

# **Bharat Sanchar Nigam Ltd vs R. Santhakumar Velusamy & Ors on 6 September, 2011**

**Equivalent citations: AIR 2011 SUPREME COURT 3793, 2011 AIR SCW 5130, 2011 LAB. I. C. 4438, 2012 (2) AIR JHAR R 100, (2012) 5 ALL WC 4711, (2011) 6 SERVLR 568, (2011) 10 SCALE 136, (2011) 3 SERV LJ 353, (2011) 5 CAL HN 156, (2012) 1 LAB LN 358, (2012) 1 MAD LJ 301, 2011 (9) SCC 510, (2011) 4 ESC 682, 2011 (10) ADJ 64 NOC**

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**Bench: Markandey Katju, R V Raveendran**

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Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.5286-87 OF 2005

Bharat Sanchar Nigam Ltd.

... Appellant

Vs.

R. Santhakumari Velusamy & Ors.

... Respondents

With

CIVIL APPEAL NOS.3405, 4542, 4543, 4544, 4545 and 4546 of 2006

J U D G M E N T

R.V.RAVEENDRAN, J.

The appellant, Bharat Sanchar Nigam Ltd., is the successor of the Department of Telecommunications, Ministry of Communications, and Government of India (for short 'government' or 'telecom department'). The question involved in these matters is whether rules of reservation will apply to upgradation of posts.

2. There were four grades of employees of telecom departments known as Telegraphists or Telecom Operating Assistants in the Telecom Department. Promotions from one grade to a higher grade were on the basis of seniority/departmental examination. The telecom department introduced an 'One Time-Bound Promotion' scheme ('OTBP scheme' for short) in the year 1983-84 under which regular employees who had completed 16 years of service in a grade, were placed in the next higher grade. After some years, the employees unions demanded a second time-bound promotion on completion of 26 years of service in the basic grade, as Group C and Group D cadres were only entitled to one-time bound promotion. The government decided that a second time bound promotion was not feasible. However, to provide relief from stagnation in the grade, the government decided to have a Biennial Cadre Review ('BCR' for short) under which a specified percentage of posts could be upgraded on the basis of functional justification.

3. The BCR scheme was accordingly introduced vide Circular dated 16.10.1990. It was made applicable to those cadres in Group C and Group D, for which one-time bound promotion scheme on completion of 16 years of service in the basic grade was in force. Under the said scheme, employees who were in regular service as on 1.1.1990 and had completed 26 years of satisfactory service in the basic cadres, were to be screened by a duly constituted Committee to assess their performance and determine their suitability for advancement and if they were found suitable, to be upgraded in the higher scale. The upgradation was restricted to 10% of the posts in Grade III. We extract below the relevant terms of the BCR from the Circular dated 16.10.1990:

".....

(iii) Biennial Cadre Reviews will be conducted in respect of the eligible cadre at the level of circles who control these cadres.

(iv) At the time of review the number of officials who have completed/would be completing 26 years of service in the basic cadres including time spend in higher scale (OTBP) will be ascertained. The persons will be screened by the duly constituted Review committee to assess the performance and suitability for advancement.

(v) In the Biennial cadre review, suitable number of posts will be created by upgradation based on functional justification.

(vi) Creation of posts by upgradation will be in the scales indicated below:

Basic scale of the cadre	Scale after 16 years of completion of 26 y	Scale after OTBP	Scale after
		basic grade	more
750-940	800-1150		950-1400
825-1200	950-1400		1200-1800
975-1540	1320-2040		1400-2600
975-1600	1400-2300		1600-2660
			(10% of the posts
			scale of 1600-2660 will
			the pay scale of Rs.2000
1320-2040	1600-2600		1640-2900
			(10% of the posts
			scale of 1640-2900 will
			the pay scale of
			3200)

(vi) xxx xxx xxx

(viii) Necessary posts will be created by upgradation under the powers

of CGMs in consultation with their accredited finance.

(ix) The first Biennial Cadre Review for eligible cadres/officials may be conducted immediately covering the period upto 30.6.1992 to ascertain the eligible officials who have completed/will be completing 26 years of services or more as on the crucial dates, namely, the date of the review 01.1.1991, 01.7.1991 and 01.1.1992. The number of posts needed or provide for the promotion of the eligible persons will be determined and will be sanctioned/activated in four instalments the first immediately, the second on 01.9.1991, the third on 01.7.1991 and the fourth on 01.1.1992.

With these posts, it should be possible to provide for promotion of those employees who have completed 26 years of service or more on the above crucial dates, subject to their otherwise being found fit. The criterion for promotion will be seniority, subject to selection.

Order implementing the first instalment of cadre review should be issued before 30.11.1990.

In the second cadre review, which will cover the period from 1.7.1992 to 30.6.1994, which should be completed before 01.7.1992, the required number of posts needed to be released in half yearly instalments on 1.7.1992, 1.1.1993, 1.7.1993 and 1.1.1994 to cater for promotion of those who would have completed 26 years of service on the four crucial dates, will be ascertained and sanctions released in appropriate instalment so that the promotions of eligible personnel could be notified on due dates.

....."

4. The Government issued the following clarification regarding designations by circular dated 11.3.1991:

	State of Entry	Grade allotted
(i)	Initial Entry (Basic grade)	Grade I
(ii)	OTBP scale	Grade II
(iii)	BCR scale	Grade III
(iv)	10% of posts in BCR pay scales	Grade IV
	to be placed in pay scale of 2000-3200	

By letter dated 7.5.1993, the telecom department clarified that there were no sanctioned posts in regard to 10% BCR and the number of posts depend upon the number of BCR officials available; and that therefore no local officiating arrangement could be made if an official in the 10% BCR retired before the next review.

5. By circular dated 13.12.1995, the government formulated the procedure regarding promotion to Grade IV. Under the said procedure, promotions to Grade IV were to be based on seniority in the basic grade from among the officers in Grade III subject to fitness determined in the usual manner of OTBP. By a clarificatory Circular dated 1.3.1996, the government issued a clarification that promotion to Grade IV would be given from among officials in Grade III on the basis of their

seniority in the basic grade, subject to fulfillment of other conditions and that normal rules of reservation would apply to promotions in Grade IV.

6. The circular of the telecom department dated 1.3.1996 applying rules of reservations to promotions to Grade IV under BCR was challenged by the All India Non SC/ST Telecom Employees Association on the ground that principles of reservation would not apply for upgradation of existing posts which did not carry any change in duties and responsibilities. The Central Administrative Tribunal, Ahmedabad Bench by its order dated 11.4.1997 (OA No.623/1996 - All India Non-Schedule Caste/Schedule Tribe Telecom Employees Association v. Union of India) held that the department could not apply reservation rules while upgrading the posts under the BCR scheme and directed the department to take appropriate action for effecting promotions to the upgraded posts without applying the reservation roster.

The writ petition (SCA No.7576 of 1997) filed by the government challenging the said order of the Tribunal (Ahmedabad Bench) was dismissed by the Gujarat High Court by order dated 24.3.1999. In view of the said decision, the Government issued an order dated 8.9.1999 directing that a Review DPC be held and all ineligible officers wrongly promoted to Grade IV by application of reservation roster as per office order dated 1.3.1996, should be reverted back and all eligible officers should be placed in Grade IV and their pay should be fixed notionally. As a consequence of the said Circular dated 8.9.1999, the contesting respondents were reverted from Grade IV to Grade III.

7. Feeling aggrieved, the contesting respondents filed applications before the Madras Bench of the Tribunal. They challenged the validity of the said order dated 8.9.1999 and sought its quashing and also sought a direction to the government to permit them to continue in Grade IV. Similar applications were filed before the Tribunal's Bangalore Bench. A Full Bench of the Tribunal at Bangalore allowed the applications by order dated 26.4.2000. It held :

"Through the mechanism of grant of time-bound advancements to the higher scales of pay with different designations, or through appointments to posts which are upgraded with higher scales of pay within a given cadre, entailing creation of additional posts or not, essentially what takes place is a process of advancement/appointment to these higher scales of pay. We are convinced that this process can only be treated as promotion in the light of the principle laid down by the Hon'ble Supreme Court that an appointment to a higher scale of pay even at the same post and even without involving any additional responsibilities can still be a promotion. Even if in a given situation, the creation of the upgraded posts with higher scales of pay do not result in a net addition to the existing number of posts in that cadre, but is specifically and explicitly created to remove stagnation, to follow that those upgraded posts involving higher scales of pay are in effect a substitute for promotion. It is so because either through a regular promotion in terms of the Cadre and Recruitment rules or through the creation of the upgraded posts in the same cadre with a higher scale of pay what is sought to be achieved is the provision of opportunities for career advancement which, in the circumstances, is synonymous with promotional opportunities. Once this basic objective for the creation of

upgraded posts is understood and appreciated, we are of the firm opinion that such provisions for career advancement through appointments to upgraded posts cannot be treated for the purpose of reservation of special categories like SCs and STs differently from appointments to posts which are designated in particular as promotional posts. In our view, it is also absolutely immaterial as to whether the mode of appointment to these upgraded posts with higher scales of pay is by selection or by merely applying the criterion of seniority subject to fitness. In fact, it is evident that appointments to a number of posts which are specifically designated as promotional posts are also made on the basis of seniority-cum-fitness. Therefore, the adoption of that latter criterion for appointment to a upgraded post by itself cannot make such an appointment as non- promotional appointment. On this score drawing a distinction between upgradation and promotion based on the nomenclature only does not appear to be tenable."

8. The Full Bench of the Tribunal differed from the decision of its Ahmadabad Bench and held that the decision of the Gujarat High Court affirming the said decision was also of no assistance as it was at variance with the decisions of this Court in *Union of India vs. S.S. Ranade* - 1995 (4) SCC 462, *Lalit Mohan Deb v. Union of India* - 1973 (3) SCC 862, *State of Rajasthan vs. Fateh Chand Soni* - 1996 (1) SCC 562, and *Ram Prasad vs. D.K. Vijay* - 1999 (7) SCC 251. It held that the BCR upgradation to Grade IV in the telecom department amounted to promotion, attracting reservation for SCs and STs.

9. Following the said decision of the Full Bench of the Tribunal, the Madras Bench of the Tribunal by order dated 25.7.2000 allowed the applications filed by the contesting respondents herein and directed the government to restore the contesting respondents to their promoted posts which they were holding before the order dated 8.9.1999. The Telecommunication Department challenged the said order of the Tribunal by filing a batch of writ petitions before the Madras High Court. The Madras High Court, by the impugned order dated 18.10.2004, dismissed the writ petitions upholding the order of the Tribunal.

10. The said order is challenged in these appeals by special leave by the appellant. The appellant has put forth the following contentions :

(i) There is a clear distinction between upgradation and promotion. While promotion involves advancement in rank, grade or both and is always a step towards advancement to higher position, grade or honour, upgradation does not involve promotion to a higher position and the pedestal of the employee remains the same and the employee is merely conferred some financial benefits by granting a higher pay scale, to overcome stagnation. The BCR scheme introduced as per order dated 16.10.1990 was a scheme of upgradation and not promotion.

(ii) Where there is only upgradation of existing posts, with creating additional posts, principles of reservation would not apply. The Tribunal and the High Court committed a serious error by treating upgradation as a promotion to which

reservation rules would apply. The Tribunal and the High Court ought to have followed the decision of this Court in All India Employees Association (Railways) vs. V.K. Agarwal - 2001 (10) SCC 165 and the decision of the Gujarat High Court dated 24.3.1999 in Special Civil Application No.7576 of 1997 - Union of India vs. All India Non SC/ST Telecom Employees Association.

11. Article 16(4) enables the State to make any provision for reservation of appointment or posts in favour of any backward classes of citizens.

Article 16(4A) enables the State to make any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes, which in the opinion of the State, are not adequately represented in the services under the State. As upgradation involves neither appointment nor promotion, it will not attract reservation. Upgradation involves mere conferment of financial benefits by providing a higher scale of pay. If there is mere upgradation of posts, as contrasted from promotion, reservation provisions would not apply. [See : All India Employees Association (Railways) vs. V.K. Agarwal - 2001 (10) SCC 165 and Union of India vs. V. K. Sirothia - 2008 (9) SCC 283]. In V.K. Agarwal this Court held :

"It appears from all the decisions so far that if as a result of reclassification or readjustment, there are no additional posts which are created and it is a case of upgradation, then the principle of reservation will not be applicable. It is on this basis that this Court on 19.11.1998 had held that reservation for SC and ST is not applicable in the upgradation of existing posts and CA No.1481 of 1996 and the connected matters were decided against the Union of India. The effect of this is that where the total number of posts remained unaltered, though in different scales of pay, as a result of regrouping and the effect of which may be that some of the employees who were in the scale of pay of Rs.550-700 will go into the higher scales, it would be a case of upgradation of posts and not a case of additional vacancy or post being created to which the reservation principle would apply. It is only if in addition to the total number of existing posts some additional posts are created that in respect of those additional posts the reservation will apply, but with regard to those additional posts the dispute does not arise in the present case. The present case is restricted to all existing employees who were redistributed into different scales of pay as a result of the said upgradation."

(emphasis supplied) The decision of this Court in V.K. Sirothia arose from a decision of the Allahabad Bench of the Tribunal which expressed a similar view (in V.K. Sirothia vs. Union of India - O.A. No.384/1986). The Tribunal held :

"The restructuring of posts was done to provide relief in terms of promotional avenues. No additional posts were created. Some posts out of existing total were placed in higher grade to provide these avenues to the staff who were stagnating. The placement of these posts cannot be termed as creation of additional posts. There were

definite number of posts and the total remained the same. The only difference was that some of these were in a higher grade. It was deliberate exercise of redistribution with the primary object of betterment of chance of promotion and removal of stagnation."

The Union of India challenged the said order of the Tribunal and this Court by a brief order dated 19.11.1998 (Union of India vs. V.K. Sirothia - 2008 (9) SCC 283) dismissed the appeal by a brief order. The relevant portion of the said order is extracted below :

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

12. We may next consider the concepts of 'promotion' and 'upgradation'.

In Lalit Mohan Deb, this Court explained the difference between a promotion post and a selection grade :

"It is well recognised that a promotion post is a higher post with a higher pay. A selection grade has higher pay but in the same post. A selection grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotions should at least be placed in the selection grade to prevent stagnation on the maximum of the scale. Selection grades are, therefore, created in the interest of greater efficiency."

In Tarsen Singh vs. State of Punjab - 1994 (5) SCC 392, this Court defined 'promotion' thus :

"Promotion as understood under the service law jurisprudence means advancement in rank, grade or both. Promotion is always a step towards advancement to a higher position, grade or honour."

13. In S.S. Ranade the scope and meaning of the word 'promotion' was considered. The issue in that case was whether a Commandant (Selection Grade) held a higher rank than a Commandant and consequently entitled to be superannuated at a later age of 58 years instead of 55 years. This Court, following the decision in Lalit Mohan Deb, held as follows:

"Undoubtedly, a Commandant who becomes a Commandant (Selection Grade) secures a promotion to a higher pay scale. But it is a higher pay scale in the same post. The use of the word 'promotion' in Rule 6 and the Constitution of a Departmental Promotion Committee for selection of Commandant (Selection Grade) in Rule 7, do not necessarily lead to the conclusion that the promotion which is



contemplated there is necessarily a promotion to a higher post. Promotion can be either to a higher pay scale or to a higher post. These two Rules and the use of the word 'promotion' there do not conclude the issue.

xxx xxx xxx In the present case, an element of selection is involved in granting selection grade because there is no automatic promotion to the selection grade pay scale. But this factor is not decisive. In the present case also, as in the above cases, Selection Grade posts are created entirely for the purpose of granting some relief to those who have very limited avenues of getting promotion to a higher post. That is why a higher pay or pay scale is granted in the same post. Thus, by its very nature, a selection grade post cannot be considered as a higher post for the purposes of Rule 9.

...Because the creation of a selection grade in the same post stands on a very different footing. By its very nature a selection grade provides a higher pay or a higher pay scale in the same post. The beneficiary of a selection grade does not thereby occupy a post which is higher in rank than the post earlier occupied by him."

(emphasis supplied) On facts, this Court found that the respondent therein required a promotion which resulted in occupation of a post which was higher in rank than the post earlier occupied, to get the relief of longer service. This Court held that though his promotion from Commandant to Commandant (Selection Grade), resulted in a promotion to a higher pay scale, that was not sufficient to grant relief to the respondent therein as his promotion to selection grade did not involve advancement to a higher post.

14. In Fateh Chand Soni, this Court following Ranade defined 'promotion' thus:

"The High Court, in our opinion was not right in holding that promotion can only be to a higher post in the service and appointment to a higher scale of an officer holding the same post does not constitute promotion. In the literal sense the word "Promote" means "to advance to a higher position, grade, or honour". So also "Promotion" means "advancement of preferment in honour, dignity, rank or grade". [See: Webster's Comprehensive Dictionary, International Edition, p. 1009]. "Promotion"

thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression "Promotion" has been understood in the wider sense and it has been held that "Promotion can be either to a higher pay scale or to a higher post."

(emphasis supplied)

15. The distinction between upgradation and promotion was spelt out by a Full Bench of the Kerala High Court in N.G. Prabhu vs. Chief Justice, Kerala High Court - 1973 (2) Lab. IC 1399, thus :

"Promotion is, of course, appointment, to a different post carrying a higher scale of pay in the service. If, to better the conditions of service of the incumbents in posts in

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

16. But even in cases where no additional posts were created, but where a process of selection was involved in the upgradation, the process has to be considered not as an upgradation simplicitor, but a process of promotion and therefore the principles of reservation would be attracted. We may refer to the Constitution Bench decision of this Court in Ram Prasad (supra) where this Court held that appointment from senior scale to selection scale is a promotion though it may not be a promotion to a higher position and consequently the reserved candidates are entitled to be promoted to the selection scale by way of roster points. For this purpose, the Constitution Bench relied upon the decision of Fateh Chand Soni.

17. In Fateh Chand Soni (supra), the issue was whether seniority in the selection grade (in the Rajasthan Police Service) was to be fixed on the basis of date of appointment to the selection scale or on the basis of seniority in the senior scale irrespective of the date on which appointment was made to the selection scale. This Court held that appointment to the selection scale of an officer in the senior scale in the service constituted promotion and seniority in the selection scale had to be fixed on the basis of the date of selection and a person selected and appointed as a result of an earlier selection would rank senior to a person who is selected and appointed as a result of a subsequent selection. We note below the reasoning of this Court :

"In Lalit Mohan Deb v. Union of India, the pay scale of all the Assistants in the Civil Secretariat in Tripura was Rs.80-180 and on the basis of the recommendations of the Second Pay Commission appointed by the Government of India the scales were revised and 25% of the posts were placed in the Selection Grade in the scale of Rs. 150-300 and the rest continued in the old pay scale of Rs.80-180. For the purpose of

filling the Selection Grade posts, a test was held and those who qualified in the said test were appointed to the Selection Grade. The Assistants in the Selection Grade and the Assistants in the old pay scale were doing the same type of work. This Court observed that "provision of a Selection Grade in the same category of posts is not a new thing" and that "a Selection Grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotions should at least be placed in the Selection Grade to prevent stagnation on the maximum of the scale" and that "Selection Grades are, therefore created in the interest of greater efficiency". The Court took note of the fact that the basis for selection of some of the Assistants to the Selection Grade scale was seniority-cum-merit which is one of the two or three principles of promotion widely accepted in the administration and, therefore, the creation of Selection Grade in the category of Assistants was not open to challenge. In that case, the Court had proceeded on the basis that the appointment to the higher grade amounted to promotion. The Rules governing appointment to the Selection Scale in the Service also envisage that such appointment constitutes promotion. The relevant provision is contained in Rule 28(A) of the Rules which prescribes the criteria, eligibility and procedure for promotion to Junior, Senior and other posts encadred in the Service. Under sub-rule (5) of Rule 28(A) promotion from the lowest post or category of post in the Service to the next higher post or category of post in the Service is required to be made strictly on the basis of seniority-cum-merit. Sub-rule (6) of Rule 28(A) provides that selection for promotion to all other higher posts or higher categories of posts in the Service shall be made on the basis of merit and on the basis of seniority-cum-merit in the proportion of 50:50."

(emphasis supplied)

18. In *Dayaram Asanand Gursahani v. State of Maharashtra* - 1984 (3) SCC 36 a three Judge Bench of this Court held :

".....As mentioned earlier, the selection grade post is not a post to which promotion has to be made nor is there any efficiency bar rule attached to it. Further it is not shown that the Governor had issued any executive instructions as it had been done in *Sant Ram Sharma v. State of Rajasthan and Anr.* (1968) 1 SCR 111 and in *Lalit Mohan Deb and Ors. v. Union of India and Ors.* (1973) 3 SCC 862 enabling the High Court to withhold increments in the extended pay scale which is in this case called as selection grade pay scale. The pay scale to which a judicial officer is entitled is a condition of service which can be regulated by a statute or rules made under the proviso to Article 309 or by executive instructions issued under Article 162 of the Constitution. It cannot come within the range of the expression 'control' in Article 235 of the Constitution. (See *B.S. Yadav and Ors. etc. v. State of Haryana and Ors. etc.* (1981) 1 SCR 1024). It is only where there is such a law, rule or executive instruction, the High Court may act under Article 235 of the Constitution to sanction it or to refuse to sanction it. We are of the view that in the present case the mere nomenclature given

to the extended pay scale as the selection grade pay scale does not lead to the inference that there is an element of selection involved in sanctioning it. In the circumstances it should be treated as just an extended pay scale which forms part of the pay scale of Rs. 900-1800 as clarified in two Government orders sanctioning the selection grade posts. ...."

The aforesaid decision in Dayaram Asanand Gursahani was distinguished in Fateh Chand Soni on the following reasoning :

"The High Court has referred to the decision of this Court in Dayaram Asanand Gursahani v. State of Maharashtra and Ors. [1984] 2 SCR 703, wherein, after considering the resolution of the State Government sanctioning the post of District Judge in the Selection Grade, this Court has held that the said resolution did not indicate that there was any process of promotion by selection or otherwise from the cadre of District Judges to the Selection Grade District Judges. In the particular facts of that case it was held that mere nomenclature given to the extended pay scale as the Selection Grade pay Scale does not lead to the inference that there is no element of selection involved in sanctioning it and that it should be treated as just an extended pay scale which forms part of the pay scale. The position in the present case is, however, different. Here the Selection Scale is a separate scale and is not an extension of the Senior Scale. Moreover appointment to the Selection Scale is made by selection on the basis of merit and seniority-cum-merit in accordance with Rule 28(A) of the Rules."

19. In view of the decisions in Dayaram Asanand Gursahani, Fateh Chand Soni and Ram Prasad, the position that emerges is that even where the upgradation does not involve appointment to a different or higher post, but is as a result of a promotional process involving selection, then the principles of reservation are attracted.

20. In Union of India vs. Pushpa Rani - 2008 (9) SCC 242, this Court examined the entire case law and explained the difference between upgradation and promotion thus :

"In legal parlance, upgradation of a post involves transfer of a post from lower to higher grade and placement of the incumbent of that post in the higher grade. Ordinarily, such placement does not involve selection but in some of the service rules and/or policy framed by the employer for upgradation of posts, provision has been made for denial of higher grade to an employee whose service record may contain adverse entries or who may have suffered punishment. The word 'promotion' means advancement or preferment in honour, dignity, rank, grade. Promotion thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law, the word 'promotion' has been understood in wider sense and it has been held that promotion can be either to a higher pay scale or to a higher post. Once it is recognized that additional posts becoming available as a result of restructuring of different cadres are required to be filled by promotion from

amongst employees who satisfy the conditions of eligibility and are adjudged suitable, there can be no rational justification to exclude applicability of policy of reservation while effecting promotions, more so because it has not been shown that procedure for making appointment by promotion against such additional posts is different than the one prescribed for normal promotion.

Policy contained in Letter dated 9.10.2003 has been framed with a view to strengthen and rationalize the staffing pattern. For this purpose, the Ministry of Railways undertook review of certain cadres. The basis of the review was functional, operation and administrative requirement of the Railways. This exercise was intended to improve efficiency of administration by providing incentives to existing employees in the form of better promotional avenues and at the same time requiring promotees to discharge more onerous duties. The policy envisaged that additional posts becoming available in the higher grades as a sequel to restructuring of some of the cadres should be filled by promotion by considering such of the employees who satisfy the conditions of eligibility including minimum period of service and who are adjudged suitable by the process of selection. This cannot be equated with upgradation of posts which are required to be filled by placing existing incumbents in the higher grade without subjecting them to the rigor of selection. It has therefore to be held that the Railway Board did not commit any illegality by directing that existing instructions with regard to the policy of reservation of posts for SC and ST will apply at the stage of effecting promotion against the additional posts. The Tribunal committed serious illegality by striking down para 14 of letter dated 9.10.2003. Matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of employees fall within the exclusive domain of employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. Power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated by mala fides. The court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also open to the court to make comparative evaluation of the merit of the candidates. The court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration."

(emphasis supplied) In Pushpa Rani, this Court while considering a scheme contained in the letter dated 9.10.2003 held that it provided for a restructuring exercise resulting in creation of additional posts in most of the cadres and there was a conscious decision to fill-up such posts from promotion from all eligible and suitable employees and, therefore, it was a case of promotion and, consequently, reservation rules were applicable.

21. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge :

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity.

Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both -

that is advancement to a higher position and advancement to a higher pay scale - are described by the common term 'promotion', does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale.

In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor.

Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation. A

(v) Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(v) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation.

22. In this case, the BCR scheme did not involve creation of additional posts but merely restructured the existing posts as a result of which 10% of the posts in Grade III were placed in a higher grade (Grade IV) to give relief against stagnation. This is evident from the terms of the BCR scheme and the clarification contained in the letter dated 7.5.1993 that no posts were sanctioned, as far as 10% BCR was concerned.

23. In this case, the BCR scheme dated 16.10.1990 provided that the persons who had completed 26 years of service would be screened by a duly constituted Review Committee to assess the performance and suitability for advancement. The screening was for the limited purpose of finding out whether the service record of the employee contained any adverse entries or whether the employee had suffered punishment. The screening process did not involve consideration of comparative merit nor involve any selection.

The 10% posts were upgraded strictly by seniority subject to screening. This is evident from the terms of BCR scheme and the Circular dated 13.12.1995 which provided that the promotions to Grade IV were to be based on seniority in the basic grade from among the officers in Grade III, subject to fitness determined as per OTBP manner, that is screening to ascertain whether there are any adverse comments or punishment against the employee concerned.

24. To sum up, the BCR scheme was an upgradation scheme to give relief against stagnation. It did not involve creation of any new posts. It did not involve advancement to a higher post. It did not involve any process of selection for conferment of the benefit of higher pay-scale. The upgradation was given to the senior most 10% of BCR scale employees in Grade III strictly as per seniority. BCR scheme as per circular dated 16.10.1990 was thus a scheme for upgradation simplicitor without involving any creation of additional posts or any process of selection for extending the benefit. Such a scheme of upgradation did not invite the rules of reservation.

25. We accordingly allow these appeals, set aside the orders of the High Court and the Tribunal and dismiss the Original Applications challenging the order of the telecom department dated 8.9.1999.

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(R V Raveendran)

New Delhi;

September 6, 2011.

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(Markandey Katju)