

CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH

THIS THE 29th DAY OF SEPTEMBER, 1995

Original Application No. 1698 of 1994

HON.MR.JUSTICE B.C.SAKSENA,V.C.

HON.MR. S. DAS GUPTA, MEMBER (A)

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A.P.S. Sinha, son of Sri Late D.P.Sinha
Chief Mechanical Engineer,
North Eastern Railway,
Gorakhpur.

.... Applicant

BY ADVOCATE SHRI S.C. BUDHWAR

Versus

1. Union of India, through:

(A) Railway Board,

Rail Bhawan, Rafi Marg,
New Delhi

(B) Through its Secretary:
Department-Personnel & Training
South Block Complex, Near
Rashtrapati Bhawan, New Delhi

(C) Shri A.K. Banerji,
General Manager,
Central Railway, Victoria Terminus
Bombay.

(D) Shri A. Mithal,
General Manager,
R.C.P. Kapoorthala
Punjab.

.... Respondents

BY ADDL. SOLICITOR GENERAL

SHRI K.T.S. TULSI & SHRI LALJI SINHA,
SHRI B.B. PAUL.

Bcl p2

O R D E R (R E S E R V E D)

HON. MR. JUSTICE B.C. SAKSENA, V.C.

Through this O.A. the applicant who is working as Chief Mechanical Engineer, North Eastern Railway, has challenged the appointment of respondent Nos 3 and 4 to the post of General Manager, Indian Railways. He seeks quashing of their appointment letter dated 28.7.94. He has further sought an order or direction in the nature of mandamus commanding the respondents to promote the applicant to the post of General Manager, Indian Railways with effect from 28.7.94.

2. Before dealing with the respective pleas advanced on behalf of the parties, in order to appreciate the controversy involved, a brief background seems to be necessary.

3. The top management of the Indian Railways consists of Chairman, Financial Commissioner (Railways) and 4 Members of the Railway Board in ~~the~~ in the fixed scale of Rs 8000. ~~The~~ Next below to the Members of the Railway Board are General Manager, Zonal Railways, Production units etc. Principal R.S.C. ^{RDSO} and Director General ^{Rs} 7300-8000.

4. There are 19 posts of General Managers and equivalent, out of which 9 are of General Managers of the Zonal Railways (also known as General Managers of open line) and the remaining 10 are of General Managers Production Units, Construction Units, Director General RDSO etc.

5. For filling up the posts of General Manager and equivalent, a scheme was notified by the Government of India through its resolution dated 16.7.86. The same was amended in some particulars by subsequent

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rsolution dated 30.1.87 and 26.2.88. The post of General Manager and equivalent are filled up by appointing the eligible Senior Administrative and above grade officers belonging to 8 organised railway Group A service which have been enumerated in appendix II of the said scheme. For the purpose of the present O.A. it may be indicated that it concerns Members of the Indian Railway Service of Mechanical Engineers (IRSME) and Mmebers of the Indian Railway Service of Engineers (IRSE).

6. The posts of General Manager and equivalent are not included in cadre or any service. Respective Recruitment Rules for Group 'A' Orgainsed Railway Service have been framed in exercise of the powers under proviso to Article 309 of the Constitution of India. The applicant belongs to the IRSME. The IRSME Recruitment rules 1968 governing his service, the post of General Manager and equivalent are not included in the cadre of IRSME.

7. This asepct of the matter needs to be highlighted since the applicant under some misconception has sought a direction for his 'promotion' to the post of General Manager. It would not be promotion, but would be appointment to the post of General Manager and equivalent.

8. The salient features of the 1986 Scheme may be noted. Para 5 of the said scheme provides for the composition of the selection committee. Para 6 deals with the criteria for assessment of the suitability. Para 7 deals with the eligibility criteria. According to this para and officer should be less than 56 years of age to be eligible for consideration for empanelment to the post of General Manager and equivalent on first of July of the year in which the panel is made.

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9. In the present O.A. there is no dispute about the eligibility of the candidates concerned including the applicant. The controversy hinges around the provision of para 7.3 and para 8 sub paras 1 and 2 ad Explanation 1 thereof and the 1986 scheme as amended from time to time.

10. In preparing a panel of names for consideration for appointment to the post of General Managers and equivalent, the selection committee shall, as far as may be practicable ensure that :

(i) Equitable opportunities are available to the members of the various services listed in Appendix-II, consistent with the experience and specific requirements of the vacancies in the posts of General Managers and equivalent for which the panel is being made:

(ii) There is no undue pre dominance of any of the Railway Service listed in Appendix II amongst the holders of the posts of General Managers and equivalent and

(iii) Omitted

Proviso-omitted

Explanation 1

For the purpose of (i) above, holding of more than 37.5% posts of General Managers and equivalent by officers belonging to any one service would ordinarily be construed as undue

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predominance.

10. Paragraph 9 of the Scheme interalia provides that the Selection Committee shall normally meet once a year at a suitable time after 1st April as soon as the reports for the year ending March of that year are available for consideration. They are required to draw up a panel consisting of such number of names as may be necessary for appointment to the existing and anticipated vacancies in the posts of General Managers and equivalent during the period from 1st July of the year to the 30th June of the next year..

11. On the basis of the pleadings of the parties the uncontroverted facts which emerged are that with a view to fill up the vacancies in the posts of General Managers and equivalent, a panel was drawn up in March 1994. The Panel, for purposes of decision in the O.A, contained the names of the following persons:

1. Shri S.N. Mathur
2. Shri A.K. Banerji (Respondent No.3)
3. Shri H.N.Lal
4. Shri V. Vishwanathan
5. Shri. A. Mithal(Respondent No.4)
6. Shri A.S.P. Sinha(Applicant)
7. Shri M. Ravindra
8. Shri. R.K. Bansali
9. And Ors.

12. The Respondents 3 and 4 and the applicant belong to the IRSME, while Shri M. Ravindra and Shri R.K. Bansali belong to the Indian Railway services of Engineers(IRSE) As far as the said, Shri H.N. Lal and Shri V. Vishwanathan are concerned, the Respondents have

indicated that the proposal for their appointment to the post of General manager was not processed because their residual service was far below 2 years when the proposal for appointment was framed and they were as such not eligible for appointment. Their respective dates of birth are 28.2.1938 and 1.1.1938.

13. From the Counter affidavit it can be gathered that the proposal for appointment of the applicant to the post of General Manager was not processed as at the relevant time 7 officers belonging to IRSME were working as General managers and therefore, he was not eligible to be considered for the said appointment. List of 7 officers of IRSME in position as General manager as on 28th July, 1994 has been filed as Annexure R-7.

15. According to the 1986 Scheme, the panel as prepared by the Selection Committee requires the approval of the appointment committee of the Cabinet. After approval of the panel by ACC is received, proposals for appointments of empanelled officers in individual posts are formulated and again sent to the Appointment Committee of Cabinet for its specific approval. The panel for appointment of the post of General managers and equivalent for the year 1993-94 was framed and approval to the same was given on the 24th April, 1994 and thereafter proposal for appointment to the post of General Managers were sent to the ACC on the 12th May, 1994 and the approval of their appointment was given on 28th of July, 1994. The appointment orders were implemented on the same day viz. 28th July, 1994.

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15A. The learned counsel for the applicant broadly made three submissions: (i) that the appointment of respondents 3 and 4 was in violation of para 7.3 of 1986 Scheme; (ii) S/Shri M. Ravindran and R.K. Bhansali who were junior to the applicant have been appointed but no consequential orders have been passed as required by para 4.4 (d) of the 1986 Scheme; and (iii) the existing and anticipated vacancies as on 30th June, 1994 have not been correctly worked out. To elaborate the last plea, the learned counsel for the applicant urged that before 30.6.94 four persons from IRSME were in position in the cadre of General Manager and with the retirement of Shri M.K. Rao as Member, Mechanical Railway Board, an anticipated vacancy was created in the cadre of General Manager in respect of persons belonging to IRSME and if these vacancies had been taken into account the Rule of pre-dominance would not have come into play and the applicant would have been appointed.

16. As far as the first plea is concerned, the submission is that on the date of their appointment, viz. 28.7.94, the respondents 3 and 4 had less than 2 years of service left, thus they could not have been appointed.

17. The respondent No. 3's date of birth is 21.6.38 and the respondent No. 4's date of birth is 10.6.1938 while the applicant's date of birth is 15.7.1938. Paragraph 7.3 of the 1986 Scheme reads as under:

"Only such of the empanelled officers would normally be appointed to the posts of General Managers and equivalent as will be able to serve for at least two years on such or higher post(s)."

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18. The learned counsel for the applicant urged that the true import of the provision of para 7.3 would be that the appointees on the date of their appointment should have 2 years residual service. The submission is that the date of occurrence of the vacancies is wholly irrelevant; the date of appointment would only be relevant. The learned counsel for the applicant sought to derive support for his submission from a judgment rendered by a bench of the Tribunal, in D.P.S. Ahuja vs. Union of India and others O.A. 2497 of 1990 decided on 10.7.1991. A photostat copy of the said decision has been annexed as Annexure RA-4 alongwith Rejoinder reply to the Counter reply of the respondents 1 and 2.

19. Amongst other questions which were considered by the Division Bench, ~~the~~ one of the ^{the} questions was of the applicant having been discriminated and thus, there being violation of Articles 14 and 16 of the Constitution of India. This plea was raised in reply to the plea taken by the respondents that though the applicant's name finds place in the panel for 1990-91, the applicant having less than two years service left, it was pleaded by the respondents that he was no more entitled for the appointment to the post of General Manager. In that context, his further allegation was that five officers were promoted as General Manager in the near past, who had less than two years of residual service. The details furnished by the respondents including the reasons for appointment of the five persons have been reproduced in paragraph 13 of the judgment. The reasons indicated in respect of five persons were that when the proposal was sent to the ACC for their appointment all the five had more than 2 years tenure. In respect of some it was indicated that they had more than two years tenure on the date of vacancy.

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20. As noted in paragraph 15 of the said judgment, the Division Bench appears to have asked the learned counsel for the respondents to clarify if any criteria had been fixed by the respondents for computing the period of two years left for service. It has further been indicated in the said paragraph that the Bench observed that theoretically it could be either ~~either~~ the date of vacancy or the date of sending the proposal for the approval of the A.C.C. or the date of receipt of approval of the A.C.C., or the date of issuing orders of appointment on promotion or the date of actually taking over charge of the higher post. The Bench had noted that it did not get any clear reply to the clarification sought by it. The learned senior counsel for the respondents, however, submitted that normally it should be the date of appointment. In this context the Division Bench made the following observations on which reliance has been sought to be placed by the learned counsel for the applicant in the present case. It reads:

"The period of two years referred to therein is for service and not for anything else. Service can be deemed to commence only from the date a person takes charge of the post."

The Division Bench held that the statement furnished by the learned counsel for the respondents shows that none of the five officers had two years left to serve on the post of General manager or equivalent or higher post from the date they were posted. In view of this finding the action of the respondents in that case in not appointing the applicant on the post of General Manager was held to be both arbitrary and discriminatory and it was observed:

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"the denial of promotion even after empanelment in the panel for the year 1990-91 to the applicant on the ground that he has less than two years to serve cannot be upheld."

21. After having given our due consideration to the observations made in paragraph 49 of the aforesaid Bench, we are inclined to take the view that the said ^{not germane to the issues in that case.} observation was ~~not germane to the issues in that case.~~ The reason being that the interpretation of para 7.3 was not material for the purpose of the said O.A., neither it is based on said provision. The plea of discrimination had been taken which prevailed with the Division Bench and it held that the five persons whose names were given in the additional Rejoinder, had less than two years of ~~residual service~~ on the date of their appointment and therefore, the applicant, who on the date of order of appointment had been posted on the basis of his inclusion in the panel of 1990-91, there was nothing before the Division bench to show that the applicant would have been left with less than two years of service before superannuation if had been appointed to such a post according to his position in the panel."

22. In the said case, it is significant to note that the appointment of others have not been questioned and no relief was prayed for quashing of the same.

23. However, for the purposes of decision in the present O.A., before us, the plea of discrimination has neither been raised, nor has to be considered and the applicant cannot derive any support from the said decision. As noted hereinabove, the applicant's candidature for appointment to the post of General manager on the basis of panel for the year 1993-94 was not processed since at the relevant time 7 officers belonging to IRSME were working as General managers and therefore he was not eligible to be considered for such appointment.

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23. IN the present O.A. however, ~~s~~ sought quashing of the order of appointment of respondent Nos. 3 and 4 on the ground that on the date of their appointment, they had less than two years to serve.

24. Shri K.T.S. Tuli, Additional Solicitor General of India submitted in reply that since the applicant had no right to be appointed he has no locus standi to challenge the appointment of respondents 3 and 4. In support of the submission he invited our attention to the decision rendered in O.A. 709 of 1991 decided on 31.10.91 by the Principal Bench of the Tribunal in S.K. Sharma vs. Union of India and others. The Division Bench incidentally comprised of the same Members which had decided the O.A. filed by Shri D.P.S. Ahuja and which decision we have referred to hereinabove. The O.A. filed by Shri S.K. Sharma also related to the appointment to the post of General Manager. Amongst questions, one of the question was challenged to the validity of clause(5) of para 7.2 and 7.3 of the 1986 Scheme. The grounds urged to assail the above ~~position~~ ^{provision} appeared to be the following:

- (a) Clause(i) of para 7.2 is arbitrary and fixes a time limit without nexus to the object.
- (b) Para 7.3 nullifies the very basis of the Select Panel already prepared and approved.
- (c) Para 7.3 gives unguided powers to executive to make discrimination under the garb of the term 'normally' and act arbitrarily.
- (d) Clause(i) of para 7.2 and 7.3 are ultra vires to the Constitution of India, because mere administrative instructions cannot be allowed to effect Fundamental Rights of the candidates to be considered and included in the panel and

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appointed to the post of General Manager. These instructions would be violative of Art. 14 and 16 of the Constitution of India.

24. It was held that Article 14 of the Constitution of India prohibits ~~class~~ legislation but it does not prevent reasonable classification, reasonable classification has to fulfil a two fold criteria. Firstly, it should be intelligible and secondly, it should have a rational nexus with the object sought to be achieved. On these basis it was held that the provisions under challenge cannot be said to violate two fold criteria laid down in various judgment of the

Apex Court for ~~testing~~ ["] of the provisions of Article 14 of the Constitution. The Division bench further held that the word 'normally' used in paragraph 7.3 cannot be said to be providing unguided powers to an executive if the entire scheme is read and appreciated as a whole. After analysing the various provisions of the said scheme, the Division Bench observed:

"Thus, the entire reading of the Scheme clearly shows that it does not suffer from the vice of unguided powers to the executive to act ordinarily."

It was further held:

"The mere fact that some appointments have been made where on the date of appointment, the officer concerned was left with service of less than two years would not make the provisions illegal or ultravires to the Constitution."

It was submitted before us that in view of this decision, the exercise of powers in appointing the respondents 3 and 4 cannot be said to be arbitrary and violative of provisions of paragraph 7.3

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25. The learned Addl. Solicitor General submitted that if the applicant cannot be appointed, not being entitled by reason of the prohibition of undue predominance, he has no locus to challenge the appointment of respondents 3 and 4. It was further submitted that the posts of General Manager is not included in any cadre and the assumption of the applicant that he has a right to be 'promoted' to the said post is untenable. It was urged that the post of General Manager or equivalent is not included in the cadre of Group 'A' Service, and therefore, no legal right can be claimed for appointment by the applicant.

26. In this context the following decisions were cited. It is not necessary to analyse these decisions.

in greater detail.
(1) Vinod Krishna Kaul vs. Union of India and ors. reported in J.T. 1991(5)S.C. 21. In the said case the petitioner was empanelled in 1976 for appointment to the post of Joint Secretary. Two other officers junior to the petitioner were also placed in the panel and they were appointed and it was therefore, urged that the petitioner who was placed higher in merit and seniority through out in comparison to respondents 4 and 5 was discriminated and was not considered for a higher post of Joint Secretary. In that context, the Hon'ble Supreme Court in paragraph 4 observed:

"The empanelment of an officer as Joint Secretary does not give him any absolute legal right for appointment as a Joint Secretary as he has been assumed by the petitioner. Joint Secretary's panel is only an eligibility list of such suitable officers who could be considered for appointment to the posts of Joint Secretary to the Government of India and this list is clearly not an entitlement list nor does it give any legal right to the petitioner or to the other officers concerned for the actual appointment as Joint Secretary."

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27. In the same context, attention was invited to another Supreme Court decision reported in (1974) 3 Supreme Court Cases 220, the State of Haryana Vs. Subhash Chander Marwaha and Ors. Reliance was placed on the following observations made in para 10 of the said judgment.

" One fails to see how the existence of vacancies give a legal right to a candidate to be selected for appointment.

The examination is for the purpose of showing that a particular candidate is eligible for consideration.

The selection for appointment comes later.

It is open for then to the Govt. to decide how many appointments shall be made. The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that

that he be appointed. "

28. Another decision ^{cited was for} rendered by the Calcutta Bench of the Tribunal in OA 816/88 'C. Bhujanga Swamy Vs. Union of India and Ors., wherein it was held in para 8 that:

" The post of Member, Central Board of Excise and Customs is not a promotional post of the Indian Revenue Service(Customs&Central Excise)

The Central Board of Excise and Customs is a creature of Section 3(2) of the Central Boards of Revenue Act, 1963.

It is nowhere stated in any Act that only the persons employed in the Indian Revenue Service(Customs & Central Excise) are to be appointed as Members of that Board. That being

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so, the applicant cannot have any claim or right for being appointed in that post. Merely because two officers of this service have been appointed to that post who are junior to him."

29. The learned Addl. Solicitor general submitted that admittedly, the Respondents 3 and 4 had more than two years service left when approval to the panel was received and also when the proposal for their appointment to the post of General Managers, ^{was} processed and sent to the Competent Authority i.e. A.C.C for approval on 12.5.1994. They were appointed as such on 28.7.94 after the approval was received on 28.7.94. It was further submitted that the Appointment Committee of the Cabinet after considering the proposal had conveyed their approval for their appointments on 28.7.94 and had also conveyed their approval to the validity of implementation of the panel being extended till these orders were implemented. It was also urged that the A.C.C which is the Competent Authority, was well aware of the position in regard to appointment of these two officers when it approved their appointment to the post of General Manager on 28.7.94. The A.C.C had conveyed their approval to the validity of implementation of the panel being extended, the orders were implemented. We ^{on the basis} _{of the submissions} ^{BCR} find no justification to interfere with the appointment of Respondents no. 3 and 4.

30. The Respondent No.3 in his counter-affidavit has indicated that he was included in the panel of General

Managers of July 1991, July 1992 and July 1993. From the panel of July 1992, seven persons junior to him were promoted on account of application of the principle of 'undue predominance'. It has been pointed out that on the date of occurrence of the first vacancy for which he was on turn i.e. 31st October, 1993 (when seven of his juniors were promoted). Again on 30th November, 1993 (when the post of General Manager, Western Railway fell vacant) and again on 31st January 1994 which incidently vacated, the disability of undue predominance of Mechanical department (when the post of General Manager/RCF fell vacant), he had residual service in excess of two years. When he actually took over the charge of General Manager/RCF on 31.1.94, he had two years and five months of residual service. It has been pleaded in the counter-affidavit of Respondent no.3 that the President was pleased to condone this delay and accordingly extended the currency of the panel from 30th June 1994 to the 28th July 1994. Similar condonation was also granted for the panel of 1992 which was extended by a much longer period from 30th June 1993 to 31st October, 1993. In the said panel also actual tenure of a number of officers as General Manager was cut short due to this long processing time. Two officers Shri R.K. Sharma and Shri Naubat Lal had two years of service on the date of occurrence of vacancy for which they were pin-pointed.

30. It has been pleaded that according to the applicant since the orders are finally issued in July 1994, the candidate whose 56th birth date falls in June should be eliminated. It has been pleaded in the counter-affidavit that extending this perverse logic the decision would be

that had the orders for appointment been issued four days later all those including the applicant whose 56th birth date falls in July should be eliminated. The word 'normally' used in para 7.3 has not to be interpreted in a pedantic manner but in a pragmatic manner. The requirement of residual service of two years has to be from a firm date such as concurrence of vacancy to which the candidate is pin-pointed and date of submission of proposal and not a flexible date on which the approval is finally received. It needs to be appreciated that scheme for appointment of General Manager framed in the year 1986 the date of pin-pointing the vacancy of empaneled candidate and date of submission of proposal to the competent Authority would be relevant from the point of residual service of two years linking it with the actual date of approval which is processing time and of other nature would have serious implications particularly because the candidate has no control over such administrative delays and processing period. When the A.C.C. was aware of the residual service period of the candidates whose appointment was approved and extension of the panel period was granted, we are persuaded to hold that the appointments of Respondents 3 and 4 do not call for interference.

31. The other plea about the appointment of Shri M. Ravindran and Shri R.K. Bhansali having been made, but no consequential orders have been passed as required by para 4.4.(b) of the 1986 Scheme has also no merit. Though the applicant was senior to the aforesaid two officers, ^{said officers were} ~~the other~~ ^{these} ple of different service viz. IRSE. Since two officers have not been impleaded as respondents and their appointment has not been questioned, we are not inclined to consider the

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submissions questioning their appointment.

32. The other plea advanced on behalf of the applicant relates to the question whether the vacancy caused due to superannuation of Shri M.K. Rao on 30.6.94 ~~would~~ ^{should} have been treated as an anticipated vacancy in the post of General Manager. The respondents are right in urging that the anticipated vacancy as per para 9 of the Scheme should be in a post of General manager or equivalent. Shri M.K. Rao was holding the post of Chairman-cum-Member Mechanical Railway Board. The plea of the applicant ~~that~~ ^{based on} the further assumption that an IRSME ~~officer~~ ^{officer} would have been appointed is hypothetical, because the senior most IRSME officer was already holding the geneal post of Member (Staff) could be filled from amongst the General Manager's belonging to differentdisciplines and not only from IRSME. The Respondents in our considered opinion further were right in submitting that the vacancy in the post of General Manager had arisen only on 28.9.94 when Shri Masih Uzzaman had been appointed as Member of the Railway Board after due approval by the competent authority on 27.9.94 AN) and the vacancy intheGeneral Manaer's grade which arose on 28.9.94 was required to be filled from the next panel of 1994-95. We therefore, hold that the applicant's contention that the resultant vacancy in the post of General Manager should have been filled from earlier panel of 1993-94 is not correct.

33. In this context, a reference was made by the learned counsel for the respondents to a Supreme Court decision reported in AIR 1977 Supreme Court 757 Union of India and ors. vs. Majji Jangammayya and ors. A specific reference was made to para 58 wherein it was

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held:

"No employee has any right to have a vacancy in the higher post filled as soon as the vacancy occurs....."

34. The applicant has sought a direction in the nature of mandamus commanding the respondents 1 and 2 to promote the applicant to the post of General Manager with effect from 28.7.95. It is clearly well settled that such a mandamus cannot be granted. The only relief which the applicant could have claimed is for a direction to the respondents for consideration of his appointment to the post of General Manager. However, in the present case, no case is made out. The applicant's appointment has not been made in view of the doctrine of undue pre-dominance. The applicant has rightly not questioned the rule of pre-dominance as laid down in paragraph 8 of the 1986 Scheme. Perhaps the applicant was aware that a challenge to the said rule of pre-dominance had failed before the Hon'ble Supreme Court. The decision in question is reported in 1994, (26) A.T.C. 352 Indian Railway Service of Mechanical Engineers Association vs. Indian Railways Traffic Association and another. No other plea has been raised.

35. On a conspectus of the discussion hereinabove, we do not find any merit in the O.A. It is dismissed accordingly. Parties to bear their own costs.

MEMBER(A)

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VICE CHAIRMAN

B. Chakravarthy