

Deepak S. Dave and ors. Vs. Union of India (Uoi) and anr.

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Court : Central Administrative Tribunal CAT Ahmedabad

Decided On : Feb-17-2006

Reported in : (2006)(92)SLJ335CAT

Judge : A Sanghvi, P A Shankar

Appellant : Deepak S. Dave and ors.

Respondent : Union of India (Uoi) and anr.

Advocate for Def. : Mr. Shevde

Judgement :

1. Aggrieved by the notification dated 26.10.05 reserving 20 of 34 posts of Loco Pilot (Goods Driver Goods) Gr.II for being filled up by members of SC/ST, the applicants, who belong to general category, have preferred the present O.A. They have sought for quashing of the same.

It is proposed to hold a selection for promotion to the post of Loco Pilot Goods/Gr.II/Driver Goods scale Rs. 5000-8000 (RSRP). The assessed vacancies are 34, out of which 16 posts are reserved for SC and 04 posts are reserved for ST as per post based roster of reservation for the category of Loco Pilot (Goods) Gr.II scale Rs. 5000-8000 including shortfall/requirement of SCs/STs in the category of Loco Pilot (Mail) and Loco Pilot (Pass Gr.II/II and Loco Pilot (Goods) Gr.I scale Rs. 5500-9000 (RSRP).

3. The grievance of the applicant is that the newly created Ahmedabad Division also includes a part of erstwhile Rajkot Division. There is no shortfall of SC/ST in the Rajkot Division as it exists today (Ann.

A/3). The candidates belonging to general category had earlier preferred O.A. 355/04 against the notification issued on previous occasion. The said notification was withdrawn stating that vacancies have been recomputed and that the same will be filled up in accordance with rules. Even though the post of driver is a safety category post diesel assistants belonging to SC/ST, who have put in less than two years service have been called for selection. Rejoinder has been filed.

The respondents in their detailed reply have stated that the selection is against existing and anticipated vacancies including shortfall of SC/ST in vacancies in higher grades. There is a shortage of persons belonging to SC/ST in the higher grades of Loco Pilot (Mail), Loco Pilot (Passenger) Grade I, Loco Pilot (Passenger) Grade II and Loco Pilot (Goods) Grade I also. These vacancies can be filled up in Loco Pilot (Goods) Grade-II as per Rail way Board instruction dated 29.6.99.

It is further submitted that in terms of Railway Board instruction 21.8.97 the rule of 50% quota has to be followed on the cadre as a whole and not on the basis of vacancies. The overall cadre strength is 146 persons and against a requirement of 22 SC and 11 STs only 6 SCs and 7 STs are working. Thus the vacancies notified does not exceed 50% of overall cadre. The reservation has been correctly applied. The eligibility list has been accordingly prepared. As a matter of fact sufficient number of SC candidates are not available. The condition of qualifying service has to be fulfilled on the date of promotion.

The notification impugned in Prabhu Kanji's case was withdrawn. Some more posts have been created and few surrendered.

5. It appears from Annexure R/5 that AGM has sanctioned 10 sets of temporary posts for Goods Crew i.e., 10 Goods Drivers and 10 Asst.

Drivers for the slack season i.e., from 1.4.05 to 30.9.05. Thus the sanction of goods crew was 65 permanent and 8 temporary posts for slack season from

1.4.05 to 30.09.05. 5 posts of Crew Controller have been sanctioned in addition. The following table is shown.

Sr. Driver Goods 28 28 Driver Goods 21 16 37 39 +18T +18T 6. The following table has been produced to show the shortfall of SC/ST.

Category Scale Cadre Reserva No. of No. of No. of Total Rs. tion emplo- emplo- emplo- short- (RS required yees yees yecs fall RP) as per avail as per as per

SC ST SC ST SC ST SC ST SC ST1.

Loco Pilot 6000- 18 3 1 2 0 1 0 1 0 2 1 (Mail/Exp) 98002.

Loco Pilot 6000- 11 2 1 0 1 0 1 0 0 2 1 (Pass) Gr.I 98003.

Loco Pilot 5500- 29 4 2 5 4 0 1 5 3 -1 -1 (Pass) Gr.II 90004.

Loco Pilot 5500- 28 4 2 0 2 0 1 0 1 4 -1 (Goods) 90005.

Loco Pilot 5000- 60 9 5 0 3 0 0 0 3 9 2 (Goods) 8000

Total 146 22 11 7 10 1 3 6 7 16 4

Total cadre of Loco Pilot category 146B Total number of SC/ST available against reservation.

13C Total number of SC/ST available as per merit.

04D Total Number of SC/ST available in the entire cadre of Loco Pilot.

17 7. We have also gone through the selection file. The following picture emerges:

(a) The Railway Board instruction E(NG) I-94/PM7/16/Pl. I dt. 1.5.96 on the subject of filling up of the posts of driver goods having regard to small cadre of Shunters or due to refusal of Shunters to be considered for promotion conveys the following decision: 2.1 The Board have reviewed the matter and have decided as an interim measure, that whenever the Railways are unable to fill up the vacancies

of Goods Drivers in terms of Board's letters dated 3.8.95 and dated 13.12.95, the Railways may, with the personal approval of their General Manager also consider First Fireman/Diesel/Elect. Assts. (including Shunters with less than 3 months service) for filling up the vacancies of Goods Drivers provided they have put in: (i) six years service (combined as Second Fireman and First Fireman/Diesel Assistant/Electric Assistant); (ii) two years service as First Fireman/Diesel Assistant/Electric Assistant; and (iii) 60,000 Kms. Experience of foot-plate as First Fireman/Diesel Assistant/Electric Assistant.

3. The above dispensation will have prospective effect and will remain valid till further orders in this regard.

(b)(i) An assessment sheet has been prepared and approved on 23.06.04 for filling up the vacant post of Driver (M/E) Senior Driver (Passenger), Driver (Passenger), Senior Driver (Goods), Driver (Goods). The statement indicates that the last selection was held on 09.10.03, 12.04.04, 04.12.03, 12.04.04 and 23.10.2000 respectively. A notification dated 02.07.04 was issued for 21 posts of driver (goods) of 12 & 3 posts were reserved for the posts of SC & ST respectively.

(ii) Prabhu Kanji and Others had filed O.A. 355/04 against the aforesaid notification. Having regard to the fact that the reservation exceeded 50% and that the eligibility list was not in accordance with seniority list of Dec. 2003 stay was granted till further orders vide order dated 22.07.04.

(iii)(a) There is a letter dated 4.7.05 of GM(E) conveying the following instructions of CPO in this case pursuant to Sr. DPO meeting on 14.06.05.

(1) M.A. should be filed seeking approval of the Court to cancel the selection and hold it afresh from the stage of assessment, submitting the fact that an error in the eligibility list is noticed.

(2) Legal opinion in the matter should be taken at the earliest so that the M.A. can be filed in (blank) (sic) week's time.

(b) DPO Rajkot has also circulated a notes recorded during personnel officer's meeting on 14/06/05. Para 21 is as under: CPO pointed out that due to wrong

issue of eligibility list by Rajkot Division the vacancies in Goods Driver category could not be filled and the stay is still continuing. If the eligibility list was issued correctly the stay should have been avoided. Instruction was given to APO(E) to prepare a fresh eligibility list and get the stay vacated immediately by filing M.A. that are rectifying the mistake.

APOs should ensure that the eligibility list should be prepared on the basis of guideline given by the CPO/SPO/(RP). If, in future, such mistake happened they will be personally held responsible.

(iv) The respondent Railway Administration had moved M.A. 448/2005 for cancelling the said test. After the Tribunal permitted the same the respondents issued order dated 22.08.05 cancelling the said selection. The O.A. was also disposed off as being infructuous.

The issue regarding global assessment had been discussed at PO's Conference with CPO (ADM) as well as by ADRM at HQ level. As such, it has been decided to discontinue the global system/procedure and to adopt old procedure of individual category/scale-wise assessment of vacancies at the time of initiating selection, suitability test and Trade Test with immediate effect.

(d)(i) A draft assessment of 41 vacancies for the period from 05.09.05 to 04.12.06 is put up at 160-159/C as per notesheet 14, 17 posts for SC and 5 posts for ST are shown as reserved. Chief OS' s note indicates that in the year 2000 selection was held for 76 posts of which 13 posts reserved for SC and 10 for ST. 11 persons belonging to ST were promoted. It was also indicated that a particular persons Was promoted against general category. This note didn't travel beyond A.P.O. (ii) A fresh assessment was put up for 41 vacancies but stating that 17 and 4 are reserved for SC and ST at 162-161/C vide 17/N. The following position is referred to _____ in _____ different grades. _____

C	A	V
Requirement		

(M/E) 18 14 4 01 02 01Sr. Driver 11 08 3 - 02 01(Passenger)Driver 29 26 3 03 - - (Passenger) [Against the quota of 4 SC & 2 ST posts 5 SC & 3 ST persons have

been promoted]Sr. Driver 28 21 7 02 04 01(Goods)Driver 67 45 22 09 10 03(Goods)

S/RP has approved the assessment. 10 more posts had become available for slack season from 01.04.05 to 30.09.05 vide order dated 12.09.05.

(iii) Having regard to these 10 posts and 5 more posts of Crew Controller another assessment is put up at 164-163/C vide 21/N. This is for 51 posts of which 18 and 5 are reserved for SC & ST respectively. ADRM has thereafter recorded the following order on 20.09.05.

I have spoken to CRSE (F&O), TR posts are not to be operated. Newly created posts 10 + 5 are to be considered. Assessment is to be prepared accordingly.

(iv) Accordingly an assessment of 34 vacancies for this grade is put up at 170-169/C vide note sheet 22/N. As per this computation vacancies are assessed at 34 of which 16 & 4 are reserved for SC & ST respectively. S/RP also endorses it. It is finally approved.

(v) Orders are also obtained to take action as per orders quoted at Sub-clause (a) above. Attention was also drawn to the minutes of the meeting dated 14.06.05. It is thereafter that the selection notification dated 26.10.05 was issued.

(e)(i) The draft seniority list had been published on 04.10.95 giving one month time to file representations.

(ii) It has been finalised vide order dated 06.12.05, that is after the selection notification was issued.

(f) It appears that AGM has sanctioned creation of 20 permanent posts and approved surrender of 8 temporary posts for the busy season 01.10.2005 to 31.03.06. Order dated 22.12.05 refers.

(g)(i) WREU protected against the assessment of SC/ST quota in selection. It is stated that though out of 35 posts only 12 & 6 posts could have been reserved for SC & ST respectively the administration has reserved 20 posts. The seniority has also been questioned.

It is followed by another representation dated 16.11.05 that there could not have been reservation of 12 posts for SC and 8 posts for ST in the 34 posts. It was also been stated that the representation against seniority has not been finalised.

(ii) The respondents have sent the following replies: Letter dated 16.12.2005 In response to your letter under reference, it is slated that reservation i.e. 16 for SC, 04 for ST is worked out on the basis of reservation required in the categories of Loco Pilot (Goods) Gr.II as well as shortfall in higher grade from Loco Pilot (Mail) to Loco Pilot (Goods) Gr.I. As regarding more than 50% vacancy, it is state that as per the instructions 50% of Reservation is required to be followed on the Cadre as a whole and not on the basis of vacancy of the Cadre. There is no excess operation i.e. more than 50% of Reservation either in the cadre of Loco Pilot (Goods) Gr.II or entire cadre of Loco Pilot.

Representations as received from Asst. Loco Pilot in reference to seniority list notified vide this officer letter No. EM/1030/5/2/27 vol. VI dtd. 04.10.2005 have been disposed off and seniority list of certain Asst. Loco Pilots have been revised which not effected in the present selection.

In view of the above, process of present selection is in order and correct.

In this connection it is stated that selection for promotion to the post of Loco Pilot is processed for 34 vacancies and not 35. It is further added that reservation is worked out in the category of Loco Pilot (Goods) Gr.II as well as shortfall in higher grade i.e. from Loco Pilot (Mail) to Loco Pilot (Goods) Gr.I. It is further stated that representation received in reference to seniority list of Asst.

Loco Pilot scale Rs. 3050-4590 notified under this officer letter No. EM/1030/5/2/27 Vol. VI dated 04/10/2005 have been disposed of and position of certain Asst. Loco Pilot have been revised which is not effected in present selection as regard employees promoted against non-selection post on SC/ST point, it is clarified that only employee Shri A. Thangwel is promoted after 7.8.2002 against unreserved post, even if he was not promoted as Sr. DL. Asst., he would have been called against the reservation post of SC for the present selection.

(h) It further appears that WREU has also raised a PNM item 136/05, which is as under: Selection for filling up 34 posts of Goods Driver scale Rs. 5000-8000 has been notified as per DRM(E) RJT letter No. FM/1029/05/05 Vol. IV dated 26.10.05 under which 12 SC & 2 ST are eligible according to 22.1/2% quota. 4 ST employees are already available in the cadre of Driver Goods. So, reservation of 20 posts of SC/ST is not correct. Moreover, the employees who were promoted as Sr. D. Asstt., in scale Rs. 4000-6000 under SC/ST quota cannot be assigned seniority as general candidate as mentioned in DRM(E) RJT letter No. E/SCT/2020/06 Dt.26.06.05. So, eligibility list is also not correct. You are requested to revise seniority list as well as eligibility list and thereafter selection should be notified. Ref.

SUNR/2005/367 dt. 31.10.05.

(i) It further appears that para-wise remarks in this O.A. Have also been sent to headquarters vide letter dated 02.12.2005 pursuant to CPO's order.

A copy of the assessment and final seniority list has also been sent in connection with this O.A. The statement referred to in Para 6 above has also been sent. (Pg. 287 of the file refers.) (j) Whether any directions were received from headquarters is not clear. The reply in the O.A. has been filed on 13.12.2005.

8. Arguments advanced by Mr. Shevde, learned Counsel for the respondents, can be summarised as follows: (a) That the posts of Loco Pilot (Mail/Express), Loco Pilot (Passenger) Gr.I, Gr.II and Loco Pilot (Goods) Gr.II , Gr.II constitute one cadre.

(b) That there is an under representation of SC/ST in the grades of Loco Pilot (Goods) Grade-II and Grade-I, Loco Pilot (Passenger) Grade-II and Grade-I, and Loco Pilot (Mail/Express). Hence to ensure proper representation for SC/ST in all these grades put together action has been taken in accordance with Railway Board circular to fill up these posts at the level of Loco Pilots (Goods) Gr.II. Reliance was placed on the following instructions of Railway Board.

(i) As per the Railway Board circular dated 21.8.97 post based roster has been introduced pursuant to the decision in J.C. Malik and R.K. Sabbarwal's case. Para 4(a), (b), 5, 6, 9 and 10 are as under: 4(a) The number of points in the roster shall be equal to the number of posts in the cadre. In case there is any increase or decrease the cadre strength in future, the rosters shall be expanded or contracted correspondingly: (b) Cadre, for the purposes of roster, shall mean a particular grade and shall comprise the number of the posts to be filled by a particular mode of recruitment in terms of the codal/Manual provisions or Railway Boards instructions issued from time to time.

Thus, in a cadre of, say, 200 posts where the recruitment rules prescribed a ratio of 50:50 for direct recruitment and promotion, 2 rosters-one for direct recruitment and another for promotion (where reservation in promotion applies)-each comprising 100 points shall be drawn up on the lines of the respective model rosters. The cadre also means the sanctioned temporary posts, workcharged posts, supernumerary posts, shadow posts etc., in the grade.

(5) At the stage of initial operation of roster it will be necessary to adjust the arising appointment in the roster. This will also help in identifying the excesses/shortage, in any, in respect of categories in the cadre. This will be done starting from the earliest appointment made and making appropriate remarks "utilised by SC/ST/General", as the case may be, against each point in the rosters, in making these adjustments, the appointments of candidates belonging to the SC/ST which were made on merit (and not due to the reservation) are not to be counted towards reservation. In other words they are to be treated as general category appointment.

(6) Excess, in any, would be adjusted through future appointments and the existing appointments would not be disturbed. Akhil Bharatiya Soceat Karamchari Sangh and Ors. v. Union of India and Ors.

(9) Post reserved for SC/ST should not be dereserved and should be carried forward as per extent rules. The reserve posts may also continue to be exchanged between SCs and STs in the 3rd year of carry forward as per extent orders. Thus, there maybe a situation where a SC may be occupying a post earmarked for STs

and vice versa.

When such a situation will arise, the combined reservation shall not exceed more than 22.5%. However, whenever either Scheduled Caste(s) or Scheduled Tribe(s) is/are occupying post(s) meant for the STs or SCs as case may be, the possibility of filling up of the post by SCs or STs as the case may be, at the earliest opportunity, against a subsequent reserved post may be kept in view.

(10) At any given point of time the rule of maximum 50% quota will be followed on the cadre as a whole and not on the basis of individual recruitment where it may happen that all posts may be falling in share of SCs/STs due to the application of post based reservation as the posts may be vacated by these segments only.

4. The number of points in each roster shall be equal to the number of posts in a cadre.

5. While cadre is generally to be construed as the number of posts in a particular grade, for the purpose of preparation of roster, it shall comprise posts required to be filled by a particular mode of recruitment in terms of the codal/manual provisions or Railway Board's instructions issued from time to time.

8. Whenever there is any increase or decrease in the cadre strength, the roster shall be correspondingly expanded or contracted. The same will also apply whenever there is a change in a recruitment rules which affects the proportion of posts to be filled by a particular mode of recruitment.

9. The roster is to be operated on the principle of replacement and not as a "running account" as hitherto. In other words, the points at which reservation for different categories applies are fixed as per the roster and vacancies caused by retirement etc., of persons occupying those points shall be filled by appointment of person of the respective categories.

Paras 1, 2 & 3 of the instructions for initial operation is as under: 1. At the point of initial operation of the roster, it will be necessary to determine the actual representation of the incumbents belonging to different categories in a cadre vis-a-vis the points earmarked for each category viz. SC/ST/OBC and General in the

roster. This may be done by plotting the appointments made against each point of roster starting with the earliest appointee. Thus, if the earlier appointee in the cadre happens to be candidate belonging to the scheduled castes, against point No. 1 of the roster, the remark "utilised by SC" shall be entered. If the next appointee is a general category candidate, the remark "utilised by general category" shall be made against point No. 2 and so on and so forth till all appointments, SC/ST/OBC candidates on merit, in direct recruitment, shall be treated as general category candidates.

2. After completing the adjustment as indicated above, a tally should be made to determine the actual percentages of representation of appointees belong to the different categories in the cadre. If there is an excess representation of any of the reserved categories, or if the total representation of the reserved categories exceeds 50% shall be adjusted of candidates belong to such categories shall be filled by appointment of candidates belong to the categories to which the relevant roster points against which the excess occur, belong.

3. Since recruitment is generally vacancy based, it may happen that the actual number of promotees and direct recruits in the cadre does not correspond to the number of posts earmarked in the respective reservation roster. For the purpose of calculations of representation of reserved category in a cadre, total of promotees and direct recruits may be taken. Rectification of the representation as per prescribed percentage by the prescribed mode of recruitment at the earliest possible should however be the goal.

(ii) RBE102/99 dated 11.5.99 is on the subject of filling up of reserved posts due to nonavailability of SC/ST candidates. It is in the context of dereservation of posts as referred to in Para 9 of 21.8.97 circular. Para 2 of this circular is as under: In this connection, it is clarified, that in cases where de-reservation is considered absolutely necessary and justified on the ground of safety of train operations, achievement of production target etc., proposals for de-reservation may be submitted to Board for consideration. Such proposals will be considered by the Board on merit as per extant procedure. However, before proposing any de-reservation, the following positive steps will be required to be taken to fill up the

reserved vacancies by the reserved candidates: (i) Considering the possibility of direct recruitment where such direct recruitments are permissible in the grade in which promotions are required, to be made, in terms of Railway Boards letter No. 90-E (SCT)/I/25/23 dated 29.11.90.

(ii) Where direct recruitments are not permissible, the possibility of down grading the post and filling up the same by promotion may be considered. If same is not feasible, it may also be examined whether such down graded posts can be filled up by direct recruitment if same is permissible.

(iii) In exercise of the powers delegated to General Manager vide Board's letter No. E(NG) I-94/PMI/717 dated 11.11.94, the possibility of relaxing the condition of two years minimum service in the existing grade to one year in non-running category posts may be considered, so that the Scheduled Casts/Scheduled Tribes may be allowed to be promoted under these delegated powers.

(iii) RBE 151/99 dated 29.6.99 is on the same subject and is in continuation of the earlier letter dated 21.8.97 and 11.5.99. It is in the context of dereservation of posts as referred to in Para 9 of 21.8.97 circular. The said circular is as under: Reference is invited to Para 2(ii) of Board's letter quoted above wherein it is suggested that, for filling up of reserved posts remaining unfilled due to non-availability of SC/ST candidates, for promotion to the categories in which direct recruitment is not permissible, the possibility of down grading the posts and filling up the same by promotion to the lower grade may be considered. If the same is not feasible, it is also to be examined whether such downgraded posts can be filled up by direct recruitment.

2. In this connection one of the Railways has asked for clarification whether the down graded posts will continue to be kept as a part of the cadre strength of the higher grade or will be counted in the cadre strength of the lower grade posts.

3. It may be stated that the issue was earlier deliberated in the CPO's Conference held in Board's office on 10.12.98 and the consensus emerged that the temporary downgradation of the reserved posts and filling up of the same by candidates belonging to SC/ST category is done with a view to achieve the prescribed

percentage of representation in the higher grade at a further date. Therefore, the downgraded posts will continue to be counted against the cadre strength of the higher grade post. In such cases, as and when the reserved community reserved posts shall be restored to the original grades and shall be filled up by promotion of reserved candidates.

(c) It further argued that the availability of posts from Loco Pilot (Goods) Grade-II to Loco Pilot (Mail) was worked out, taking into account even the 6 monthly sanctions. The requirement of SC/ST candidates in each of these grades was worked out. The Railway Board policy that once representation is achieved the posts held by SC/ST and vacated by them should be filled by SC/ST and that the posts can be filled at lowest level was taken into consideration. Anticipated vacancies was also taken into account. There were some carry forward vacancies also. They have to be treated separately as an independent transaction for the purposes of reservation.

9. The Department of Personnel & Training, which is the nodal department in matters of personnel policy has pursuant to the decision in R.K. Sabbarwal and J.C. Malik v. Ministry of Railways issued instructions regarding implementation of post based roster.

A comparison of the text of the letter dated 2.7.97 of the Department of Personnel and Training and the Railway Board circular dated 21.7.97 indicates that there are minor variations. Paras 1 to 6 of the DOPT O.M. have been by and large reproduced with minor modifications.

Para 7 of DOPT O.M. had requested the Ministries of the Department to initiate immediate action and to prepare roster according to this guidelines. Para 8 is reproduced as Para 13 in the Railway Board circular. Para 9 of the DOPT letter indicates that the order issued shall take effect from the date of their issue and that the selection which have already been finalised, need not be disturbed and the necessary adjustments made in future. In other cases the recruitment may be withheld till the revised rosters are brought into operation and recruitment effected in accordance with these instructions. The Railway Board instructions on the other hand has made this order effective from 10.2.95. Paras 7 to 11 are detailed

guidelines in place of this guideline. The explanatory note are by and large the same except that Para 6 is modified and there is no paragraph.

10. It appears from the decision of Jodhpur Bench in L.N. Mathur v. UOI 2005 (1) SLJ (CAT) 55 that the Jodhpur Bench in O.A. 268/98, Rajendra Kumar Gaur v. UOI has held that the L based roster prescribed by Railway Board for small cadres upto 13 points is bad in law as "it is contrary to the DOPT circular, writ petition 3722/01 filed against the aforesaid order was dismissed by the Hon'ble Rajasthan High Court.

S.L.P., C.A. 2614/03. filed by respondent Railway Administration is pending in the Apex Court.

The Jodhpur Bench in Rajendra Kumar Gaur v. UOI 2002 (1) SLJ (CAT) 316, had held: 11. The next question is whether Railway Board has the authority to issue a roster which is at variance with the roster issued by the Department of Personnel. We find from the O.M. dated 2.7.97, the same has been sent to all the Ministries and Departments of the Government of India and no exception has been made for the department of Railways. In Para 7 of the letter it has been clearly stated that: All Ministries/Departments are requested to initiate immediate action to prepare rosters and operate them according to these guidelines.

12. Learned Counsel for the respondents also was not able to place before us, any material to support that Railway Board had been given authority to issue a roster which is different from the one, issued by the Department of Personnel and Training. In terms of Department of Personnel and Training O.M. No. 36001/15/79 EST (SCT) dated January 6, 1981 all Ministries/Departments have been advised that if they intend to depart from the policies laid down by the Department of Personnel, it is mandatory for them to consult the Department of Personnel, in terms of Sub-rule 4 of Rule 4 of the Transaction of Business Rules; otherwise the policies laid down by the Department of Personnel are binding on them. If that is the policy of the Government, we do not see any reason for the Railway Board not to adopt the policy instructions relating to reservation roster as issued by the Department of Personnel. The orders issued by Railway Board dated 21.8.97 Annexure-A/3 are thus, liable to be quashed and set aside.

It has not been argued by the applicant that there are no instructions of DOPT to fill up vacant post in higher grades by promotion in lower grades, so as to, maintain overall reservation and therefore following the above principle these provisions of the Railway Board circular are itself bad in law.

11. We first note that a re-organisation of zones as well as divisional offices has taken place in 2002 and 2003 respectively. The new division have come into existence with effect from 1.4.2003. Apart from the filling up of the post in the new zonal and divisional office the rest of the staff have been transferred on as is where is basis. There have been some exception to this rules inasmuch as the Ajmer Division issued transfer orders and conducted selection before the cut off date on 31.3.2003 giving rise to some litigation in respect of employees around Gandhidham. This geographical area, which was earlier part of Ajmer Division has since become part of Ahmedabad Division.

We do not know as to whether on account of the transfer of staff on as is where is basis imbalances have crept in either in communal representation of the employees or in various grades.

We note that a part of Rajkot Division together that some parts of Baroda Division and Ajmer Division has becomes newly created Ahmedabad Division. The circular requires a preparation of fresh roster to work out the shortfall or excess if any. Nothing has been indicated in the reply to show as to whether there was a shortfall of SC/ST in the past recruitments carried out in Rajkot Division and that some of these posts are against that shortfall and that the same continues to exist even if a number of posts have been transferred to Ahmedabad.

12. The first thing to be noted is that the definition of cadre used by the Department of Personnel and Training for the purpose of implementation of the reservation policy is different from the word cadre used in FR 9(4).

We similarly note that the definition of cadre used in Railway Board circulars is identical to that used in the letter of the DOPT and is different from cadre as defined in Rule 102(8) of Indian Railway Establishment Code which has been indicated in the reply of respondents. The drivers are placed in a number of grades

namely Loco Pilot (Goods) Gr.II , Loco Pilot (Goods) Gr.II , Loco Pilot (Passenger) Gr.II , Loco Pilot (Passenger) Gr.II and Loco Pilot (Mail Passenger).

They were earlier passed Driver (Goods), Driver (Goods) Senior, Driver (Passenger), Driver (Passenger) Senior and Driver (Mail Express).

13. We also note that the preamble of the restructuring order 177/03 and the percentage of different drivers has been changed in the following manner: The Ministry of Railway have had review cadres of certain Group "C" & "D" STAFF in consultation with the staff-side with a view strengthening and rationalizing the staffing pattern on Railways. As a result of the review undertaken on the basis of functional operation and administrative requirement. It has been decided with the approval of the PRESIDENT THAT THE GROUP "C" & "D" CATEGORIES of staff as indicated in the ANNEXURES to this letter should be restructured in accordance with the revised percentage indicated therein. While implementing these orders the following detailed instructions should be strictly and carefully adhered to.

STATEMENT REGARDING RESTRUCTURING OF GROUP 'C' & 'D' STAFF OF
TRANSPORTATION AND POWER DEPARTMENT. ANNEXURE TO BOARD'S
LETTER No. PC. III/2003 CRC 6, DATED
9.10.2003

Category Grade Existing Revised Rs (%) (%)2. PASSENGER DRIVERS/ 6000-9800 20 27 MOTORMEN (ALL PASSENGER 5500-9000 80 73 TRAINS & EMU SERVICE ONLY)3. GOODS DRIVERS (ALL GOODS 5500-9000 20 27 TRAINS) 5000-8000 80 734. SHUNTING DRIVERS 5000-8000 20 27 4000-6000 80 735. DIESEL ASSISTANTS/ELECTRICAL 4000-6000 20 27 ASSISTANTS. 3050-4590 80 736. LOCO RUNNING SUPERVISOR 7450-11500 65 6500-10500 35 This ratio has been further modified to 30:70 in case of Shunting Drivers/Diesel Assistants by RBE 05/04.

14. The applicants in O.A. 522/2004, J.K. Verma v. UOI were senior diesel assistants/diesel assistants and were aggrieved by the action of respondents in filling up the posts of Loco Pilot (Goods), [Driver (Goods)] Grade II on the basis of selection and not by applying the modified selection procedure. It had been

strongly argued on behalf of the applicant that they have to be treated as one group and the scheme applies even to movement from one category to another category. The respondents had resisted the same on the ground that restructuring applies to each grade and that where there is a shortfall the modified procedure does not apply. The Tribunal held: 18. It is clear from Annexure quoted in Para-6 above that Goods Driver and Senior Assistant/Assistant are belonging to different categories. The preamble and Para-2 of the RBE indicates that the policy is applicable to categories/cadres. The percentage distribution of different grades/scales in each category has been modified with more posts being placed in higher category.

19. We first note that the present modified restructuring order refers to category and not to cadre. The word category is not defined in IREC but the word cadre is defined in Rule 103(7) is as under: (7) Cadre means the strength of a service or a part of a service sanctioned as a separate unit.

The word 'service' is not defined in Indian Railway Establishment Code. All India Station Masters and Assistant Station Masters Association v. General Manager, Central Railway has held as follows: We propose to consider the second question first, on the assumption that matters of promotion are "matters relating to employment". So multifarious are the activities of the State that employment of men for the purpose of these activities has by the very nature of things to be in different departments of the State and inside each department, in many different classes. For each such class there are separate rules fixing the number of personnel of each class, posts to which the men in that class will be appointed, questions of seniority, pay of different posts, the manner in which promotion will be effected from the lower grades of pay to the higher grades, e.g. whether on the result of periodical examination or by seniority or by selection or on some other basis and other cognate matters.

Each such class can be reasonably considered to be a separate and in many matters independent entity with its own rules of recruitment, pay and prospects and other conditions of service which may vary considerably between one class and another. A member joins a particular class on recruitment; he leaves the class

on retirement or death or dismissal, discharge, resignation or other modes of termination of service, or by joining another class of employees whether by promotion thereto or direct recruitment thereto on passing some examination or by selection in some other mode.

21. It would be clear from the aforesaid Apex Court decision that unless a promotion scheme discriminates between similarly situated persons, a promotion scheme cannot be challenged. The onus is also on the person that scheme is discriminatory unless the discrimination is writ large on the face of it.

22. We find that Drivers belonging to Transportation (Power) Deptt.

has been placed in five distinct categories. The Goods Driver (All Goods Trains), Shunting Drivers and Diesel Assistants and Electrical Assistants are three distinct categories. The normal frame work in Railways is that after appointment by Direct recruitment or selection the next post is filled up by promotion on the principle of seniority-cum-fitness. The next higher category is again selection. Thus the contention that movement from Senior Assistant/Diesel Assistant/Electrical Assistants to Goods Drivers if governed by the modified restructuring scheme has to be rejected.

15. The Hyderabad Bench of the Tribunal in its common order in O.A.1318/04 and 1347/04 regarding applicability of reservation in restructuring to which one of us is a party (Shankar Prasad, M(A) has summarised the discussions regarding cadre is as under: 24. However the Railways has now come out with a plea during the course of arguments that each grade in the cadre of Chief Ticket Collectors/Ticket Collectors and Station Masters/Assistant Station Masters is a cadre by itself. This aspect was also, in fact, considered by the Central Administrative Tribunal, Chandigarh Bench in Unreserved Employees Association, Railway Coach Factory, Kapurthala v. Union of India (supra). In that case, the Tribunal found that "the respondents were trying to narrow down the scope and meaning of the term "Cadre". The definition of the word "cadre" given in Fundamental Rule 9(4), which is *pan materia* to the rules of Railway Administration, means the strength of a service or part of a service sanctioned as a separate unit. Therefore, by interpreting this definition, the word "cadre" was held to include all the categories

in a particular wing of service. Certain instances were given that in the clerical cadre, it will include all the categories starting from Clerk upto officer Superintendent and similar will be the position in the technical meaning so as to restrict it to only one category out of the total service on the basis of one scale of pay. The Tribunal declared the Railway Board's letter mentioning that each scale of pay is to be treated as a cadre, as illegal. This judgment was rendered on 24.11.2004. The Railway Board made a reference to the DOPT and DOPT vide O.M. Dated 7.3.2005 clarified that the terms "cadre" in the O.M. Dated 2.7.1997 has been defined for the limited purpose of implementation of reservation for SCs, STs and OBCs in services and for maintenance of reservation rosters/registers for the purpose. It is stated therein that the O.M. speaks of "cadre" for the purpose of roster and shall mean a particular grade and the definition of the word "cadre" given in Fundamental Rules 9(4) is not relevant for the purpose of maintenance of reservation rosters and will be against the policy of reservation. Therefore, the Railway Authorities were advised to file an appeal against the stand taken by the Central Administrative Tribunal in respect of the definition of the term "cadre". The concept of "cadre" was also considered by the Full Bench of Central Administration Tribunal, in P.S. Rajput and 2 Others v. Union of India (supra) as well as in Jagdish M. Mistry v. Union of India (supra).

16. The Hon'ble Allahabad High Court in J.C. Malik v. UOI, 1978 (1) SLR 844 : 1978 SLJ 401 (All. HC) has held as follows: In the instant case, the total number of posts of A Grade Guards is 37 including 32 permanent posts and 5 temporary posts. If 15% of the vacancies occurring in a particular year is filled by promotion of Scheduled Caste, the result would be that after some time the percentage of Scheduled Caste Candidate in the A Grade Guards would reach upto 60% which would obviously be to the detriment of other persons who may be senior or meritorious but they cannot be promoted on account of the reservation made in favour of Scheduled Castes. It is pertinent to note that the circular letter dated 20th April, 1970 further lays down that if Scheduled Castes candidates are not available for selection from B Grade Guards, then the Selection Committee is required to consider the case of SC candidates belong to 'C grade and if they are selected they would be entitled to promotion to A grade guards. Thus Scheduled Caste candidates belong to lowest category of C Grade Guards will always have edge

over B Grade Guards who are admittedly senior to C Grade Guards. The petitioners have drawn up a chart Annexure-5 to the petition giving the details of the vacancies which would be available upto 1984 on account of the retirement of A Grade Guards on attaining their age of superannuation. The figures as mentioned in the chart have not been disputed by the respondents. The result would be that by December, 1984, Schedule Castes will be having 56% of posts in the Cadre of A Grade Guards. This would be violation of Clause (i) to Article 16 of the Constitution. Article 16(1) ensure equality of opportunity to all citizens in matter relating to appointments to any officer under the State. Clause (4) of Article 16 is an exception to Clause (1) which confers power on the State to make reservation in the matter of appointment in favour of Scheduled Caste, Scheduled Tribes and other backward classes. The power conferred under Clause (4) cannot be exercised in a manner to make the reservation so excessive that it may practically deny a reasonable opportunity of employment to members of other communities.

In view of the above discussion, we are of the opinion that the Railway Boards circular letter dated 20th April, 1970 made reservation to the extent of 15% in favour of Scheduled Castes in respect of appointment to the posts and not to the vacancies which may occur in the cadre of posts. *Indra Sawhney v. UOI* , has held: 94A. We must, however, point out that Clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation.

Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State Legislature in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by Clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits and what is more reasonable than to say that reservation under Clause (4) shall

not exceed 50% of the appointments or posts, barring certain extraordinary situations as explained hereinafter.

From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of backward classes and Scheduled Tribes, it comes to a total of 49.5%.

In this connection, reference may be had to the Full Bench decision of the Andhra Pradesh High Court in *Narayana Rao v. State*, striking down the enhancement of reservation from 25% to 44% O.B.Cs. The said enhancement had the effect of taking the total reservation under Article 16(4) to 65%.

It needs no emphasis to say that the principle aim of Articles 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective.

Clause (4) is a special provision-though not an exception to Clause(1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4)- conceived in the interest of certain sections of society should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (see his speech in Constituent Assembly, set out in Para 28).

No other member of the Constituent Assembly suggested otherwise. It is, thus, clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept.

From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%.

While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of the conditions peculiar to and characteristically to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

In this connection it is well to remember that the reservation under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to say, Scheduled Castes get selected in the open competition filed on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.

95. We are also of the opinion that this rule of 50% applies only to reservation in favour of backward classes made under Article 16(4).

A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause(1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; thus would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains and should

remain the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

It is, however, made clear that the rule of 50% shall be applicable only to reservations proper; they shall not be-indeed cannot re-applicable to exemptions, concessions or relaxations, if any, provided to 'Backward Class of Citizens' under Article 16(4).

96. The next aspect of this question is whether a year should be taken as the unit or the total strength of the cadre, for the purpose of applying the 50% rule. Balaji AIR 1963 SC 649 does not deal with this aspect but Devadasan AIR 1964 SC 179 (Majority opinion) does, Mudholkar, J. speaking for the majority says: We would like to emphasise that the guarantee contained in Article 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any officer under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.

On the other hand is the approach adopted by Ray, C.J. in Thomas AIR 1976 SC 490. While not disputing the correctness of the 50% rule he seems to apply it to the entire service as such. In other opinion, the approach adopted by Ray, C.J. would not be Consistent with Article 16. True it is that the backward classes, who are victims of historical social injustice, which has not ceased fully as yet, are not properly represented in the services under the State but it may not be possible to redress this imbalance in one go i.e., in a year or two. This position can be better explained by taking an illustration, Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Glasses is 50% which means that out of the 1000 posts 500 must be

held by the members of these classes i.e., 270 by other backward classes, 150 by scheduled castes and 80 by scheduled tribes. At a given point of time, let us say, the number of members of O.B.Cs. in the unit/service/category is only 50, a short fall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500 i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many.

Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become amere mirage. It must be remembered that the equality of opportunity guaranteed by Clause (1) is to each individual citizen of the country while Clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a years should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be.

97. The rule (providing for carry forward of unfilled reserved vacancies as modified in 1955) struck down in Devadasan AIR 1964 SC 179, read as follows: 3(a) If a sufficient number of candidate considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course, and to the extent to Which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year (i) Reservation in favour of Scheduled Castes and Scheduled Tribes was 12 1/2% and 5% respectively; (ii) In 1960, U.P.S.C. issued, a notification proposing to hold a limited competitive examination for promotion to the category of Assistant Superintendents in Central Service 48 vacancies were to

be filled, out of which 16 were unreserved while, 32 were reserved for Scheduled Castes/Scheduled Tribes, because of the operation of the carry forward Rule 28 vacancies were, actually carried forward; (iii) U.P.S.C recommitted 161 for unreserved and 30 for reserved vacancies a total of 46; (iv) the Government however appointed in all 46 persons, out of whom 29 belonged to Scheduled Castes/Scheduled Tribes.

The said Rule and the appointments made on that basis were questioned mainly on the ground that they violated the 50% rule enunciated in Balaji. It was submitted that by virtue of the carry forward Rule, 65% of the vacancies for the year in question came to be reserved for Scheduled Caste/Scheduled Tribes.

The majority, speaking through Mudholkar, J. upheld the contention of the petitioners and struck down the Rule purporting to apply the principle of Balaji AIR 1963 SC 649. The vice of the Rule was pointed out in the following words: In order to appreciate better the import of this rule on recruitment, let us take an illustration. Supposing in two successive years no candidate from amongst the Scheduled Castes and Tribes is found to be qualified for filling any of the reserved posts. Supposing also that in each of those two years the number of vacancies to be filled in a particular service was 100. The reserved vacancies for each of those years would, according to the Government resolution, be 18 for each year. Now, since these vacancies were not filled in those years a total of 36 vacancies will be carried forward to the third year. Supposing in the third year also the number of vacancies to be filled is 100. Then 18 vacancies out of these will also have to be reserved for members of the Scheduled Castes and Tribes. By operation of the carry forward rule the vacancies to be filled by persons from amongst the Scheduled Castes and Tribes would be 54 as against 46 by persons from amongst the more advanced classes. The reservation would thus be more than 50%.

98. We are of the respectful opinion that on its own reasoning, the decision in so far as it strikes down the Rule is not sustainable.

The most that could have been done in that case to quash the appointment in excess of 50%, inasmuch as, as a matter of fact, more than 50% of the vacancies for the year 1960 came to be reserved by virtue of the said Rule. But it would bit

be correct to presume that is the necessary and the only consequence of that Rule. Let us take the very illustration given at pp. 691-2 namely 100 vacancies arising in three successive years and 18% being the reservation quota and examine. Take a case, where in the first year, out of 18 reserved vacancies 9 are filled up and up another 9 are carried forward.

Similarly, in the second year again, 9 are filled up and another 9 are carried forward. Result would be that in the third year, $9 + 9 + 18 = 36$ (out of a total of 100) would be reserved which would be far less than 50% the rule in Balaji AIR 1963 SC 649 is not violated.

But by striking down the Rule itself, carrying forward of vacancies even in such a situation has become impermissible, which appears to us indefensible in principle. We may also point out that the premise made in Balaji and reiterated in Devadasan AIR 1964 SC 179, to the effect that Clause (4) is an exception to Clause (1) is no longer acceptable, having been given up in Thoms AIR 1976 SC 490. It is for this reason that in Karamchari Sangh AIR 1981 SC 298, Krishna Lyer, J. explained Devadasan in the following words: In Devadasan's case the Court went into the actual, not into the hypotheticals This is most important. The Court actually verified the degree of deprivation of the equal opportunity right....

...What is striking is that the Court did not take an academic view or make a notional evaluation but checked up to satisfy itself about the seriousness of the infraction of the right.... Mathematical calculations, departing from realities of the case, may startle us without justification, the apprehension being misplaced. All that we need say is that the Railway Board shall take care to issue instruction to see that in no year shall SC & ST candidates be actually appointed to substantially more than 50% of the promotional posts. Some excess will not affect as mathematical precision is different in human affairs but substantial excess will void the selection. Subject to this rider or condition that the 'carry forward' rule shall not result, in any given year, in the selection of appointments of SC & ST candidates considerable in excess of 50% of uphold Annexure-I. We are in respectful agreement with the above statement of law.

Accordingly, we over-rule the decision in Devadasan Air 1964 SC 179.

We have already discussed and explain the 50% rule in Paras 93 to 96. The same position would apply in the case of carry forward rule as well. We, however, agree that a ear should be taken as the unit or basis, as the case may be, for applying the rule of 50% and not the entire cadre strength.

99. We may reiterate that a carry forward rule need not necessarily be in the same terms as the one found in Devadasan. A given rule may say that the unfilled reserved vacancies shall not be filled by unreserved category candidates but shall be carried forward as such for a period of three years. In such a case, a contention may be raised that reserved posts remain a separate category altogether. In our opinion, however, the result of application of carry forward rule, in whatever manner it is operated, should not result in breach of 50% rule.

18. The Constitution Bench of the Apex Court in R.K. Sabharwal and Ors.

v. UOI : 2. On the above facts the petitioners have challenged the reservation-policy on several grounds but Mr, Harish Salve, learned Counsel for the petitioners, has confined the arguments to the following two points: (1) The object of reservation is to provide adequate representation to the Scheduled Caste/Tribes and Backward Classes in services and as such any mechanism provided to achieve that end must have nexus to the object sought to be achieved. The precise argument is that for working out the percentage of reservation of promotees/appointees belonging to the Scheduled Cusecs and Backward Classes whether appointed against the general category posts or against the reserve posts are to be counted. In other words if more than 14% of the Scheduled Castes candidates are appointed/promoted in a cadre on their own merit/seniority by competing with the general category candidates then the purpose of reservation in the said cadre having been achieved the Government instructions providing reservations would become inoperative.

(2) Once the posts earmarked for the Scheduled Castes/Tribes and Backward Classes on the roster are filled the reservation is complete Roster cannot operate any further and it should be stopped.

Any post falling vacant, in a cadre thereafter, is to be filled from the category reserve or general due to retirement etc., of whose member the post fell vacant.

4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserve posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the backward class/classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular backward class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the backward class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a backward class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the backward class. The fact that considerable number of members of a backward class have been appointed/promoted against general seats in the State Services may be relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/Rule providing certain percentage of reservations for the backward classes are operative the same have to be followed. Despite any number of appointees/promotes belonging to the backward classes against the general

category posts the given percentage has to be provided in addition. We, therefore, see no force in the first contention raised by the learned Counsel and reject the same.

5. We see considerable force in the second contention raised by the learned Counsel for the petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster is implemented in the form of running account from year to year. The purpose of "running account" is to make sure that the Scheduled Castes/Scheduled Tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. "16% of the posts..." are reserved for members of the Scheduled Caste and Backward Classes. In a lot of 100 posts those 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Caste. To illustrate, first point in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive.

The percentage of reservation is the desired representation of the Backward classes in the State services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents as figure with due application of mind.

Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the "running account" must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at Roster-points 1, 7, 15 retire then these belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation.

7. When all the roster-points in cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Scheduled Caste/Tribes and Backward Classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from amongst the category of persons to whom the respective vacancies belong. Jeevan Reddy, J. speaking for the majority in *Indra Sawhney v. Union of India* observed as under (Para 96): Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e. 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say the number of members of OBCs in the unit/service/category is only 50, a shortfall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500 i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open Competition category would become barred and ineligible.

Equality of opportunity guaranteed by Clause (1) is to each individual citizen of the country while Clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be allowed to eclipse the other, For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit as the case may be.

8. The quoted observations clearly illustrate that the rule of 50% a year as a unit and not the entire strength of the cadre has been adopted to protect the sight of the general category under Clause (1) of Article 16 of the Constitution of India, These observations in Indra Sawhney's case AIR 1993 SC 477 are only in relation to posts which are filled initially in a cadre. The operation of a roster, for filling the cadre-strength, by itself ensures that the reservation remains within the 50% limits. Indra Sawhney's case is not the authority for the point that the roster survives after the cadre-strength is full and the percentage of reservation is achieved.

9. A Division Bench of the Allahabad High Court in J.C. Malik v. Union of India and Ors. (1978) 1 Serv LR 844 interpreted Railway Board's circular dated April 20, 1970 providing 15% reservations for the Scheduled Castes. The High Court held that the percentage of reservation is in respect of the appointment to the posts in a cadre. On the basis of the material placed before the High Court it reached the conclusion that if the reservation is permitted in the vacancies after all the posts in a cadre are filled then serious consequences would ensue and the general category is likely to suffer considerably. We see no infirmity in the view taken by the High Court.

19. The Apex Court in UOI v. Virpal Singh Chauhdh 1996 SCC (L & S) 1 : 1996 (1) SLJ 65 (SC), has held as follows: Under Article 16(4) there is no uniform or prescribed method of providing reservation. The extent and nature of reservation is a matter for the State to decide having regard to the facts and requirements of each case. In Indra Sawhney case it has been held by the majority that "larger concept of reservations take within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of

efficiency of administration the admonition of Article 335".

Therefore, it is open to the State, if it is so advised, to say that while the rule of reservation shall be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate promoted earlier by virtue of rule or reservations/roster shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate will regain his seniority over the reserved candidate notwithstanding that he is promoted subsequent to the reserved candidate. There is no constitutionality involved in this. It is permissible for the State to so provide. The circulars/letters of the Railway Board providing for reservation in favour of Scheduled Caste/Scheduled Tribe candidates, rosters and their operation and on the subject of seniority as between general candidates and reserved category candidates, being the nature of special rules prevail over the general instructions contained in Volume I of the Indian Railway Establishment Manual including those contained in Paras 306, 309 and 319 et. al.

Thus so far as Railway Guards in Railway service (non-selection posts) are concerned it must be concluded: (i) The seniority position in the promoted category as between reserved candidates and general candidates shall be the same as their inter se seniority position in Grade 'C' at any given point of time provided that at that given point of time, both the general candidates and the reserved category candidates are in the same grade. This rule operates whether the general candidate is included in the same batch of promotes or in a subsequent batch. (This is for the reason that the circulars/letters aforesaid do not make or recognize any such distinction.) In other words, even if a Scheduled Caste/Scheduled Tribe candidate is promoted earlier by virtue of rule of reservation/roster than his senior general candidate and the senior general candidate is promoted later to the said higher grade, the general candidate regains his seniority over such earlier promoted Scheduled Caste/Scheduled Tribe candidate. The earlier promotion of the Scheduled Caste/Scheduled Tribe candidate in such a situation does not confer upon him seniority over the general candidate even though the general candidate is promoted later to that category.

(ii) Further, once the number of posts reserved for being filled by reserved category candidates in a cadre, category or grade (unit for application of rule of reservation) are filled by the operation of roster, the object of rule of reservation should be deemed to have been achieved and thereafter the roster cannot be followed except to the extent indicated in Para 5 of R.K. Sabharwal case. While determining the said number, the candidates belonging to the reserved category but selected/promoted on their own merit (and not by virtue of rule of reservation) shall not be counted as reserved category candidates.

(iii) The percentage of reservation has to be worked out in relation to number of posts in a particular cadre, class, category or grade (unit for the purpose of applying the rule of reservation) and not with respect to vacancies.

If the above three rules are observed and followed, there may not remain such room for grievance on the part of the general candidates. While in the very scheme of things, it is not possible to give retrospective effect to these rules a fact recognized in R.K. Sabharwal the above rules, operated conjointly, should go a long way in maintaining a balance between the demands of merit and social justice.

The conclusions stated above (Para 29) shall be followed by the Railway Authorities with effect from the date of judgment in R.K. Sabharwal i.e. 10.2.1995.

The proper course is to send all these matters back to the Tribunal to work out the rights of individuals concerned applying the three principles aforesaid. These appears are accordingly disposed of in the above terms and matters remanded to the respective Tribunals.

Writ petitions are dismissed. Post Graduate Institute of Medical Education and Research, Chandigarh v. Faculty Association and Ors. 1998 (3) SLJ 139 (SC) held: In Balaji's case, the Constitution Bench has held that the reservation should be allowed to advance the prospects of weaker sections of the society, but while doing so, care should be taken not to exclude admission to higher educational standards of deserving and qualified conditions of other communities. It has also been indicated that reservation under Articles 15(4) and 16(4) of the Constitution

must be within a reasonable limit. The interest of the weaker sections of the society, which are a first charge on the States and the Centre, have to be adjusted with the interests of the community as a whole. The objective of Article 15(4) is to advance the interests of the weaker elements in society. If a provision under Article 15(4) ignores the interest of the society that is clearly outside the purview of Article 15(4). It is therefore, quite evident that the Constitution Bench Balaji's case has clearly indicated that in giving effect to reservations for the Scheduled Castes, Scheduled Tribes and other backward classes, a balance is to be struck so that the interests of the backward classes and the members of the scheduled castes and scheduled tribes are properly balanced with the interests of the other segments of the society, and in order to safeguard the interests of the reserved classes the interest of the community as a whole can not be ignored. In Devadasan's case (supra), the majority decision of four Judges (Justice Subba Rao dissenting) was to the effect that the carry-forward rule as a result of which the applicants belonging to Scheduled Castes or Scheduled Tribes could get more than 50% of the vacancies to be filled up in particular year, is unconstitutional.

It has also been indicated that Article 14 will not be infringed if certain proportion of appointments of the State in order to provide the backward classes as opportunity equal to that of the members of more advanced classes is made, provided that the reservation is not so exercised which would amount to practically deny reasonable opportunity of employment to the members of the other communities.

It was indicated that under Article 16(4) of the Constitution, reservation of a reasonable percentage for the Scheduled Castes and Scheduled Tribes is valid and within the competence of the States or the Centre. But it is necessary that a reasonable balance between backward classes and other members of the society is to be struck and maintained. In the decision of Devadasan's case (supra) reliance was also placed on the decision in Balaji's case and another Constitution Bench decision of this Court in General Manager S.E. Railway v. Rangachari . In the majority decision in Rangachari's case, it has been held that Articles 16(1) and 16(2) are intended to give effect Articles 14 and 15 of the Constitutional code of guarantees and supplement each other. Article 16(1) should, therefore, be construed in a broad and general way, and not in pedantic and technical way.

When so construed, matters relating to employment cannot mean merely matters prior to the act of appointment nor can 'appointment to any office' mean merely the initial appointment but must include all matters relating to employment, whether prior or subsequent to the employment, that are either incidental to such employment or form part of its terms and conditions.

(a) The roster is implemented in the form of running account from year to year. The purpose of running account is to make sure that persons belonging to SC/ST get their percentage of reserved posts.

The concept of "running account" has to be so interpreted that it does not result in excessive reservation. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by notification is achieved. There is no justification for the roster to operate thereafter. The operation of the roster and the "running account" must come to an end thereafter.

The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. The same has to be filled from: amongst the category to which the post belonged in the roster.

(b) The plain meaning of posts and vacancies makes it clear that there must be post in existence to enable the vacancy to occur. The cadre strength is always measured¹ by the number of posts comprising the cadre. The percentage of reservation has to be worked but in relation to the number of posts which form the cadre strength. The concept of "vacancy" has no relevance in operating the percentage of reservation.

(c) The percentage of reservation has to be worked out in relation to number of posts in a particular cadre class category or grade (Unit for the purpose of applying the rule or reservation) and not with respect to vacancies.

(d) Indra Sawhney is not an authority for the proposition that the roster survives after the cadre strength is full and percentage of reservation has been achieved.

(e) For applying the rule of 50% a year has to be taken as the unit and not the entire strength of cadre, service or unit as the case maybe.

(f) The result of operation of carry forward rule in whatever manner it is operated, should not result in breach of 50% rule.

22. The Apex Court in Para 96 of Sawhney's case had considered an example to show that the shortfall cannot be filled up in a manner to choke altogether the open competition channel. It must be remembered that equality of opportunity guaranteed by Clause (1) is to each individual citizen while Clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Neither should be allowed to eclipse the other.

23. The first limb of the argument is that the cadre consists of all the posts from Driver Goods Gr. II, Driver, Mail Express. Rule 103(7) of IREC defines cadre. Para 4(b) of the Railway Board circular dated 21.8.97, defines cadre for the purposes of reservation to be that part of a particular grade which is filled by a particular mode of recruitment in terms of order/manual provision or Railway Board instructions issued from time to time. Subsequent instructions dated 29.06.98 also reiterates this very position. The Hyderabad judgment has noted a DOPT advice that "cadre" in 02.07.97 is cadre for the purposes of reservation only and is not "cadre" in normal sense of the terms.

This contention has accordingly to be (August-258) rejected 24. The next question is how to compute the reservation. .It is clear that the running account has to be operated till the cadre is filled.

It is only after this has been achieved that the replacement operates.

That is how Para 9 of the explanatory memorandum has to be Understood.

25. It has been contended on .behalf of the respondent Railway Administration that even the vacancies in the higher grades can be filled by recruiting more persons belonging to SC/ST at the lowest level. Reliance has been placed on the Railway Board circular referred to in Para 8 above.

26. It is seen that these instructions have been issued in the, context of de-reservation of post when adequate number of persons belonging to SC/ST are not available. Para 9 of the Railway Board circular talks of de-reservation and carry

forward, "Derreservation" and "carry forward" are two facets of the same policy in as much as while on one hand the post is filled by general category the reservation is Carried forward. DOPT instructions provide that it can be carried forward for three recruitment years. Exchange of vacancy between SC & ST is permissible in third year.

What the Railway Board circular of 11.5.99 provides is that before sending a proposal for de-reservation the possibility of resorting to direct recruitment may be resorted to where direct recruitment is permissible and where direct recruitment is not permissible the possibility of downgrading the post and filling up the same by promotion may be considered, If the same is not feasible then the 'question of filling up of such downgraded post by direct recruitment, if feasible, should be considered.

June 1999 circular is trying to answer the Equation as to whether downgraded post should be considered against which cadre It is stated that they will be continued to be treated against the cadre strength of the higher post and that the post will be restored when such persons become eligible for promotion.

27. An important question that would arise is as to whether the downgrading of the post means downgrading only in the feeder grade just below or even grades much below. The avenue of promotion in the instant case is as under: Loco Pilot (Goods) Gr.II Loco Pilot (Goods) Gr.I Loco Pilot (Passenger) Gr.II Loco Pilot (Passenger) Gr.I Loco Pilot (Mail Passenger).

28. What the Railways have attempted in the present case is to fill up the vacancies of Drivers in Loco Pilots (Goods) Grade II and vacancies of SG/ST drivers from Loco Pilot (Goods) Gr.I to the highest level of driver mail/express at the level of driver (Goods) Gr. II. It would have been an altogether different question if posts of general category were also simultaneously filled up. All the posts from driver (Goods) Gr.II onwards are filled by promotion only, The element of direct recruitment is only at the level of diesel assistant which is the second grade below driver (Goods). The Rules provide for two years service in the next below grade on date of promotional the circular for permitting diesel assistants to participate in driver (Goods) Gr.II subject to requisite experience has been

produced. No circular is produced to show whether any relaxation is granted for higher level posts. The posts of drivers are safety category posts and safety of passengers is also involved in higher level posts.

29. We are not expressing any final opinion on this question as to whether the Railway Board circular provides for filling up the post by promotion only in the next below feeder grade as the O.A. can be decided otherwise.

We are also not expressing any opinion on the question as to whether the decision that the posts can continue to belong to higher cadre even when persons are being promoted is proper in law.

We have noted in Para 7(b) above that the date on which the previous selections have taken place in these grades. There is, however, no examination on file as to how the reservation have been actually worked out. There is no information as to whether posts reserved for SC/ST have remained vacant and if yes then the vacancies were coming forward for how many recruitment years. It is also not indicated as to whether on bifurcation of Rajkot Division a fresh roster was prepared and whether all the posts in the cadre have been filled up and that concept of replacement has to be applied.

30. The computation sheet which had been sent to Headquarters shows that the computation has been made in the following manner: (i) The vacancies have been computed by showing that 45 of 60 posts are filled up i.e. 15 posts are vacant. 19 further posts have been shown as anticipated vacancies on account of promotion. It is indicated that number of roster points to be operated is 34.

As per the Railway Board Circular 15 points have to be operated as per roster and thereafter as all the 60 posts of cadre have been filled up replacement will apply. Quota for SC & ST has been shown as 9 & 5 though as per 15% and 7 1/2% posts only 5 and 2.5 post are admissible. Supporting statement as to whether the rest are carry forward is not available. The notification also does not refer to carry forward vacancies.

(ii) (a) The roster of SC/ST has been worked out as if all the posts in each grade are going to be filled up.

(b) Having worked out this global picture the number of SC/ST, who have been promoted against the reserve post have been worked out and by subtracting the same from the global picture, the shortfall for reservation in higher grade of SC/ST has been worked out at 7 SC and 2 ST. (c) It is also not seen if rule of 50% is being broken in the transaction in each of the grades even if the same is permissible.

(d) This has been added to the reservation of 9 SC and 5 ST worked out earlier.

(iii) Nothing has been brought on record to show if action has been taken separately for filling up the posts of Loco Pilot (Goods) Gr.I (Driver Gr.I).

31. The application of roster to anticipated posts even after the required percentage has been reached is contrary to Apex Court decision and is also against the Railway Board circular itself.

32. Even if the arguments of Railway Administration have to be accepted the notification has provided for reservation in excess of 50%.

33. It is a settled position of law that the reservation cannot exceed 50% in a year.

34. The O.A. is accordingly allowed and the impugned order is quashed and set aside. There shall be no order as to costs. M.A. also stands disposed off. A copy of the order should be sent to GM(WR) also for information. Para 21 of the minutes of CPO's meeting, Para 7B(iii) (b) refers. He may also consider issuance of general guidelines determining the number of posts to be reserved in such promotions.

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