 36499 of 2007

Sajeeve, N.J.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-10-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Citation : (2010) 3 SLR 346

Hon'ble Judges : V. Giri, J;P.S. Gopinathan, J;K. Balakrishnan Nair, J

Bench : Full Bench

Advocate : P. Ramakrishnan and Preethy Ramakrishnan, for the Appellant; O.V. Radhakrishnan Mohammed Kunhi, for Repondents 5 and 6 and Tojan Vathikulam, A.C.G., S.C. for Respondents 1 to 4, for the Respondent

Final Decision : Allowed

Judgement

V. Giri, J.—The principal question that arises for consideration in this writ petition involves application of the principles of the "sit back theory" that have been evolved by the Courts as part of service jurisprudence. In plain terms, the "theory of sit back" postulates a situation where the incumbents in a service assume as settled, a certain state of affairs reflecting their position in a cadre or a service, vis-a-vis other persons comprised within the same service. The theory has been mostly applied in disputes involving inter se seniority and matters consequential thereto, including promotion. The dispute in the present case involves Superintendents of Central Excise, who originally commenced service as Inspectors. The contesting Respondents had commenced service in the Department earlier to the Petitioner. They had, on their request, been subjected to an inter-unit transfer. It is the case of the Petitioner that such inter-unit transfer, on request, would entail loss of seniority in the parent unit and the transferee has to take his place at the bottom of the cadre in the unit to which he is transferred. Accordingly, the contesting Respondents, the Petitioner contends, had commenced service in the unit in question, subsequent to him. They had

accepted the position that the Petitioner is senior to them. The Petitioner had also accepted the position and he contends that he, therefore, was entitled to sit back and assume the said state of affairs as governing the parties. It was after a long lapse of several years that the position was sought to be reviewed at the instance of the contesting Respondents and such a plea, according to the Petitioner, should not have been entertained, let alone be accepted. It is essentially this contention, involving the application of the principles of "sit back theory", that has been mooted for consideration.

2. The Petitioner entered service as a directly recruited Inspector in the Commissioner ate of Customs and Central Excise, Cochin on 25-8-1975. At the same time, Respondents 5 and 6 entered service in the Madurai Division on 11-12-1974 as Inspectors, but later, were transferred to the Cochin Commissioner ate, wherein they commenced service on 13-12-1976 and 5-12-1977 respectively. Such transfer of Respondents 5 and 6, indisputably, were, on their request.

3. This inter se position amongst the Petitioner and Respondents 5 and 6 in the Cochin Commissioner ate was prevailing from 1976-77 onwards and it is, on the said basis that the Petitioner was promoted as Superintendent of Central Excise on 5-3-1993 and Respondents 5 and 6 came to be promoted to the said post on 30-9-1996. The Petitioner makes a reference to the seniority list of Inspectors published on 5-12-1994 [Annexure R-5(d) produced by the Petitioner herein along with the reply statement filed by him before the Central Administrative Tribunal]. The Petitioner was rank No. 186 and Respondents 5 and 6 were 279 and 288 respectively.

4. The same position inter se the Petitioner and Respondents 5 and 6 is reflected in the seniority list of Superintendents of Central Excise on 5-8-1997 [Annexure R-5(e)] wherein the Petitioner is ranked 87 and Respondents 5 and 6 are ranked 158 and 162 respectively.

5. Parties refer to certain instructions issued by the Central Board of Customs on 12-2-1958, (Annexure A-3 to the Original application filed before the Central Administrative Tribunal) wherein the inter-unit transfers within a period of three years from the first appointment could be made without a loss of seniority. The Petitioner refers to the revised instructions issued on 22-12-1959, Annexure A-5 to the Original Application and later, stated to have been forwarded to the Central Board of Customs and Central Excise, to all Commissioners. The said revised instructions did not provide for saving the seniority of an inter-unit transferee where such transfer is on his request. This was a position that was accepted in 1994, when the seniority list amongst Inspectors was published and even in 1997 when the seniority list of Superintendents was published. But apparently, the Patna Bench of the Central Administrative Tribunal, by Annexure A-11 order in an original application permitted one Damodar Singh, an inter-unit transferee to carry over the seniority from his parent department to his transferee unit. This order of the Patna Bench of the Central Administrative

Tribunal came to be affirmed by the Hon'ble Supreme Court, by order dated 31-3-1998. Apparently, acting on the basis of the direction issued by the Patna Bench of the Central Administrative Tribunal, which came to be affirmed by the Supreme Court by Annexure A-13, the Ministry proposed a revision in the seniority list amongst the Inspectors of the Central Excise Department by determining the seniority from the date of the original entry in the department without providing for a forfeiture of the same amongst the inter-unit transferees. Thus, in the revised seniority list of Inspectors dated 4-7-2000, the Petitioner was ranked 288 while Respondents 5 and 6 were ranked 259 and 260 respectively. Consequently, the seniority list of Superintendents also came to be revised as per Ext. A-19 to the Original Application and while the Petitioner was ranked 102 therein, Respondents 5 and 6 were ranked 75 and 76. This seniority list amongst the Superintendents was published on 12-6-2002.

6. The Petitioner then preferred O.A. No. 59/2003 before the Central Administrative Tribunal, Ernakulam Bench. The Petitioner challenged the circular dated 20-10-1998 issued by the Department, which inter alia, permitted the inter-commissioner ate transferees, who had been transferred on their request, prior to 25-5-1980, to count their seniority in their parent unit also, provided such inter-commissioner ate transfer, was within three years from the date of entry into the service. This direction was a benefit flowing out of Clauses 1 and 2 of the circular dated 12-2-1958, apparently, comprehending non-gazetted staff in the Central Board of Central Excise and Customs and the Department proceeded on the premise that this was the benefit that was directed to be given to Damodar Singh by the Patna Bench of the Central Administrative Tribunal and the Supreme Court had affirmed the same. The writ Petitioner had challenged the circular dated 20-10-1998 and the apparent consequential revision of the seniority list amongst Inspectors and Superintendents in the Cochin Commissionerate.

7. The official Respondents, who filed a reply and an additional reply before the Central Administrative Tribunal, inter alia, contended that the aforementioned circular dated 20-10-1998 had actually been withdrawn by the Department by a subsequent circular dated 25-3-2004.

8. The Central Administrative Tribunal, nevertheless went on to consider the merits of the contentions raised by the parties and proceeded to hold that the principle laid down in Damodar Singh's case by the Patna Bench of the Central Administrative Tribunal, which had been affirmed by the Supreme Court, would hold the field and therefore, the inter se seniority amongst the Inspectors and Superintendents of Central Excise should be reckoned with reference to the original date of entry into service and that inter-commissioner ate transferees, who had obtained such transfers on request, should not be compelled to forfeit their seniority in the parent unit, provided such transfers had been effected within three years of commencement of service.

9. This order of the Central Administrative Tribunal was challenged by the

Petitioner in W.P. (C) No. 30312/05 and by judgment dated 15-11-2005 a Bench of this Court observed that since the circular dated 20-10-1998 had been withdrawn subsequently on 25-3-2004, the Department need only proceed to implement the subsequent circular provided, the same remains unchallenged and has become final. The Bench made it clear that it was not deciding any of the questions raised by the writ Petitioners and the writ petitions were disposed of on the submission of the learned Counsel for the Petitioners that the orders challenged before the Central Administrative Tribunal are superseded by subsequent orders of the Government of India

10. Based on the subsequent circular and the directions issued by the Division Bench, the seniority list of Inspectors was again revised on 20-2-2000, while the Petitioner was ranked 273, Respondents 5 and 6 came to be ranked 366 and 375. It will have to be noticed in this context that W.P. (C) No. 30312/05 was disposed of at the stage of admission, before issuing notice to Respondents 5 and 6 herein.

11. Respondents 5 and 6 then challenged the subsequent circular dated 25-3-2004 and the seniority list published on 20-2-2006 in O.A. No. 469/06. The said original application was allowed by the Central Administrative Tribunal as per judgment dated 30-9-2006, inter alia, placing reliance on the judgment of a Division Bench of this Court in W.P. (C) No. 7945/06. It is this order of the Central Administrative Tribunal, Ernakulam Bench, that has been challenged in this writ petition.

12. A counter-affidavit has been filed by the official Respondents as also by the contesting Respondents.

13. We heard Mrs. Preethy Ramakrishnan, learned Counsel for the Petitioner, Mr. Tojan Vathikulam, learned Counsel for the Department and Mr. O.V. Radhakrishnan, learned Counsel for Respondents 5 and 6.

14. Learned Counsel for the Petitioner contended that the Tribunal has committed a serious error in allowing the original application filed by Respondents 5 and 6 herein, on two grounds. Firstly, that Respondents 5 and 6 were not permitted to carry over their seniority from the Madurai Division when they were transferred, on their request, to the Cochin Commissioner ate. The instructions issued by the Central Board of Customs and Excise on 12-2-1958 permitting transfers without loss of seniority, within a period of three years from the date of first appointment were revised on 22-12-1959 and it was the revised instructions Annexure A-5 that was prevailing when Respondents 5 and 6 had joined service in Madurai Division and were transferred, on their request to Cochin Division. Thus, the premise on which the Tribunal had proceeded to hold that Respondents 5 and 6 were entitled to carry over their seniority in the Madurai Division when they were transferred to the Cochin Commissioner ate is factually untenable.

15. It was then contended that assuming for arguments sake that the

instructions issued on 12-2-1958 permitting transfers within a period of three years from the date of first appointment without loss of seniority, was in force when Respondents 5 and 6 had been transferred from Madurai Division to Cochin Division, on their request, it was a case where Respondents 5 and 6 themselves had accepted their position at the bottom of the ladder in Cochin Commissioner ate. This position of inter se seniority between the Petitioner and Respondents 5 and 6 was accepted by them as a state of affairs from the date on which they joined the Cochin Commissioner ate, in 1976-1977 and continued even in 1994 when the seniority list of Inspectors was published on 5-12-1994. The said seniority list Annexure R-5(d) reflected the inter se seniority between the Petitioner and Respondents 5 and 6. The latter did not raise any objection to the same. In the meanwhile, the Petitioner had been promoted as Superintendent on 5-3-1993 and this was also not objected to by Respondents 5 and 6. They themselves were promoted as Superintendent on 30-9-1996 and they have not raised any objection to the same. The seniority list of Superintendents was published on 5-8-1996. That also reflected the seniority of the Petitioner and Respondents 5 and 6. They did not raise any objection to the same. Thus, the state of affairs which was prevailing from the year 1976-1977 till 1998, were accepted by the parties as governing them and naturally the Petitioner was entitled to "sit back" with the belief that he was senior to Respondents 5 and 6 in the cadre of Inspectors as also Superintendents. The state of affairs was not consequent upon any benefit that the Petitioner had claimed and had received in antagonism to Respondents 5 and 6 and which benefit had been challenged by the latter. The state of affairs came to prevail by reasons of Respondents 5 and 6 having been transferred from the Madurai Division to Cochin Division, on their request, and since such transfers were perceived as entailing loss of seniority in the parent unit, that was accepted as such by Respondents 5 and 6. In such circumstances, they should not have been permitted to raise a claim at a distance of time, almost 22 years after they had secured a transfer from one division to another.

16. It was also contended that the Tribunal erred in proceeding on the premise that the Patna Bench of the Central Administrative Tribunal in Damodar Singh's case laid down any inviolable principle, as it were, that all inter-commissioner ate transfers effected in the Department of Central Excise, within a period of three years from entry into service prior to 25-5-1980, will enable the incumbent to carry over the seniority from the parent unit. The judgment of the Supreme Court, dismissing the Civil Appeal against the order in Damodar Singh's case was rendered essentially on the premise that no materials had been placed before the court to show that inter-commissioner ate or inter-division transfers would occasion loss of seniority. Obviously, the observations made by the Supreme Court in the Civil Appeal against Damodar Singh's case would bind only the parties and it cannot be treated as a precedent, in relation to any claim made by persons like Respondents 5 and 6, who had been subjected to inter-commissioner ate transfer, on request.

17. Sri O.V. Radhakrishnan, learned Senior Counsel, on the other hand, submitted that the instructions issued in 1958 permitted inter-commissioner ate transfers without loss of seniority. There is no material to show that the revised instructions issued on 22-12-1959 were operative in 1976-1977 when Respondents 5 and 6 had joined the Cochin Commissioner ate. It was further contended that the earlier order passed by the Tribunal dismissing the original application filed by the Petitioner herein, O.A. No. 59/93 stood in the way of the Petitioner reagitating his claim, in the course of defending O.A. No. 469/06 filed by Respondents 5 and 6.

18. Learned Counsel for the Department Mr. Tojan Vathikulam submitted that the Department affirms the stand taken by them in the counter-affidavit filed before this Court wherein they oppose the Petitioner.

19. The question that has been seriously mooted for consideration and which we have considered in some detail revolves around the principle that the incumbents in a service are entitled, as of right, to assume the prevalence of a state of affairs relating to their position in service, including inter se seniority amongst persons included in a cadre, and sit back with the belief that such state of affairs have assumed finality and should accordingly govern the parties. Learned Counsel for the Petitioner relies on the following judgments of the Supreme Court.

20. Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, , Amrit Lal Berry and Another Vs. Collector of Central Excise, New Delhi and Others, , R.S. Makashi and Others Vs. I.M. Menon and Others, , K.R. Mudgal and Others Vs. R.P. Singh and Others, , B.S. Bajwa and Another Vs. State of Punjab and Others, , Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd., and Government of Karnataka v. Gowramma AIR 2008 S.C. 863.

21. We consider it advantageous to extract the dictum laid down by the Supreme Court in Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, . We note that the principles laid down therein have been almost unwaveringly quoted by the Supreme Court in the subsequent judgments. It was held as follows in paragraphs 34 and 35 of the judgment in Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, .

34. The learned Counsel for the Petitioners strongly urges that the decision of this Court in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, needs review. But after carefully considering the matter, we are of the view that no relief should be given to Petitioners who without any reasonable explanation, approach this Court under Article of the Constitution after inordinate delay. The highest Court in this land has been given Original Jurisdiction to entertain petitions under Article 32 of the Constitution. It could not have been the intention that this Court would go into stale demands after a lapse of years. It is said that Article 32 is itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution makers that this Court

should discard all principles and grant relief in petitions filed after inordinate delay.

35. We are not anxious to throw out petitions on this ground, but we must administer justice in accordance with law and principles of equity, justice and good conscience. It would be unjust to deprive the Respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years. It was on this ground that this Court in *S.G. Jaisinghani Vs. Union of India (UOI) and Others*, observed that the order in that case would not affect Class II officers who have been appointed permanently as Assistant Commissioners. In that case, the Court was only considering the challenge to appointments and promotions made after 1950. In this case we are asked to consider the validity of appointments and promotions made during the periods of 1945 to 1950. If there was adequate reason in that case to leave out Class II officers, who had been appointed permanently Assistant Commissioners, there is much more reason in this case that the officers who are now permanent Assistant Commissioners of Income Tax and who were appointed and promoted to their original posts during 1945 to 1950, should be left alone.

22. The theory of "sit back" has been applied almost uniformly in the context of a contention of delay and laches on the part of any person, who makes an attempt to prosecute a claim, which, if accepted, would result in a situation where inter se positions which have been settled over the years will have to be revised. These contentions have often been raised in proceedings under Articles 226 or 32 of the Constitution and therefore, the Supreme Court had taken note of the fact that though there is no statutory period of limitation applicable to proceedings under Articles 226 and 32 of the Constitution, where settled positions of seniority are sought to be questioned after a considerable lapse of time, the court would be inclined to decline jurisdiction in such cases, on the ground of delay and laches. The court would be loathe to interfere with settled affairs in matters of seniority and promotion effected in any cadre or service after a lapse of time. As observed by the Supreme Court in *Rabindranath Bose and Others Vs. The Union of India (UOI) and Others*, , though the courts would not be anxious to throw out petitions on the ground of delay on the part of the Petitioner in approaching the court, justice will have to be administered in accordance with law and principles of equity, justice and good conscience. As the court observed in the said case, it would be unjust to deprive the Respondents (in the said case) the rights which have accrued to them; "each person ought to be entitled to" sit back" and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years.

23. The principles laid down in *Rabindranath Bose and Others Vs. The Union of India (UOI) and Others*, were followed in *Amrit Lal Berry and Another Vs.*

Collector of Central Excise, New Delhi and Others, . The Court again reiterated the position in R.S. Makashi and Others Vs. I.M. Menon and Others, , and thereafter in K.R. Mudgal and Others Vs. R.P. Singh and Others, .

24. The approach made by the Supreme Court in a case dealing with a dispute of seniority between Assistants in the Intelligence Bureau in the case of K.R. Mudgal and Others Vs. R.P. Singh and Others, is significant. The Supreme Court specifically held that where a belated challenge is mounted before the High Court, the Court ought to decline to consider the merits of the contentions. Where a writ petition mounting such belated challenge was found to be liable to be dismissed on the ground of laches, the following observations made by the Supreme Court are significant:

The Respondents in the writ petition raised a preliminary objection to the writ petition stating that the writ petition was liable to be dismissed on the ground of laches. Although the learned Single Judge and the Division Bench have not disposed of the above writ petition on the ground of delay, we feel that in the circumstances of this case the writ petition should have been rejected on the ground of delay alone. The first draft seniority list of the Assistants was issued in the year 1958 and it was duly circulated amongst all the concerned officials. In that list the writ Petitioners had been shown below the Respondents. No objections were received from the Petitioners against the seniority list. Subsequently, the seniority lists were again issued in 1961 and 1965 but again no objections were raised by the writ Petitioners, to the seniority list of 1961, but only Petitioner 6 in the writ petition represented against the seniority list of 1965. We have already mentioned that the 1968 seniority list in which the writ Petitioners had been shown above the Respondents had been issued on a misunderstanding of the Office Memorandum of 1959 on the assumption that the 1949 Office Memorandum was not applicable to them. The June 1975 seniority list was prepared having regard to the decision in Ravi Varma's case and the decision of the High Court of Andhra Pradesh in the writ petitions filed by Respondents 7 and 36 and thus the mistake that had crept into the 1968 list was rectified. Thus the list was finalised in January 1976. The Petitioners who filed the writ petition should have in the ordinary course questioned the principle on the basis of which the seniority lists were being issued from time to time from the year 1958 and the promotions which were being made on the basis of the said lists within a reasonable time. For the first time they filed the writ petition in the High Court in the year 1976 nearly 18 years after the first draft seniority list was published in the year 1958. Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the Government servants created by the writ petitions filed after several years as in this case. It is essential that anyone who feels aggrieved by the seniority assigned to him should approach the court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the Government servants there would also be administrative complications and difficulties. Unfortunately, in this case even after nearly 32 years the dispute regarding the appointment of some

of the Respondents to the writ petition is still lingering in this Court. In these circumstances we consider that the High Court was wrong in rejecting the preliminary objection raised on behalf of the Respondents to the writ petition on the ground of laches. The facts of this case are more or less similar to the facts in *R.S. Makashi v. I.M. Menon*. In the said decision, this Court observed at page 100 of the Reports thus: (S.C.C. p. 400 para 30)

In these circumstances, we consider that the High Court was wrong in overruling the preliminary objection raised by the Respondents before it, that the writ petition should be dismissed on the preliminary ground of delay and laches, inasmuch as it seeks to disrupt the vested rights regarding the seniority, rank and promotions which had accrued to a large number of Respondents during the period of eight years that had intervened between the passing of the impugned resolution and the institution of the writ petition. We would accordingly hold that the challenge raised by the Petitioners against the seniority principles laid down in the Government Resolution of March 22, 1968 ought to have been rejected by the High Court on the ground of delay and laches and the writ petition insofar as it related to the prayer for quashing the said Government Resolution should have been dismissed.

25. Though the theory of "sit back", as such, was not referred to in *K.R. Mudgal and Others Vs. R.P. Singh and Others*, : *K.R. Mudgal and Others Vs. R.P. Singh and Others*, essentially the principle upheld by the Supreme Court was that settled positions of seniority should not be permitted to be agitated again, after a reasonable lapse of time. The Supreme Court observed that it would not be in the interest of administrative efficiency to let disputes of seniority to be permitted to be raised and prosecuted several years after the seniority had been settled in the department in the ordinary course of business.

26. The crucial dates and facts involved in the present case have already been mentioned in the opening portion of this judgment. We consider it appropriate to recall certain crucial dates and events. The writ Petitioner entered service as an Inspector in the Cochin Commissioner ate on 25-8-1975 and Respondents 5 and 6, though had joined the Madurai Division on 11-12-1974, had joined the Cochin Division on an inter commissioner ate transfer, on 13-12-1976 and 5-12-1977 respectively. There is no dispute that the Petitioner was promoted as the Superintendent on 5-3-1993 and Respondents 5 and 6 were promoted only on 30-9-1996. These promotions were accepted by both sides and significantly the Petitioner's promotion effected on 5-3-1993 was not questioned by Respondents 5 and 6. What is of crucial significance is, therefore, that the seniority position prevailing inter se the Petitioner and Respondents 5 and 6 and obtaining from 1975, 1976 and 1977, was not questioned at any point of time by Respondents 5 and 6 either in 1993 when the Petitioner was promoted or in 1996 when Respondents 5 and 6 themselves were promoted as Superintendents. Obviously, the earlier promotion of the Petitioner on 5-3-1993 to the post of Superintendent must have been on acceptance of the seniority enjoyed by the Petitioner over

Respondents 5 and 6 from the date on which Respondents 5 and 6 had joined the Cochin Commissioner ate on 13-12-1976 and 5-12-1977. The seniority list of Inspectors published on 5-12-1994 also reflected the same inter se seniority position. The seniority list of Superintendents published on 5-8-1996, i.e., after the promotion of Respondents 5 and 6 as Superintendents, further reiterated and reflected the inter se seniority of the Petitioner and Respondents 5 and 6. At no point of time were these seniority lists of Inspectors or Superintendents published on 5-12-1994 or 5-8-1996 challenged by Respondents 5 and 6 before any authority or court, as the case may be.

27. Apparently Respondents 5 and 6, proceeded to raise their claim, for what they call as "carrying over their seniority in the parent unit" on the basis of a letter issued by the Ministry on 20-10-1998. This letter was issued purportedly for the purpose of uniformly implementing the direction issued by the Patna Bench of the Central Administrative Tribunal in Damodar Singh's case. No doubt, a reference was made to the judgment of the Supreme Court affirming the judgment of the Central Administrative Tribunal, Patna Bench. But, it is only relevant to recall in this context that the Supreme Court had not issued any general directions in the matter of fixation of seniority amongst the Inspectors and Superintendents of the Central Excise Department. The aforementioned order of the Central Administrative Tribunal, Patna Bench affirmed by the Supreme Court by the judgment dated 31-3-1998 need not have really been taken as a reason by the Ministry for proposing a revision of the seniority list which had long since been settled. It is useful to refer to the letter dated 20-10-1998, which reads as follows:

I am directed to say that the question of granting benefits of Clause (i) and (ii) of this Ministry's O.M. No. 6/97/57- Ad.IIIA dated 12-2-1958 to the Non-gazetted staff in CBEC who took Inter-commissioner ate transfer before 20-5-1980, was under dispute in CAT, Patna Bench. CAT, Patna Bench in its judgment dated 20-7-1995 (O.A. No. 601/93 Shri Damoder Singh) has held that the benefit of Clause (i) of the O.M. of 1958 may be given to Shri Damodar Singh while fixing his seniority on his inter-commissioner ate transfer from Jaipur to Patna in the year 1978. Hon''ble Supreme Court has also upheld the judgment of CAT, Patna Bench vide its judgment dated 31-3-1998 in SLP No. 6734/96. Consequent upon the judgment of Hon''ble Supreme Court it has been decided by the Board suo moto that to avoid further litigation/representations, the benefit of Clause (i) and (ii) of 1958 circular (copy enclosed) may be granted to all the similarly situated Group "C" officers under CBEC who were transferred before 20-5-1980. While implementing the decision and revising the Seniority of the employees who have undergone inter-commissioner ate transfer before 20-5-1980, it may be ensured that all those who are adversely affected should be given a due notice and their representations should be considered before revising their seniority. This issue in consultation with DOPRT/Ministry of Law.

28. The reason, therefore, purported to be given for issuing a direction to revise

the seniority list already published was allegedly to avoid further litigation and to attain uniformity. Obviously the Ministry only achieved the converse. No doubt, Damodar Singh had approached the Patna Bench of the Central Administrative Tribunal for getting the benefit of his seniority in his parent unit. But forfeiture of seniority in the parent unit was accepted by the inter-unit transferees in the Cochin Commissioner ate and settled positions of seniority amongst Inspectors and Superintendents, accepted as governing them over a period of time and enabling the persons concerned to "sit back" in their positions were overturned by a circular, which obviously was not mandated even by the order of the Patna Bench of the Central Administrative Tribunal, let alone by the Supreme Court which had affirmed the order of the Central Administrative Tribunal. It will have to be recalled that the said circular was the subject-matter of a subsequent challenge by the Petitioner herein before the Central Administrative Tribunal, Ernakulam in O.A. No. 59/03. The said challenge was mounted along with the challenge to the revised seniority list of Inspectors issued on 4-7-2000 and revised seniority list of Superintendents issued on 12-6-2002. The Petitioner moved the Central Administrative Tribunal, Ernakulam Bench in O.A. No. 59/03 against the revision of seniority list of Superintendents and obviously because, since the both the Petitioner and Respondents 5 and 6 had been promoted as Superintendents in 1993 and 1996 respectively, the Petitioner's cause of action could have arisen only after the revised seniority list of Superintendents was published.

29. Apparently, waking up to the sudden spurt in belated claims and the obvious lack of wisdom or foresight behind the issuance of the circular dated 20-10-1998, the Ministry itself had withdrawn the same on 25-3-2004 and this fact was specifically adverted to in the reply statement and the additional reply statement filed by the Department in O.A. No. 59/03. Nevertheless, the said original application came to be dismissed. The order of the Central Administrative Tribunal was challenged before this Court in W.P. (C) No. 30312/05 and by judgment dated 15-11-2005 this Court observed that the Department need only follow the proceedings dated 25-3-2004, if it had not been challenged.

30. In the context of considering whether the Petitioner was entitled to "sit back" in his position and assume that inter se seniority between him and Respondents 5 and 6 ought to have been taken as settled, it will have to be noticed that the position of seniority which obtained in the department between Petitioner and Respondents 5 and 6 from 1977 onwards came to be even questioned by Respondents 5 and 6 only after 20-10-1998; i.e., to say, almost 22 years later. No doubt, the validity of the said circular dated 20-10-1998 had to be challenged by the Petitioner herein. But the Tribunal should have considered whether the positions of seniority which came to be settled over more than two decades can be upset by a circular issued by the Ministry. The principles laid down by the Supreme Court in *Rabindranath Bose and Others Vs. The Union of India (UOI) and Others*, and in the subsequent judgments which have followed the same, ought to have been kept in mind by the Tribunal at that point of time. That was

not done.

31. We are of the view that, just as in a case where a belated challenge to a settled position of seniority or consequential orders of promotion will not be entertained by a writ court under Article 226 of the Constitution, on the principles laid down in *Rabindranath Bose and Others Vs. The Union of India (UOI) and Others*, and *K.R. Mudgal and Others Vs. R.P. Singh and Others*, , the court should also be wary in countenancing a contention which, if accepted, would result in overturning seniority positions of long standing. Essentially, the doctrine of sit back would apply both in cases where challenge against settled positions are mounted belatedly and in cases where the challenge to administrative actions overturning settled seniority positions are sought to be defended.

32. This principle ought to have been kept in mind by the Tribunal when Respondents 5 and 6 had subsequently challenged the circular dated 25-3-2004 in O.A. No. 469/06. That was not done. The challenge to the circular dated 25-3-2004 by itself would not have been of any significance, as acceptance of the claim made by Respondents 5 and 6 could be done by any Tribunal only if the Tribunal or the court as the case may be, permits Respondents 5 and 6 to claim the benefit of carrying over seniority from their parent unit, when they joined the Cochin Commissioner ate in 1976 and 1977. In other words, accepting the claim made in O.A. No. 469/06 at the instance of Respondents 5 and 6 herein could only be resultant upon the Tribunal permitting Respondents 5 and 6 to challenge positions of inter se seniority of Inspectors in the Central Excise Department, to be raised after a period of almost 22 years. Applying the principle in *K.R. Mudgal and Others Vs. R.P. Singh and Others*, , the Tribunal ought to have dismissed O.A. No. 469/06 on a preliminary ground of delay, laches, acquiescence and application of the principles of "sit back theory".

33. The second aspect which was mooted by the learned Counsel for the parties, relates to the question as to whether an inter-unit transferee in the Central Excise Department, was entitled to carry over the seniority from the parent unit. The Tribunal has proceeded on the premise that the circular dated 12-2-1958 which enable such transfers without loss of seniority had not been modified at any point of time till 20-5-1980. The revised instructions applicable to non-gazetted staff, inter alia for the purpose of determining seniority and issued on 22-12-1959 Annexure A-5 was pressed into service by the Petitioner. We have gone through the instructions dated 12-2-1958 and 22-12-1959. We are unable to agree with the view taken by the Tribunal that the revised instructions dated 22-12-1959 has no application to the inter-unit transfer of Respondents 5 and 6. There is no basis for such a finding. Respondents 5 and 6 have not placed on record, either before this Court or before the Tribunal the orders under which they have been transferred from Madurai Division to the Cochin Commissioner ate. It has always been the specific contention of the Petitioner that the inter-unit transfer of Respondents 5 and 6 was allowed on condition that they had

agreed to forfeit their seniority in the parent unit. We do not find any tenable explanation on the part of Respondents 5 and 6 for not producing their orders of inter-unit transfer. We further take note of the additional documents produced by the Petitioner as Exts. P-10 and P-11 along with I.A. No. 8399/09. We think, it is also significant to take note of the fact that Ext. P-10 refers to one K.C.C. Raja, Preventive Officer Grade I, and apparently K.C.C. Raja had earlier approached the Tribunal, Ernakulam Bench in O.A. No. 1182/95 for reckoning his seniority from his entry in service in the Bombay Unit. His claim was accepted and affirmed by this Court in O.P. No. 1070/98. But, having gone through the judgment affirming the judgment of the Tribunal, we find that this Court had merely gone by the circular dated 20-10-1998, which was subsequently withdrawn on 25-3-2004. The principles of law apparently were not argued before this Court. At any rate, the same has not been considered by the Division Bench. We also take note of the fact that the Tribunal itself has not considered the 1959 revised instructions, but had proceeded on the premise that the 1958 circular had continued to prevail till the year 1980. Since there was not even a reference to the 1959 revised instructions, we are of the view that the principles laid down by the Tribunal in O.A. No. 1182/95 or the aforementioned judgment of the Division Bench of this Court in O.P. No. 1070/98 ought not to have had any persuasive effect with the Tribunal in the present case. Further more, Respondents 5 and 6 have not placed any materials before this Court to indicate that their inter-unit transfer was not subject to a condition that they shall not be permitted to carry over their seniority from the parent unit.

34. Learned Senior Counsel for the Respondents Mr. O.V. Radhakrishnan submitted that the direction issued by the Patna Bench of the Central Administrative Tribunal in Damodar Singh's case in the matter of permitting an inter-unit transferee to carry over his seniority from the parent unit was affirmed by the Supreme Court. It is profitable to refer to the judgment of the Supreme Court in its entirety, which reads as follows:

The Respondent's seniority was determined taking into fact that at Patna he should be treated to be the junior most on the date his prayer for transfer was allowed and he joined at Patna. Challenging the said seniority the Respondent had initially filed a representation to the Central Board but the representation having been rejected, he had approached the Central Administrative Tribunal. The Tribunal by the impugned judgment has come to the conclusion that in view of the policy of the Central Government in the year 1958 the Respondent's seniority has to be determined taking the entire service period and not on the basis of the transfer which was made at his request. The Appellant has not been able to produce any material to indicate that the said policy was not in vogue when the Respondent was transferred pursuant to his request. In that view of the matter, we see no infirmity with the impugned order of the Tribunal. This appeal is accordingly dismissed. No order as to costs.

35. It is quite clear from the judgment in Civil Appeal No. 6734/98 that the

Supreme Court had taken specific note of the fact that the Union of India was not able to produce any material to indicate that the policy of the Central Government laid down in the year 1958, whereby the seniority had to be determined taking the entire service period was not in vogue when Damodar Singh was transferred pursuant to his request. Thus, the revised instructions of 1959, nor the circular which was issued in 1980 was brought to the notice of the Supreme Court. We have gone through the judgment of the Central Administrative Tribunal, Patna Bench in Damodar Singh's case, which has also been placed on record and it seems that the 1959 circular was not brought to the notice of the Central Administrative Tribunal also. In the circumstances, we are of the view that the judgment of the Apex Court in Civil Appeal No. 6734/98 really turned on the fact that the revised policy which came into force in 1959 had not been brought to the notice of the court. In such circumstances, as has been repeatedly laid down by the Supreme Court on several occasions, the direction issued therein cannot be intended to act as a precedent in other cases. It will bind only the parties to the judgment. Reference in this regard could be made to the dictum laid down in *Government of Karnataka v. Gowramma* AIR 2008 S.C. 863.

36. We are, therefore, unable to accept the submission of the learned Senior Counsel for Respondents 5 and 6 that the decision of the Supreme Court in Civil Appeal No. 6734/98 was intended or would actually govern the dispute that has been raised in the present case.

For all these reasons, the Petitioner is entitled to succeed. The writ petition is allowed. The order of the Central Administrative Tribunal, Ernakulam Bench in O.A. No. 469/06 shall stand set aside and O.A. No. 469/06 shall stand dismissed. In the circumstances, there will be no order as to costs.