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CENTRAL ADMINISTRATIVE TRIBUNAL: PRINCIPAL BENCH.

O.A. NO. 574/93

New Delhi this the 4th day of Aug, 1995.

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

Hon'ble Dr. A. Vedavalli, Member(J).

1. Shri Anil Kumar Sanghi, ASTE,
R/o 31, Transit Camp, State Entry Road,
New Delhi-1.
2. Ms Vijay Lakshmi, ASTE,
D/o Shri Kanchhi Lal Gaur,
R/o 3A, Transit Camp, State Entry Road,
New Delhi-1.
3. Shri Gautam Arora, ASTE,
S/o Shri Ashok Kumar Arora,
R/o 97, Railway Colony,
St. Mary's Road,
Saharanpur (UP).
4. Shri Satish Kumar,
S/o Shri Sushil Kumar,
R/o 530, Railway Officer's Colony,
Tundla,
Distt. Firozabad.
5. Shri Jeet Kumar,
S/o Shri Dalip Singh,
R/o 482, Railway Colony,
Ferozepur Cantt (Punjab).
6. Shri Satyavir Singh,
S/o Shri Chhote Lal,
R/o Suite No. 11, RE Officers Rest House,
Allahabad (UP). ...Applicants.

By Advocate Shri G.D. Gupta.

Versus

1. Union of India through
The Secretary,
Railway Board,
Rail Bhawan, Rafi Marg,
New Delhi.
2. Indian Railway Class II
Officers Federation,
through its General Secretary,
Room No. 268, Rail Bhawan,
Rafi Marg,
New Delhi.
3. Shri A.K. Saxena, IRSSE,
through General Manager,
Northern Railways, Baroda House,
New Delhi.

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4. Shri Atul Kumar, IRSSE, through General Manager, Northern Railways, Baroda House, New Delhi.
5. Union Public Service Commission through its Chairman, Dholpur House, Shahjahan Road, New Delhi.
6. Shri R.G. Deshmukh,
7. Shri N.C. Philipose
8. Shri H.L. Khosla,
9. Shri K.S. Harinath,
10. Shri S.T. Deharia,
11. Shri A.K. Paranjape
12. Shri O.P. Agarwal,

(Respondents 6 to 12, C/o The General Manager, Central Railways, S&T Department, Bombay V.T., Bombay).

13. Shri H.C. Jaitly,
14. Shri K.P.S. Rawat,
15. Shri A.K. Jana,
16. Shri K.K. Singh,
17. Shri A.K. Bhattacharjee,
18. Shri M.K. Mandal,
19. Shri K.B. Moitra,
20. Shri B.B. Ghosh,
21. Shri B.R. Jha,

(Respondents 13 to 21, C/o The General Manager, Eastern Railway, S&T Department, Fairley, Calcutta)

22. Shri Mukhtiar Chand,
23. Shri D.D. Prabhakar,
24. Shri R.N. Tondon,
25. Shri V.N. Khanna,
26. Shri J.R. Sandhoo,
27. Shri P.K. Mukherjee,
28. Shri N.K. Tandon,
29. Shri R.K. Aneja,

30. Shri P.P. Goel,
31. Shri P. Ramachandran,
32. Shri V.K. Saxena,
33. Shri Barmeshwar Ram,
34. Shri Subhas Chander,
35. Shri J.P. Mehta,
36. Shri Bansh Bahadur,
37. Shri A.D. Monga,
38. Shri T.R. Mahajan,
39. Shri H.P. Yadav,
40. Shri Sarjoo Prasad,
41. Shri Piara Singh,
42. Shri J.C. Chitkara,
43. Shri T.R. Diwakar,
44. Shri Basant Ram Suman,

(Respondents 22 to 44, C/o The General Manager, Northern Railways, S&T Department, Baroda House, New Delhi)

45. Shri Shankar Pandey,
46. Shri J.S. Makkar,
47. Shri A.K. Ghosh,
48. Shri G.N. Shai,
49. Shri J.C. Goel,
50. Shri M.D. Dhondiyal,
51. Shri Munshi Lal,
52. Shri Prem Ram,
53. Shri V.L.N. Shastry,
54. Shri U.S. Srivastava,
55. Shri Jayant Banerjee,

(Respondents 45 to 55, C/o The General Manager, North-Eastern Railways, S&T Department, Gorakhpur).

56. Shri P.L. Sharma,
57. Shri D. Mukhopadhyay,
58. Shri K. Roy,
59. Shri A.N. Bandopadhyay,

60. Shri A. Goswami,

(Respondents 56 to 60, C/o The General Manager, Northeast Frontier, S&T Department, Maligaon)

61. Shri S. Ramakrishnan,

62. Shri P. Damodaran,

63. Shri S. Sambasivan,

64. Shri A.R. Parasuraman,

65. Shri S. Subbaraman,

66. Shri T. Ganeshan,

67. Shri K. Balakrishnan,

68. Shri T.V. Srinivasan,

69. Shri S. Ramanujam,

70. Shri N. Rangaswamy,

71. Shri N. Srinivashan (II),

72. Shri V. Balasubramanian,

73. Shri P. Venkataraman,

74. Shri V.I. Munavalli,

75. Shri G. Chandersekharan,

76. Shri V. Govindaswamy,

(Respondents 61 to 76, C/o The General Manager, Southern Railways, S&T Department, Madras)

77. Shri A.S.N. Murthy,

78. Shri T.V. Raghava Rao,

79. Shri V. Nagaraj,

80. Shri G. Babji Rao,

81. Ch. Ramachandra Vittal,

82. Ch. Pandu Ranga Rao,

83. Shri V.P.N. Krishnan,

84. Ch. Janardhan Rao (SC),

85. Shri K. Selve Raj,

86. Shri M.N. Sastry,

87. Shri P.B. Pardhasaradhi,

88. Shri T.G. Osuru,

89. Shri P. Maneshwara Rao,

90. Shri C. Maria Susai,

91. Shri R. Lakshma Reddy,

(Respondents 77 to 91, C/o The General Manager, South Central Railways, S&T Department, Rail Nileyam, Secunderabad (AP))

92. Shri R.S. Narayanaswamy,

93. Shri A.K. Chakraborty,

94. Shri J.N. Haldar,

95. Shri R.N. Banerjee,

96. Shri S.C. Sen,

97. Shri J.B. Pramanik,

98. Shri S.K. Saha,

99. Shri J.K. Das,

100. Shri D.K. Sengupta,

101. Shri Samir Kumar Sinha,

102. Shri S.C. Basu,

103. Shri D.T. Rao

(Respondents 92 to 103, C/o The General Manager, South Eastern Railways, S&T Department, Garden Reach, Calcutta)

104. Shri T.S. Harchandani,

105. Shri P.P. Mohod,

106. Shri Y.K. Jain,

107. Shri H.N. Rao,

108. Shri N.N. Murthy,

109. Shri V.S. Kapoor,

110. Shri R.N. Chadha,

111. Shri H.N. Joshi,

112. Shri S.K. Vaid,

113. Shri R.K. Talageri,

114. Shri J. Ramdaur,

115. Shri Mohan Lal Sharma,

116. Shri R. Vaidyanathan,

117. Shri J.S. Rao,
118. Shri B.G. Sathe,
119. Shri V.S. Manrai,
120. Shri A.K. Bhattacharya,
121. Shri C. Sohan Lal,
122. Shri Ram Sevak,
123. Shri G.L. Jain,
124. Shri R.N. Singh,
125. Shri V.B. Ketkar,
126. Shri R.C. Sharma,
127. Shri T.N. Sharma,
128. Shri V.N.R. Pillai,
129. Shri L.L. Namdev,
130. Shri R.P. Bhatnagar,

(Respondents 104 to 130, C/o The General Manager, Western Railways, S&T Department, Churghgate, Bombay). ... Respondents.

By Advocate Shri Shyam Moorjani (For Respondent No.1).

By Advocate Mrs Shyamla Pappu, Sr. Counsel with Shri B.S. Maine and Shri M.R. Krishnamurthi (For Respondent No. 2).

By Advocate Shri S.P. Singha with Shri S.N. Gupta (For Respondents 3, 4, 22, 25, 29, 31, 34, 35, 37, 38, 43 & 54).

None for other respondents.

O R D E R

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

The applicants are directly recruited to the junior scale, (Rs.2200-4000) of the Group 'A' service of the Indian Railway Service of Signal Engineers (IRSSE for short). They are aggrieved by the Annexure A-1 notification dated 15.9.1992 of the Ministry of Railways appointing substantively 127 Group 'B' Officers of the S&T Department to the junior scale of the IRSSE with

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effect from 23.7.1992. The main ground urged is that this is contrary to the recruitment rules and, that, further, these 127 appointees are likely to be given weightage in seniority in the junior time scale upto a maximum of five years, as a result of which they are likely to be placed over the applicants, thus, defeating the rightful claims of the applicants for further promotion to the higher grades.

2. Initially, the applicants had impleaded the Union of India as Respondent No. 1 and the Indian Railway Class II Officers Federation as Respondent No. 2. Permission was granted to them to implead two of the persons appointed by the impugned Annexure A-1 order as Respondents 3 and 4. Subsequently, when objection was raised that the affected persons have not been impleaded, all officers mentioned in Annexure A-1 were permitted to be impleaded. An amended memo of parties was filed on 16.3.1994.

3. The first respondent, i.e. Railways, the second respondent, i.e. Association, and the respondents 3 and 4 have filed theirseparate replies.

4. In view of the averments made, an interim direction was first given that any further promotion made shall be subject to the outcome of this O.A. Thereafter, the first respondent was directed not to proceed with the fixation of the seniority of the officers promoted under the impugned Annexure A-1 order and subsequently, a further direction was given to the first respondent to maintain the status quo of the applicants and the 127 promotees as on 2.4.1993 until the case is disposed of.

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5. Though the application is hotly contested, subsequent developments have considerably lessened our task. This is due to the fact that the parties referred to two decisions already rendered by other Benches of the Tribunal in similar matters and the arguments were confined to the main question of law raised therein.

6. It is necessary to state the facts briefly and identify the issues in dispute.

7. On our direction, the Railways filed an additional affidavit on 30.11.1993, which among other things, gave a clear picture of the rules that govern recruitment and the amendments made to the relevant Rule 4 from time to time. The position that emerges is as follows:

(a) Recruitment to the Signal Engineering Department of the Superior Revenue Establishment of the Indian Railways is governed by the "Signal Engineering Department of the Superior Revenue Establishment of the Indian Railways Recruitment Rules, 1962". The record shows that the rules were subsequently called the Indian Railway Service of Signal Engineering Recruitment Rules, 1962 by notification dated 4.2.1967. Rule 4 of the Recruitment Rules notified on 28.4.1962 stood as under:

"4. Method of Recruitment.- Recruitment to the Service shall be by the following methods:-

(a) By competitive examination held in accordance with Part II of these rules.

(b) By promotion of specially qualified Class II officers, including officiating Class II officers of the Signal Engineering Department.

Not more than 33 1/3 per cent of the vacancies will be filled by the departmental promotion: this percentage is liable to be varied from time to time if found necessary.

(c) By occasional admission of other qualified persons appointed by the Government on the recommendation of the Commission".

It may be noted that there was no indication as to what would happen if this reservation is not fully utilised.

(b) This rule was amended on 4.4.64, 27.4.68, 8.2.69, 27.1.76, 23.2.79 and 9.3.79. ^u

(c) The amendment made on 27.4.68 provided for ~~and~~ another source viz., appointment of Assistant Signal and Telecommunication Engineers (ASTE, for short) recruited through the UPSC as temporary officers to the extent decided from time to time. A note was then added to the rule, clarifying that if the quota of 33 1/3% reserved for Class II Officers is not utilised, the remaining vacancies shall be filled up by direct recruits and the ASTE referred to above, in such proportion as may be decided in consultation with the UPSC.

(d) The provision regarding ASTE was amended later. On 27.1.76, the amended provision provided that they will be appointed to six vacancies, added each year, and that these vacancies shall not be taken note of either for direct recruitment or for promotion. This provision was deleted, perhaps inadvertently, when Rule 4 was amended on 23.2.1979, but was more or less restored in practically the same form by the amendment dated 9.3.1979.

(e) We are concerned with the amendment made on 23.2.1979 to Rule 4. Clause (b) thereof, which deals with promotion, was substituted as follows:

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"(b) By promotion of Class II Officers of the Signal Engineering Department. Not more than 40 per cent of the vacancies shall be filled by departmental promotion. This percentage is likely to be varied from time to time, if found necessary."

The Note at the end of Rule 4 was substituted as follows:

"Note: If the quota of 40 per cent reserved for Class II Officers for promotion to Class I is not fully utilised, the remaining vacancies shall be filled up by direct recruitment under clause(a)".

The amendments raised the promotion quota to 40 per cent and clarified that if the quota is not utilised fully, the remaining vacancies will be filled up by direct recruitment.

8. In so far as the seniority is concerned, the Railways stated as follows vide reply to para 4.6 and 4.7:

"..It is further submitted that the principles for determining relative seniority of Group 'A' officers are contained in Railway Ministry's letter No.E(O) 1-72/SR-6/29 dated 30.11.1976 as amended from time to time. Principle (vii) of these principles provides for weightage of Group 'B' service, in determining seniority in Group 'A' of Group 'B' officers, on their promotion from Group 'B' service to Group 'A' based on -

- a) the year of service connoted by the initial pay on permanent promotion to Class I service; or
- (b) half the total number of years of continuous service in Class II, both officiating and permanent.

whichever is higher, subject to a maximum weightage of five years provided that the weightage so assigned does not exceed the total non-fortuitous service rendered by the Officer in Group 'B'.

Principle (ix) of these principles further provides that officers permanently appointed to Class I (Jr. Scale) from amongst the categories mentioned, *inter alia*, in principle (vii) referred to above, against quotas of vacancies reserved for them, shall be placed below or above a particular batch of Direct Recruits accordingly as their dates of increment on time scale are earlier or later than the earliest date on which any one of the Direct Recruits in a particular batch joined service".

(Emphasis added)

9. Admittedly, the applicants joined the Group 'A' of IRSSE in the junior time scale on 6.3.1989 on the results of the competitive examination held in 1986-87. In terms of Rule 4 as amended in 1979, not more than 40 per cent of the junior time scale vacancies can be filled up by promotion of Group 'B' Officers. Therefore, the direct recruitment is to 60 per cent of the vacancies. Thus, there is a ratio of 3:2 between direct recruitment and promotion. In 1992, only 41 persons were directly recruited. Therefore, the number of Group 'B' Officers who could be promoted to junior time scale should not have exceeded 26. Instead, 127 persons have been appointed. That apart, a greater danger to the interest of the applicants is that applying Principle (vii) regulating seniority read with principle (ix) thereof, all these 127 persons would gain seniority upto a maximum period of five years and will be ranked along with the 1987 batch of direct recruits. Hence, they have sought a direction to quash the impugned Annexure-I order to the extent the number of departmental candidates promoted exceeds the quota of 40

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per cent of vacancies for 1992.

10. In their reply, the Railways have given the detailed background leading to the issue of the impugned order. It is stated that it was all along felt that the Group 'B' Officers did not have adequate representation in the various grades of Group 'A', not merely in the IRSSE with which this O.A. is concerned, but in 8 other services. In this connection, the reply gives the following information:

"i) It is submitted that as early as in 1973 to 1980, 632 posts were upgraded from JS/Group 'B' to Sr. Scale as a result of Cadre Reviews in 1973 and in 1980 and these were intended largely for the benefit of Group 'B' officers. However, larger induction of Group 'B' officers into Group 'A' against these vacancies had not taken place.

ii) Actually, for want of Group 'A' officers, as many as about 1500 Senior Scale Group 'A' posts in the above mentioned services were being manned by Group 'B' officers on ad hoc basis. Out of these 1500 Group 'B' officers, more than 600 had completed 8 years of regular Group 'B' service. As it would have been anomalous to continue these ad hoc arrangements indefinitely, larger induction of Group 'B' officers into Junior Scale Group 'A' was made reducing ad hoc arrangements against Senior Scale posts.

(iii) There were about 4500 Group 'B' officers working in Group 'B' posts and about 1500 Group 'B' officers were working on ad hoc basis in senior scale. There were as many as 1110 Group 'B' officers (including 164 officers belonging to the S&T department) with 8 years or more of Group 'B' service as on 1.9.1989, yet to be promoted to Group 'A'. The percentage of officers of Group 'B' origin was only 14% in the overall

Group 'A' cadre (senior scale and above) and was only 7.7% in Sr. Scale. This imbalance had arisen on account of various factors operating cumulatively over the years. The number of Group 'B' officers in Group 'A' was very small. Therefore, keeping in view the large base of about 4500 Group 'B' Officers, it was considered a right step in the right direction to induct more Group 'B' Officers into Group 'A' junior scale".

~~The applicants are directly recruited to the~~

11. In order to minimise the ad hoc appointment, it was decided to increase the intake of Group 'B' Officers into junior time scale. This applied not merely to the IRSSE but to all the 9 Central Group 'A' services of the Railways, which provided the gazetted manpower. The Railways proposed that 654 additional posts in the junior time scale should be filled up in all the services by promoting Group 'B' Officers. The Union Public Service Commission (UPSC) agreed only for 463 posts. Out of these, the allocation for the S&T department i.e. the Department to which the parties belong, was 76. The reply states that the appointment of 127 persons by the Annexure-I notification to the junior time scale was made against 153 vacancies in the promotion quota, as per particulars given below:

| Recruitment year | Direct recruitment quota | Promotion quota |
|------------------|--------------------------|--|
| 1989 | 35(60%) | 23 (40%) + 2 (carry forward vacancies) |
| 1990 | 42(29%) | 104 (71%) including additional 76 posts decided by the Govt. in consultation with UPSC, for reasons brought out in para 8 to 10 of this counter affidavit). |
| 1991 | 37 (60%) | 24-(40%) |
| | | TOTAL 153 |

D.P.C. recommended 146 officers, of whom 127 have been appointed.

12. It is further stated in para 8 of the reply of the Railways that the additional number of posts (76 in the present case) was to be filled by promotion of Group 'B' Officers "in relaxation of the normal quota in consultation with the UPSC in exercise of the powers conferred on it by Rule 4 (b) of the relevant recruitment rules". In other words, it is the contention of the Railways that, in the special circumstances mentioned above, it was necessary to create 76 additional posts and promote the respondents, so that the Railways are managed properly.

13. The second respondent and the third and 4th respondents have filed separate replies. They have stated that the Railways have a pronounced bias in favour of the direct recruits. The cadre management is designed to serve the interests of the direct recruits. They contend that, as a matter of fact, there were a much larger number of vacancies in 1989, than indicated in the reply of the Railways, and would have justified the intake of the promotees, even on the existing Rule 4 without relaxation. In a written submission filed by the second respondent, it is that the vacancies in the junior scale as on 31.3.89, 1.1.90 and 1.1.92 were 364, 367 and 313 respectively. Therefore, the intake of 127 Group 'B' Officials in 1992 was well within the limits of the 40 per cent quota for promotion.

14. During the pendency of this O.A., O.A. No. 784 of 1993 Smt. Vishwanathan Vs. Chairman, Railway Board and others has been decided by the Madras Bench of the

Tribunal on 17.2.1994. That case related to a similar order of the Railways promoting 99 Group 'B' Officials to the junior time scale of the Indian Railway Traffic Service. This was challenged by a direct recruit. The Tribunal dismissed the application and upheld the appointment of the 99 promotees to the junior time scale. The respondents have produced a copy of that order and contend that we should also dispose of this O.A. in like manner.

15. The applicants state that the decision of the Madras Bench is distinguishable. They contend that a more appropriate decision is the one rendered on 5.8.1994 by the Jabalpur Bench in O.A. 865/93 Ranjan Yadav & Ors. in which the issue involved is similar to the present O.A., but pertains to another service, viz., the Indian Railway Service of Engineers. The challenge was upheld, though some relief was given to the respondents, without detriment to the interest of the direct recruit applicants. It is, therefore, contended that we may follow this judgement.

16. In the circumstance, our task has been considerably reduced. We have to primarily consider whether the judgement of the Madras Bench or of the Jabalpur Bench would apply for the disposal of this case. We have seen both these judgements.

17. We are of the view that the decision rendered by the Madras Bench of the Tribunal is in entirely different circumstances. The Rules relating recruitment to the Indian Railways Traffic Service are materially different in two respects. The Rules provide for direct recruitment by open competitive examination held by the UPSC and promotion of eligible Group 'B' Officers belonging to Traffic and Commercial Department. The

judgement states that as per Rule 5(2) of the Indian Railway Traffic Service Rules the percentage of vacancies to be filled by direct recruitment and by promotion from Group 'B' service shall be 60 per cent and 40 per cent respectively. However, Rule 25 specifically confers powers of relaxation in the following terms:

"25. Power to relax. Where the Central department is of the opinion that it is necessary or expedient so to do. It may, by order for reasons to be recorded in writing and in consultation with the Commission, relax any of the provisions of these rules with respect in any class or category of persons or posts".

In the present case, Rule 4 provides that not more than 40 per cent of the vacancies shall be filled by promotion. There is also a provision that this percentage is likely to be varied. It is this provision that calls for interpretation. In the Indian Railway Traffic Service Rules, the percentage for direct recruitment and promotion are fixed at 60% and 40% specifically. They cannot be varied except by relaxation for which specific power has been conferred. Hence, the provisions are substantially different. The decision of the Madras Bench cannot, therefore, apply to this case and will not be helpful in deciding the disputes raised therein.

18. In the case considered by the Jabalpur Bench the issue related to recruitment to the Indian Railway Service of Engineers (IRSE). The recruitment rule considered was Rule 4 which reads as under:

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"Rule 4. Methods of Recruitment - Recruitment to the Service shall be by the following methods-

(a) By competitive examination held in accordance with Part II of these rules.

(b) By promotion of Class-II officers of the Civil Engg. Department. Not more than 40% of the vacancies shall be filled by Departmental promotion. This percentage is likely to be varied from time to time if found necessary.

(c) By occasional admission of other qualified persons appointed by the Government on the recommendations of the Commission.

Note-1: If the quota of 40 percent reserved for Class-II for promotion to Class-I is not fully utilised, the remaining vacancies shall be filled by direct recruitment under Clause (a).

Note-2: In addition to the methods of recruitment referred to above, Assistants Engineers recruited through the Commission, initially as Temporary Officers, shall be absorbed in the Service to the extent as may be decided in consultation with the Commission from time to time.

The vacancies so added shall not be taken into account for calculation of the vacancies to be filled in accordance with clauses (a) and (b)".

It may be noted that Clause (b) and Note (1) are the same as the amendments introduced in Rule 4 in the present case on 23.2.1979 as extracted in para 7 (e) - except, of course, for the reference/ to the appropriate Department/ Group 'B' Officers have to be promoted. In other words, that Bench had to interpret identical provision in another set of recruitment rules.

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19. It posed for consideration three issues as follows:

"In the background of the contentions of the parties, the following three points emerge out for adjudication-

(i) Whether 225 vacancies existed in the Junior Time Scale of IRSE on the date of notification; (ii) whether the recruitment rules can be relaxed to exceed the promotion quota of 40% and (iii) whether slots/vacancies in Junior Time Scale of IRSE against promotion quota for the past years which have remained unfilled can be carried forward and filled by promotion of Group 'B' officers".

We are concerned with issues (ii) and (iii).

20. That Bench has considered issue (ii) in great detail. It will be useful to reproduce the relevant portions of the judgement in extenso:

"12. As regards exceeding the promotion quota, the relevant rule has already been quoted above. The legal import of the words "not more than" has to be understood. The Supreme Court in the case of State of Andhra Vs. Gadiam Mukkatappayya, AIR 1961 SC 779 had occasion to consider the import of words "not more than". In the aforesaid case the method of appointment to the category of Sub-Inspectors was to be by promotion from Head Constables "upto, not more than" 30% of the cadre and by direct recruitment, for which no proportion was fixed. The Supreme Court in the context of the provisions as regards direct recruits in regard to whom there was no limitation placed on the proportion which they could have in the service, observed that the words "not more than" fix the maximum percentage of rank promotees in the category leaving it to the appointing authority to adopt

any percentage below this figure. In the case of Laxmi Narayan Vs. Union of India, AIR 1976 SC 714 the words "not less than three months notice" were required to be interpreted. In this connection, the Supreme Court has observed in para 66 of the judgement as follows:

"If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of premptry language in a negative form is per se indicative of the intent that the provision is to be mandatory (Crawford - The Construction of Statutes, p.523 & 524)"

Mr. Chief Justice G.P. Singh (as he then was) in his Book of 'Principles of Statutory Interpretation' IIIrd Edition at page 280 has observed as follows:

"Another mode of showing a clear intention that the provision enacted is mandatory, is by clothing the command in a negative form. As stated by Crawford "prohibitive words or negative words can rarely, if ever, be directory".

In the context of above, we have no hesitation to come to the conclusion that the words used in the statutory recruitment rules leave no scope for doubt that the appointing authority can fill up the post in the Junior Time Scale by departmental promotion upto maximum 40%. If and when the 40% quota is not fully utilised by the promotee officers, it would amount to variation and the advantage shall go to the direct recruits i.e. the percentage of direct recruits would accordingly go up. In our opinion this is the true import of the relevant aforesaid Rule 4 of the Recruitment Rules of IRSE. The question of relaxation does not arise in regard to the recruitment rules of IRSE. As and when there is a provision for relaxation in the rules, as in the case of IRTS Recruitment Rules (quoted above in para 9) the power to relax may be exercised. However, we cannot import the provision of relaxation in the rules on our own. The normal rule of

construction of a statute is that we cannot add or subtract from the statute on our own. We are unable to subscribe to the view that the sentence "this percentage is likely to be varied from time to time if found necessary" dilutes the negative command ~~and~~ contained in the words "not more than 40% of the vacancies shall be filled by departmental promotion" occurring in Clause (b) of Rule 4. The reason is that isolated consideration of a provision often leads to the risk of some other interrelated provision becoming otiose or devoid of meaning. Note-I to Rule 4 provides "if the quota of 40% reserved for Class-II officers for promotion to Class-I is not fully utilised, the remaining vacancies shall be filled by direct recruitment under Clause (a). The combined reading of Rule 4 yields only one result and leaves no scope for doubt that the over all scheme of the rule and the true intendment of Rule 4 is that there is a ceiling as regards the vacancie to be occupied by departmental promotion. The remaining vacancies are to be filled up by direct recruitment under Clause (a) of Rule 4, for which no proportion has been fixed. We are unable to subscribe to the view that the Rule 4 vests power of relaxation in the appointing authority to fill more than 40% vacancies by departmental promotion in the Junior Time Scale of Indian Railway Service of Engineers".

21. We have only to add that if the Note at the end of Rule 4 is to be construed as conferring a power on Government to enhance the promotion quota beyond 40 per cent, it would have been necessary to have used a non-obstante clause with reference to the restriction in sub rule (b) of Rule 4 which bars promotion beyond 40 per cent. Alternatively, if such an additional power is to be inferred, there

should have been one more Note specifically empowering Government to fill up by promotion more than 40% of the vacancies. Otherwise, sub rule (b) and note under Rule 4 can be interpreted only in the manner it has been done by the Jabalpur Bench.

22. The applicants have also strongly contended that there is no authority for carry over of the vacancies in the promotion quota. This is the implication of Note-I under Rule 4 that if there are vacancies in the promotion quota which have not been filled up, then they should be filled up by direct recruitment. Hence, the claim of the Railways as mentioned in the reply, namely, that out of 127 appointments made by the impugned notification, 25, 28 and 24 appointments should be deemed to be against the vacancies falling to the promotion quota in 1989, 1990 and 1991, cannot be accepted.

23. On the contrary, the learned counsel for the respondents contend that, in these years, the vacancies in the promotion quota have not been filled up and, therefore, it would be legitimate to conclude that out of the 127 appointments at least 77 appointments relate to vacancies in these three years. The dispute, if at all can, therefore, arise only in respect of the remaining 50 vacancies. They claim that these vacancies are also regularly filled up by relaxation of rules.

24. In this regard, the Jabalpur Bench has held as follows:

(Sic:is)

"13. The third and the last point/ regarding carry forward of promotion quota vacancies, / we are of the opinion that in normal circumstances answer has to be against the respondents. The backlog vacancies cannot be carried forward. It is not permissible to fill up the unfilled vacancies of the past years at a future date".

In this regard, the Bench has not considered the Note below Rule 4 on which reliance is placed by the applicants 25. We have considered this Note. A word is needed about its genesis. Such a Note was not in existence when the Rules were first notified on 28.4.1962. This is due to the fact that Rule 4 itself implied that this will be the position. There were only two modes of recruitment, i) direct & ii) promotion. The latter was restricted to "not more than 33 1/3% of the vacancies". By inference, direct recruitment was to not less than 66 2/3% of the vacancies. The percentage could be more if the percentage of promotion was less than 33 1/3%. The need for such an amendment is brought out in para 7 supra dealing with the amendments made to Rule 4. The need arose when a new mode of recruitment viz., appointment of temporary ASTEs was provided for on 27.4.1968 (para 7(c) supra). Therefore, the Note provided that, if the quota of 33 1/3% for promotees was not fully utilised, the remaining vacancies (i.e. in the quota) may be filled by direct recruitment or by the appointment of ASTEs to the extent decided by Govt. in consultation with the UPSC. The need for this Note of clarification ceased, when, on 27.1.76, the Rule provided that ASTEs will be appointed to 6 vacancies, which will not be taken into account to work out the quota of promotees and direct results (vide para 7 (d)). Hence, much significance cannot be attached to this Note to hold that vacancies cannot be carried over. Its primary purpose was not to prevent carry forward of the unfilled vacancies in the promotion quota but to indicate whether they can be filled up by direct recruitment or by ASTTE.

26. The implication of Rule 4 is that vacancies in every year have to be filled by direct recruitment or by promotion. If all the vacancies are filled up, there is nothing to be carried over. If vacancies in either quota are not filled up fully, those vacancies will be filled up in the succeeding year. In this sense, there is a carry over of vacancies. However, there is nothing in Rule 4 to show that the carried over vacancies will be filled up by direct recruitment only or by promotion only, depending on whether the carry over was due to inadequate recruitment by direct recruitment or promotion. The carry over vacancies also will be filled in the same ratio as is indicated in Clause (a) & (b) of Rule 4.

27. The Railways have indicated that there were 153 vacancies i.e. 77 vacancies in the promotion quota pertaining to the years 1989, 1990 and 1991 and 76 newly created posts to be filled only by promotion. In the case decided by the Jabalpur Bench, the position regarding vacancies was not clear. That Bench had held, as mentioned in para 24 (Supra), that the backlog of vacancies cannot be carried forward. Nevertheless, in the subsequent portion of para 13 of the judgement, the Bench took into the account the special difficulties of the Railways and the circumstances in which promotion to 225 vacancies in the junior time scale was made and in the interest of equity, it felt that the Group 'B' Officers may be allowed to be appointed on slots/vacancies which remained unfilled in the past, as a one time measure. It was further held that the appointments in excess of such vacancies shall be only either on ad hoc basis or on work charge basis.

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28. The question is whether we should also give the same direction. In our view, this may not be appropriate because this has adverse implications in regard to the seniority of the applicants who are direct recruits. Therefore, the directions have to be suitably modified. We have already referred to the principles regarding seniority in para 8 supra. The promotees can get a maximum weightage of five years. Therefore, if, promotees recruited in excess of their quota are assigned seniority in terms of the principles (vii) and (ix) this will adversely affect direct recruits. These principles can apply only to those promotees who are appointed within the quota as is evident from the emphasised portion of principle (x) vide para 8 supra.

29. This law is also firmly established by the decision of the Supreme Court in a similar case involving weightage for seniority to promotees vide B.S. Gupta Vs. Union of India, AIR 1972 SC 2627. That case related to the Income Tax Officers under the Central Board of Revenue. In pursuance of judgement of the Supreme Court in S.G. Jaisinghania Vs. Union of India (AIR 1966 SC 1427), a fresh seniority list was prepared by Government. In the covering letter dated 15.7.1968, the principles adopted were specified. The fifth principle is as follows:

"(v) Class II Officers promoted to Class I, Grade II have been allowed weightage vide Rule 1(f)(iii) of the seniority rules. Any excess promotions over the quota in a particular year have been carried forward to the subsequent year and taken against the promotions of that particular year and given weightage accordingly. The excess in that year has similarly been carried forward to the following year and so on".

Dealing with this principle, the Supreme Court held as follows:

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"19. Principle V is obviously correct. Class II officers promoted to Class I, Grade II have been allowed weightage in accordance with rule 1 (f) (iii) of the seniority Rules. That rule, in effect, provides that a promotee in any particular year not only gets seniority over a direct recruit appointed in that year but also in two previous years. Any promotions in excess of the quota have to be carried forward to the subsequent year and taken against the quota of promotions of that particular year and given weightage accordingly. That is how it should go on".

30. That judgement of the Supreme Court also throws light on two other questions which arise in this case. The first is whether Government can decide that the 76 ~~IRSSE~~ new posts created in the ~~IRSSE~~ should be filled exclusively by promotion only, contrary to the Rule 4. The second is the consequence of promoting Group 'B' Officers to these extra posts created to be filled up only by promotion. In B.S. Gupta's case also it was noticed that on 16.1.1959 100 posts of Income Tax Officers Class-II were upgraded to Class-I posts. A similar upgradation of 114 posts was done on 9.12.1960. The direct recruits who were aggrieved raised two contentions. The first was that 214 new vacancies were created in Class-I and, therefore, the direct recruits had to be given 2/3rd of those vacancies on the basis of the quota rule. However, as all the posts were filled up only by promotion, the excess appointment to the extent of 2/3rd would be invalid. The second contention was that the seniority rule had collapsed by a colosal departure from the quota rule.

31. In so far as the first contention is concerned, the Supreme Court observed as follows in para 22 of the judgement:

"So far as the first contention referred to above is concerned, there is no substance. There was no quota rule as such in existence in 1959. Only the old quota rule of 1951 was being followed as a guideline. Rule 4 of the Recruitment Rules, 1945 permitted Government to determine the method to be employed for the purpose of filling any particular vacancies and the number of candidates to be recruited by each of the two methods described in Rule 3. So if the Government takes a decision that 214 posts must be upgraded to Class I and all these upgraded posts must be filled by promotees from Class II which is one of the two methods described in Rule 3 of the Recruitment Rules, there can possibly be no objection. Rule 4 permitted the Government to fill the vacancies either by direct recruitment or by promotion or both. Therefore, it cannot be contended that these 214 upgraded posts must be divided between the direct recruits and promotees in the ratio of 2:1".

32. In regard to the second contention, it was held as follows:

"...In our opinion, with the upgrading of a large number of posts and the appointments to them of promotees, the quota rule collapsed and with that the seniority rule also. The decision to upgrade 100 posts was taken in January 1959 and the remaining 114 posts in the year 1960. In our opinion, the quota rule came to an end on January 16, 1959 when sanction to upgrade 100 temporary posts was given by the President and with that went the seniority rule".

33. In the present case, Rule 4 specifically provides for separate quotas for direct recruitment and promotion. Therefore, the direct recruits cannot be deprived of their share of the 76 posts newly created. Hence, only

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40% of the 76 posts i.e. 30 will fall to the share of the promotees. Regarding seniority, we shall revert to this issue shortly after determining how many persons can be considered to have been promoted within the quota.

34. In our view, the limited 'carry forward' principle which we have set out in para 26 on the basis of Rule 4 itself, will have to be applied to determine how many ^{are} ~~are~~ tentatively the vacancies in the promotion quota in 1992. That is/worked out as follows subject to departmental verification:

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| i) | Total vacancies in promotion quota - 77 (vide para 11 Supra) |
| ii) | Newly created posts - 76 (vide para 11) |
| iii) | Vacancies filled up by direct recruits in 1992 - 41 (para 4.4 of the O.A.) |
| iv) | Vacancies for promotees based on (iii) - 28 |
| | Total vacancies in 1992 -222 |

A maximum 40% of these vacancies can be filled up by promotion i.e. 89. Therefore, out of the 127 appointments, only 89 persons can be deemed to have been promoted in 1992 against the promotees quota. The remaining 38 officers have been promoted outside the quota. Applying the ratio of the decision of the Supreme Court in B.S. Gupta's case (supra), the weightage principle to determine seniority be given only to 89 promotees.

35. The question is how the seniority of the remaining 38 persons promoted by the Annexure-I order should be determined. Could it be said that the seniority principles (vii) and (ix) should be deemed to have

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collapsed when the Annexure-I order was issued against the existing vacancies and the newly created posts, as observed by the Supreme Court in B.S. Gupta's case vide para 32 Supra? In our view, this case is distinguishable in this regard because a substantial number of posts falling to the quota of promotees were vacant. The transgression of the quota rule is marginal. Promotions do not appear to have been made against the vacancies of 1993 and 1994. The excess appointments requiring to be adjusted are only 38 and these can be adjusted against the vacancies of 1993 and 1994. That apart, in the decision of the Constitution Bench in the Direct Recruit's case (AIR 1990(SC) 1607), it is held as follows:

"(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was possible to do so the inference is irresistible that the quota rule had broken down".

(Emphasis added)

In this view of the matter, it does not follow that the quota rule has failed. The appointments in excess of the quota are to be treated only as ad hoc and not as regular appointments. They can count their seniority only from the dates their promotions are adjusted against the future vacancies and thereupon principles (vii) and (ix) will apply.

36. There is only one more argument to be considered. This was especially advanced by Mrs Shyamla Pappu, the learned Senior Counsel for the second respondent. She contended that the Annexure A-I order is neither

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an order of promotion nor an order of appointment. It is only an order of regularisation. Therefore, Rule 4 on which the applicants have laid so much stress, does not apply at all. In the circumstance, seniority shall be assigned in terms of the principles of seniority referred to above, which have no connection whatsoever with the recruitment rules. She relies on R.N. Nanjundappa Vs. T. Thimmaiah (AIR 1972 SC 1767).

37. The learned counsel for the Railways, however, ~~as well~~ did not associate himself ~~into~~ this plea. His contention was that the Annexure-I order was issued in relaxation of the rules for which the necessary power was available under the Note to Rule 4.

38. We have considered this plea. We are unable to accept it for the simple reason that the Annexure-I states unambiguously that 127 persons mentioned therein are Group 'B' Officers "appointed substantively" to the junior time scale. We cannot presume that this has not been done under Rule 4, particularly when the Railways have made such an averment in their reply. That apart, the judgement relied upon by the learned counsel does not help her at all. On the contrary, the decision of the Supreme Court would render untenable this proposition of Mrs Shyamla Pappu.

38. It was held by the Supreme Court in that case that regularisation of appointment by stating that notwithstanding any rules, the appointment is regularised strikes at the roots of the rules and if the effect of regularisation is to nullify the operation and effectiveness of the rules, the rule itself is open to criticism on the ground that it is in violation ~~of the rules~~ of the current rules. In other words, one set of rules cannot be permitted as authorising regularisation of persons in utter defiance of rules

requiring consideration of seniority and merits in the case of promotion and appointment by selection. Hence, there cannot be regularisation of promotees de hors Rule 4. Hence, this submission is rejected. 39. In the circumstance, we dispose of this O.A. with the following declarations/orders and directions:

- (i) It is not competent for the Railways to appoint as many as persons by promotions as they like, in disregard of the provisions of Rule 4 which stipulates the quota for promotion and direct recruitment. Repeated violent departures from the quota rule will lead to collapse of the quota rule (Direct Recruit's case-supra) and therefore of the linked seniority rule (B.S. Gupta's case-supra).
- (ii) The principle of weightage in seniority will be limited to promotees appointed against their quota.
- (iii) As the rules stand at present, the maximum quota for promotees is only 40%. It cannot be raised further by relaxation, as Government has no such power.
- (iv) Vacancies not filled in a year - whether in the direct recruitment quota or promotee quota - can be carried over, but all such vacancies have to be filled in the subsequent years by both methods on the basis of the quota mentioned in Rule 4.
- (v) Out of the 127 appointments made by the Annexure A-1 order dated 15.9.1993, promotion should be deemed to have been made to the extent of 40% of the vacancies in 1992 which have been computed tentatively at 89 (para 34 supra) subject to departmental verification.

They alone are entitled to weightage and seniority on the seniority principles (vii) and (ix).

(vi) The remaining 38 persons, subject to departmental verification, have been promoted in excess of the promotion quota and they are not entitled to weightage in seniority on the basis of the Annexure A-1 order. Their promotions shall be treated as ad hoc only. They can be treated as regularly promoted against the quota for promotees in 1993 and thereafter. In that case, such promotees can be given weightage from the dates their promotions are regularised.

(vi) The Annexure A-1 order shall stand modified to the extent indicated above.

40. The O.A. is disposed of as above. No costs.

A. Vedavalli
(DR. A. VEDAVALLI)
MEMBER(J)
4.8.95
'SRD'

N.V. Krishnan
(N.V. KRISHNAN)
VICE CHAIRMAN(A)
4.8.95