

SUPREME COURT OF INDIA

Union of India

Vs.

Pushpa Rani & Others

C.A.Nos.6934-6946 of 2005

(B.N. Agrawal and G.S. Singhvi JJ)

29.7.2008

JUDGMENT

G.S. SINGHVI, J.

1. Whether the policy of reservation of posts for Scheduled Castes/ Scheduled Tribes can be applied at the stage of giving effect to cadre restructuring exercise undertaken pursuant to letter No.PC-III/2003/CRC/6 dated 9.10.2003 issued by the Railway Board is the question which arises for determination in the above noted appeals filed against the orders of Punjab & Haryana High Court which upheld the decision of Chandigarh Bench of the Central Administrative Tribunal (hereinafter referred to as 'the Tribunal') to quash para 14 of the said letter and the direction given for making appointments de hors the policy of reservation. The special leave petition filed by the Union of India against the order of Allahabad High Court is being disposed of along with appeals because the issue arising therein is similar.

2. For the sake of convenience, we have taken the facts from the record of Civil Appeal Nos.6934-6946 of 2005. The same are:-

(i) Respondents Pushpa Rani and six others joined service as Clerks in Ambala and Ferozepur Divisions of the Northern Railway. They were promoted as Senior Clerks and then as Head Clerks. They filed applications under Section 19 of the Administrative Tribunals Act, 1985 for quashing the instructions issued by the Railway Board vide letter No.PC-III/2003/CRC/6 dated 9.10.2003 for giving effect to the policy of reservation of posts for Scheduled Castes and Scheduled Tribes at the stage of restructuring of Group C and D cadres. They pleaded that the exercise of restructuring undertaken by the government resulted in upgradation of the existing posts and in view of the law laid down by the Supreme Court, the policy of reservation cannot be applied while making appointment against the upgraded posts.

(ii) In the counter filed on behalf of the administration, it was pleaded that instructions issued by the Railway Board are in conformity with the policy decision taken by the Government of India and the applicants cannot object to the reservation of posts for Scheduled Castes and Scheduled Tribes because restructuring of cadres resulted in creation of additional posts which were required to be filled by promotion.

(iii) The Chandigarh Bench of the Tribunal allowed the application filed by Pushpa Rani and others along with 12 similar applications filed by other employees of Ambala and Ferozepur Divisions of Northern Railway, Rail Coach Factory, Kapurthala and Diesel-Loco Modernization Works, Patiala and quashed para 14 of letter dated October 9, 2003. The Tribunal declared that the policy of reservation of posts for Scheduled Castes and Scheduled Tribes is not applicable to the restructuring scheme including exchange formula and directed the petitioners herein to consider the cases of the applicants (respondents herein) and other eligible persons for placing them in appropriate pay scales under the restructuring scheme keeping in view their eligibility and suitability and give them consequential benefits.

(iv) The Union of India through Divisional Personnel Officer, Northern Railway, Ambala, challenged the order of the Tribunal in Civil Writ Petition No.3182-CAT of 2003, which was dismissed by Division Bench of the High Court of Punjab and Haryana along with a batch of similar petitions. The High Court referred to the order passed by this Court in Contempt Petition (Civil) No.304 of 1999 in Civil Appeal No.1481 of 1996 and held that in view of the law laid down by the Supreme Court, the direction given by the Tribunal to fill up the upgraded posts without applying the principles of reservation cannot be termed as erroneous.

3. Shri Amarendra Sharan, learned Additional Solicitor General, referred to Annexures 'A' to 'K' appended to letter dated 9.10.2003 to show that as a result of restructuring of Group C and D cadres, additional posts became available in the higher grades and argued that the Railway Board did not commit illegality by issuing direction for implementation of the policy of reservation qua those posts and argued that the policy of reservation was rightly made applicable in relation to the additional posts. In support of this argument he strongly relied on the case of K. Manickaraj vs.

Union of India [1997 (4) SCC 342]. Shri Sharan emphasized that restructuring of cadres undertaken for enhancing organizational efficiency and functional, operational and administrative requirements cannot be treated as a simple exercise for upgradation of existing posts and the Tribunal did not have the jurisdiction to nullify the instructions issued by the Railway Board or issue directions for making appointment by ignoring the policy of reservation. He distinguished the orders passed in Union of India vs. V.K. Sirothia [1999 SCC (L&S) 938] and All India Non-SC/ST Employees' Association (Railway) vs. V.K. Agarwal and Others [2001 (10) SCC 165] by pointing out that those were the cases of mass upgradation of posts and not restructuring of cadres resulting in creation of additional posts in different grades.

4. Shri K.S. Chauhan, counsel for All India SC/ST Railways Association submitted that the directions given by the Tribunal are liable to be set aside because its interpretation of the policy of restructuring is also contrary to the law laid down by the Constitution Bench in R.K. Sabharwal and Others vs. State of Punjab and Others [1995 (2) SCC 745]. He pointed out that the respondents had not challenged the instructions issued by the Railway Board for filling up the additional posts which were to become available as a result of restructuring of Group C and D cadres by selection and promotion and argued that in the absence of such challenge, the Tribunal could not have quashed para 14 of letter dated 9.10.2003 and ordained that appointments be made by ignoring the policy of reservation.

5. Dr. Rajiv Dhawan, Senior Advocate, appearing for some of the respondents, argued that restructuring of Group C and D cadres is nothing but an exercise for upgradation of the existing posts and the Tribunal did not commit any illegality by striking down para 14 of letter dated 9.10.2003 vide which the policy of reservation was made applicable to the upgraded posts. He further argued that if the policy of reservation is applied at the stage of restructuring of Group C and D cadres then the same would amount to giving double benefit to the members of Scheduled Castes and Scheduled Tribes, who had already been given out-of turn promotions. Dr. Dhawan relied on the larger Bench judgment of this Court in Indra Sawhney and Others vs. Union of India and Others [1992 Supp. (3) SCC 217] and of the Constitution Bench in M. Nagaraj and Others vs. Union of India and Others [2006 (8) SCC 212] and argued that even if the upgraded posts are required to be filled by promotion after following the process of selection, the policy of reservation of posts for Scheduled Castes and Scheduled Tribes cannot be applied qua such posts because no quantifiable data showing backwardness of Scheduled Castes and Scheduled Tribes and inadequacy of their representation was produced before the Tribunal. Dr. Dhawan made specific reference to paragraphs 85, 86, 106, 117, 119 and 121 of the judgment in M. Nagaraj's case and argued that the enabling provision contained in Article 16(4-A) cannot be relied upon by the appellants to justify implementation of the policy of reservation at the stage of restructuring of Group C and D cadres because the members of Scheduled Castes and Scheduled Tribes are adequately represented in those cadres and efficiency of the administration will be adversely affected by giving double benefit to them. He then argued that even if para 14 of letter dated 9.10.2003 is held to be constitutionally valid, the policy of reservation should be made applicable only qua posts which become available after 9.10.2003. Another argument of the learned senior counsel is that if restructuring exercise is intended to remove stagnation and improve the quality of services then implementation thereof cannot be made subject to the policy of reservation. Shri Sushil Jain and Smt. Kiran Suri, Advocates, adopted the arguments of Dr. Dhawan and submitted that view expressed by different

benches of the Tribunal that the policy of reservation cannot be applied at the stage of making appointment against the upgraded posts should not be disturbed because the same has been substantively approved by this Court in V.K. Sirothia's case and V.K. Agarwal's case. In the written submissions filed by him, Shri Sushil Jain has highlighted the difference between the scheme of restructuring resulting in upgradation of the posts and the policy of promotion and contended that the Tribunal rightly annulled para 14 of letter dated 9.10.2003 on the ground that policy of reservation cannot be applied against the upgraded posts. Another point made by Shri Jain is that the definition of 'cadre' contained in para 4(b) of Circular dated 21.8.1997 is ultra vires para 103 of the Code because the effect of statutory rules framed by the Board cannot be nullified by an administrative decision.

6. Learned counsel appearing for the respondent in SLP (C) No.5045 of 2007 supported the order passed by Allahabad Bench of the Tribunal and argued that the direction given for considering the case of his client for promotion as Personal Inspector Grade 'A' should not be upset because the cadre comprises of only two posts out of which one was required to be filled from the general category candidates.

7. We have considered the respective arguments/submissions and examined the records. The Railway Establishment Code (hereinafter referred to as "the Code") was first published in September 1940. It was revised from time to time. The 1985 edition of the Code was issued under the authority of the President of India under proviso to Article 309 of the Constitution of India. Paragraphs 103(7), 119, 120, 123 and 124 of the Code which have bearing on the decision of these cases are as under:- 103(7) 'Cadre' means the strength of a service or a part of a service sanctioned as a separate unit.

119. In the Railway Board and attached offices ♦ The number and character of Group C & D posts in the office of the Railway Board and other offices, projects, organizations immediately under its control shall be such as may be determined by the Railway Board. The Director General, Research, Designs and Standards Organisation or any other authority to whom the powers may be specifically delegated by the Railway Board may create temporary posts on the conditions prescribed in their respective schedules of power.

120. On Railways, Production Units or other Establishment - The number and character of Group C & D posts may be determined by the General Managers or the

authority in whom such powers are delegated, provided that the prior sanction of the Railway Ministry is necessary for the introduction of a new category not already obtaining on a Railway.

123. The Railway Board have full powers to make rules of general application to Group C & Group D railway servants under their control.

124. The General Managers of Indian Railways have full powers to make rules with regard to Railway servants in Group C & D under their control provided they are not inconsistent with any made by the President or the Ministry of Railways." Para 103(i), (ii) and (iii) of the Railway Establishment Manual (Volume I), which too is relevant for these cases reads as under:-

103. Definitions - For the purpose of these rules, unless there be anything repugnant in the subject or context ❖

(i) A "Group" means a series of classes which form a normal channel of promotion.

(ii) A "Class" comprises all appointments in the same branch or department bearing the same designation.

(iii) "Grades" are sub-divisions of a class, each bearing a different scale of pay. An intermediate grade is any grade in a class, higher than the lowest."

8. Till 1997, the rosters framed for giving effect to the policy of reservation were vacancy based. In R.K. Sabharwal's case, this Court held that the rosters must be operated with reference to the posts and not the vacancies. Thereafter, the Government of India, Ministry of Railways (Railway Board) issued revised instructions vide Circular R.B.E. No.113/97 and prescribed post based roster. These instructions were circulated vide letter No.95-E(SCT)1/49/5(1) dated 21.8.1997, the relevant portions of which are extracted below: - Circular No.113/97

"Under the existing instructions, vacancy based rosters have been prescribed in order to implement the Government's Policy relating to the reservation of jobs for the Scheduled Castes, Scheduled Tribes and other Backward Classes (OBCs). The application of reservation on the basis of these rosters was called in the question before the courts. The Constitution Bench of the Supreme Court in the case of R.K. Sabharwal vs. State of Punjab as well as Union of India vs. J.C. Malik has held that the reservation of jobs for Backward Classes SC/ST/OBCs should apply to the posts and not to the vacancies. The Court further held that the vacancy based rosters can operate only till such time as the representation of the persons belonging to the reserved categories, in a cadre, reaches the prescribed percentage of reservation. Thereafter, the rosters cannot operate and vacancies released by retirement, resignation, promotion etc. of the persons belonging to the general and the reserved categories are to be filled by the appointment of the person from the respective category so that the prescribed percentage of reservation is maintained.

The courts also held that persons belonging to reserved categories, who are appointed on the basis of merit and not on account of reservation are not be counted towards the quota meant for reservation.

With a view to bring the policy of reservation in line with the law laid down by the Supreme Court, it has been decided that the existing 200 point and 100 point vacancy based rosters of direct recruitment shall be replaced by post based rosters. All the Zonal Railways, Production Units and Associated Officers of the Railway Board should therefore, prepare the rosters for Group C posts (where the minimum of scale of pay is Rs.1400 (RPS) and above) based on principles elaborated in the Explanatory notes given in Annexure I and illustrated in the Model Roster as given in Annexure II and Annexure III. Similarly the concerned authorities may prepare rosters to replace the existing 100 point rosters in respect to local recruitment to Gr. C and Gr. D posts where the minimum of scale of pay is less than 1400 (RPS) and normally attracting candidates from a locality/region on the basis of the same principles. The principles for preparing the rosters elaborated upon in Explanatory notes are briefly recapitulated below:-

(a) The number of points in the roster shall be equal to the number of posts in the cadre. In the case there is any increase or decrease in the cadre strength in future, the rosters shall be expanded or contracted correspondingly.

(b) Cadre, for the purpose of roster, shall mean a particular grade and shall comprise the number of posts to be filled by a particular mode of recruitment in terms of the codal/manual provisions of Railway Board's 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, work charged posts, supernumerary posts, shadow posts in the grade." [Emphasis added]

9. The relevant paragraphs of Railway Board's Circular No.181/85 which was issued vide letter NO.PCIII/84/UPG/19 dated 25.6.1985 and was considered in various cases read as under:- Letter dated 25.6.1985

"1. Restructuring of certain Group 'C' & 'D' cadres have been under consideration in consultation with the Staff Side in the Committee of the Departmental Council of the JCM (Railways) for sometime. The Ministry of Railways have decided with the approval of the President to restructure certain categories of Group 'C' & 'D' as detailed in the Annexure enclosed.

2. While implementing these orders specific instructions given in the footnote under the different categories should be strictly and carefully adhered to.

3. For the purpose of restructuring the cadre strength as on 1.1.1984 will be taken into account and will include Rest Giver and Leave Reserve posts.

5.1 The existing classification of the posts covered by these restructuring orders, as "Selection" and "Non-Selection", as the case may be, remains unchanged. However, for the purpose of implementation of these orders, if an individual Railway servant becomes due for promotion to only one grade above the grade of the post held by him, at present, on a regular basis, and such higher grade post is classified as a "Selection" post, the existing selection procedure will stand modified in such a case to the extent that the selection will be based only on scrutiny of service records without holding any written and/or viva-voce test. Under this procedure, the categorization 'Outstanding' will not exist.

6.1 The existing rules and orders in regard to reservation for SC/ST will continue to apply while filling up additional vacancies in the higher grades arising as a result of restructuring.

9. In all the categories covered by this letter even though more posts, in higher scales of pay have been introduced as a result of restructuring, the basic functions, duties and responsibilities, attached to these posts at present will continue, to which may be added such other duties and responsibilities as considered appropriate.

10. The Board desire that restructuring and posting of staff after due process of selection as provided for in these orders, should be completed expeditiously."

The percentage of upgraded posts is indicated in Annexure I appended to letter dated 25.6.1985, which reads as under:-

ANNEXURE-I

Subject: Statement indicating restructuring of certain Group 'C' and 'D' cadres on Railways.

25.6. 1985

I Loco Running Staff

1. Passenger Driver `A' (Rs.550-700)
Drivers `A' having

All Passenger Train

a run of 250 kms.

And above to be

upgraded from

Driver `A' (Rs.550-700)

to Driver `A' Spl.

(Rs.550-750)

All Leave Reserve

for `A' Spl. and `A'

Drivers to be kept in

Grade only.

Revised

2. (i) Goods Driver Gr.`B'
Gr.`B' Percentage

Goods Driver

(Rs.425-640 - 40%)
640 60

Rs.425-

(ii) Goods Driver Gr.`C'
Gr.`C' 40

Goods Driver

(Rs.330-560-60%)

Rs.330-560

(10% of the Gr.`C'
Rs.425-600

Selection Grade

posts operated as

to be discontinued

Selection Grade posts

in Rs.425-600)

3. Shunters (Rs.290-400) 30% of Shunters to
be upgraded as Shunting Drivers
Rs.330-560

4. Fireman `A'/Diesel Asstt./ 30% of posts to be
given special pay @
Asstt. Elec. Loco Driver Rs.15 p.m.
(Rs.290-350)

5. Fireman `B' Leave reserve posts
for Fireman `A' hitherto kept in
(Rs.260-350) upgraded to
Fireman `B' to be Fireman `A'

6. Fireman `C' 30% of Fireman `C'
to be upgraded to scale Rs.260-350
(Rs.210-270)
(L)

(L) Note: 30% of Fireman `C' scale Rs.210-270 who are upgraded to scale Rs.260-350 will remain designated as Fireman `C' and utilized as far as possible on Mail, Express and Passenger Trains. The further avenue of promotion of Fireman `C' in scale Rs.210-270 and Rs.260- 350 will remain unaltered.

7. Motormen on EMU Trains 50% on Western
Railway and 40% on Central, Northern,
(Rs.550-700)

Eastern, Southern

be upgraded as

scale Rs.550-750.

and S.E. Railways to

Driver `A' Spl. in

II. Traffic Running Staff

1. Passenger Guard `A'
Train Guards

(Rs.425-600)
kms. and

to Guard

for `A' Spl. and

in `A'

(i) All Passenger

having a run of 250

above to be upgraded

`A' Spl. Rs.425-640.

(ii) Leave Reserve

`A' Guard to be kept

Grade only.

Revised

2. (i) Goods Guard Gr.`B'
Gr.`B' Percentage

(Rs.330-560-40%)
560 60

Goods Guard

Rs.330-

(ii) Goods Guard Gr.`C'
Gr.`C' 40
(Rs.330-530-60%)

Goods Guard
Rs.330-530

III. Account Staff

Clerks Grade I to be aggregated with Selection Grade Clerks Grade I, Sub- Heads and Selection Grade Sub-Heads and placed in the following Percentages:-

Clerk Grade I (Rs.330-560)	55%
Sub-Heads (Rs.425-700)	45%

Note:

1. Posts of Selection Grade Clerks Grade I Rs.425-700 to be discontinued.
2. Selection Grade Sub-Heads will continue as per extant orders.
3. Sub-Heads to work as Clerical hands as required by the Administration

IV. Cash & Pay Office Staff

The cadre of Shroffs to be placed in the following Percentages:-

(a) Head-Shroff	Rs.425-640	20%
Senior Shroff	Rs.330-560	40%
Junior Shroff	Rs.260-400	40%

(b) Cashiers to be placed in the following Percentages:-

Rs.455-700	40%
Rs.425-640	40%
Rs.330-560	20%

(c) Upgradation effected to posts in Supervisory Cadre as under:-

Scale (Rs.)	Existing	Revised
700-900	55	107
550-750	134	146
455-700	37	Nil
Total	226	253 (+27 posts upgraded from Head Shroff Scale Rs.425-640)

The detailed distribution of Supervisory Cadre Railway-wise is given in Annexure-II.)

V. Tool Checkers

1. *CLW & DLW*: The existing cadre of Tool Checkers in CLW & DLW will be restructured as under:-

Scale (Rs.)	Revised Percentage
260-400	40%
330-560	30%
425-700	20%
550-750	10%

The CLW and DLW Administration should take action for introducing direct recruitment in the cadre of Tool Checkers on the standard pattern applicable to other Ministerial cadres and merge with the appropriate Ministerial cadre.

2. Eastern Railway: The Tool Checkers on Eastern Railway will also have the grades Rs.425-700 and Rs.550-750 and the same percentage structure as laid down for CLW and DLW in Item I above with the proviso that upgradation of posts to scale Rs.550-750 forming part of 10% of the cadre will be effected only after the existing staff promoted to scale Rs.425-700 in terms of these restructuring orders complete one year of service in that grade from the date of physical promotion. The Railway should take action to merge the cadre of Tool Checkers with the appropriate Ministerial cadre and introduce direct recruitment as per existing pattern applicable to the Ministerial cadre.

VI. Tracers (Rs.260-430)

The existing regular incumbents of the post of Tracers in all the four disciplines of the Engg. Departments viz. Civil Engg, Mechanical Engg., Signal & Telecommunication Engg. and Elec. Engg. Departments will be promoted in the following manner:-

- (i) Those who possess the diploma in Draftsmanship from recognized institutions will be upgraded as Junior Draftsman scale Rs.330-560.
- (ii) Those who do not possess the diploma in Draftsmanship but have completed 5 years of service as on 1.1.84 will be upgraded as Junior Draftsman in scale Rs.330-560.

(iii) The balance non-qualified Tracers will be progressively promoted by upgrading their posts as Junior Draftsman (Rs.330-560) as and when they complete 5 years of service or acquire the necessary qualification. The review will be done every six months commencing from 1.7.1986.

(iv) The vacancies which occur in the normal course in scale Rs.330-560 will continue to be filled as per existing pattern.

(v) After the entire cadre of the Tracers has been fully accommodated in the higher grade post of Junior Draftsman in scale Rs.330-560, future vacancies in scale Rs.330-560 will be filled cent-per-cent by direct recruitment of diploma holders in Draftsmanship. Detailed instructions will follow.

Note:

The existing cadre of Tracers is to be frozen and actual requirements reviewed and determined with Board's approval within six months. In this connection, reference is invited to Ministry of Railways letter No.E(NG) II- 85/RC-2/7 dated 27.2.1985. Once the cadre of the Junior Draftsman in scale Rs.330-560 is fixed finally, it will be taken into account for percentage distribution applicable to the drawing office staff vide item 6 of the Annexure to this Ministry's letter No.PCIII/84/UPG/9, dated 16.11.1984 in the subsequent annual cadre reviews.

VII. Permanent Way Mates to Permanent Way Mistries

(i) 20% of posts of Permanent Way Mates in scale Rs.260-400 to be upgraded to Permanent Way Mistries in scale Rs.380-560.

(ii) 50% of vacancies arising on or after 1.1.85 in scale Rs.380-560 should be filled by candidates who have passed 12th Standard with Maths and Science.

(iii) Direct recruitment of PWI Grade III in scale Rs.425-700 will be reduce from 75% to 66-2/3% for vacancies arising in that category after the date of restructuring as proposed in item VII(i) above. For promotion of directly recruited PW Mistries scale Rs.380-560 to PWI Grade III in scale Rs.425-700, a minimum of three years service as PW Mistries will be required including training period.

VIII Message Checkers (for Central Western & Eastern Railways only)

Message Checkers will be restructured as under:-

Western	Grade (Rs.)	Eastern		Central	
		Extg. Extg.	Extg. Revd.	Revd. cadre	Extg. cadre
7	260-430	4	5 3	4	8
5	330-560	3	4 3	3	6
2	425-640	2	1 2	2	1
1	550-750	-	- 1	1	1
	700-900				1
16	Total	9	10 9	10	16

10. The relevant paragraphs of policy contained in letter dated 9.10.2003 which is subject matter of

this litigation, also read as under:-

"The Ministry of Railways have had under review cadres of certain Group 'C' & 'D' staff in consultation with the staff side with a view to strengthening and rationalizing the staffing pattern on Railways. As a result of the review undertaken on the basis of functional, operational and administrative requirements, 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 percentages indicated therein. While implementing these orders the following detailed instructions should be strictly and carefully adhered to:

xxx

xxx

xxx

1. Date of effect (hereinafter referred to as cut-off date): This restructuring of cadres will be with reference to the sanctioned cadre strength as on the date following the date on which the cadres in the headquarter offices of new Zonal Railways/New Divisions are closed. The benefit of restructuring will be restricted to the persons who are working in a particular cadre on the cut-off date.

3. Pay Fixation (Rule 1313 (FR 22) - RII). Staff selected and posted against the additional higher grade posts as a result of restructuring will have their pay fixed under Rule 1313 (FR-22)(I)(a)(1)-RII on proforma basis w.e.f. the cut-off date with the usual option for pay fixation as per extant rules. Actual payment based on the pay so fixed should be made from the date of taking over the charge of the higher grade post arising out of these restructuring orders. The benefit under this rule will, however, no longer be available in the case of movement from lower grade to higher grade in the non-functional situations where there is no change in duties as in the case of movement from Goods Guards to Sr. Goods Guards and Goods Drivers to Sr. Goods Drivers etc. In the case of such movement, the pay will be fixed under Rule 1313 (FR 22) (I)(a)(2)-RII. However, the benefit of fixation of pay under Rule 1313 (FR-22)(I)(a)(1) R-II will now be admissible in the cases of functional promotions such as promotion from Sr. Goods Guards to Passenger Guards and Sr. Goods Drivers to Passenger Drivers etc. though in identical scale of pay.

4. Existing classification and filling up of the vacancies. The existing classification of the posts covered by these orders as 'selection' and 'non-selection', as the case may be, remains unchanged. Action should be taken to position the employees on the basis of selection/non-selection/suitability/Trade Test, as the case may be. However, the instructions contained in Para 13.2 should be followed in case of placement of Supervisors (erstwhile Mistries) to grade Rs.5000-8000.

5. Extant instructions for D&A/Vigilance clearance will be applicable for effecting promotions

under these orders with reference to the cut-off date.

6. Minimum years of service in each grade. While implementing the restructuring orders, instructions regarding minimum period of service for promotion issued from time to time should be followed. In other words, residency period prescribed for promotions to various categories should not be relaxed.

7. Basic functions, duties and responsibilities. Since the cadres as detailed in the annexures to this letter are being restructured on functional, operational and administrative considerations, the posts being placed in higher scales of pay as a result of restructuring should include the duties and responsibilities of greater importance.

8. Adjustment of excess number of posts. If prior to issue of these instructions the number of posts existing in any grade in any particular cadre exceeds the number

admissible on the revised percentages, the excess be allowed to continue to be phased out progressively with the vacation of the posts by the existing incumbents.

11. Introduction of Direct recruitment (i) Ministerial Staff (excluding Accounts staff) (ii) Personnel Inspectors (iii) Depot Material Superintendents. The implementation of restructuring scheme in the categories of Ministerial staff, Personnel Inspectors and Depot Material Superintendents is subject to the introduction of direct recruitment in these categories. After implementation of the restructuring in accordance with the revised percentage distribution of posts indicated in the annexures enclosed, the vacancies arising in these categories on or after the cut-off date should be filled through direct recruitment in the manner indicated hereunder:-

11.1 An element of direct recruitment of graduates with not less than 50% marks shall now be introduced at the level of Office Superintendent Gr.II in the pay scale Rs.5500- 9000 in the Ministerial categories (Establishment & other than Establishment but excluding Accounts) to the extent of 20% of the posts. The remaining 80% of the posts in grade Rs.5500-9000 shall continue to be filled by promotion of staff from the lower grade Rs.5000- 8000 as per the procedure in force.

11.2 20% of the posts in grade Rs.6500-10500 in the category of Personnel Inspectors shall be filled by direct recruitment from amongst the candidates possessing

Bachelor degree with Postgraduate Diploma in Personnel Management, labour laws, etc. as mentioned in Board's letter No.E(NG)I-2002/PM4/1 dated 12-07-2002. The remaining 80% of the posts shall continue to be filled by promotion of staff from the lower grade of Rs.5500-9000 as per

the procedure in force.

11.3 20% of the posts in grade Rs.6500-10500 in the category of Depot Material Superintendents should be filled by direct recruitment from amongst the candidates possessing qualification of degree in Engineering in any discipline. The remaining 80% of the posts shall continue to be filled by promotion of staff from the lower grade of Rs.5500-9000 as per procedure in force.

12. Gatemen (Engg.) As a result of implementation of this restructuring, more number of additional posts will be available in the highest grade of this category. Henceforth, therefore, the posts of Gatemen (Engg.) should be operated in grade Rs.2750-4400. In order to ensure the full availability of Gatemen (Engg.) and rotation of the existing staff specially those who are working, as such, for a long period, the Trackmen etc. at the time of their promotion to grade Rs.2750-4400 should be posted as Gateman (Engg.) subject to their fulfilling the requirement of prescribed medical standard and literacy level etc. as per extant instructions.

13(a) Upgradation of the posts of Supervisor (erstwhile Mistries) Subject to provisions of Para-13.2 below, all the posts of Supervisors (erstwhile Mistries) in grade Rs.4500-7000 + Rs.100 Special Allowance (excluding Supervisors (P.Way) should enbloc be upgraded to the posts of Junior Engineer Gr.II in the pay scale of Rs.5000-8000 and merged with the respective cadre of Technical Supervisors with its spread effect in higher grades Rs.5500-9000, 6500-10500 & 7450-11500 as per the revised percentage distribution of posts prescribed for Technical Supervisors in these orders.

13(b) In case of Supervisor (P.Way), the posts being held by the erstwhile PWMs supervising more than one gang upto a maximum of 17.26% of the sanctioned cadre of PWMs shall be upgraded to and merged with the posts of Junior Engineer (P.Way) Gr.II in the pay scale of Rs.5000-8000 with its spread effect in higher grades of JE-I, SE & SSE in grades Rs.5500-9000, 6500-10500 & 7450-11500 respectively, as per the revised percentages prescribed for Technical Supervisors in these orders.

13.1 The financial implications involved in the upgradation covered by (a) & (b) above should be off set by surrender of posts of Supervisors of equivalent money value.

13.2 Procedure for fitment. The placement of the existing incumbents will be regulated as per the procedure given below:-

(a) The existing regular incumbents of the posts of Supervisors (including Supervisors/P.Way to

the extent of upgradation of posts) will be placed in grade Rs.5000- 8000 without subjecting them to normal selection procedure. Their suitability shall be adjudged by following modified selection procedure according to which the selection will be based on scrutiny of service records and confidential reports only.

(b) The Supervisors (other than P.Way) who do not get promoted to grade Rs.5000-8000 shall continue to hold the post in the existing grade Rs.4500-7000 + Rs.100 SA as personal to them. To this extent, the posts upgraded to grade Rs.5000-8000 will be operated in the lower grade Rs.4500-7000 + Rs.100 SA till the existing incumbents vacate the same by way of promotion, retirement etc. On vacation of the posts, the same shall automatically be operated in grade Rs.5000-8000.

13.3 Specific provisions for Supervisor (P.Way) The remaining posts of Supervisors (P.Way), erstwhile PWMs which are not to be upgraded and shall continue to be operated in the existing scale of pay, should be redesignated as 'Track Supervisor'.

13.4 While the existing incumbents of the post of Supervisor (P.Way) redesignated as 'Track Supervisor' shall continue to draw the scale of pay Rs.4500-7000 + Rs.100 SA as personal to them, the future incumbents to the post of 'Track Supervisor' will be in the pay scale of Rs.4500-7000 without the Special Allowance of Rs.100/-.

13.5 The upgradation of posts of Supervisor (P.Way) as indicated hereinabove should not result in creation of posts of Trolleyman. In other words under no circumstances, additional posts of Trolleyman would be created.

14. Provisions of reservation. The existing instructions with regard to reservation of SC/ST wherever applicable will continue to apply.

15. Direct recruitment percentages: Direct recruitment percentages will not be applicable to the additional posts arising out of these restructuring orders as on the cut-off date. The direct recruitment percentage will apply for normal vacancies arising on or after the date following the cut-off date. Also the direct recruitment quota as on the date preceding the cut-off date will be maintained.

16. Pin pointing of posts. The administration should take steps to pin-point the additional posts arising out of this restructuring as per administrative requirements.

18. Matching Savings. Entire scheme of restructuring is to be a self-financing and expenditure neutral proposition. Financial implications should be worked out taking into account the mid points of the scales of pay of the respective posts (mean of the minima and maxima of the scale), existing number of posts and revised number of posts in the grade on the basis of the revised percentage of distribution of posts. After working out the financial implications, the matching savings should be effected from the category itself. Wherever it is not possible to do so from the category itself, the matching savings should be arranged from the department at the

divisional/zonal level. But before restructuring the cadre as per the revised percentage distribution of posts, matching savings will have to be ensured and if the Department/Railways are not able to provide the matching savings, the particular category/department will not be restructured. While effecting surrender of posts of equivalent financial value, the existing vacant posts available in the categories on the cut-off date should be considered for the purpose of off-setting the cost of restructuring/financial effects of restructuring. Board desire that the General Managers should ensure that the restructuring is implemented expeditiously with matching savings without any exception and difficulty. There would be no restructuring without matching savings by surrender of posts."

19. Re-organization of Zonal Railways/Divisions: Due to re-organization of Zonal Railways/Divisions cadres are in a fluid situation. It may, therefore, take some time for the cadres in the headquarter offices of New Zones and Divisions to stabilize. In the circumstances, new Zonal Railways are required to ensure that the staff transferred to headquarter offices of new Zonal Railways/new Divisions are not extended the double benefit of restructuring. In case an employee has been given the benefit of restructuring on the old (parent) railway in terms of these orders, he will not be allowed the benefit of restructuring again on the headquarter offices of new

Zonal Railways/ new Divisions. In other words, no railway servant will be considered for double promotion as a result of this restructuring."

The existing and revised percentage of posts in different cadres are indicated in Annexure `A' to `K' appended to letter dated 9.10.2003. For the sake of reference Annexure `A'(i) appended to that letter is reproduced below:-

ANNEXURE `A'(i)

STATEMENT REGARDING RESTRUCTURING OF GROUP

`C' & `D' STAFF OF TRANSPORTATION TRAFFIC

DEPARTMENT

Annexure to Board's letter No.PC III/2003/CRC/6 dated 9-10-

CATEGORY	GRADE (Rs.)	EXISTING %AGE	REVISED %AGE
Station Masters/Assistant Station Masters*	7450-11500		6.5
	6500-10500		22
	5500-9000		30
	5000-8000		33
	4500-7000		8.5
Train Clerks	5500-9000	20	30
	5000-8000	30	36
	4000-6000	25	17
	3050-4590	25	17
Traffic Controllers	7450-11500	30	37
	6500-10500	55	48
	5500-9000	15	15
Shunting Masters/	5000-8000	25	50

Jamadars	4000-6000	75	50
Pointsmen/Levermen/ Shuntmen	3050-4590	75	83
	2650-4000	25	17
Cabinmen	4000-6000	25	50
	3050-4590	75	50

Foot Note: The revised percentage distribution of posts will be made applicable in the unified cadre as per the provisions contained in Para-10.1 of the covering letter.

11. The nature and scope of the Railway Board's power to make rules was considered by the Constitution Bench of this Court in *B.S. Vadera vs. Union of India and Others* [1968 (3) SCR 575]. The facts of that case were that the petitioners, who joined service as Lower Division Clerks, were first promoted as Upper Division Clerks and then as Assistants (on ad-hoc basis). In June 1967, they were reverted to the posts of Upper Division Clerks. It was argued on their behalf that the Railway Board does not have the power to frame the Scheme or amend the same with retrospective effect. This Court referred to the provisions of the Indian Railway Board Act, 1905, Article 309 of the Constitution and Rules 157 and 158 of the Code (these rules are pari material to paras 123 and 124 of 1985 edition of the Code) and held that the Railway Board's Secretariat Clerical Service (Re-organisation) Scheme was statutory in character and that the Railway Board could amend the same with retrospective effect. Paras 21 to 25 of the judgment which contain its ratio are extracted below:-

"21. There is no controversy that the Indian Railway Establishment Code has been issued, by the President, in exercise of the powers, vested in him, by the proviso to Article 309, of the Constitution. Only two rules require to be noted, and they are Rules 157 and 158, occurring in Chapter I, under the sub-heading "Power to frame rules". They are as follows: "157. The Railway Board have full powers to make rules of a general application to non-gazetted railway servants under their control. 158. The General Managers of Indian Railways have full powers to make rules

with regard to non-gazetted railway servants under their control, provided they are not inconsistent with any rules made by the President or the Railway Board."

We are not concerned, really in this matter, with Rule 158, because the Scheme, Annexures 4 and 7, in particular, and the various orders, have been passed by the 2nd respondent, the Railway Board. The Railway Board, as will be seen from Rule 157, have full powers to make rules of general application, to non-gazetted railway servants under their control. The question is whether the 2nd respondent, has, while acting under Rule 157, power to make a rule (in this case, the Scheme), having effect from an anterior date.

22. The matter must be considered, in the light of the provisions of Article 309, of the Constitution. That Article provides:

"309. Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act." We may emphasize the words "and any rules so made shall have effect subject to the provisions of any such Act," which must receive their due weight. To that aspect, we shall come, presently.

23. We have already pointed out, that Annexure 4 was issued on February 5, 1957, and Annexure 7, on March 30, 1963, and that the initial constitution of the Service was to be from December 1, 1954, and it is, on that basis, that the promotions, or appointments, to the Service, are to be made. In this case, there is no Act of the appropriate Legislature, regulating the recruitment and conditions of service, under the 2nd respondent and, therefore, the main part of Article 309 is not attracted. But, under the Proviso therein, the President has got full power to make rules, regulating the recruitment, and conditions of service, of persons, under the 2nd respondent. Further, under the Proviso, such person, as may be directed by the President, can also make rules, regulating the recruitment and conditions of service, of persons, under the 2nd respondent. The rules so made, either by the President, or such person, as he may direct, will have currency, until provision, in that behalf, is made by or under an Act, of the appropriate Legislature, under Article 309.

24. It is also significant to note that the proviso to Article 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act'. The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning, unless hedged-in, by any limitations. The rules, which have to be 'subject to the provisions of the Constitution, shall have effect, 'subject to the provisions of any such Act'. That is, if the appropriate legislature has passed an Act, under Article 309, the rules, framed under the proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate legislature, on the matter, 'in our opinion, the rules, made by the President, or by such person as he may direct, are to have full effect, both prospectively, and, retrospectively. Apart from the limitations, pointed out above, there is none other, imposed by the proviso to Article 309, regarding the ambit of the operation of such rules. In other words, the rules, unless they can be impeached on grounds such as breach of Part III, or any other Constitutional provision, must be enforced, if made by the appropriate authority.

25. In the case before us, the Indian Railway Establishment Code has been issued, by the President, in the exercise of his powers, under the proviso to Article 309. Under Rule 157, the President has directed the Railway Board, to make rules, of general application to non-gazetted railway servants, under their control. The rules, which are embodied in the Schemes, framed by the Board, under Annexures 4 and 7, are within the powers, conferred under Rule 157; and, in the absence of any Act, having been passed by the 'appropriate' Legislature, on the said matter, the rules, framed by the Railway Board, will have full effect and, if so indicated, retrospectively also. Such indication, about retrospective effect, as has already been pointed out by us, is clearly there, in the impugned provisions."

12. In view of the pronouncement of the Constitution Bench, there cannot be any doubt that the Railway Board and General Managers are empowered to frame rules for regulating the recruitment and conditions of service of the employees.

13. We shall now consider whether the posts created with reference to different grades in Group C and D can be treated as independent cadres and the policy of reservation can be applied while making appointment to these cadres.

14. A conjoint reading of paragraph 103(7) of the Code, 103(iii) of the Railway Establishment Manual and Circular R.B.E. No.113/97 makes it clear that in the railways, the term 'cadre' generally denotes the strength of a service or a part of a service sanctioned as a separate unit. However, for the purpose of roster, a wider meaning has been given to the said term so as to take within its fold the posts sanctioned in different grades. The reason for giving this enlarged meaning to the term "cadre" is that posts in the railway establishment are sanctioned with reference to grades. Even temporary, work charged, supernumerary and shadow posts created in different grades can constitute part of the cadre.

15. In the service jurisprudence which has developed in our country, no fixed meaning has been ascribed to the term "cadre". In different service rules framed under proviso to Article 309 of the Constitution as also rules framed in exercise of the powers of delegated legislation, the word "cadre" has been given different meaning.

16. In *A.K. Subraman and Others vs. Union of India and Others* [1975 (1) SCC 319], a three Judges Bench of this Court while interpreting the provisions contained in Central Engineering Service, Class I, Recruitment Rules, 1954, observed as under :

"The word "grade" has various shades of meaning in the service jurisprudence. It is sometimes used to denote a pay scale and sometimes a cadre. Here it is obviously used in the sense of cadre. A cadre may consist only of permanent posts or sometimes, as is quite common these days, also of temporary posts."

17. In *Dr. Chakradhar Paswan vs. State of Bihar and Others* [1988 (2) SCC 214] it was observed as under:- "In service jurisprudence, the term 'cadre' has a definite legal connotation. It is not synonymous with 'service'. It is open to the Government to constitute as many cadres in any particular service as it may choose according to the administrative convenience and expediency and it cannot be said that the establishment of the Directorate constituted the formation of a joint cadre of the Director and the Deputy Directors because the posts are not interchangeable and the incumbents do not perform the same duties, carry the same responsibilities or draw the same pay. The posts of the Director and those of the Deputy Directors constitute different cadres of the Service. The first vacancy in the cadre of Deputy Directors was that of the Deputy Director (Homoeopathic) and it had to be treated as unreserved, the second reserved and the third unreserved. Therefore, for the first vacancy of the Deputy Director (Homeopathic), a candidate belonging to the Scheduled Caste had therefore to compete with others."

18. In *State of Maharashtra vs. Purshottam and Others* [1996 (9) SCC 266], it was held that the "cadre" means unit of strength of a service or a part of it as determined by the employer.

19. The argument of Shri Sushil Jain that para 4(b) of Circular RBE No.113/97 dated 21.8.1997 is ultra vires the definition of the word "cadre" contained in para 103(7) of the Code completely ignores the stark reality that in the railway establishment the posts are sanctioned with reference to grades which term means sub-division of a class, each bearing a different scale of pay. Therefore, the posts sanctioned in different grades would constitute independent cadres and we see no reason why a restricted meaning should be given to the term 'cadre' for the purpose of implementing the roster.

20. The next question which merits consideration is whether the policy of reservation can be applied at the stage of restructuring of Group C and D cadres in the railways and whether para 14 of letter dated 9.10.2003 is violative of doctrine of equality enshrined in Articles 14 and 16 of the Constitution.

21. A cursory reading of the relevant extracts of letters dated 25.6.1985 and 9.10.2003 reproduced hereinabove may give an impression that the policies contained therein are similar but a closer scrutiny thereof reveals the following stark dissimilarities:-

(i) In terms of para 5.1 of letter dated 25.6.1985, the existing classification of the posts covered by the restructuring orders i.e. 'selection' and 'non-selection' was to be retained. However, for the purpose of promoting an individual railway employee there was deemed modification of the selection procedure and the promotion

was to be made without holding any written test and/or viva-voce. As against this, action in terms of para 4 of letter dated 9.10.2003 is required to be taken for making appointment on the basis of selection/non-selection/suitability/Trade Test and in para 5, the requirement of D&A/Vigilance clearance has been made mandatory for effecting promotion with reference to the cut off date.

(ii) While the policy contained in letter dated 25.6.1985 did not specify any minimum period of services as a condition for promotion, para 6 of letter dated 9.10.2003 lays down the requirement of minimum period of services as a condition for promotion and also declares that residency period prescribed for promotion to various categories should not be relaxed.

(iii) Para 9 of letter dated 25.6.1985 postulated retention of basic functions, duties and responsibilities and addition of other duties and responsibilities, whereas para 7 of letter dated 9.10.2003 mandates that posts being placed in the higher scales of pay should include the duties and responsibilities of greater importance because restructuring is contemplated on functional, operational and administrative considerations.

(iv) While the policy contained in letter dated 9.10.2003 postulates progressive phasing out of excess number of posts in a particular cadre, no such provision was made in the policy circulated vide letter dated 25.6.1985.

(v) The instructions contained in letter dated 25.6.1985 did not provide for direct recruitment against upgraded posts, but para 15 of letter dated 9.10.2003 unequivocally lays down that direct recruitment percentages will not be applicable to the additional posts becoming available as a result of restructuring and the same will apply to normal vacancies after the cut-off date.

(vi) Para 18 of letter dated 9.10.2003 shows that the scheme of restructuring is a self-financing and expenditure neutral proposition. There was no such provision in the earlier policy.

(vii) Annexure 1 appended to letter dated 25.6.1985 shows that the percentage of the upgraded posts becoming available as a result of restructuring varied from 20 to 60 in different grades, except in the cadre of Tool Checkers where the percentage varied from 10 to 40. As against this, the percentage of additional posts (as indicated in Annexures A to K appended to letter dated 1.10.2003) becoming available as a result of restructuring of different cadres in Group C and D posts varied from 1 to 10, except in one or two cadres where it was more than 20.

22. From what we have noted above, it is clear that the policies contained in letters dated 25.6.1985 and 9.10.2003 are substantially dis-similar. The exercise of restructuring envisaged in the first policy was in the nature of upgradation of substantial number of posts in different cadres and the upgraded posts were to be filled simply by scrutinizing the service records of the employees without holding any written and/or viva voce test and there was no merit based selection. In contrast, the restructuring exercise envisaged in letter dated 9.10.2003 resulted in creation of additional posts in some cadres with duties and responsibilities of greater importance and which could be filled by promotion from amongst the persons fulfilling the conditions of eligibility and satisfying the criteria of suitability and/or merit.

Para 13 of letter dated 9.10.2003 is, in itself, demonstrative of the difference between simple upgradation of posts in the cadre of Supervisors which are required to be filled without subjecting the incumbents of the posts to normal selection procedure whereas the additional posts becoming available in other cadres are required to be filled by promotion.

23. In legal parlance, upgradation of a post involves the transfer of a post from the lower to the higher grade and placement of the incumbent of that post in the higher grade. Ordinarily, such placement does not involve selection but in some of the service rules and/or policy framed by the employer for upgradation of posts, provision has been made for denial of higher grade to an employee whose service record may contain adverse entries or who may have suffered punishment - *D.P. Upadhyay vs. G.M., N.R. Baroda House and Others* [2002 (10) SCC 258].

24. The word 'promotion' means "advancement or preferment in honour, dignity, rank, or grade". 'Promotion' thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law the expression 'promotion' has been understood in the wider sense and it has been held that "promotion can be either to a higher pay scale or to a higher post" - *State of Rajasthan vs. Fateh Chand Soni* [1996 (1) SCC 562].

25. Once it is recognized that the additional posts becoming available as a result of restructuring of different cadres are required to be filled by promotion from amongst the employees who satisfy the conditions of eligibility and are adjudged suitable, there can be no rational justification to exclude the applicability of the policy of reservation while effecting promotions, more so because it has not been shown that the procedure for making appointment by promotion against such additional posts is different than the one prescribed for normal promotion. In Fateh Chand Soni's case, this Court interpreted the provisions contained in the Rajasthan Police Service Rules, 1954, which regulate appointment to the Selection Scale in the service and held that such appointment constitutes promotion. The

Court then considered two earlier judgments in Lalit Mohan Deb vs. Union of India [1973 (3) SCC 862] and Union of India vs. S.S. Ranade [1995 (4) SCC 462] and declared that the High Court was in error in holding that appointment to the Selection Scale does not constitute promotion.

26. In Ram Prasad and Others vs. D.K. Vijay and Others [1999 (7) SCC 251], it was submitted that the view taken in Fateh Chand Soni's case requires re-consideration because the same is inconsistent with the latter judgments in Ajit Singh Januja vs. State of Punjab [1996 (2) SCC 715] and Ajit Singh II vs. State of Punjab [1999 (7) SCC 209]. While rejecting this plea, the Constitution Bench observed:-

"The contention of Shri Gopal Subramaniam for the general candidates that appointment from senior scale to selection scale is not a promotion and that Fateh Chand Soni requires reconsideration in view of the judgments in Union of India vs. S.S. Ranade and Lalit Mohan Deb vs. Union of India cannot be accepted. We are unable to agree. We find that both these cases have been referred to and explained in Fateh Chand Soni case. Therefore, the reserved candidates are entitled to be promoted to the selection scale by way of the roster points. But this has to be done in the manner mentioned in R.K. Sabharwal vs. State of Punjab. The appeal of the general candidates has to fail."

27. A careful reading of the policy contained in letter dated 9.10.2003 shows that with a view to strengthen and rationalize the staffing pattern, the Ministry of Railways had undertaken review of certain cadres. The basis of the review was functional, operational and administrative requirement of the Railways. This exercise was intended to improve the efficiency of administration by providing incentives to the existing employees in the form of better promotional avenues and at the same time requiring the promotees to discharge more onerous duties. The policy envisaged that additional posts becoming available in the higher grades as a sequel to restructuring of some of the cadres should be filled by promotion by considering such of the employees who satisfy the conditions of eligibility including the minimum

period of service and who are adjudged suitable by the process of selection. This cannot be equated with upgradation of posts which are required to be filled by placing the existing incumbents in the higher grade without subjecting them to the rigor of selection.

28. In view of the above discussion, we hold that the Railway Board did not commit any illegality by directing that the existing instructions with regard to the policy of reservation of posts for Scheduled Castes and Scheduled Tribes will apply at the stage of effecting promotion against the additional posts and the Tribunal committed serious illegality by striking down para 14 of letter dated 9.10.2003.

29. Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the

employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The Court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also not open the Court to make comparative evaluation of the merit of the candidates. The Court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration.

30. We may now deal with an ancillary question whether the policy of reservation of posts for Scheduled Castes and Scheduled Tribes can be applied in the matter of promotion.

31. The framers of the Constitution were very much conscious and aware of the widespread inequalities and disparities in the social fabric of the country as also of the gulf between rich and poor and this is the reason why the goal of justice - social, political and economic was given the place of pre-eminence in the Preamble. The concept of equality enshrined in Part III and Part IV of the Constitution has two different dimensions. It embodies the principle of non-discrimination [Articles 14, 15(1), (2) and 16(2)]. At the same time it obligates the State to take affirmative action for ensuring that unequals (downtrodden, oppressed and have-nots) in the society are brought at a level where they can compete with others (haves of the society) (Articles 15(3), (4), (5), 16(4), (4A), (4B), 39, 39A and 41).

32. The legislative and administrative measures taken by the State for providing reservation of seats and posts in the field of education and employment are reflective of the affirmative action taken for achieving the goal of real equality. However, implementation and execution of such actions have continuously faced roadblocks at several stages. Those who had been benefited by the existing system cried foul and created the bogey of violation of their legal and constitutional rights. Almost all the actions taken by the State and its agencies for ameliorating the conditions of have-nots of the society by providing reservation were subjected to periodical judicial scrutiny. By

and large, the Courts approved the affirmative actions of the State but on some occasions the policy of reservation or implementation thereof was found to be faulty and actions taken by the government have been nullified or sliced by judicial intervention.

33. Article 16(1) ensures that there shall be equality of opportunity in matters relating to employment or appointment. Clause (2) thereof declares that no citizen shall be treated ineligible or discriminated in respect of any employment or office under the State on the ground only of religion, race, caste, sex, descent, place of birth, residence or any of them. Clause (4) enables the State to make provision for reservation 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. In *General Manager, Southern Railway vs. Rangachari* [AIR 1962 SC 36], the Constitution Bench made comparative analysis of Articles 16 (1), (2) and (4) and held that reservation can be made not only at the stage of initial appointment, but also while making appointment against selection post.

34. The ratio of Rangachari's case was reiterated in *State of Punjab vs. Hira Lal and Others* [1970 (3) SCC 567]. In that case, the Court considered whether the Government of Punjab could provide for reservation of 10% of posts for Scheduled Castes and Scheduled Tribes at the stage of promotion. While reversing the judgment of Punjab & Haryana High Court which had quashed the policy of the State Government, this Court referred to the judgment in Rangachari's case and held:-

"The reservation must be only for the purpose of giving adequate representation in the services to the Scheduled Castes, Scheduled Tribes and Backward Classes. The exception provided in Article 16(4) should not make the rule embodied in Article 16(1) meaningless. But the burden of establishing that a particular reservation made by the State is offensive to Article 16(1) is on the person who takes the plea. The mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad.

It is true that every reservation under Article 16(4) does introduce an element of discrimination particularly when the question of promotion arises. It is an inevitable consequence of any reservation of posts that junior officers are allowed to take a march over their seniors. This circumstance is bound to displease the senior officers. It may also be that some of them will get frustrated but then the Constitution makers have thought fit in the interests of the society as a whole that the backward class of citizens of this country should be afforded certain protection."

35. In *Akhil Bharatiya Soshit Karamchari Sangh (Railway) vs. Union of India and Others* [1981 (1) SCC 246], Chinnappa Redy, J. in his concurring judgment observed as under:-

"Reservation of posts and all other measures designed to promote the participation of the Scheduled Castes and the Scheduled Tribes in the Public Services at all levels are necessary consequences flowing from the Fundamental Right guaranteed by Article 16(1). This very idea is emphasized further by Article 16(4). Therefore, when posts whether at the stage of initial appointment or at the stage of promotion are reserved or other preferential treatment is accorded to members of the Scheduled Castes, Scheduled Tribes and other socially and economically backward classes, it is not a concession or privilege extended to them; it is in recognition of their undoubted Fundamental Right to Equality of Opportunity and in discharge of the constitutional obligation imposed upon the State to secure to all its citizens 'Justice, social, economic and political' and 'Equality of status and opportunity', to assure 'the dignity of the individual' among all citizens, to 'promote with special care, the educational and economic interests of the weaker section of the people', to ensure their participation on equal basis in the administration of the affairs of the country and generally to foster the ideal of a 'Sovereign, Socialist, Secular, Democratic Republic'. Every lawful method is permissible to secure the due representation of the Scheduled Castes and Scheduled Tribes in the Public Services. There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty per cent. There is no rigidity about the fifty per cent rule which is only a convenient guide-line laid down by judges. Every case must be decided with reference to the present practical results yielded by the application of the particular rule of preferential treatment and not with reference to hypothetical results which the application of the rule may yield in the future."

36. In Indra Sawhney's case, the larger Bench considered whether Clause (4) of Article 16 was confined to initial appointment or the same can be applied at the stage of promotion. After elaborate discussion, the majority of the larger Bench held that Article 16(4) is confined to initial appointment and cannot extend to providing reservation in the matter of promotion. At the same time it was held that the promotions already made by applying the policy of reservation will not be affected and the policy may continue to operate for a period of 5 years.

37. The judgment in Indra Sawhney's case led to seventy-seventh amendment of the Constitution. The Statement of Objects and Reasons incorporated in the bill introduced, which led to the passing of Constitution (Seventy-seventh Amendment) Act, 1995 reads as under:- "Statement of Objects and Reasons.- The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16.11.1992 in the case of Indra Sawhney vs. Union of India [1992 Supp. (3) SC 217], however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States has not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes. In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the Government has decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry this out, it is necessary to amend Article 16 of the Constitution by inserting a new clause (4-A) in the said article to provide for reservation in promotion for the Scheduled Castes and the Scheduled

Tribes."

Clause (4-A) which was inserted by the aforesaid amendment reads as under:-

"Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."

38. The constitutionality of the above reproduced clause has been upheld in M. Nagaraj's case.

39. We shall now advert to the decisions of different benches of the Tribunal and orders passed by this Court in the context of the actions taken by the competent authority for giving effect to the policy of restructuring envisaged in letter dated 25.6.1985 for reservation of posts for Scheduled Castes and Scheduled Tribes.

40. The policy contained in Railway Board's letter dated 25.6.1985 was considered by Allahabad Bench of the Tribunal in case bearing registration No.384 of 1986, V.K. Sirothia vs. Union of India and Others. Some of the peculiar features of V.K. Sirothia's case are:-

(i) Prior to 1.6.1981 there were 3 categories of guards in grades 'A', 'B' and 'C' in Jhansi Division of Central Railway.

(ii). On 1.6.1981 a fourth category was created, which was called as guards grade 'A' (Special).

(iii) Originally 69 posts of guards grade 'A' were upgraded and re- designated as guards grade 'A' (Special).

(iv) 109 posts of guards grade 'B' were upgraded to guards grade 'A' and 182 posts of guards grade 'C' were upgraded to that of guards grade 'B'. Consequently, 272 posts of guards remained in grade 'C'.

(v) The above redistribution of posts was done as a result of restructuring of cadre of guards in Jhansi Division by the Railway Division manager.

(vi) There was redistribution among various grades of guards on 1.1.1984. 69 posts of guards grade 'A' which were upgraded to grade 'A' (Special) (15 posts) and grade 'A' (Special-II) (54 posts). Some more posts of guards in grade 'C' were upgraded to grade 'B'. Out of 109 posts of grade 'A' 32 were upgraded as grade 'A' (Special-II) and 77 were left as guards grade 'A'.

(vii) Similarly in grades 'B' and 'C' the percentage of distribution was interchanged and instead of 182, 272 posts were upgraded to that of grade 'B' leaving out 182 posts in grade 'C'.

41. The Tribunal noted that as per Railway Board's letter No.E9(P&A)- II-SCT/3 dated 2.8.1983, the policy of reservation for Scheduled Castes and Scheduled Tribes is not applicable where cadre restructuring results in mass upgradation of posts and held:

"6. In this connection Railway Board's letter No.E9(P&A)- II-SCT/3 dated 2.8.1983, which is placed at Annexure-I of the petition, refers Board have clarified in this letter that where cadre restructuring results in mass up-gradation of posts in a particular category reservation for SC/ST is not to be provided. However, in cases where restructuring results in partial up- gradation on the basis of percentage distribution the existing rules should be applied against the additional number of higher grade posts which become available as a result of cadre restructuring. The first important aspect of this letter is 'mass up-gradation'. What does the term 'mass' signify and how it should be interpreted? Does it mean that if all the posts in a category are upgraded en-block, such an up-gradation will justify for being called 'mass up-gradation' or is it that if a major percentage is up-graded then it will be called 'mass up- gradation'? The dictionary meaning of the word 'mass' is large quantity or number. 'It can not be said that the large quantity will only mean all the posts being upgraded. Large quantity should mean what the word signifies i.e. a large number of posts should be involved in the exercise. The petitioner Guard grade 'C' there were 454 posts. By an up-gradation made on 1.6.81 40% of these posts got upgraded to grade 'B' while on 1.1.84 the percentage was changed to 60%. Out of total 454 posts 40% works out to 182 posts to a 60% to 272 posts. This is sizeable number and it cannot be said that the figure is in any way small. This should fall within the meaning of mass up- gradation.

7. The second condition enunciated in the Board's letter leads us to the question whether this up-gradation has resulted in additional posts. The restructuring of posts was done to provide relief in terms of promotional avenues. No additional posts were created? Some posts out of existing total were placed in higher grade to provide these avenue to the staff who were stagnating. The placement of these posts in the higher grade cannot be termed as creation of additional posts. There were definite number of posts and total remained the same. The only difference was that some of these were now in a higher grade. It was a deliberate exercise or re-distribution with the primary

object of betterment of chances of promotion and removal of stagnation. Additional posts could only be created if there were additional requirements. There should have been justification for their creation and proper sanction. We find no such situation here. It was a simplicitor exercise of dividing the total number in ratios. It was done on 40:60 first and later it was made 60:40 the number remained same.

8. It would be different matter if in a fixed cadre the promotion are made on occurrence of vacancies in higher grades. Such vacancies arise due to promotion, attrition or creation of additional posts. It is in such situations that reservation percentages apply and have to be followed. Up-gradation of cadres by redistribution of posts will lose its primary objective if it is taken as generation of additional posts in the up-graded posts which it rightly is not.

There has to be rationality in the implementation of direction and instructions. The criteria has also to for cumulated keeping the aims and as regards in view. The key note thought behind the exercise should not be lost sight of. It is to improve prospects, remove stagnation and provide avenues. The very purpose is defeated if the end result is anything also. The ambiguity in the Railway Board's letter of 2.8.83 needs to be clarified and correctly interpreted. There cannot be any additional posts as result of restructuring up-gradation. The so called promotion as a result of redistribution of posts is not promotion attracting reservation. The 454 posts in grade 'C' had already been subject to reservation, a second reservation tantamount to giving unintended benefits."

42. The appeal preferred against the aforementioned order [Union of India vs. V.K. Sirothia (supra)] was dismissed by this Court in the following terms:-

"Heard counsel on both sides. The finding of Tribunal that "the so called promotion as a result of redistribution of posts is not promotion attracting reservation" on the facts of the case, appears to be based on good reasonings. On facts, it is seen that it is a case of upgradation on account of restructuring of the cadres, therefore, the question of reservation will not arise. We do not find any ground to interfere with the order of the Tribunal."

43. The same issue was considered by Jabalpur Bench of the Tribunal in T.A. No.139 of 1986, Ashok Kumar Shrivastava vs. Union of India decided on March 24. 1987. That case involved upgradation of 300 posts of Assistant District Medical Officers to those of District Medical Officers in accordance with the directions issued by the Railway Board vide circular dated 31.7.1981. Ashok Kumar Shrivastava and another challenged the applicability of reservation to the upgraded posts and pleaded that they were entitled to the higher post without requiring to undergo any selection. The Tribunal referred to the orders passed by Allahabad Bench in V.K. Sirothia's case and judgment of the Full bench of Kerala High Court in N.G. Prabhu v. Chief Justice, Kerala High Court (1973 Labour Industrial Cases 1399) and held :

"24. Railway Board in their letter No.81/E (GR) 11/7/7/30, dated 16.5.1981, to UP SC which recommending only 5 per cent direct recruitment to the posts of DMOs informed the Secretary, UPSC as under :

However, the situation has since changed in that the justification for direct recruitment of Divisional Medical Officers no long exists. Many Assistant Divisional Medical Officers are not postgraduates. There has been considered demand for scrapping of direct recruitment. The Ministry of Railways have an in-depth study of the problem and have come to the conclusion that there is no justification to continue direct recruitment in senior scale for the following reasons, etc. It is also clear from the following extract of subsequent order of upgradation dated 31.7.1981 (Annexure `A') that the process was only to give better pay to same ADMOs.

An over all view of the organizational and medicare structure of the Indian Railways has been taken keeping in view the basic objectives of improving effectiveness and quality of service. As a result of the review, it has been decided that 300 existing posts of Assistant Divisional Medical Officers in Indian Railway Medical Service should be placed in the senior scale as Divisional Medical Officer.

We also find that posts of ADMOs have been just upgraded and placed in the higher scale of DMO to give relief to ADMOs who were stagnating. Persons so upgraded are not going to occupy any new posts as the total number of posts remains unchanged and the total strength of ADMOs and DMO remains the same. No new post has been created as per the Indian Railway Medical Services (CMO, Addl. CMO, MS and Div./Sr. MO) Recruitment Rules, 1978 (Annexure `R-2') or Order 8I/EGRIII/7/30, dated 16.5.1981. The placement of same posts in higher grade is not creation of additional posts.

25. Under these circumstances this Tribunal is of the view that this mass upgradation of 300 ADMOs to the exactly equivalent number of posts of DMOs is a case of their being simply placed in the higher senior scale of the grade and as admittedly also no selection is involved, cannot be considered to involve any process of promotion or fresh appointment and therefore no fresh reservation of SC and STs in terms of the prescribed percentage can be made to the upgraded posts and to

the existing incumbents holding the posts of ADMOs which were upgraded. What is applicable to this situation is not Railway Board's Circular No.X/78/E(SCT)/15/13/P & II, dated 22.2.1982 (Annexure `E') but Railway Board's Circular No. E (P&A) II, 83/RS/8, dated 2.8.1983 an extract of which is reproduced below :

In supersession of instructions contained in Board's Letter No.81/E(SCT) 15/83 dated 16.1.1982 and 5.5.1982 the Board desires to clarify that where cadre restructuring results in on mass upgradation of posts in a particular category, the question of providing for reservation to SC/ST according to the

extent rules and orders in such a situation should not ordinarily arise since reservations have already been made in the lower grade. However, if cadre restructuring results in particular upgradation of a Cadre/Category on the basis of percentage distribution, the existing rules and orders governing reservation for SC/STs will apply against the additional number of higher grade posts which become available as a result of cadre restructuring on the basis of existing rules and order providing for reservation for SC/STs. The respondent has not stated that the above instructions have been superseded.

26. In similar circumstances, a Full Bench of Kerala High Court in *N.G. Prabhu v. Chief Justice*, in para 16 observed as under :

In other words, if the upgradation relates to all the posts in a category naturally there is no sense in calling it a promotion of all the person in that category. That is because there is no question of appointment from one post to another. Parties continue to hold the same posts but get a higher scale of pay. It may be that it is not all the posts in a particular category that are so upgraded but only a part of it. Normally, the benefit of such upgradation would go to the seniors in the category. They would automatically get a higher scale of pay. That is because though their posts continue in the same category, a higher scale of pay is fixed for those posts. It is appropriate then to say that the seniors have been nominated to the higher grade which has been so created by the upgradation. The phenomenon does not differ from the case where all the posts are upgraded, and it appears to us that those who get the higher grade cannot be said to have been 'promoted'; because here again there is no question of appointment from one post to another. They continue to hold the same post, but because of seniority in the same post they are given a higher scale of pay.

On the same analogy thus, this upgradation of 300 posts of ADMOs in present case is not an appointment of a member of the service by promotion to a post in the service on a higher scale of pay and therefore does not attract the reservation principle. Allahabad bench of CAT in its decision in OA 384 of 1986 *V.K. Sirothia v. Union of India* has held in the case of upgradation of railway guards as follows : The restructuring of posts was done to provide relief in terms of promotional avenues. No additional posts were created. Some posts out of existing total were placed in higher grade to provide these avenues to the staff who were stagnating. The placement of these posts cannot be termed as creation of additional posts. There were definite number of posts and the total remained the same. The only difference was that some of these were in a higher grade. It was deliberate exercise of redistribution with the primary object of betterment of chance of promotion and removal of stagnation."

44. The Union of India unsuccessfully appealed against the order of the Tribunal inasmuch as SLP No.11801 of 1987 filed by it was dismissed by this Court on 8.12.1987 in the following terms: "We have heard the learned counsel for both the parties and we have gone through the judgment of the Central Administrative Tribunal at Jabalpur Bench in *Ashok Kumar Shrivastava & Ors. v. Union of India & Ors.* (T.A. No.139/86) decided on 24th March, 1987 against which the special leave petition

is filed. We agree with the reasons given by the Central Administrative Tribunal for the conclusion it has reached. We hereby affirm the judgment of the Central Administrative Tribunal. The Special Leave Petition is dismissed."

45. In O.A. No.414 of 1987, N.K. Saini & Others vs. The Director General, RDSO & Others, the applicant challenged the question of application of policy of reservation in the matter of promotion to the upgraded posts becoming available as a result of restructuring of cadres in Research Design & Standards Organization. Allahabad Bench of the Tribunal referred to the orders passed in V.K. Sirothia's case and A.K. Srivastava's case and held that the upgraded posts could not have been offered to the reserved category candidates.

46. S.L.P. (C) No.9628-30 of 1988, Govind Sahai & Ors. vs. N.K. Saini & Ors., was dismissed by the Supreme Court by a short order which reads as under:-

"Heard learned counsel for the petitioners at length and also heard learned counsel for the Central Government. In our opinion, we see no reason to entertain this special leave petition. It is, therefore, dismissed.

47. In All India Non SC/ST Employees Association (Railway), Bikaner & Another vs. Union of India & Others, O.A. No.326 of 1989, Jodhpur Bench of the Tribunal ruled that the reservation for Scheduled Castes and Scheduled Tribes is not applicable in the case of upgradation of the existing posts.

48. Petition for special leave to appeal filed by the Union of India against the afore-mentioned order which was converted as Civil Appeal No.1481 of 1996 was dismissed by this Court on 19th November, 1998 in the following terms:-

"Special Leave granted in S.L.Ps. Heard counsel on both sides. This court on 3.1.96 granted special leave but limited to the proposition that the reservation for SC and ST is not applicable in the case of upgradation of existing posts. This issue we have decided today in Civil Appeal No.3622/95 etc. In the light of that decision, these appeals are dismissed with no order as to costs."

49. The Association which was respondent before this Court, filed Contempt Petition (C) No.304 of 1999. During the pendency of the Contempt Petition, the railway administration filed I.A. No.2 of 2000 for clarification of order dated 19th November, 1998 by claiming that there was a lot of confusion. The same was disposed of vide this Court's Order dated 31.1.2001. The relevant portions

of which read as under:-

"It appears from all the decisions so far that if as a result of reclassification or readjustment there is no additional posts which are created and it is a case of upgradation, then the principle of reservation will not be applicable. It is on this basis that this Court on 19th November, 1998 had held that reservation for SC and ST is not applicable in the upgradation of existing posts and Civil Appeal No.1481/1996 and the connected matters were decided against the Union of India. The affect of this is that where the total number of posts remained unaltered, though in different scales of pay, as a result of regrouping and the effect of which may be that some of the employees who were in the scale of pay of Rs.550-700 will go into the higher scales, it would be a case of upgradation of posts and not a case of additional vacancy or post being created to which the reservation principle would apply. It is only if in addition to the total number of existing posts some additional posts are created that in respect of those additional posts the reservation will apply, but with regard to those additional posts the dispute does not arise in the present case. The present case is restricted to all existing employees who were re-distributed into different scales of pay as a result of the said upgradation."

50. In K. Manickaraj's case the Court considered whether the benefit of reservation could be extended to the appellant while making appointment on the post of Welfare Inspector Grade II. The Court noted that as a result of restructuring, the number of posts available in cadre of Welfare Inspector Grade II increased from 23 to 26 and if reservation of 15% of promotion was given to Scheduled Castes, 4 posts would be available for reserved category. On behalf of the respondents, it was pleaded that there has been no change in the strength of the posts in Grade II which remained 23 and the upgraded posts were meant only for sport persons. The Tribunal accepted the contentions raised by the respondents and negated the claim of appellant. This Court reversed the order of the Tribunal and observed:-

"It is admitted that the total number of posts in Grade II was 23 and 3 posts from Grade III were upgraded to that of Grade II. The upgraded posts which were made as early as in August 1987, as per Memorandum dated 24-8-1987, still continue. It is, therefore, not possible for us to accept the contention of the learned counsel for the respondent that the alleged upgradation was made for a temporary period meant for sports personnel. The posts which were upgraded in the year 1988 having continued till date, the cadre strength of Grade II Inspectors must be held to have become 26 and not 23 as contended by the respondent. If 15% of the cadre is meant for reserved category people then it would work out at 4 and admittedly there are only 3 persons belonging to the Scheduled Castes in Grade II.

In that view of the matter the appellant was entitled to be promoted against the 15% reserved quota of posts in Grade II treating the total number of posts in Grade II to be 26. In our considered opinion the Tribunal was in error in not taking into account the upgraded posts which have been upgraded from Grade III to Grade II on the ground that it was meant for sports personnel. While computing the number of posts available for reserved category, there is no justification to exclude the upgraded posts which had continued from 1988 till date."

51. An analysis of orders passed by the Tribunals and this Court shows that all cases except that of K. Manickaraj's case involved upgradation of large number of posts which could be filled by placing the existing incumbents in the higher grade without subjecting them to the process of selection. Different Benches of the Tribunal referred to the policy decision taken by the Railway Board that reservation policy for Scheduled Castes and Scheduled Tribes is not applicable where cadre restructuring results in mass upgradation of posts and held that the administration was required to make appointment/placement against the upgraded posts without reserving posts for Scheduled Castes and Scheduled Tribes. This Court repeatedly emphasized that the restructuring exercise did not result in creation of new posts/additional posts which could be filled by promotion by following the procedure of selection. Therefore, these decisions are of no help to the cause of the respondents. At the cost of repetition, we consider it necessary to emphasize that restructuring exercise envisaged in letter dated 9.10.2003 resulted in creation of additional posts in most of the cadres covered by the policy and the government had taken a conscious decision to fill up such posts by promotion from amongst eligible and suitable employees and the promotees were burdened with duties and responsibilities of greater importance. Therefore, the Tribunal and High Court were not justified in treating it as a case of upgradation of posts simplicitor. Consequently, the decision of the Tribunal to quash para 14 of letter dated 9.10.2003 and direction given for making appointments de hors the policy of reservation are legally unsustainable.

52. The arguments made by learned counsel in the context of paras 11 and 15 need not detain us because none of the issues decided by the Tribunal and High Court relate to direct recruitment against future vacancies.

53. The point remains to be considered is whether the order of the Tribunal, which has been confirmed by the High Court, can be maintained by applying the ratio of M. Nagaraj's case. Dr. Rajiv Dhawan, learned senior counsel appearing for some of the respondents, made strenuous efforts to convince us that the policy of reservation cannot be applied at the stage of making promotions because the Railway Administration did not produce any evidence to show that Scheduled Castes and Scheduled Tribes were not adequately represented in different cadres and that the efficiency of administration will not be jeopardized by reserving posts for Scheduled Castes and Scheduled Tribes, but we have not felt persuaded to accept this submission. In the applications filed by them, the respondents did not plead that the application of the policy of reservation would lead to excessive representation of the members of Scheduled Castes and Scheduled Tribes, or that the existing policy of reservation framed by the Government of India was not preceded by an exercise in relation to the issue of adequacy of their representation. Rather, the thrust of their claim was that restructuring of different cadres in Group C and D resulted in upgradation of posts and the policy of reservation cannot be applied qua upgraded posts. Therefore, the Union of India and the Railway Administration did not get opportunity to show that the employees belonging to Scheduled Castes and Scheduled Tribes did not have adequate representation in different cadres; that the outer limit of reservation i.e. 50% will not be violated by applying the policy of reservation and that the efficiency of administration will not be jeopardized by applying the policy of reservation. Therefore, it is neither possible nor desirable to entertain a totally new plea raised on behalf of the respondents, more so, because adjudication of such plea calls for a detailed investigation into the issues of facts.

54. Leave granted.

55. In this appeal, Union of India and two others have challenged order dated 5.4.2006 passed by Allahabad Bench of the Tribunal and order dated 6.7.2006 passed by High Court of Allahabad in Writ Petition No.34662 of 2006. The facts culled out from the record of the appeal show that as a result of cadre restructuring exercise undertaken pursuant to the policy contained in letter dated 9.10.2003, two posts of Personal Inspector Grade I (Rs.6500- 10500/-) became available in Varanasi Division of Northern Railway. One of these posts was earmarked for general category and the other for the reserved category. The respondent who was holding the post of Senior Personal Inspector represented for appointment against the unfilled post earmarked for reserved category by contending that she fulfils the conditions of eligibility. Her claim was rejected by the competent authority on the premise that the reserved post cannot be offered to general category candidate. She then filed O.A. No.509 of 2005. The Allahabad Bench of the Tribunal relied on the order passed by this Court in V.K. Sirothia's case and the one passed by the Full Bench of the Tribunal in O.A. No.933 of 2004 (P.S. Rajput and two others v. Union of India and Others) and held that the applicant (respondent herein) is entitled to be considered for the second post. The High Court also relied on the order passed in V.K. Sirothia's case and dismissed the writ petition filed by the Union of India and others.

56. We have heard learned counsel for the parties. In view of the findings recorded by us in civil appeals that policy of reservation is applicable to the cadre restructuring exercise undertaken pursuant to the policy contained in letter dated 9.10.2003, the orders impugned in civil appeal arising out of Special Leave Petition (Civil) No.5045 of 2007 are liable to be set aside.

57. In the result, the appeals are allowed and the impugned orders are quashed. As a consequence, the original applications filed by the respondents in all the cases shall stand dismissed. However, parties are left to bear their own costs.