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**CENTRAL ADMINISTRATIVE TRIBUNAL  
JODHPUR BENCH: JODHPUR**

**Original Application NO.129/2008**

**Date of Order: 24.05.2012**

**Order reserved on 17.02.2012**

**HON'BLE MR. SUDHIR KUMAR, MEMBER (A)  
HON'BLE MR. V.AJAY KUMAR, MEMBER (J)**

Vijay Prakash

Son of Shri Sohan Lal Swamy,  
R/o Qtr. No.T-12-B, Railway Colony,  
Churu at present employed on the post  
of Senior Health Attendant in the office  
of Sr.DMO Churu, Railway Dispensary,  
Churu, NWR.

...Applicant

(By Advocate: Mr. A.K. Kaushik)

**VERSUS**

1. Union of India  
Through General Manager,  
North Western Railway, Jaipur,  
Ganpati Nagar, Opp. Railway Hospital,  
Hasanpura Road, Jaipur-302006.
2. Divisional Personnel Officer,  
North Western Railway,  
Bikaner Division, Bikaner.
3. Chief Medical Superintendent,  
North Western Railway,  
Lalgarh, Bikaner Division,  
Bikaner.
4. Smt. Bimla Meena,  
OT Asst-III/Dresser-III,  
Office of Sr. DMO, Railway Dispensary,  
Ratangarh, NWR.
5. Shri Mahendra Kumar,  
OT Asst-III/Dresser-III,  
Office of CMS, Railway Divisional  
Hospital, Lalgarh, Bikaner, NWR.

...Respondents

(By Advocate: Mr. Kamal Dave for Mr.Salil Trivedi)



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**:ORDER:****PER MR. SUDHIR KUMAR:**

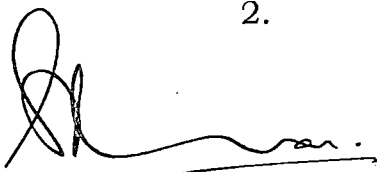
The applicant of this OA is an employee with the respondent No.3's department, as a Senior Health Attendant at a Railway Dispensary. He applied for an internal departmental promotion/selection for the post of Operation Theatre Assistants-III/Dresser-III in the pay scale of Rs.3050-4590. Five vacancies had been notified in the Advertisement, and out of them three were general, and one post each was reserved for SC/ST categories. As he met the eligibility criteria, the name of the applicant found place in the list of 42 eligible candidates announced by the second respondent on 21.02.2008, for the written test to be held on 15.03.2008. The result of the examination was declared on 02.04.2008 through Annexure A/5, and the applicant's name stood at Serial No.4 in the panel of employees who were declared passed in the written examination. The panel of finally selected persons was ultimately declared through Annexure-A/2 dated 29.05.2008, which mentioned as follows:-

"Dated: 29.5.08

"Sub:-Panel for the post of OT Asstt-III/Dresser-III grade Rs.3050-4590 (RP) in Medical Deptt.

"As a result of written test held on 15.03.2008 for selection to the post of OT Asstt-III/Dresser-III grade Rs.3050-4590 (RP) in Medical Deptt. the following employees are placed on the provisional panel of OT Asstt-III/Dresser-III grade Rs.3050-4590 (RP) in Medical Deptt.

S.No.	Father's name	Desig/Stn.
1.	S/Shri Bulaki Dass	Sr.HA/BKN
2.	Hans Raj	Sr.HA/HSR



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- |    |                     |                    |
|----|---------------------|--------------------|
| 3. | Mohan Lal           | Sr.HA/SSA          |
| 4. | Mahender Kumar (SC) | Sr.HA/LGH          |
|    |                     | (against SC quota) |
| 5. | Smt.Vimla Meena(ST) | Sr.HA/BKN          |

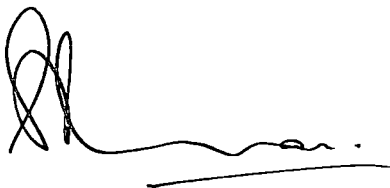
(against ST quota by relaxed standard of marks)

"The above panel is provisional subject to the final outcome of court cases pending in various courts on reservation cases and any other unforeseen circumstances as the case may be.

"The panel is PROVISIONAL"

2. When once the result of the written examination was declared through Annexure-A/5 dated 02.04.2008, and the final promotion orders were issued through Annexure-A/3 dated 03.06.2008, and applicant had stood at Serial No.4 in the result of the examination, while the general unreserved vacancies were only three as per the notification Annexure-A/1, the applicant became concerned about any manipulation or mistake in the calculation of vacancies and quota for SC/ST reserved categories, since Private Respondents No.R/4 & R/5 had stolen a march over him.

3. Since the posts of Operation Theatre Assistant-III/Dresser-III are scattered at the various dispensaries and hospitals of the Railways and at different stations, for gathering the requisite information he filed an application on 16.5.2008 under the Right to Information Act. In response to his application, the information was supplied to him through Annexure-A/6 dated 30.05.2008, giving the details as follows:-



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<u>Category</u>	<u>Grade.</u>	<u>S/S.</u>	<u>O/R.</u>	<u>VAC.</u>	<u>"Working"</u>	
					<u>SC</u>	<u>ST</u>
OT ASST-I/ Dresser-I	4500-7000	03	02	01	---	01.
OT ASSTT- II/ Dresser- II	4000-6000	10	08	02	01	---
OT ASSTT- III/ Dresser-III	3050-4590	05	02	03	01	01

Names of working SC/ST Employees:-

1. Shri Shambu Dayal (ST) OT ASSTT-I SSA.  
Dresser
2. Shri Rajinder Kumar (SC) OT ASSTT-II LGH
3. Shri Mahavir Prasad (SC) OT ASSTT-III DLP  
Dresser
4. Shri Dwarka Prasad Meena (ST) - D/o- Bkd".

4. From this table information, the applicant discovered that one Shri Mahavir Prasad (SC) and One Shri Dwarika Prasad Meena (ST) were already working against the posts of Operation Theatre Assistant-III/Dresser-III against the SC/ST reserved ~~point~~ points respectively. The contention of the applicant, therefore, is that the reservation made for ST category in the impugned vacancy notification was ex facie in excess, and since the SC reserved category post in the cadre was filled fully, there was in fact no deficiency in the number of reserved SC category posts.

5. Therefore, immediately after the final result was notified through Annexure-A/2 dated 29.05.2008, the applicant submitted a detailed and exhaustive representation vide his letter dated 03.06.008 Annexure-A/7, complaining that injustice had been



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done to him, in as much as excess reservation had been extended to the reserved category candidates. He has prayed that the contents of the representation Annexure A/7 may be read as part of the OA.

6. The case of the applicant is that the model roster for reservation for the cadre strength upto 13 posts has been provided by the DOP&T OM dated 02.07.1997, produced by the applicant as Annexure-A/8. An L type roster has been prescribed as an Appendix to the Annexure-III of the said Annexure-A/8, which would have to be applied to cadre in question. He has submitted that since the total strength of the cadre is 5, to be filled up by promotion, as per the aforesaid L-shaped roster, Point No.7 goes to the SC category and the 14<sup>th</sup> point goes to the ST category. His submission that in a cadre of five posts, more than 1 post each cannot be given for SC/ST ~~and~~ even by rotation of vacancies, and there is no possibility for SC/ST candidates occupying more than 1 post each. His contention thus is that reservation for both the SC/ST categories was already full at the time the impugned Notification Annexure-A/1 was issued on 18.01.2008, and by having provided reservation for SC/ST candidates for one more post each through the impugned notification, the percentage of reservation became 40% each for both these categories, leaving only 20% posts to be filled up by general category candidates.

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7. The applicant has further tried to support his contention by stating that even prior to the notification, vacancies for the same Cadre posts were notified earlier also, on 23.02.2007 and 6.03.2007, when there were stated to be six vacancies, and all of which were then sought to filled up through General Category candidates, and there was no post earmarked for reserved categories, which is apparent from the respondents' subsequent letter dated 06.06.2007, Annexure A/9 of this OA, through which those earlier notifications of six vacancies were cancelled, due to the reduction of one post in the cadre, which ultimately led to the issuance of the impugned Annexure A/1 for only five vacancies. The contention of the applicant is that reduction of general category posts by one post out of six could have only led to five general categories posts being left available, for being filled up by promotion by selection, and that the impugned notification Annexure A/1 dated 18.10.2008 had, therefore, wrongly earmarked one vacancy each as reserved for SC/ST category candidates.

8. The applicant submitted that in the information supplied to him through Annexure A/6 dated 30.5.2008, as reproduced in Para 3/above, clearly shows that the sanctioned strength of the cadre of Operation Theatre Assistant-III/Dresser-III has been shown as five, out of which two posts are already indicated as filled, and the vacant posts have been shown only as three. He, therefore, alleged that in spite of there being only three vacancies,



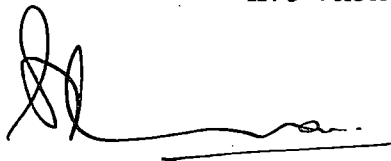
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five persons had been empanelled as per the impugned Annexure A/2, as already cited above, and the empanelled persons were thereafter wrongly given promotions and postings through Annexure A/3 dated 03.06.2008. The applicant submitted that if five posts were to be filled up, the sanctioned strength of the relevant cadre should have been seven, but even then there was no possibility of any SC/ST candidates occupying any of those five notified vacancies, since both the already working employees in the cadre were candidates belonging to SC and ST categories respectively.

9. Therefore, the case of the applicant hinges upon the interpretation to be applied to cadre strength of Operation Theater, Assistant-III/Dresser-III, as, if all the five candidates were to be only from among the general category candidates, since the applicant was placed at fourth place in the merit list of selected general category candidates, he would have got the promotion, which he now says has been denied to him, because of excess reservation having been granted to SC/ST categories. He had, therefore, invoked the jurisdiction of this Tribunal seeking reliefs as follows:-

8. (i) That impugned order dt. 18.1.2008 (Annexure A-1), so far it relates to earmarking one vacancy each for SC and ST category, order dated 29.5.2008 Annexure A/2) and order dated 3.6.2008 (Annexure A/3) to the extent of empanelment and promotion of respondents No.4 and 5, may be declared illegal and the same may be quashed.

(ii) The respondents may be directed to treat all the five vacancies as unreserved and interpolate the name



of applicant in the impugned orders dated 29.5.2008 (A/2) and 3.6.2008 (A/3), accordingly as per rules and allow all consequential benefits including arrears of difference of pay along with market rate of interest. Any adverse order, if in the meantime passed on his pending representation, may also be quashed.

(iii) The respondents may be directed to produce the reservation roster register for the cadre of OT Asst/Dresser I, II and III and the file containing completing selection proceedings for the post of OT-III/Dresser-III, before this Hon'ble Tribunal for perusal at the time of hearing.

(iv) That any other direction, or orders may be passed in favour of the applicant which may be deemed just and proper under the facts and circumstances of this case in the interest of justice.

(v) That the cost of this application may be awarded."

10. He had taken the ground that since the reservation for both SC and ST categories was already full in the concerned cadre at the time the impugned notification was issued, by providing for one more vacancy each to be <sup>l</sup>filled up by SC/ST categories, the reservation, thus, became 40% each for these categories, and collectively 80%, and it had ex facie crossed the boundary/maximum limit of reservation which could be provided by the respondents to SC/ST categories. He had, therefore, submitted that his rights under Articles 14 and 15 of the Constitution of India had been violated, and the applicant had been made a victim of hostile discrimination, and arbitrariness. The applicant had also submitted that out of the total 18 posts in the three cadres of OT Assistant-I/Dresser-I + OT Assistant-II/Dresser-II and OT Assistant-III/Dresser-III, six posts have already now been given by the respondents to the reserved candidates, by which 33.33% of

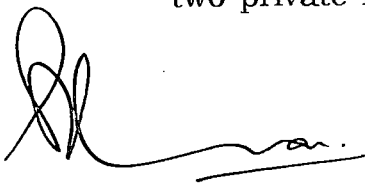




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the posts in all the three Cadres have gone to reserved category SC/ST candidates, instead of 22.5%, as ought to have been provided under Articles 14 and 16, read with Article 335 of the Constitution of India.

11. In their reply written statement, the respondents stoutly defended their actions, and stated that there was no manipulation or mistake in the calculation of the vacancies and the quota for SC/ST reserved categories, while undertaking selections to the Posts of OT Assistant-III/Dresser Grade-III Scale Rs.3050-4590. It was submitted that apart from the cadre of 5 posts of OT Assistant-III/Dresser Grade-III, there were also 10 sanctioned posts of OT Assistant-II/Dresser Grade-II in Bikaner division. Therefore, according to the prescribed percentage of quota, i.e., 15% for SC, and 7.5% for ST, out of the total 15 posts, two posts were to be filled up by SC candidates, and one post was to be filled up by ST candidate, while only one SC candidate Shri Rajendra Kumar, was at that time working as OT Assistant-II/Dresser, Grade-II Rs.4000-6000. It was submitted that in order to fill the existing short fall of two posts in reserved categories, 1 for SC and 1 for ST, it was decided for those posts to be filled up by downgrading 2 posts of OT Assistant-II/Dresser Grade-II temporarily to the posts of OT Assistant-III/Dresser Grade-III, which were taken into account for the calculation of vacancies while notifying the selection through the impugned Annexure A-1 dated 18.1.2008. It was further submitted that the names of the two private Respondents, Respondent No.4 and Respondent No.5,



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had been placed in the provisional panel by virtue of the instructions issued by the Railway Board, as they had also passed the test under relaxed standards. It was submitted that the panel for promotion and the letter of promotion impugned in this OA were issued strictly as per the Rules. It was also submitted that the earlier notifications for the vacancies dated 23.2.2007 and 06.03.2007 had been cancelled vide letter dated 06.06.2007 since it was discovered that in that Notification the posts had been notified on the basis of an incorrect assessment of the available vacancies, and that the Competent Authority was ~~not~~ fully empowered to cancel those cited Notifications. It was further submitted that once the applicant had appeared in the process of selection in pursuance of the impugned Notification as issued, he cannot now be allowed to agitate that the vacancies themselves had been notified wrongly, and, therefore, the OA is liable to be rejected and deserves to be dismissed.

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12. The applicant filed a rejoinder on 23.7.2009. He contended that the Railway Board's Circular dated 29.6.1999 (RBE No.151/99) specifically provides that the downgraded posts will continue to be counted against the cadre strength of the higher grade post, and any such down-gradation does not affect the cadre strength sanctioned for various levels of posts. He had filed the said Instruction as Annexure A-11, and had relied upon Para-3 of the Instruction, which states as follows:-



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"3. It may be stated that the issue was earlier deliberated in the CPOs' Conference held in Board's office on 10.12.1998 and the consensus emerged that the temporary downgradation of the reserved posts and filling up of the same by candidates belonging to SC/ST category is done with a view to achieve the prescribed percentage of representation in the higher grade at a future date. Therefore, the downgraded posts will continue to be counted against the cadre strength of the higher grade posts. In such cases, as and when the reserved community candidates become available for promotion in future, the reserved posts shall be restored to the original grades and shall be filled up by promotion of reserved candidates".

13. The applicant, therefore, argued that temporary downgradation of a higher post should, therefore, not make any difference in so far as the cadre strength of the lower grade is concerned. He further submitted that the reservation roster has to be applied on the basis of the sanctioned cadre strength of the posts in a grade. He submitted that in the cadre of 10 posts of OT Assistant-II/Dresser Grade-II, the 7<sup>th</sup> point goes to SC, and 5<sup>th</sup> replacement point goes to ST, as per the L type roster issued by the DOP&T, and that within the cadre of OT Assistant-III/Dresser Grade-III, there was no shortfall in the posts of SC/ST in the cadre, and as such vacancies were manipulated, and have been wrongly filled up by giving undue relaxation to SC/ST candidates, and not according to the general merit. He also cited that in the case of R.K. Gaur (OA No.286/1998) decided by this Tribunal on 11.5.2001, the L type reservation roster for the cadre of 14 posts or less, as issued by the Railway Board itself, had been struck down, and it had been held that the model roster issued by the DOPT for



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a cadre of 13 or less posts would have to be followed. It was submitted that since then the Hon'ble High Court of Rajasthan at Jodhpur has also in the case of Union of India & Ors, Vs. Rahendra Kaur Gaur and Ors.; 2002 (4) WLC 60, upheld on 30.05.2002 the order passed by this Tribunal. It was, therefore, submitted that the temporary downgradation of the higher post should not have made any difference in so far as the cadre strength of the lower grade is concerned, and, therefore, the OA deserves to be allowed.

14. Heard. It emerged during the arguments that the issue regarding following L type roster for railway reservation has since attained finality. The Hon'ble Rajasthan High Court order dated 30.5.2002 was under challenge before the Hon'ble Apex Court, as Civil Appeal No.2614/2003 had been filed before the Hon'ble Apex Court, which has since been disposed of by the Hon'ble Apex Court through order dated 09.11.2011, in which the Hon'ble Apex Court has not deemed it fit and proper to interfere with the order passed in favour of the respondent employees by the Tribunal on 11.5.2001 in R.K.Gaur (Supra), and confirmed by the Hon'ble Rajasthan High Court through its order dated 30.05.2002 in Union of India & Ors. Vs. Rajendra Kumar Gaur & Ors.(supra). However, the Hon'ble Apex Court had still not settled the issue of L type roster applicability once and for all, and had mentioned that the directions given in its order on 09.11.2011 would not be treated as precedent, because of which the matter regarding the applicability



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of L type reservation roster was still legally open for any further adjudication beyond the orders of the Hon'ble Rajasthan High Court dated 30.5.2002 (supra).

15. However, the crux of the matter in the instant case lies in the definition of a cadre, and as to what constitutes a cadre. During the arguments, while the learned counsel for the applicant contended that all the three pay scales of OT Assistants-III/Dressers Grade-III Rs.3050-4590 with sanctioned strength of 5 vacancies, and OT Assistants-II/Dressers Grade-II in the pay scale of Rs.4000-6000 with the sanctioned strength of 10 posts, and OT Assistants-I/Dresser Grade-I in the pay scale Rs.4500-7000 with the sanctioned strength of three posts, each constituted a separate cadre in itself. If this contention of the applicant has to be accepted, the applicability of the L type roster for reservation of vacancies and separate reservation for SC and ST would become applicable in all the three categories of posts in the three given pay scales entirely separately.

16. On the other hand, the learned counsel for the official respondents argued that it was a case of the whole cadre of OT Assistants/Dressers having been divided into three pay scales, in respect of OT Assistants-I/Dresser Grade-I, OT Assistants-II/Dresser Grade-II and OT Assistants-III/Dresser Grade-III, as detailed above, and therefore, the cadre of OT Assistants/Dressers was constituted of a total of  $03+10+05=18$  sanctioned posts, in the three given pay scales, as per the table given in para-3 above, and



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within that cadre, the posts could be temporarily upgraded or downgraded for movement of individual incumbents from one grade/pay scale to another, within the same cadre consisting of posts in three separate pay scales..

17. The issue of what constitutes a cadre vis-à-vis a number of pay scales was indirectly considered by the Hon'ble Apex Court in the cases of **Dr. Chakradar Paswan v. State of Bihar & Ors.** AIR 1988 SC 959, and in the case of **K.S. Vohra & Others vs. State of Gujarat**, AIR 1987 SC 2348. It is clear from the findings arrived at by the Hon'ble Apex Court in these two judgments that a common cadre can be constituted of posts existing in different grades of pay, and when the posts are inter-changeable, and the incumbents can perform the same duties, carrying the same responsibility, though they may draw different pay scales, they constitute the same cadre. In this instant case, the nature of functions and duties of OT Assistants-I/Dresser Grade-I, OT Assistants-II/Dresser Grade-II, and OT Assistants-III/Dresser Grade-III are such that they can be performed interchangeably, and the incumbents, though borne on the different pay scales, perform almost the same duties within the Operation Theatre, and carry the same responsibilities, even though they may be drawing different scales of pay.

18. Therefore, in the instant case, it is clear that the cadre of OT Assistants/Dressers constituted of a total of 18 posts (03+10+05) as given in the table re-produced above in para-3/ante, and this



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cadre contained posts in three different scales of pay, as given in that table, which posts could be interchangeable in between the different pay scales. For example, if an OT Assistant Grade-I/Dresser Grade-I retires, the respondents would be fully within their rights to utilize that vacancy by either promoting an incumbent to that pay scale from the post of OT Assistant-II/Dresser Grade-II, or by promotion of an OT Assistant-III/Dresser Grade-III, to the next higher grade of OT Assistant-II/Dresser Grade-II, who would be able to perform the same nature of functions within the Operation Theatre.

19. An example can also be given from the State level cadres of the Indian Administrative Service, the Indian Police Service or the Indian Forest Service, where the respective State cadres include officers placed in different pay scales, from the lowest entry level grade of pay to the highest grade, but all of whom constitute and belong to a single cadre.

20. As a result, in this case, though the respondents had wrongly mentioned in their reply written statement that they could have clubbed all the OT Assistants-II/Dresser Grade-II posts with the OT Assistants-III/Dresser Grade-III posts, without mentioning anything about the clubbing of posts sanctioned in OT Assistants-I/Dresser Grade-I pay scale posts also, in effect the cadre of OT Assistants/Dressers constitutes a total of 18 posts, as mentioned in para 18 above, and reservation percentage for SCs/STs had to



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be necessarily counted against the total strength of the 18 Cadre posts.

21. As per Annexure A-6, RTI information supplied to the applicant of this OA by the respondent authorities, reproduced in para-3/ante, one Shri Shambhu Dayal was already working as OT Assistant-I/Dresser Grade-I in ST category, and one Shri Rajendra Kumar was working as OT Assistants-II/Dresser Grade-II from the SC category. In the case of the cadre constituting 18 posts, the L

type reservation roster applicable only for a Cadre of upto 13 posts would not be applicable to this cadre at all, which point has been not submitted properly by the respondents even in their reply written statement. Only the percentages of reservation of posts of 15 % for SCs and 7.5% for STs would be applicable in such a case.

22. It is seen that Annexure A-2 had mentioned that as a result of the written test held for selection for the posts of OT Assistants-III/Dressers Grade-III, the Private Respondent No. R/5 Shri Mahender Kumar had been selected against SC quota, and the Private Respondent No. R/4 Smt. Vimla Meena had been selected against ST quota, by relaxed standard of marks. This brought the total number of reserved category persons in the whole cadre of 18 sanctioned posts to four posts, which roughly corresponds to the prescribed constitutional percentage of 22.5% reservation in favour of SCs and STs.

23. Further, there is merit in the arguments of the respondents that not having challenged the selection Notification dated





18.1.2008 when it was issued, and his having participated in the process of selection, the applicant cannot now be allowed to turn around, and assail and state that the notification for selection itself was bad in law. The Hon'ble Apex Court has already held in the case of **Madan Lal Vs. State of J&K**, AIR 1995 SC 1088; 1995 SCC (L&S) 712; AIR 1995 SC 1088 and in the case of **Dhananjay Malik Vs. State of Uttranchal**, AIR 2008 SC 1913; (2008) 1 SCC 1005 (L&S); (2008) 4 SCC 171, and a catena of other cases also, that if the candidate takes a calculated chance, and appears at the test or interview, then, only because the result is not favourable to or unpalatable for him, he cannot turn around and subsequently contend that the process of selection itself was unfair.

24. Therefore, we do not find any merit in the present OA, and the OA is rejected, but there shall be no order as to costs.

*V. 2 Kumar*  
(V. AJAY KUMAR)  
MEMBER (J)

*[Signature]*  
(SUDHIR KUMAR)  
MEMBER (A)

cc.

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