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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

O.A. 2822/91

New Delhi, this the 15th day of July, 1994.

HON'BLE SHRI N.V. KRISHNAN, VICE CHAIRMAN (A)
HON'BLE SHRI C.J. ROY, MEMBER (J)

Shri Arun Kumar Tyagi,
Travelling Ticket Examiner,
Northern Railway,
Railway Station,
Moradabad.

....Applicant

By Advocate : Shri B.S. Mainee

VERSUS

Union of India, through

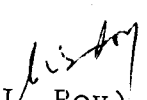
1. The General Manager,
Northern Railway,
Baroda House,
NEW DELHI.
2. The Divisional Railway Manager,
Northern Railway,
Moradabad.
3. Shri Harnam Singh,
Head Goods Clerk
Railway Station
Gajraulua


....Respondents

By Advocate : Shri Rajesh for Official Respondent
No.2 & 3.

Mr PN Allahawat with Shri V.P. Sharma, for
Respondent No.3.

1. Whether Reporters of local papers may be allowed to
see the Judgement? Yes
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair
copy of the Judgement? Yes
4. Whether it needs to be circulated to other Benches
of the Tribunal? No


(C.J. Roy)
Member(J)


(N.V. Krishnan)
Vice-Chairman(A)

(36)

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JUDGEMENT

Hon'ble Shri N.V. Krishnan, Vice Chairman (A)

The applicant is working as a Travelling Ticket Examiner under the second respondent, the Divisional Railway Manager, Moradabad Division, of the Northern Railway, and is aggrieved by the letter dated 5.11.1991 (Annexure A-1) of the Second Respondent, by which the following decision was communicated to the Station Supdt. Moradabad in regard to the representation of the applicant for addition of his name as a general candidate in the panel of Commercial Apprentices in the scale of Rs.1600-2660.

"Reg : Representation of Shri Arun Kumar Tyagi, IIE/ for addition of his name as Genl Community Candidate, in the panel of Comm1 App. (1600-2600).

In the above noted case, it is informed that, as the name of the reserved community candidate has not been deleted from the panel of Comm1 Apperentices grade 1600-2600 (RPS), the question of putting some one else's name does not arise. Moreover, the vacancies once assessed, the panel is formed according to that and no addition and alteration is permissible subsequently. As only 2 posts (two posts) were assessed for candidates of general category, they cannot be changed.

Shri Arun Kumar Tyagi, may be advised accordingly."

2. The brief facts which give rise to this grievance are as follows :-

2.1 An examination was held for selection of Commercial Apprentices in the grade of Rs.1600-2600 to fill up the 10% posts in the same scale reserved for serving non-ministerial employees, who are graduates. Admittedly, the applicant was asked to appear in the test (Annexure A-4) and on 4.01.89, the results of the written examinations were announced (Annexure A-5) which show that 10 candidates were called for interview, including the applicant and the third respondent.

2.2 The final result was announced on 3.2.1989 (Annexure A-6). A panel of 3 names was declared. The name of the applicant was not included but the name of the third respondent who is a Scheduled Caste, candidate is shown at the third place.

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2.3 The persons in the panel were sent for training. However, by the order dt 8.8.90 (Annexure A-9), the second respondent appointed only the first and second persons on the panel in the grade of Rs.1600-2660 but in respect of the third, (i.e. R-3) the following order was passed :-

"Shri Harnam Singh H.G.C./GJL grade Rs.1400-2300 (RPs) who has completed the training of Cooml APP Grade Rs.1600-2600 (RPs) is posted back to GJL on his present pay and grade. His promotion to grade Rs.1600-2600 (RPs) will be considered on occurrence of a vacancy."

2.4 The applicant states that the aforesaid decision in respect of the third respondent was taken in the light of the interim order dt 6.6.90 (Annexure A-7) passed by this Tribunal in O.A. 1160/90. The relevant portion of that order reads as follows :-

"In the meanwhile, we direct that the promotion of SC/ST employees in all grades and cadres be regulated strictly in accordance with the principles laid down by the Supreme Court in its order dated 24.09.94. We further direct that the seniority of SC/ST employees vis-a-vis other employees be regularised in all cadres and grades strictly in accordance with the judgement of the Allahabad Bench of this Tribunal in Veerpal Singh Chauhan Vs U.O.I. 1987(4)A.T.C. (685)."

On the basis of this interim order, a standing instruction was also issued by the second respondent on 26.7.90 (Annexure A-8). It is stated that it is because of this direction that, though the third respondent was included in the panel, he was posted back to his earlier scale and not absorbed after passing the Commercial Apprentice examination.

2.5 At about the same time, the Northern Railway Men's Union took up the matter with the second respondent, pointing out that in the selection for the post of commercial apprentices, there was no justification to reserve one post for a Scheduled Caste candidate. The Union requested that the third general candidate, who qualified, be appointed to the third post. (Annexure A-10 and A-11). In reply to this representation, the Union was informed by the (Annexure A-12) letter dated 9.01.91 of the second respondent that no general candidate can be placed in the aforesaid panel as per rules. No reply was given to the Union, when it wanted to know which rules were being relied upon.

2.6 The applicant also wrote to the second respondent on 16.09.91 (Annexure A-14) claiming that, as he was the qualified third candidate, he should be appointed to the third post and that post should not be reserved for a, SC, candidate.

2.7 It is in answer to this representation that the Annexure A-1 letter was sent by the second respondent to the Station Superintendent Moradabad, which has been reproduced at para-1 above. Being aggrieved by this decision, the applicant has prayed to quash the same and to direct the Railways to place ~~to xxx place~~ the name of the applicant on the panel and to consider him for promotion against the third vacancy from the date on which the other two persons in the panel were promoted.

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3. The first and second respondents i.e. General Manager, Northern Railway and D.R.M. Moradabad (Railways for short) and the third respondent have filed separate replies. In so far as the Railways are concerned, the application has been opposed on preliminary grounds as well as on merits. It is contended that as the Annexure A-6 dated 3.03.89 notifying the panel of three selected persons has not been challenged, this application is not maintainable. It is also contended that the O.A. is barred by limitation as the cause of action arose on 3.2.89 and O.A. was filed on 25.11.91. In so far as the merits of the case are concerned, the Railways contend that the applicant has failed in the examination and, therefore, whatever the facts, he is not entitled to be considered, even if there was a vacancy for a general candidate. It is further contended that the third vacancy has rightly been reserved for a Scheduled Caste. The third respondent could not be appointed, though selected, because of the interim order of the Tribunal. As such, the applicant has no right to be appointed. The O.A. has been opposed by the third respondent. His reply will be considered later.

4. The parties have also filed additional pleadings introducing a number of additional documents. Unfortunately, these documents have not been indexed properly. Therefore, wherever a reference is made to these additional documents, the page number of the paper book is given in brackets. The learned counsel for the parties were heard at great length. We find it convenient to consider the case with reference to various issues raised by the parties.

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5. The first preliminary objection is that the applicant has not challenged the panel dt 3.2.89 (Annexure A-6) and that, therefore, the O.A. is barred by limitation.

6. We have carefully considered this objection. It is true that (Annexure A-6) panel has not been challenged. The fact is that it is the respondents ^{who} themselves /did not appoint the third respondent, though his name was included in the panel, vide, thier order dated 8.8.1990 reproduced at para 23 above. It is thereafter that the matter was pursued by the Union and by the applicant, for appointment of the applicant in the third vacancy. It is in this connection that the applicant sent, the Annexure A-14 representation dated 16.09.91, which has been rejected finally by the impugned letter dt 6.11.91 (Annexure A-1). It is thus clear that the cause of action arose when this final decision was communicated to the applicant. Accordingly, this O.A. filed on 25.11.91 is very well within time.

7. The next issue is whether the applicant has really passed the examination and is the third general candidate qualified to be appointed. In their reply, the Railways have contended that the applicant could ^{be} never /placed in the panel as he did not qualify in the viva voce test. He qualified only in the written test, as a result of which, he was called for the viva voce test, but he did not qualify in that test.

8. This was amplified by a Miscellaneous Petition (82 to 89) filed by the respondents on 28.8.93 with which 5 additional documents were introduced. On the

strength of these documents, particularly the Annexures thereto (85 to 87), the Railways contended that it was necessary for a general candidate to obtain 60% marks in the aggregate. The results of the examination have been produced at Annexure IV (88) which indicated that the total marks were 100, which were allocated as follows :-

Written - 50 marks	:	i.e. Professional
Oral - 25 "	:	ability = 75 Marks

Leadership - 10 Marks

Record of - 15 Marks
Service

Total = 100 Marks

The applicant secured 30 marks in the Written and 13 marks in the Oral, i.e. 43 marks for Professional Ability Test. He should have secured 60% out of 75 marks for professional ability test i.e. 45 marks which is the minimum. As he has secured only 43 marks, the Railways have contended that he failed in the examination.

9. The Railways depend upon the Circulars dated 13.10.64, 29.4.74 and 3.11.73, for this contention. We have seen the Circulars. The Circular dated 13.10.64 (Annexure I (85) encloses the Railway Board's Circular dated 5.10.64, which relates to the Procedure for filling up Selection Posts - non-gazetted. The Board indicated therein the relative weight to be given to various factors. The relevant extract is given below :-

"After considering the recommendations of the Railway Accidents Committee, the Board have decided that hereafter the relative weight given to the factors to be taken into account as

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indicated in the above quoted letter and as appearing in para 9(E) of Chapter II of the Indian Railway Estt. Manual should be amended to read as follows :-

	<u>Maximum Marks</u>	<u>Qualifying Marks</u>
Professional Ability	50	30
Personality, address, leadership & academic/ technical qualifications	25	...
Record of Service	25	...

Note 1. The 'Record of Service' should also take into consideration "seniority" of the employees but no separate allotment of marks need be made on this account.

2. Candidate must obtain a minimum of 30 marks in professional ability and 60% marks on the aggregate for being placed on the panel.

10. The learned counsel for the respondents was unable to explain as to whether "Professional Ability" in the above Circular included both written examination and oral examination. A perusal of the table above gave an impression that it did not because, there is a separate examination for personality, address and leadership, which can be assessed only by oral examination. Secondly, professional ability was to be given only 50% of the total marks. In the examination actually held (Annexure IV (88), Professional Ability has been assigned 75% marks. Likewise, for 'Record of Service' the circular gives 25% marks while, in the examination actually held, 15% marks were given. The learned counsel for the Railways was unable to explain these material discrepancies pointed out to him.

11. The Circular dated 29.04.74 (Annexure-II) (86) has no relevance to the issue under consideration because it is connected with the procedure for calling candidates for viva voce test for filling up of non-gazetted selection post and clears doubts raised by certain railway administrations about the position of the Scheduled Castes and Scheduled Tribes, in this regard. Likewise, the Circular dated 3.11.73 (Annexure-III) (87) has also no application, as that Circular deals with the representation of SC & ST in Class III posts involving safety of operations.

12. On the contrary, the applicant has, in reply, (90-99) produced a copy of the Circular No.757-E/103(E1B), dated 11.09.74 given Serial No.6196 (Annexure X) (95). The relevant portions of the Circular are extracted below :-

"Sub :Channel of promotion of Transportation Staff

"As per the integrated channel of promotion of Transportation Department circulated vide this Office letter No.757-E/72-C(E1B)L, dated 28.11.72 based on Railway Board's letter No.E(NG)II 72RRI/18 of March 1972, copy circulated vide GM(P)'s letter No. 220-E/172-Pt.XI(Rectt) of 00-6-72, 10% of the annual vacancies in the category of SM-AYM and Section Controller grade Rs.250-380(AS) are to be filled in through a departmental competitive examination from Class III non-ministerial staff who are graduates and less than 33 years of age. It has been decided by the competent authority to adopt the following procedure for the purpose of conducting this competitive examination.

1. A selection consisting of written test and viva-voce should be conducted for selecting the suitable hands from among those who apply & satisfy the requirements laid down.

2. The evaluation for this departmental examination will be held on the following basis :-

(i)	Professional ability	Written Test	50
		Oral	25
(ii)	Professionalism address leadership		10
(iii)	Record of Service		15

3. The staff may be arranged according to merit order obtained on the basis of aggregate marks." (Emphasis supplied)

The second respondent too has clarified, as late as on 17.02.93 (Annexure Y) (96) that the procedure laid down in Circular S.No.6196 will apply for such recruitment of Commercial Apprentices. The learned counsel for the applicant, therefore, contended that the examination for the 10% of the vacancy is conducted on the basis of this Circular.

13. We are satisfied that the learned counsel for the applicant is correct in this regard. His submissions are borne out by the portions of the Circular dated 11.9.94 emphasised by us above. The circular clarifies that it lays down the procedure for recruitment to the 10% of the annual vacancies to be filled through departmental Competitive Examination from amongst Class III non-ministerial staff, who are graduates. That description absolutely fits the test held by the Annexure A-2 Memorandum dated 2.05.88 as seen from its subject heading. That apart, the allocation of marks in the test actually conducted (i.e. Annexure IV) (88) tallies exactly with the allocation of marks given in Para-2

of the Circular. Para 3 of the Circular shows that the staff have to be arranged according to merit order based on aggregate marks. It is on this basis that Shri B.S. Mainee contends that the applicant is the third successful candidate.

14. We are, therefore, satisfied that the examination was, in fact, conducted in accordance with the Circular Sr No.6196 dated 11.09.74 Annexure 'X' (95). A perusal of the result (Annexure IV (88) produced by the respondents, shows that, amongst the general category, the applicant is the third meritorious person for consideration, based on aggregate marks, the first two persons being Shri H.N. Mishra, Shri S.P. Singh whose names have already been included in the Annexure A-6 panel.

15. The Railways have next advanced an argument that the scale of pay of Rs.1600-2600 for Commercial Apprentices was introduced for the first time w.e.f. 15.05.87. This is made clear in the letter of the Railway Board of the same date filed by the applicant with Annexure Y (97). Relevant extracts from Para-2 are reproduced below :-

"2. The questions relating to recruitment of Traffic/Commercial Apprentices, the scales in which such recruitment should be made, the qualifications and period of training etc have been under review by the Railway Board for some time past. As a result of such review the Board have decided as under :-

(i) The scheme of recruitment of Traffic and Commercial Apprentices should continue.

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- (ii) In future, the recruitment of these Apprentices should be made to grade Rs.550-750/1600-2660 (RP). Traffic Apprentices absorbed in the cadre of Section Controllers in scale Rs.470-750/1400-2600 (RP) will be fixed at starting pay of Rs.1600/- on absorption. The recruitment of Traffic Apprentices may be suitably staggered in view of sub-para (viii) below.
- (iii) The existing quota of 15% for open market recruitment and 10% for departmental candidates will continue to apply."
- (xii) Apprentices already under training will be absorbed only in scale of Rs.455-700(Rs)/1400-2300(RP) or 470-750(RS)/1400-2600(RP), as the case may be for which they have been recruited.
- (xv) Traffic/Commercial Apprentices working in the lower scale of Rs.455-700(RS)/1400-2300(RP) and 470-750(RS)/1400-2600(RP) in getting selected for recruitment in the higher scale of Rs.550-750(RS)/1600-2600(RP) as per the above provisions, will not be required to be sent for training again. They will, however, will have to appear for and qualify the final retention test along with their batchmates and their seniority will be regulated as per normal rules alongwith either candidates in that batch."

16. It was, therefore, contended that there were 2 sets of posts of Commercial Apprentices. The first set is in the scales of Rs.455-700 = Rs.1400-2300 and Rs.470-750 = Rs.1400-2600 and the second set is in

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the higher scale of Rs.550-750 + 1600-2660 from 15.5.87. This second set of posts is a new Cadre. There was no question of these posts having been filled up because they have been created only from 15.5.87. Hence, the Scheduled Castes were not fully represented in this new cadre. There were vacancies in this cadre and hence reservation was made of one post of the cadre. This is appropriate and selection of Respondent No.3 cannot be questioned.

17. On the contrary, the learned counsel for the applicant states that the cadre continued to be the same i.e. Commercial Apprentices though the pay scale was revised. Further, there are judgements of the (Annexure XI to MA1601/94) (150-157), Tribunal /which declare that the higher pay scale i.e. Rs.550-750 (Rs.1600-2660) should be paid even to the Commercial Apprentices who were in position before 15.5.87 on lower scales i.e. Rs.455-700 and Rs.470-750. In other words, notwithstanding, the revision of pay scale there is still only one cadre. In that cadre, the Scheduled Castes have been given more than 15% representation.

18. We have considered these arguments. We notice that the argument of the Railways that Commercial Apprentices in the pay scale Rs.550-750 is a new cadre, in which vacancies for Scheduled Caste exists, is contrary to the records of the case and pleadings of the Railways. During the selection, one vacancy out of three was, undoubtedly, reserved for a Scheduled Caste and the third respondent, a Scheduled Caste, was included in the panel (Annexure A-6), as the third candidate. Hence the Annexure A-9 order dated 8.8.90 of the second

respondents, declares that the third respondent, despite completing his training, could not be posted in the grade of Rs.1600-2660 (RPS) and he was reverted to his original grade of Rs.1400-2300. It was also mentioned that he would be considered on the occurrence of the vacancy. The third vacancy did exist. What is meant is that this cannot be reserved for S.C, as will be seen presently. This Annexure A-9 Order is contrary to the submissions now made that the Commercial Apprentices in the scale Rs.1600-2060 introduced from 15.5.87 is a new cadre, where vacancies exist for Schedule Castes. No explanation was given in Annexure A-9 order as to why the third respondent was not promoted on 8.08.90. However, in their reply to Para 4.24 of the O.A., the Railways have stated that the third respondent could not be promoted in view of the Tribunal's interim order. In other words, this is a new argument for which there is no basis either in the original records or in the Railway's reply.

19. The real reason for not appointing R.3 is also stated in another document. The third respondent has filed with his reply dated 15.9.92 a letter from the second respondent dated 9.10.91 (Annexure R-3/4) to the General Secretary, Utteriya Railway Majdoor Union, about the third respondent's case. It was, inter alia, stated as follows :-

"All the three candidates were sent for training w.e.f. 8.3.89 and after completion of training they reported for duty on 15.5.90. In the meantime, on 26.9.89, the CAT/NDLS issued interim orders to this Division that any promotion made should strictly in accordance with the instructions contained in the orders passed by the Supreme Court on 21.12.84. When the case for promotion

of Shri Harnam Singh was put up after 25.5.90, the direction given by the CAT on 26.9.89 had become applicable on this Division. After calculation it was found that the vacancies were existing in the Cadre of coaching, Goods and Ticket Checking but there was no vacancy in the quota reserved for S.C. Community on the basis of 15% reservation for S.C. category."
(Emphasis given)

This also contradicts the plea now raised that, after the pay scale for apprentices were raised from 15.5.87, a new cadre was created in which vacancies existed for Scheduled Caste.

20. Therefore, the Railways cannot now take this plea which is totally different from the official records and official reply as no foundation has been laid for this new claim. That apart, on merits, this plea has to be rejected for reasons which will be stated shortly.

21. The crucial question is whether the Railways have established that there was a vacancy for absorbing a Scheduled Caste Commercial Apprentice, which could not be filled up because of the Tribunal's interim order. The only document filed in this connection, is Annexure-I with the reply dated 25.7.87 of the Railways. That statement is reproduced below :-

"Statement showing Vacancy Position for Commercial Apprentices on M/Division

<u>Year</u>	<u>Total No. of Posts</u>	<u>No. of posts Occupied by SC</u>	<u>No. of posts occupied by ST</u>	<u>Remarks</u>
1982	6	1	Nil	-
1989	3	Nil	Nil	-

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As this did not give any information about the cadre strength, the respondents were directed on 8.10.93 as follows :-

"We have heard the parties. One issue is whether in the cadre of commercial apprentices the scheduled castes/scheduled tribes had already been represented in full at the time of the selection held on 30.1.89 as averted in para 4.10 of the application. The respondents are directed to submit information regarding the total number of posts as on 1.1.89 in this cadre and the number of posts held by scheduled castes/scheduled tribes. This information should be furnished within four weeks."

22. The learned counsel for the Railways was given a number of opportunities to produce the records, in this behalf. He confessed that, despite his best efforts, he could not procure the same from the Railways. Therefore, with our permission, the applicant filed M.A.1601/94 containing valuable information from official records. Copy of the M.A. has been served on the respondents but there is no rebuttal of the documents produced by the applicant.

23. We, therefore, find it necessary to revert to M.A.1601/94 which has been taken on record and is at pages 131 to 157 of the paperbook.

24. Annexures I to V (137-143) are filed to show that though respondent No.3 was included in the panel as a SC, he could not be appointed as a Commercial Apprentice as there was no vacancy for a scheduled caste. Annexure V (143) is important. It is a note dated 7.5.93 from Senior Personnel Officer in the office of the General Manager, Northern Railway (Respondent 1) to the Senior Personnel Officer (Union) regarding

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denial of promotion to the third respondent. Extracts are reproduced below:-

"2. In the instant case, such a selection was initiated in 1988 at which point of time the roster points for SC/ST were taken into account. Sh. Harnam Singh was declared suitable for induction as Commercial Apprentice under the relaxed standard for SCs and was, therefore, sent for the P28A & B courses which were the pre-requisite training courses before posting accordingly.

3. While he was due to complete this course on 25.5.90, the complexion for filling up of the SC quota posts of MB Division completely changed due to the CAT/NDLS judgement dated 26.9.89 whereby the 15% and 7½% quotas for SC and ST respectively were made applicable on the total number of posts and the incumbance of such personnel thereon. Thus the calculation for filling up these vacancies through SC roster point became irrelevant since the number of incumbents already in the grade was 26 instead of 26 (15%).

4. Promotion of Sh. Harnam Singh at this stage would tantamount to a contempt of Court more so in the context of the recent judgement of the CAT Principal Bench dated 6.6.90. While it can be argued that since the CAT judgement was known, the hopes and expectations of the employee have been kept alive by permitting him to continue the training course even after receipt of the Court judgement. I find that this may at a future date enable us to exempt Sh. Harnam Singh from undergoing such a course as and when his turn for promotion arises as per his seniority level.

5. Under the circumstances and looking into the chronology of the events, it would appear that Sh. Harnam Singh's promotion from the panel, where he was included after having passed under relaxed standards, cannot be justified."

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25. The above decision was reviewed at a PNM meeting held on 6.9.93 and 7.9.93, the minutes of which are enclosed to the letter dated 18.11.93 Annexure IV (140 to 142). The union was critical of the decision. The General Manager stuck to his decision but offered as follows:-

"G.M. said that he had examined this case in detail and recorded his observations on the file. If the Union still so desires he can send the observations to Railway Board for a decision. The Union agreed and desired that a copy of reference be endorsed to the Union."

26. In pursuance of this decision a reference was made to the Railway Board by the General Manager. The Board communicated its decision on 9.2.94, a copy of which has been filed by the respondent No.3 with his reply to the MA-1601/94^{(Ann. C-1)(126)} of the applicant. That reply reads as follows:-

"The matter has been examined. It is observed that Shri Harnam Singh was already empanelled as Commerical Apprentice, grade Rs.1600-2660 (RPS) and had undergone training. After completion of training, he should have been posted against the working post.

Supreme Court as well as CAT/ALD's decision is that no SC/ST should be promoted in excess of the prescribed percentage and if excess SC/STs have already been promoted, they should be adjusted against the future vacancies. Moreover, at the time of his empanelment there were no stay orders from CAT. In these circumstances, your railway may post Shri Harnam Singh as CMI, grade Rs.1600-2660 (RPS) in Moradabad Division.

Board may please be advised of the action taken in the matter urgently."

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27. The respondents, therefore, contend that Respondent No. 3 is now entitled to be posted to the grade Rs.1600-2660. It has only to be added that, according to the Annexure C-3/letter of Respondent No. 2 to the General Manager, a Disciplinary Enquiry is pending against Respondent No. 3 and hence he could not be promoted.

28. We shall deal with this issue a little later. We can now revert to the issue whether reservation could be made in the cadre of Commercial Apprentices in the pay-scale of Rs.1600-2660 from 15.5.1987 which we left for consideration vide para 20 supra. That issue is settled by the Annexure-VI and Annexure-VII documents filed with M.A. 1601/94 by the applicant.

VI
29. Annexure VI is a D.O. letter dated 16.9.1993 (144) from the Chief Personnel Officer of the Northern Railway to the senior D.P.O. Moradabad to examine the promotion case of Respondent No. 3 afresh after the P.N.M. meeting dated 7.9.93 referred to in para 25. Information was sought in that D.O. letter on six points, one of which was the sanctioned strength of Commercial Apprentices.

30. Annexure VII dated 24.9.93 (145) is the reply to Annexure VI. As this letter gives vital information it is necessary to reproduce it below:-

"In reference to above, the pointwise remarks are offered below:-

1) The Commercial Apprentice is not a particular post or category, hence there is no question of any sanctioned strength for this. It is only a sort of selection and the candidates selected as Comml. Apprentices against 10% deptt. Graduate quota, are absorbed in different categories of Coml. Deptt. such as Goods, Coaching and Ticket Checking.

2) As the Comml. App. is not a particular post, it is not possible to list out the names of the staff against this. However, the names of the staff, selected as Comml. App, against 10% graduate quota in 1983, are listed below:-

S/Shri

- | | | |
|------------------------|---|-------------------------------|
| 1) Ajit Kumar Mehrotra | Ø | |
| 2) Jitendera Kapoor | Ø | |
| 3) Shiv Kumar | Ø | |
| 4) Rajesh Kumar | Ø | - Absorbed in Coaching Cadre. |
| 5) Ramesh Chander (SC) | Ø | |
| 6) Ambrish Nath Pathak | | - Absorbed in Goods Cadre. |

3) The selection for Comml. App. against 10% graduate quota, was held for three(3) vacancies in 1988, in the categories of Goods, Coaching & Ticket Checking.

4) The panel of Comml. App. dt. 3.2.89, in enclosed herewith as desired. It is added, that though the vacancies were available in the cadre of Goods, Coaching and Ticket Checking, but no post was available for SC community, being the percentage for SC community (15%) already full, in these categories.

5) No adhoc arrangement has been made in grade Rs.1600-2660 (RPS) in the categories of Goods, Coaching and Ticket Checking, during the period of this selection and after the said panel was operated.

6) Selection proceedings are enclosed herewith in a sealed cover, as desired please."

31. It is thus clear from para 1 of Annexure VII reply (145) that Commercial Apprentice is not a cadre at all. These are temporary posts - comparable to training reserve in a rough way - created when there are vacancies in the regular cadres like Coaching Cadre, Goods cadre, Ticket Checking cadre which have to be filled up. Recruitment is then made as Commercial Apprentice in the first instance and after successful

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training, these apprentices are absorbed in the vacancies in the above cadres. Thus the Annexure A-2 notice in Hindi states that the 10% quota for graduate in respect of vacancies in the cadres of Goods Supdts. Parcel and Booking Supdt., Enquiry and Reservation Clerks, Ticket Checking Staff, C.I.M. etc. is proposed to be filled by a competitive examination. In a like manner, recruitment was made as Commercial Apprentice in 1983. 5 of them were allocated to the Coaching cadre and one to be Goods cadre as seen from para 2 of Annexure VII (145).

32. Therefore, there is no cadre of Commercial Apprentice and there cannot be any direct reservation in the posts of Commercial Apprentice, because they are training posts. Reservation will depend on the position in the roster in the cadres where they have to be absorbed. There was one point reserved for SC. Hence a reservation was made. But this position changed when the matter was reviewed in the light of the judgement dated 26.9.89 of the Tribunal as mentioned in paras 2 and 3 of the Annexure V (143), reproduced in para 24 supra. Hence, it is stated in para 4 of the Annexure VII reply (145) that, though there were vacancies in the cadre of Goods, Coaching and Ticket Checking, no post was available for SC.

33. As there is no direct reservation in the posts of Commercial Apprentice, the new plea taken by the Railways that there was a new cadre with a higher pay scale introduced from 15.5.87 is incorrect and his contention of a separate roster in this cadre has no basis.

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34. That still leaves for consideration the question whether one vacancy reserved for SC was available in the cadres, in which, the Commercial Apprentices notified by the Annexure A-9 panel had to be absorbed. The Railways have not furnished any information on this point. The applicant has furnished important information having a bearing on this point with MA 160/94 (131 to 157). Respondent No.3 has taken pains to file a reply to this M.A., but we regret to note that the Railways have not even deemed it necessary to give their version. They have not questioned the veracity or genuineness of the eleven Annexures filed with the MA which are, therefore, taken to be true.

35. Annexure VIII (147) gives particulars of the Goods, Coaching and Ticket Checking cadres. The relevant information is tabulated below:-

Cadre:	Goods	Coaching	Ticket Checking
Sanctioned strength	22	35	47
Posts required to be reserved for SC (i.e. 15%)	3	5	7
No. of SCs already available	8	6	12

ll The burden of the argument of Sh. B.S. Mainee is that as the number of scheduled castes already appointed to these cadres is more than the number required to be reserved under the standing orders, no further reservation on basis of the roster is necessary. This

is decided by the Allahabad High Court in J.C. Malik's case (1978 (1) SLR 844) and in its interim order in the appeal against this judgement, the Supreme Court has directed that this judgement should be followed. In other words, if scheduled castes already hold posts in a cadre equal to or more than their due share under the reservation scheme there is no need to reserve for them any further posts against future vacancies. We shall revert to this argument later.

36. We have now to take note of the reply of the third respondent and the argument of his counsel. This respondent has focussed attention on certain aspects of the case, which, unfortunately, the Railways have not emphasized in their reply.

36. The third respondent filed his first reply on 15.9.92. He has questioned the decision of the first and the second respondent that, though the third respondent's name was included in the Annexure A-6 panel, yet, he could not be appointed because there was no vacancy as mentioned in the Annexure A-9 order. In the subsequent correspondence (e.g. the reply given by the second respondent to the Uttariya Railway Mazdood Union on 9.10.91 Annexure R-3/4) it was stated that there was no vacancy in the quota reserved for Scheduled castes community on the basis of 15% reservation, as computed in terms of the Tribunal's interim order. This aspect of the reply need not detain us. If this respondent was aggrieved by this conclusion, he should have resorted to appropriate legal action at that time.

37. Two important points are made by the third respondent.

Firstly, the applicant is wrong in assuming that the quota for scheduled castes should be determined with reference to the strength of the cadre. In a second reply dated 11.1.94 (100-118) it is pointed out that the reservation of the post for scheduled castes should be made on the basis of the vacancies which arise in each year as held by the Supreme Court in Indira Shawney & Others vs. Union of India & Others (JT 1992 (6) SC 273). It is urged that the judgement of the Allahabad High Court in J.C. Malik's case is not relevant and that the matter stands concluded by the Supreme Court's decision referred to above.

Secondly, Chapter-4 of ^{the} "Brochure regarding Reservation for Scheduled Castes and Scheduled Tribes in Services" (7th Edition - 1987) deals with the maintenance of the roster. Para-4.7 thereof reads as follows:-

"(4.7) Separate rosters should be maintained for determining the number of reservations in appointment made by direct recruitment and promotion (with separate rosters for each mode of promotion viz. limited competitive examinations, selection, seniority-cum-fitness etc.)"

It is urged that the roster in respect of the 10% posts to be filled up by Commercial Apprentices recruited in the manner laid down in Annexure A-2, has to be seen to find out whether there was a vacancy for SC or not. There were only two selections made for filling up the vacancies to the extent of 10% by serving graduates. The first was in 1982-83 when six commercial apprentices were appointed, of whom only one was a

Scheduled Caste. The second was in 1988-89 (which is the dispute in the present O.A.) when three vacancies were notified, of which one was reserved for a Scheduled Caste. It is contended that the claim that the SCs were over-represented in this category is not well-founded and hence, the third post should be filled up by appointing the third respondent.

38. This respondent has also filed with his reply dated 19.5.94 (119-130) to MA-1601/94 filed by the applicant, copy of the Railway Board's letter dated 9.2.94 (Annexure C-1) (126) to the first respondent, which has been reproduced in para 26 above. This is the reply to the reference made by the first respondent in pursuance of the decision taken at the PNM meeting as stated in para 25 supra. It is, therefore, contended that the O.A. has now no merits as the Railway Board has taken the above decision which has not been challenged by the applicant.

39. The learned counsel for the third respondent Sh. P.M. Ahlawat and Sh. V.P. Sharma were also heard. They also endorsed the arguments of Sh. Rajesh, learned counsel for the Railways - as distinct from the reply of the Railways - and made their separate submissions in respect of the above mentioned special points.

40. We have carefully considered the views of respondent No. 3 and his counsel.

41. A preliminary point raised by the third respondent should be disposed of first. He has produced the Railway Board's letter dated 9.2.94(126) reproduced in para 26 above, and contended that this letter settles the dispute finally and as the applicant has not challenged this letter, the O.A. should be dismissed. We have considered this. Apparently, the Railway Board was not advised about the pendency of this O.A. It was entirely improper on the part of

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the first respondent to have taken up the matter regarding third respondent's promotion with the Railway Board, without bringing to its notice that the present O.A. was pending, in which the same issue has been raised and that Harnam Singh has been impleaded as the third respondent. We do not, therefore, find fault with the Railway Board in issuing this letter. But, in the circumstances of the case, the first respondent ought not to have acted upon it without taking our prior orders thereon. Therefore, the objection has no force.

42. The first issue is whether, as claimed by the third respondent, the interim directions issued by the Supreme Court in J.C. Malik's case (supra) have been superseded by their decision in Indira Shahney's case. In J.C. Malik Vs. Union of India (1978 (1) SLR 844), the Allahabad High Court held that reservations of posts for Scheduled Castes is in respect of appointment to the posts in the cadre and not to the vacancies which arise every year. The petitioners therein objected to the reservations for Scheduled Castes granted by the Railways in the category of Grade-A Guards, to which the contesting respondents were promoted. It would appear that a chart was produced which indicated the total strength of the Cadre, the dates on which the persons are to retire in future. It was then pointed out that if 15% of the vacancies occurring in each year in future is reserved for Scheduled Castes, the result would be that the reservation for SCs would reach upto 60%. The High Court held that this was not permissible under Article 16 of the Constitution. Accordingly, the selection of the contesting SC respondents was

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cancelled on the ground that this is in excess of the 15% quota reserved for them. A direction was also issued that the reservation for appointment should be made with reference to the sanctioned strength of the cadre and not with reference to the annual vacancies arising in the cadre.

43. A SLP was filed against this decision and an interim order was passed by the Supreme Court, to which a reference was made during arguments. In the Annexure A-7 interim order dated 6.6.90 in O.A.-1168/90, the Tribunal has directed that promotions of the SC/ST employees in all grades and cadres be regulated "strictly in accordance with the principles laid down by the Supreme Court in its order dated 24.9.84". However, a copy of that order of the Supreme Court has not been produced by the parties. The learned counsel for the applicant submitted that the interim order passed by the Supreme Court in J.C. Malik's case (supra), is found reproduced in the Full Bench (Hyderabad Bench) decision of the Tribunal in V. Lakshminarainan and Others Vs. Union of India & Others (1992 (2) ATJ (13) 611). Para 46 of the judgement reads as follows:

"However, as indicated above, it is not prudent to go into controversy any further and give our considered view on the conclusion of the Allahabad High Court in Malik's case because the apex court is seized of the matter. Appeal filed by the Union of India against the judgement in that case was admitted on 27.7.78. It is pending. The Supreme Court though originally stayed the operation of the judgement on 24.2.1984, modified it on 21.12.1984 in the following manner.

"We clarify our order dated 21.2.84 by directing that the promotions which may be made hereafter will be strictly in accordance with the judgement of the High Court and such promotions

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will be subject to the result of the appeal. If any promotions have been made after Feb 24, 1984, otherwise than in accordance with the judgement of the High Court, such promotion will be adjusted against the future vacancies, C.M.P. is disposed of accordingly...."

The learned counsel for the applicant has also produced for our perusal an uncertified copy of the order dated 21.4.1984 of the Supreme Court (158) which actually reads as follows:

"The application for stay above-mentioned being called on for hearing before this Court on the 21st day of December, 1984. UPON perusing the the applications and the accompanying documents and hearing counsel for the petitioners herein THIS COURT DOTH ORDER THAT pending the hearing and final disposal by this Court of the applications for stay above-mentioned after notice, pass inter alia the following orders:

'Pending notice, the promotions which may be made hereafter will be strictly in accordance with the judgement of the High Court in Civil Writ Petition No. 1809 of 1972 and if any such promotions have been made otherwise than in accordance with the judgement of the High Court, such promotions shall be adjusted against the future vacancies'.

It has only to be added that the Civil Writ Petition 1809 of 1972 is J.C. Malik's writ petition decided by the Allahabad High Court, as is clear from 1978(1) SCR 844.

44. We have carefully gone through the judgement of the Supreme Court in Indra Shawney's case. By that judgement a number of writ petitions were disposed of. There is, however, no reference in that judgement either to the appeal against the Allahabad High Court's judgement in J.C. Malik's case (supra) or to the interim order of the Supreme Court dated 21.12.1984 reproduced above. Hence, Indra Shawney has not decided this issue.

45. However, in the judgement delivered by Hon'ble Mr. B.P.Jeevan Reddy (J), which became the majority judgement in that case, the Supreme Court has held that the year should be taken as the unit for applying

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reservation.

46. It was first held in that judgement that reservation cannot exceed 50%. The question then arose whether, while applying the 50% rule, an year should be taken as the unit or whether the total strength of the cadre should be looked into (Question 6(c) page 636). This was examined in great detail in paragraphs 834-835 of the judgement and the conclusion was reached that a year should be taken as the unit and not the entire strength of the cadre or the service, as the case may be. The reasons for this decision are given in the following extracts from Para 835:-

"The position can be better explained by taking an illustration. Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Schedule Tribes, Scheduled Castes and other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e., 270 by other backward classes, 150 by scheduled castes and 80 by scheduled tribes. At a given point of time, let us say, the number of member of O.B.Cs. in the unit/service/category is only 50, a short fall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500 i.e., till the quota meant for each of them is filled up. This may take quite a number of year because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while

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clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other."

(Emphasis supplied)

47. It is thus clear that this decision has been given in an altogether different context, as would be evident from the example considered. In a situation where adequate representation (i.e. 15%) has not yet been given to the Scheduled Castes, the question arises whether all the vacancies that arise thereafter should be reserved and be filled up by SCs until the 15% reservation is reached. The answer given is that, doing so, would offend the guarantee of equality given to others. Therefore, only 50% of the vacancies that arise may be reserved for S.C. The balance has to be kept unreserved. The question whether reservation should continue after 15% representation has been reached for S.C., was not considered by the Supreme Court.

48. Therefore, we reach the following conclusions:-

- (i) The interim order of the Supreme Court dt. 21.12.94 reproduced above still remains in force.
- (ii) According to that interim order the principle laid down in J.C. Malik's case should be followed.
- (iii) The principle decided in J.C. Malik's case is that if the Scheduled Castes have already secured adequate representation (15%), recruitment to further vacancies should be made without making any further reservation.

49. This is the case of the applicant. We shall now examine whether he has established such a case. In order to come to the conclusion that SCs are already

over-represented, it will not be sufficient if the total strength of the cadre and the total number of SCs appointed in the Moradabad Division are taken into account. The mandate given in para 4.7 of Chapter-4 of the Brochure (reproduced in para-37 above) has to be noted. In other words, we have to limit ourselves to 10% of the strength of the cadre, which alone is to be filled up by a limited competitive examination, open to only serving non-ministerial graduates.

50. In this regard, we find that the information supplied by the applicant in Annexure-VIII to MA-1601 of 1994 (147) - summary of which has already been given in para-35 above - is totally inadequate. It appears ~~that~~ from that statement that the total number of posts sanctioned in Moradabad Division upto 1993 are 22 in the Goods cadre, 35 in the Coaching cadre and 47 in the Ticket Checking cadre, making a total of 104 posts. The number of SCs required to be appointed at the rate of 15% are 3, 5 and 7 respectively (total 15) as against which the number of SCs already appointed are 8, 6 and 12 respectively (total 26). In other words, SCs are already over-represented. Hence, no more reservation can be made in terms of the Supreme Court's order, as concluded by the applicant's counsel.

51. This information is not adequate. We should know the total strength in the cadres of Goods Supervisor, Parcel and Booking Supervisor, Enquiry and Reservation Clerks, Ticket Checking staff, CMI etc./ in Moradabad Division as on 2.5.1988 when that notice was issued for the limited competitive examination to recruit commercial apprentices to fill up 10% posts in these cadres by graduate non-ministerial staff.

The strength of these cadres can be given as on 2.5.88 preferably or at least as on 1.4.88 or 1.1.88. We are thereafter concerned only with the 10% strength of these cadres which alone can be filled up by this method. Information as to how many of these posts already stood filled up as on 2.5.88 and how many Scheduled Caste persons are appointed will be required to consider whether there can be reservation in further vacancies or not. This detailed information was not given by the applicant. It was, therefore, the duty of the Railways to have properly furnished all this information, as the entire case rests on this issue. We are sorry to note that the Railways have miserably failed to discharge their duties in this regard despite being given adequate time. In these circumstances, we find that it would not be possible for us to dispose of this O.A. finally and this matter has to be remanded to the Railways with suitable directions.

52. We, therefore, dispose of this O.A. as follows:-

- a) This O.A. is not barred by limitation and is maintainable. All preliminary objections are dismissed.
- b) The applicant has not only passed the examination which commenced with the Annexure A-2 notice but he stands third on merit, as is clear from the Annexure-IV result (88).
- c) The interim order of the Supreme Court issued on 21.12.84 in the SLP filed against the judgement of the High Court in Civil Writ Petition No.1807/92 (i.e. J.C. Malik vs. Union of India decided by the Allahabad High Court reported in 1978 (1) SLR 844), directs that promotions to be made

after 21.12.84, should be strictly in accordance with the judgement of the High Court in that case and if, any promotions have been made otherwise than in accordance with the judgement of that High Court, such promotions shall be adjusted against future vacancies. This interim order is still in force and has to be complied with by all concerned. The Railways are, therefore, required to consider whether the third vacancy can be kept reserved for a S.C. candidate, keeping in view this interim order of the Supreme Court.

d) For this purpose the second respondent shall obtain the following information:-

i) Total strength of the cadres specified in the Annexure A-2 notice dated 2.5.88 which was issued to fill up 10% of the vacancies in these cadres as on 1.1.88 or 1.4.88 or 2.5.88, whichever be the latest.

ii) The total number of posts (i.e. 10%) in the above cadres which have to be filled up by departmental non-ministerial graduates on the basis of the limited competitive examination.

iii) The number of posts that have to be reserved for Scheduled Castes i.e. 15% of (ii).

iv) Names of the Scheduled Castes holding the 10% posts referred to in (ii) above as on the date on which Annexure A-2 notice was issued i.e. 2.5.88 and whether their number is more or less than the number of posts to be reserved for them vide (iii) above.

e) In case the second respondent finds that the number of Scheduled Castes holding the 10% posts as on 2.5.88 (iv of (d) above) is more than the quota reserved for them, the applicant would

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become eligible for appointment to the third vacancy from the date (8.8.90) on which the Annexure-A-9 order was issued and he shall be accordingly appointed, subject to satisfying other formalities, if any. On such appointment, the pay of the applicant shall be fixed in the pay scale of Rs.1600-2660 from 8.8.90 but he shall be entitled to get the benefit of this refixation, either from the date on which he has actually been promoted to that pay scale or from the date of this order, whichever is earlier.

- f) In case it is found that a vacancy exists for a Scheduled Caste candidate, the second respondent shall reject the claim made by the applicant in this O.A.
- g) The Annexure C-1 letter of the Railway Board dated 9.2.94 to the first respondent shall remain in abeyance until the second respondent passes one of the two orders as in (e) or (f) supra and it shall abide by such order.
- h) The second respondent shall issue a speaking order, containing all the information specified in (d) supra, within three months from the date of receipt of this order, under intimation to the applicant and the third respondent, who if aggrieved, may seek redress in accordance with law, as may be advised.

53. The O.A. is disposed of, as above. No costs.

Sanju
(C.J. Roy)
Member(J)

N.V. Krishnan
(N.V. Krishnan)
Vice-Chairman(A)

'Sanju'