

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 25.05.2015

+ **WP(C) No.7545 of 2011**

SAURABH DUBEY & ORS. Petitioners

Through: Ms. Jyoti Singh, Sr. Adv.
Mr. Ankur Chhibber, Mr. Sameer Sharma &
Mr. Amandeep Joshi, Advs.

Versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Sanjay Jain, ASG with
Mr. Amit Mahajan, Mr. Manish Mohan,
Ms. Monika Arora, Mr. Rajesh Gogna,
Mr. Vivek Goyal, CGSCs, Mr. Arnab &
Mr. Abhishek Chaudhary, Advs. for the
UOI.
Ms. Rekha Palli & Ms. Garima Sachdeva,
Advs. for the Private Respondents.

+ **WP(C) No.596 of 2012**

AMIT KUMAR GUPTA & ORS. Petitioners

Through: Mr. P. Vinay Kumar, Adv.

versus

UNION OF INDIA & ANR. Respondents

Through: Mr. Sanjay Jain, ASG with
Mr. Amit Mahajan, Mr. Manish Mohan,
Ms. Monika Arora, Mr. Rajesh Gogna,
Mr. Vivek Goyal, CGSCs, Mr. Arnab &
Mr. Abhishek Chaudhary, Advs. for the
UOI.

+

WP(C) No.4980 of 2012

DEV SHARMA

..... Petitioner

Through: Ms. Jyoti Singh, Sr. Adv.
Mr. Ankur Chhibber, Mr. Sameer Sharma &
Mr. Amandeep Joshi, Advs.

versus

INDO-TIBETAN BORDER POLICE & ANR.

..... Respondents

Through: Mr. Sanjay Jain, ASG with
Mr. Amit Mahajan, Mr. Manish Mohan,
Ms. Monika Arora, Mr. Rajesh Gogna,
Mr. Vivek Goyal, CGSCs, Mr. Arnab &
Mr. Abhishek Chaudhary, Advs.

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WP(C) No.7104 of 2012

JITESH KUMAR POTFODE & ANR.

..... Petitioners

Through: Mr. P. Vinay Kumar, Adv.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Sanjay Jain, ASG with
Mr. Amit Mahajan, Mr. Manish Mohan,
Ms. Monika Arora, Mr. Rajesh Gogna,
Mr. Vivek Goyal, CGSCs, Mr. Arnab &
Mr. Abhishek Chaudhary, Advs. for the
UOI.

+

WP(C) No.7287 of 2012

ANAND PRAKASH

..... Petitioner

Through: Ms. Jyoti Singh, Sr. Adv.
Mr. Ankur Chhibber, Mr. Sameer Sharma &
Mr. Amandeep Joshi, Advs.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Sanjay Jain, ASG with
Mr. Amit Mahajan, Mr. Manish Mohan,
Ms. Monika Arora, Mr. Rajesh Gogna,
Mr. Vivek Goyal, CGSCs, Mr. Arnab &
Mr. Abhishek Chaudhary, Advs.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.

1. These batch of writ petitions have impugned the Office Memorandum dated 26.11.2010 issued by the respondents whereby the officers of Minor Cadres have been merged with that of the GD Cadre and a combined seniority list of the General Duty Cadre Group A officers (hereafter referred to as the “ GD Cadre”) have been notified along with Minor Cadres officers. Furthermore, the seniority of the officers has been fixed on the basis of their respective date of appointment, as a result whereof the petitioners have been placed below the private respondents (in these writ petitions) in the seniority list. It is the petitioners’ case that they had been selected earlier than the private respondents who had been selected subsequently by their respective selection body. They have accordingly, sought quashing of the orders dated 1.4.2011, 5.5.2011 along with the Office Memorandum dated 26.11.2010 and the combined seniority list dated 1.12.2010. The petitioners further seek a writ of mandamus for maintenance of a

separate seniority list of the GD Cadre officers and the Minor Cadre officers who have been appointed prior to 5.10.2010 or in the alternative, a writ of mandamus directing the respondents to place the private respondents below the petitioners in the combined seniority list, if continued.

2. The petitioners' case is that they are Group 'A' General Duty (GD) Cadre officers of the Indo-Tibetan Border Police Force (for short 'ITBPF'), which was constituted by the Ministry of Home Affairs (hereafter referred to as the "MHA") after the Chinese Aggression in the year 1962 under the provisions of the ITBPF Act and Rules; that they had applied for the post of Assistant Commandant/GD in Central Police Organizations, Group 'A' and after having cleared the written examination conducted by the UPSC, they appeared before the interview board in August/September, 2004 and were finally selected on 30.9.2004; that in July, 2004, after having cleared the written examination, they were called for PET and DME; that the appointment letter was sent after a delay of nine (9) months in July, 2005; the petitioners joined the ITBP Academy on 7.8.2005; on successful completion of their training on 3.11.2006, they were posted in different battalions. Correspondingly, the respondents initiated the process of recruitment of Assistant Commandants in the Telecom Cadre and constituted a Special Selection Board in September, 2004. On 17.1.2005, the private respondents were asked to appear before the Board for verification of documents, physical measurement and PET. The candidates who qualified were asked to appear in the written examination.

The candidates who were successful in the written examination were called for interview and medical examination on 21.1.2005. The result of successful candidates was declared in March, 2005 and in the subsequent month, they were offered appointment for the post of Assistant Commandants (Telecom). Between the period 6.6.2005 and 8.8.2005, these Assistant Commandants (Telecom) joined different ITBPF Battalions on different dates, as they were not required to undergo training in the first instance, hence, they were sent directly to their allotted units. Likewise, the officers of the MT Cadre also joined the ITBPF between April-June, 2005 on the basis of the results declared by another Special Selection Board of the ITBPF. Vide Memorandum dated 27.8.2008, the respondents notified the *inter se* seniority of direct recruits (AC/GD) in respect of officers of the GD Cadre only. Ms. Jyoti Singh, the learned Senior Advocate for the petitioners, would submit that the aforesaid process would show that the selection process of the GD Cadre officers is far more difficult, onerous and involving different qualification parameters such as having to undergo a long training before they were actually appointed to the said post.

3. On 5.10.2010, the respondents issued a notification purporting to amend the recruitment rules of the ITBPF General Duty Cadre, 2010 (hereinafter referred to as the 'new RRs'). These RRs amended the following six previous recruitment rules:

“i. ITBP Force General Duty Cadre Group ‘A’ Post Recruitment Rules 1999,

- ii. ITBP Telecommunication Cadre (Group 'A' and 'B' Posts) insofar as they relate to Group 'A' post,
- iii. ITBP Force, Deputy Commandant (Transport) and Assistant Commandant (Transport) Recruitment Rules, 2002,
- iv. ITBP Force, Armourer Cadre (Group 'A' and 'B' Posts) 2007 insofar as they relate to Group 'A' post,
- v. ITBP (Electronic Data Processing Cadres) Recruitment Rules, 1981 insofar as they relate to the post of Company Commander (Programmer); and
- vi. ITBP Force, Second-in Command (Transport) Recruitment Rules, 2007.

New Recruitment Rules are called as ITBP Force General Duty Cadre Group 'A' Posts Recruitment Rules, 2010."

4. Pursuant to the above, an order of merger of the GD Cadre with the Minor Cadre was issued on 26.11.2010. Five (5) days later, on 1.12.2010, a combined seniority list of the GD Cadre and the Minor Cadre was issued whereby officers of the Minor Cadre have been placed above the GD Cadre officers. The petitioners' case is that although both the UPSC and the selection body concerned had selected them earlier in time, delays in the subsequent process of appointment owing to bureaucratic and/or procedural delays at the hands of the respondents including the period of delay of nine (9) months in simply notifying the appointment letter cannot put them lower in the seniority list than the officers of the Minor Cadre. However, the combined seniority list does exactly the same. It places the officers of the Minor Cadre above the officers of the GD

Cadre. Their representation dated 30.12.2010 to the Director General, ITBPF was rejected on 1.4.2011 and 5.5.2011. The petitioners submit that the orders disposing off their representation did not deal with the issues raised by them. A further representation to the Secretary, Home Affairs did not elicit any response either.

5. Representing the petitioners, Ms. Jyoti Singh, the learned Senior Advocate would submit that the purported merger of the Cadres and the combined seniority list is wholly illegal and fraught with any number of legal as well as operational difficulties which have not been surmounted as per the procedure laid down. She contends that:
 - i. the nature of functions discharged by the Cadres are entirely different as they mandate specialised and trained wherewithal to discharge the duties assigned to each of the Cadres;
 - ii. the induction into different Cadres was based upon different/specialised basic educational qualification and consequent training as well as on the job capacity building which prepared them for a separate set of duties which is not interchangeable at a higher/supervisory level (Commandant level);
 - iii. the RRs for recruitment of the officers to the GD Cadre (Telecom), MT Cadre, etc. were different and for a good reason, they could not have been merged or lumped together at a supervisory level solely on the ground that it would

provide better promotional avenues to officers of different Cadres, which would enable them to keep their morale high; that the ground for merger so as to provide promotional avenues itself would be belied by the fact that in September, 2009, a proposal was sent to the Ministry of Home Affairs for restructuring of post in Minor Cadres and to grant additional post for promotion in the said cadres. The said proposal was approved by the Government and a formal sanction was issued on 17.2.2011 granting additional posts for the promotion in the said cadres. In such circumstances, seeking to provide promotional avenues by way of merger is obviously without any basis or justification.

- iv. the officers on the GD Cadre are the main combat arm of the ITBPF while the Minor Cadres or the Technical Cadres provide specialised logistical support to the fighting/combat forces. The duties of the fighting force and the duties of the technical/Minor Cadres are not interchangeable since it requires special skills set to discharge the functions of the each Group.
- v. a glance of the nature of training, apart from the training schedule, imparted to the Assistant Commandants of the different Cadres of the GD Cadre vis-à-vis the minor/technical Cadres would show that each of them have been trained to impart and equip them with different skill sets as may be required in the discharge of their duties:

Assistant	Commandant/GD	Technical Cadres/Minor Cadre
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Cadre	
Required to undergo rigorous training of 54 weeks.	Required to undergo 16 weeks of training.
To undergo two mandatory promotional courses viz. Commando Course and Battalion Support Weapon Course besides other courses and to have at least 5 years of experience to be eligible for next promotion of Deputy Commandant. In those five years a GD Cadre officer performs the duty of a Company Commander and performs various related tasks such as leader in many Long Range Patrolling, Short Range Patrolling, Rescue Operations, Expedition, Counter Insurgency Operations and leads a Company (128 personnel) in Sector Level and Battalion Level War Exercises, including on the Border against China, endeavours to make him capable of commanding a battalion comprising six such companies	Officers of the Minor/Technical Cadre are not required to undergo the Commando and BSW Course for the next promotion nor are they supposed to perform any duties for the five years. All they do that they perform their own specialised duties as surveillance, support, logistical arms of the Force. The learned senior counsel would submit that although the duty of the technical/minor cadre may not be the same as that of the General Duty Cadre nonetheless each wing would be deemed to be as important since the Force works as one Unit with the combined inputs with all its different wings. The Force would be severely handicapped if the output or required skill set of one wing were to be compromised or

and other elements in future. Thus, making the said officer battle ready with immense experience of actual combat.	lessened in any way by introducing personnel who do not have the requisite expertise or experience.
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vi. from the aforesaid, it is clear that one Cadre could not discharge the duties of the other.

6. The impugned OM dated 26.11.2010 reads as under:

“Sub: Merger of 4 Specialist Cadres (Telecom, Motor Transport, Armourer and EDP (Electronic Data Processing) cadre with General Duty Cadre, Group ‘A’ posts and related matters.

Consequent upon approval of Government of India on the subject cited above, the revised Recruitment Rules have been framed and published/notified in the Gazette of India vide Notification dated 5th October 2010 of Ministry of Home Affairs. With the issuance of the aforesaid notification, the Recruitment Rules of Group ‘A’ posts, which were in vogue till now, in respect of above cadres stand superseded.

2. In consonance of the revised Recruitment Rules notified on 5th October, 2010, as stated above, a combined seniority list of all the five cadres viz. General Duty, Telecom, Motor Transport, Armourer and EDP cadres is under process for circulation in terms of DoP&T advice contained in their note dated 9.3.2010 which provides that the seniority of the incumbents of the merged cadres will be counted from the date they are holding the post originally on a regular basis. Accordingly, the combined seniority list is being prepared.

3. The Director General, ITBP has desired that the above decision of the Government be formally brought into the notice of all affected officers in appropriate forums and Sainik Sammelans at the Frontiers, Sector and unit levels so that there is no scope for lack of clarity in this regard.”

7. The learned Senior Counsel submits that the said OM is illegal because it seeks to merge four (4) dissimilar Cadres; that the said OM suffers from procedural lapses inasmuch as the requisite approval of the (i) Ministry of Law, (ii) the Department of Personnel and Training, (iii) the UPSC and (iv) the Ministry of Finance was not taken despite the repeated advisories on the issue by the Ministry of Law; that by merging all the four Cadres, the seniority of the petitioners has been reduced. The learned senior counsel refers to the Government of India Business Rules which mandates a prior consultation with the Ministry of Finance in matters where financial outlay would be required. She submits that according to the affidavit of the Government of India, there is an admission to the lapse of procedure and that in the affidavit filed pursuant to the orders of this Court dated 22.4.2013, which directed the respondents to place on record the relevant material whereby the Cadre merger of ITBP was approved by the Competent Authority, the respondents have *inter alia* submitted that “*before taking the final decision on merger inter ministerial deliberations i.e. MHA, DOP&T and MoL took place on the issue of fixation of inter seniority consequent upon the merger and for making the rules effecting the merger of Telecom, EDP, TPT and Armourer into GD cadre and same was done with the approval of*

Home Minister by notification of the rules in official Gazette vide GSR 811 (E) dated 5.10.2010.” She submits that there was no justification for the proposal in the first place because mergers would ordinarily be done in the case of Driving Cadres whereas in the present case, the Technical Cadres are not Driving Cadres and this is reflected from the Ministry of Finance, Department of Expenditure’s note which reads as under:

“Sub: Merger of Driver/MT and Motor Mechanic Cadre and re-designation of the posts of Constable to Inspector in the new cadre.

Ref: MHA File No.1/12013/15/2009-Org.(Main)

The proposal of MHA on the above mentioned subject has been examined by this Department and the following observations are made:

- a. No functional justification has been given in support of merger of the MT driver and Motor Mechanic Cadre of ITBP. It has also not been explained as to what are the specific functional/operational requirements which are not being met in the present set up. Providing promotional avenues is the only justification stated in the proposal.
- b. The rationale of merging distinct ‘Technical’ and ‘General’ cadres are required to be examined for issues like redefinition of duties and responsibilities, and related cadre management issues like competing claims for higher positions by personnel holding dissimilar qualification.
- c. It is also felt that after the proposed merger of the two cadres, the base of the cadre with significant financial implication would be very broad and certainly, there will arise demands for higher posts in the hierarchy, with creation of posts at all levels.

2. MHA may, therefore, examine all the above aspects before taking a final decision on the matter. It may also be noted that MACP scheme takes adequate care of stagnation. ITBP, may, therefore, be advised that frequent structural changes in the established cadres should be avoided without very strong functional justification.”

8. The proposal for framing the recruitment rules of Group ‘A’ posts for ITBP dated 8.2.2010 was premised on the following justification:

“5. The main justification for amalgamation of four cadres with the GD cadres is that there is stagnation in various cadres and there is lack of promotional prospects. Management of so many cadres is becoming very difficult. The proposal for amalgamation of the cadres has been discussed at great length internally in the official circles and there is general consensus for amalgamation.

XXXX XXXX XXXX XXXX XXXX

7. Only one issue that is sorted out in this case relates to inter se seniority in the amalgamated cadre between GD cadres and other cadres which are being amalgamated with GD cadre. It could be based on two principles i.e. one the telecom cadre, motor transport etc. could placed en-block junior to the persons in the GD cadre or their date of appointment in the particular year could be the basis. We may request DOP&T to indicate broad principles for such amalgamation. In case they have issued any orders in this regard, a copy of the same may be placed on file.”

9. To this, the response of the DoPT dated 8.3.2010 is as under:

“MHA have submitted the proposal for framing/amendment of RRS for Gr.A posts in General Duty cadre in ITBP. The existing RRS for the Gr.A posts in General Duty cadre

notified in the year 1999 is at p.7/c. The existing RRS for the Specialists Cadre are also placed in the file at p.25-62/c. The present proposal involves merger of 4 Specialist cadres i.e. Telecom, Motor Transport, Armourer and EDP with General Duty cadres. The justification for the same is detailed in MHA notes at pre-pages.

2. The draft notification in respect of ITBP General Duty Gr.A posts RRs placed below have been examined and our observations on the same are as below:

i. In the heading of Col.11, the words “percentage of posts” need to be revised as “percentage of vacancies”.

ii. the entries under Col.11 for the post of Inspector General (GD) shall accordingly be revised as (i) 50% by promotion failing which by deputation of IPS officers and (ii) 50% by deputation of IPS officers.

iii. For the post of Deputy Inspector General (General Duty), the entries under col. 11 shall be revised as (i) 80% by promotion and (ii) 20% by Deputation of IPS officers.

iv. MHA may satisfy themselves in respect of entries pertaining to age of superannuation mentioned in the notification and also that the posts are exempted from the purview of UPSC.

3. Subject to the above and also incorporating the corrections as shown, the draft RRs are in order and may be approved. The 4 draft notifications to denotify the Specialist cadre are also in order and may be approved. On the issue of inter se seniority in the amalgamated cadre, the matter may be referred to Estt.D.”

10. In the meanwhile, after carrying out the necessary corrections, the draft Recruitment Rules was forwarded by the DIG, ITBP to the MHA to obtain the concurrence of the DoPT on 18.3.2010. The

Ministry of Law, advised the Ministry of Home Affairs vide its note dated 29.3.2010, as under:

“Dy. No.575/10

The draft forwarded by the administrative Ministry has been tentatively examined in this Department. On examination it is found that the subject matter is concerned with merger of 4 Specialist Cadres (Telecom, Motor Transport, Armourer and EDP (Electronic Data Processing) cadres with General Duty Cadre, Group ‘A’ posts and framing/amendment of RRs on common seniority basis. Therefore concurrence of Ministry of Finance is required.

2. From the perusal of the notes on pre-pages, it appears that the proposal has not been got approved from the competent authority i.e. the Hon’ble Minister concerned. So, before forwarding the proposal to this Ministry, the same may be got approved by the competent authority.

3. The recruitment rules have not been prepared as per guidelines issued by DOPT vide their OM dated 24th March, 2009. The same may be prepared accordingly.

4. In the Schedule against the post of Assistant Commandant (General Duty) in column 11 regarding method of recruitment, 50% is by direct recruitment. Therefore, consultation and approval of the UPSC is necessary in this regard before forwarding the file to this Ministry for vetting.”

11. Taking the same into consideration, the ITBPF noted as that:

“MHA may kindly refer to the notes of MOL(LD) dated 30.3.2010 on page 14/n.

2. As suggested by MOL(LD), parawise reply are mentioned below for their kind consideration please.

a. In the event of merger of 4 specialist cadres namely Telecommunication, Motor Transport, Armourer, and Electronics Data Processing cadres with General Duty cadre, there is no creation of additional posts are required. Therefore, concurrence of Ministry of Finance may not be needed.

b. Regarding approval of competent authority in MHA in this proposal MHA may kindly decide to this aspect and reply to MOL(LD) accordingly to their satisfaction.

c. As per the advice of MOL(LD) the note mentioned in DOP&T instructions contained in their O.M. dated 24.3.2009 have suitably been added below column 12 under heading “By promotion” and “By deputation”.

d. With respect to recommendation given by MOL(LD) in para 4 of their note, MHA may kindly evaluate this aspect and informed to MOL(LD) accordingly.

3. MHA, are therefore, requested to refer the file to MOL (LD) for final vetting by them after considering the above aspects in MHA.”

12. However, on 5.4.2010, the MHA noted:

“Reference notes on pages 14-15/N. The proposal in the file relates to notification of RRs of Group ‘A’ post in ITBP. One of the item include in the RRs relates to notification of RRs for the post of DIG and this is included in the Annual Action Plan 2009-2010.

2. The observations of MOL on page 14/N may please be perused. ITBP in their note on page 15/N have clarified most of the issues raised by MOL(LD). However, the following two issues needs further elucidation:

(i) The proposal has been processed based on the general principles with the approval of Hon'ble Home Minister. In this connection MHAs orders at pages 68-70/c may please be perused. It is further clarified in the case of notification of RRs for the post of DIG. General principles of the proposal has been approved by the Hon'ble HM in the case of another CPMF and in this case fresh approval of HM is not required.

(ii) The RRs have been approved by JS (P.II) in the Administrative Wing (P.7/N). DOP&T have scrutinised the RRs several times and given their concurrence vide notes on page 10/N. DOP&T have also given guidelines for merger of specialist cadres of ITBP and in this connection notes on page 9/N may please be seen. With regard to consultation with UPSC, as mentioned in para 4 of Legislative Department's note, it is clarified that ITBP is exempted from the purview of the UPSC's consultation. This is mentioned in the RRs. Further with regard to Asstt. Commandants/GD the proposed RRs are based on the existing RRs as copy of which is also placed on file. We may request MOL(LD) to process the case on priority basis."

13. But on 27.4.2010, the ITBPF recorded the observations of the Ministry of Law, in particular on the issues that the approval of the Ministry of Finance/Cabinet is required since the proposed merger will involve transfer of posts and merger of cadres up to the level of IG in consultation with the UPSC since 50 per cent of posts of Assistant Commandant (GD) were filled up through direct recruitment.
14. The views of the ITBPF on the observations raised by the Ministry of Law is as under:

“3. Our views on the observations raised by the MOL (LD) are

as under:

(i) Proposed merger is based on the established system in other Border Guarding Forces i.e. BSF, and SSB. Accordingly we have proposed that the work related to Telecom, M.T., Armourer and EDP will be looked after by GD cadre by way of proposed merger. This is time tested system and may kindly be agreed to.

(ii) Officers of specialist cadre were directly recruited on the basis of some terms and conditions, now since these terms and conditions are likely to be changed in the event of proposed merger. Therefore, the provision of willingness has been kept to avoid any legal complications in the later stage. But if Ministry of law feels that such willingness/option clauses are not required then this can be done away with.

(iii) This issue may kindly be dealt by MHA to decide the competent authority who will approve this proposal.

(iv) With the proposed merger, the creation of the post is not involved. With all the probabilities, the specialist cadre officers will be employed in their field of specialisation only. Only a few, who cannot be accommodated in their field of specialisation will be required to be used on other jobs as per requirement. This arrangement is a time tested arrangement as it is working well in BSF, SSB and CRPF which are much larger forces than ITBP. However, MHA may like to comment on this point.

(v) Although, 50% vacancies of Assistant Commandant (General Duty) cadre posts of all CPMFs i.e. ITBP, BSF, CRPF and SSB are being filled up by direct recruitment through UPSC, but with proposed merger we are not, in any way changing the terms and conditions of recruitment of Assistant Commandant (General Duty). However, MHA may take a view on this aspect in light of UPSC letter No.F.1/49/69-SII dated 6-8-1969 and letter No.14/26/68-BS.II/P.VII (Vol.II) dated 4-11-1969 (copies placed in file at F'A' & B').”

15. On 6.5.2010, the Ministry of Home Affairs noted as under:

“2. The proposal does not involve transfer of posts and merger of Cadres upto the level of IG as no post of IG or DIG has been sanctioned in the Telecom, MT, Armourer & EDP cadres in ITBP. As such merger of post of the level of Commandant to Asstt. Commandant can be done by re-classification of posts in consultation with IFD and approval of Home Secretary as this does not involve any additional financial implication or any change in the total strength. Earlier one post of 21/C of GD cadre & 2 posts of DCs were transferred into TPT cadre, with the concurrence of IFD & approval of SS (IS) (Copy placed at Flag ‘A’).”

16. On 21.6.2010, the ITBPF noted as under:

“2. Contrary to bigger force (BSF and CRPF), ITBP is having too many small cadres and do not have any promotional prospects due to which there is discontentment in these cadres. Keeping this factor in mind organisational structure of BSF and CRPF studied and on the basis of their time tested system ITBP also explored the possibility through a series of presentations and discussion with D.G. and concerned cadre officers. On the basis of this, ITBP proposed for merging of specialist cadres i.e. Motor Transport, Communication and Armourer only at supervisory level i.e. Assistant Commandant (GD) onwards. The same system is prevalent in BSF and CRPF which can be seen from their reply vide UO No.17/60/2009-Pers/BSF 19118 dated 24-5-2010 and P.VIII/3/2010-Pers-DA-1 dated 19-5-2010 respectively. Similar proposal was mooted by SSB also but it could not be materialised due to some observations raised by UPSC.”

17. On 24.6.2010, the MHA noted as under:

“2. The proposal has been processed and concurrence of DOP&T has been obtained (vide pages 8-10/N). The file

has been referred to MOL for concurrence. They have raised certain observations and these has been discussed by officials of ITBP. The issues raised and the replies of ITBP may please be perused on pages 19-20/N. ITBP have satisfactorily explained the issues raised. However two issues are to be sorted out. They are (i) merger of three cadres in ITBP as Group 'A' service and (ii) approval of competent authority i.e. Home Minister in this case.

3. With regard to the above it has been ascertained from the other Forces, CRPF and BSF do not have separate cadre called Motor Transport Cadre, Telecommunication Cadre, Armourer Cadre and these posts are filled up through Group 'A' post General Duty Officers who have undergone training in the related field. ITBP propose to remodel their RRs on these lines. In BSF also similar system is in vogue. Hence may be process the proposal and seek concurrence of MOL.

4. With regard to approval of competent authority it is felt that approval of SS(IS) is adequate in this case because this is within the overall principles being followed in other CPMFs. The file may be shown to SS(IS) before this is referred to MOL.”

18. Meanwhile, the Ministry of Law again reiterated its objections in the following terms:

“Dy. No.1405/10-SRO

The notification placed on the file relates to merger of 4 specialist cadres (Telecommunication, Motor Transport, Armourer and EDP of cadre) Group 'A' posts with the General Duty Cadre, Group 'A' posts and framing of Recruitment Rules of General Duty Cadre on common seniority basis on common seniority basis.

From the perusal of the notes on pre-pages, it appears that it was suggested to the administrative Ministry to consult and obtain the approval of the UPSC before the merger of the specialist cadres with the General Duty cadre of the ITBP is sent for vetting in this Department.

From para 1 of the page/23 – note and the fax message from the Sashastra Seema Bal placed in the correspondence part of the file it is observed that similar proposal was mooted by the SSB also but it could not be materialised due to some observations raised by UPSC.

Para 2 of the Note OM No.AB.14017/31/2008-Estt. (RR) dt. 24th March, 2009 of the DOPT reads as follows:

“...All Ministries/Departments are, therefore, requested to effect necessary amendments to the Recruitment Rules/Service Rules notified by them after following the normal procedure of furnishing proposals to the Department of Personnel and Training and the UPSC in the format prescribed in the general guidelines on Recruitment rules circulated by the DOPT OM No.14017/12/87-Estt. (RR) dated 18.3.1988 and also in consultation with Legislative Department.”

Under these circumstances, it is suggested that the administrative Ministry may refer this proposal to the UPSC before the same is submitted to this Department.”

19. In any case, the Ministry of Home Affairs went on to record as under:

“(i) ITBP is exempted from the requirement of the consultation with UPSC. In this connection a copy of the letter received from UPSC may please be seen at F/B.

(ii) With regard to reference to SSB mentioned at X on page 25/N it is felt that the same may not be relevant in this case

because there are other two CPMFs i.e. CRPF and BSF where these Forces do not have separate cadre called Motor Transport Cadre, Tele-communication Cadre, Armourer Cadre etc. Present merger in ITBP is on the lines of CRPF/BSF since there is a clear cut precedent and prevent practice of merger in other CPMFs, we may impress upon MOL(LD) to give concurrence to the proposal at the earliest. May please see.”

20. But the Ministry of Law on 5.8.2010, once again noted:

“Dy. No.1575/10-SRO

The draft notification placed on the file relates to merger of four specialist cadres Group ‘A’ posts i.e. Telecommunication, Transport, Armourer and Electronic Data Processing with General Duty Cadre Group ‘A’ post and framing of Recruitment Rules of General Duty Cadre on common seniority basis in the Indian Tibetan Border Police Force.

It was suggested earlier by this department to the administrative Ministry to consult and obtain the approval of the UPSC before the merger of the specialist cadres with the General Duty cadre of the ITBP because 50% of the Assistant Commandant (General Duty) vacancies are to be filled through direct recruitment and 17% of the vacancies are to be filled by Limited Departmental Competitive Examination through Union Public Service Commission. In column 14 of the Schedule relating to the post of Assistant Commandant (General Duty), it has been provided that consultation with the UPSC is necessary for direct recruitment and Limited Departmental Competitive Examination.

Further, it may be noted here that the UPSC has not agreed to the merging of the cadres of General Duty and Telecommunication on the proposal of the SSB to have a

common Assistant Commandant level. (ref. reply to the administrative Ministry on the subject by the SSB vide File No.3/1/SSB/SSB/CSC/GC/03-1039 dated 21-5-10).

It is observed with reference to the note of the administrative Ministry at page 26/N and the UPSC's letter dated 6th August, 1969 placed on file as Annexure 'B', it is presumed that the ITBP is also exempted from seeking approval for the merger of the cadres as proposed by the administrative Ministry. However, since the recruitment shall be conducted through UPSC and the proposal of the SSB regarding merger of technical posts which is also akin to the present proposal is suggested that the administrative Ministry may get the approval of the UPSC before sending this notification for publication.

Subject to the above, the draft as modified is formally in order. However, the administrative Ministry may before issue ensure that the draft as modified meets with their intention and requirements.”

21. The Ministry of Home Affairs, on 19.8.2010, read the conditional approval of the draft as being a complete approval and noted as under:

“3. The case has been pending for quite sometime. We have referred the case to MOL on several occasions, finally in their note on page 27/N they have modified the draft and stated that it is formally in order. DOP&T has given concurrence to the proposal at the level of Secretary (P).

4. In the light of the above, it is proposed that we may finalise the RRs, as amended by MOL and send to MOL (O.L. Wing) for Hindi version of the RRs. A clean copy of the amended RRs is placed at F/D.

5. The file may be submitted for kind consideration and approval of Hon'ble H.M.”

22. The learned Senior Counsel for the petitioners submits that the aforesaid correspondence itself would show that the consultation as prescribed in the Government Guidelines on framing/amendment/relaxation of Recruitment Rules dated 18.3.1988 and 2010 have not been followed. The said Guidelines required the approval of the Secretary which *inter alia* required consultation with the DoPT and the UPSC. The relevant portion reads as under:

“CONSULTATION WITH DOPT

2.4 Ordinarily, the draft Recruitment Rules will be returned by the Department of Personnel & Training with their comments, within a month from the date of reference to that Department. If the circumstances of a case require more time for scrutiny/discussion, the administrative Ministry/Department will be inform of the same and where there are many points for clarification, the Ministries may also be requested to discuss the case with the officers of the Department of Personnel & Training.

CONSULTATION WITH UPSC

2.5 After obtaining the concurrence of the Department of Personnel & Training, the Administrative Ministry/Department should refer the draft Recruitment Rules for posts/services which are within the purview of the UPSC in a self-contained letter to the Commission, along with the information in the prescribed proforma (Annexure II). It should be stated in the letter to the Commission whether the clearance of the Department of Personnel & Training (and also the Department of Pension & Pensioners' Welfare where required) has been obtained in respect of the

proposals in question. Where the procedure for consultation with the Commission has been followed and information necessary for consideration of the proposal has been fully given, it should be possible for the Commission to convey their advice ordinarily within 4 to 5 weeks. If the Commission's advice is not received within this time, the administrative Ministry/Department may settle the matter by personal discussion with the officers concerned in the Commission."

23. The learned Senior Counsel for the petitioners argues that the petitioners have been seriously prejudiced inasmuch as their seniority has been reduced from No.1 to No.17 after the alleged merger; that the correspondence between the Ministry of Home Affairs, the Ministry of Law and the Ministry of Finance show that the requisite clearance from the concerned Ministries have neither been obtained nor has the UPSC been consulted. Therefore, the issuance of notification of merger of cadres is without due authority of law and it accordingly, needs to be set aside. The learned senior counsel refers to the objections raised by the Ministry of Finance, Department of Expenditure on 21.10.2010 with respect to the merger of the Driver/MT and the Motor Mechanic Cadre and re-designation of the posts of Constable to Inspector in the new cadre. The objections were to the effect that no functional justification had been given in support of merger of the MT driver and the Motor Mechanic Cadre of ITBP. It has also not been explained the specific functional/operational requirements which are not being met in the present set up. Providing promotional avenues is the only justification stated in the proposal.

She submits that in response, the matter was examined by the Directorate General, the ITBP and the Ministry of Home Affairs which sought to circumvent the observations of the Ministry of Finance as well as the Ministry of Law by observing that since there was no financial implication in the proposal to merge the four specialist cadres, the concurrence of the Ministry of Finance may not be needed. The Ministry had advised that the MHA should examine all the above aspects before taking a final decision in the matter. It further drew the attention to the fact that the MACP scheme takes adequate care of stagnation and further suggested that the ITBP would be better advised if it were to be prudent to avoid frequent structural changes in the established cadres unless such structural changes are supported by strong functional justification.

24. It is argued that the mere merger of the two cadres of Driver/MT and Motor Mechanic attracted serious objections by the Ministry of Finance. However, in the present case, the ramifications would be far more since the nature of duties discharged by the five different cadres, which are sought to be merged, are as diverse as each can be. Therefore, there could not be and indeed, there was no functional justification for the merger of the established cadres. Indeed, the Government has given no justification for the merger and the entire discussion has all along been for the post merger of the senior cadre at supervisory level but there is no discussion, let alone justification for the aforesaid decision. She submits that the inter-departmental consultations are a requisite under the

Government of India Transaction of Business Rules, in particular Rules 2 & 2(c) thereof which require one department to seek the concurrence of all such departments which are concerned with that department. In particular, it stipulates that no department shall issue any orders without the prior concurrence of the Ministry of Finance if a matter relates to number or grade of posts, to pay or allowances having financial implications. The concurrence of the Ministry of Finance in this regard is absent.

25. She further states that the OM dated 24.3.2009 has suitably been amended by promotion and by deputation. Therefore, the issue of 80 per cent by promotion and 20 per cent by deputation has also been met, with respect to 50 per cent by promotion and 50 per cent by deputation.
26. It is further argued that the nature of duties discharged by the different Cadres is as diverse as it can be and for personnel to be appointed into the various Cadres a specific educational qualification is a pre-requisite. Subsequently, Cadre specific training has to be undergone by the personnel of the respective cadres; that for the GD Cadre, a simple degree of Graduation from a recognised university was all that was required whereas for the Technical Cadres, a Diploma or Degree in Automobile or Mechanical Engineering was required. The difference in educational qualification itself lays the foundation for the nature of duties which would be undertaken by them; that the officers of the GD Cadre were first appointed as Assistant Commandant and were required to undergo rigorous training of 54 weeks (63 weeks in the

case of the petitioners) as compared to the officers of the Technical Cadres who were required to undergo merely 16 weeks of training; that the training, orientation of the officers of the Technical Cadres is entirely different from the GD Cadre and they were neither trained nor equipped to undertake the work of the GD Cadre – which is the main strike force of the ITBPF; that the ITBPF itself had recognised the need for willingness of the officers who were directly recruited since these specialist cadres had come on the basis of some terms & conditions which are now sought to be changed in the event of the merger.

27. The ITBPF further sought the opinion of the Ministry of Law whether the willingness/option clauses would be required or could be done away with. However, the willingness of the officers of the Technical Cadres was never addressed by either the ITBPF or the Ministry of Home Affairs. They simply referred to the absence of a separate Motor Transport Cadre, Telecommunication Cadre, Armourer Cadre, etc. in the CRPF and the BSF to justify the proposed merger of other Central Paramilitary Forces.
28. In reply, Mr. Sanjay Jain, the learned Additional Solicitor General appearing for the Union of India argues that there is sufficient justification for the present merger and the same is based on the structural arrangement of other paramilitary forces such as the BSF and the CRPF. He submits that the merger is only at the supervisory level at which stage the officers are sufficiently mature and experienced to perform the supervisory functions of the lower cadres. Insofar as there may be a lack of technical know-how in

the non-familiarised aspect apropos either the GD or the Technical Cadre, the personnel have to undergo a training to equip themselves for the same.

29. Mr. Jain submits that dissimilar posts can be integrated at the supervisory level provided they meet the criteria laid down in *The State of Maharashtra & Anr. v. Chandrakant Anant Kulkarni & Ors.*, AIR 1981 SC 1990. He further submits that the entire proposal has to be seen from the prism of Wednesbury Principle- whether it would shock the conscience of a reasonable person to arrive at the conclusion that the Government did. He relies upon the case of *S.P. Shivprasad Pipal v. Union of India & Ors.* (1998) 4 SCC 598, which held that a decision to merge cadres is essentially a matter of policy and the power to regulate recruitment and conditions of service is wide and includes the power to constitute a new cadre by merging the existing cadres and that the principles of governing equation of posts for merger of cadres are followed in *Union of India & Ors. v. S.L. Dutta & Ors.* (1991) 1 SCC 505 and *Chandrakant Anant Kulkarni (supra)*. He further contends that all that the Government was required to see was whether the comparable cadres, possessing similar qualification and comparable duties, are sought to be merged. If such is the case, then the Cadres can be merged along with the condition that the officers would be required to undergo an enabling training programme to remove any such difficulties as there may be. At this stage, Ms. Jyoti Singh, the learned Senior Counsel for the petitioners submits that the terms of engagement have changed: the

engineering and technical persons do not wish to go to borders to combat because that is not the basis on which they were engaged in the forces; their work was only supportive in nature and not to be out on the actual battlefield as that would require separate skill sets to discharge the duties at the supervisory level.

30. The learned ASG submits that there is no creation of additional posts and that the job was required to be carried out by the junior cadres. This Court, however, is of the view that the distinction between post and job as sought to be canvassed is meaningless because it is the job and the duty, which an officer has to discharge in a post. Therefore, the higher the post, more responsibility is cast upon the senior officer. A person discharging the duties of supervising the actual ground work has to be experienced and ought to have the requisite technical knowledge to know how the entire work at the ground level is done so that in the event of any difficulty, the said supervising officer is competent to remove the deficiencies or obstacles that may arise. This would be possible only if the person is sufficiently trained and has the requisite skill set as well as the experience to discharge the duties. Just as a Dentist cannot be expected to cure a defect in the eyes nor can an Orthopaedic operate on the heart, a person in the Telecommunication Department or any other Technical Department/Cadre cannot be expected to supervise the firing of a specialised gun on the border as well as the attendant movement of troops or requisite nature of command in an actual combat. Upon a specific query being posed to the learned ASG as to where the

justification was for the proposed merger in the pre-merger discussion, Mr. Jain submits that the original office file, now flagged as 'A' to 'L', may be perused and that the notings may not be elaborate and hence, much has to be read between the lines. He further submits that although the reasoning may not be explicit, the power to frame policies should not be interfered with. This Court, however, is of the view that the power to frame policy is not in question. What is under judicial review is whether the procedure prescribed for the formation of the policy was followed.

31. Ms. Rekha Palli, the learned counsel appearing for the private respondents submits that the affected parties do not have an objection to the merger and that the present merger is akin to the structure already existing in the BSF and the CRPF, therefore, the ITBP too can discharge the same functions without any difficulty. She finally submits that the respondents/private parties are more in number, therefore, there is greater willingness in support of this merger.
32. This Court, however, is of the view that what needs to be examined is the exact procedure prescribed for the merger and whether the same was complied with or not. The ITBP manual specifies that the Force constitutes various cadres and categories which discharge their duties in the general functioning of the Force. However, each cadre is independent in terms of its recruitment, training and career progression under the aegis of the Force, its concept and philosophy. The various technical as well as specialised cadres assist the Force in a well co-ordinated manner

to make the Force a homogenous organisation to achieve the desired goal. Similarly, in Volume 2 of the ITBP Manual which deals with provisioning Part IV Mechanical Transport, the duties of the Mechanical Transport Staff Unit/Structure Headquarters are listed which for a Motor Transport Officer includes *inter alia*:

“a. He will be responsible for proper and correct indenting of MT spare parts, tools and other stores required for the running of MT and Workshop.

b. Correct preparation of reports/returns and their timely submission.

c. Formulation of budgeted estimates and control of expenditure pertaining to MT.

d. He will also arrange proper distribution of MT parts & tools and ensure correct storage and maintenance.

XXXX XXXX XXXX XXXX XXXX

h. He will be responsible for the local purchase of MT parts and various other connected stores.

XXXX XXXX XXXX XXXX XXXX

m. He will have the vehicles tested every month on ITBPF Form-53, for the general fitness and place a report on record. The repairs to the vehicles would generally be carried out in the Unit Workshops and records of spare parts supplied to each vehicle would be entered in the Log Book.”

33. Furthermore, in Volume 6 of the ITBP Manual dealing with the Telecommunication, the role & functions of the Telecommunication Cadre are spelt out, which read as under:

“ a. Operational: Primary function of Telecom cadre entails providing Telecommunication cover efficiently throughout the deployment of the Force in the Border areas as well as in Peace locations deployed permanently or temporarily or in the event of emergency, whatsoever, it may be round the clock. It also implies to provide reliable and secure communication cover to the Force both during peace, Internal security scenario as well as during wartime in co-ordination with Army.

b. Equipment management: This entails Planning, Procurement and Supply of Telecommunication & other allied equipment including Telephone equipment and stores required for providing Telecommunication as well as line communication cover.

c. Maintenance cover: This function of Telecom cadre entails providing Repair and Maintenance cover to all the Telecommunication sets and Equipment held by the Force to ensure effective, uninterrupted and fool proof Telecommunication cover to entire Force at all places round the clock.

d. Training Management: In addition to the above mandatory functions it shall be their responsibility of the Telecommunication cadre to Plan, organise and conduct various technical Training programmers for Radio Operators, Technicians and Linemen at the Basic, upgradation and advance level of their training. The cadre will also be responsible for carrying out regular practical training to Telecom personnel to ensure correct and effective regular maintenance of Telecommunication as well as Line communication equipment and other Technical stores vis-a-vis to keep abreast the latest technological development in Telecommunication.

e. Man Management: Besides, it will be their responsibility to see that the men power under their command are utilised to their fullest advantage for operational, equipment

management, training and other purposes as mentioned in sub Para a to d above.

f. Modernization: It will be added responsibility of the Telecom cadre to strive for the continuous development and modernization of Telecom system in the force vis-a-vis its requirement in changing scenario with the latest technique and trend in the field of Telecommunication.”

34. It also details the functions of the Telecom Branch and the Directorate General which are as under:

“Functions of Telecom Branch, Directorate General

Telecom Branch at Directorate General, headed by an officer of the rank of a Deputy Commandant of Telecom Cadre is placed under the overall administrative supervision, command and control of DIG (Prov.) for the purpose of coordination in regard to functioning of the Branch. The functions of Telecom Branch of Directorate General are defined below:

- a. Assess Telecom needs of the force and render technical advice to DG ITBP, through specified chain command, on all matters of telecommunication.
- b. Assist through specified chain of Command in updating, controlling over all technical functioning of Telecom set up and monitoring thereof.
- c. Advise all branches of Directorate General on the issue likely to effect Telecom set up e.g. re-organisation of Telecom set up etc.
- d. Liaise with MHA/MOF/MOD and other agencies on all matters related to functioning of Telecom set-up of the force.

- e. Issue standing orders/standard-operating procedures on all aspects of functioning of Telecom set-up and review thereof from time to time.
- f. Keep track of Telecom staff/major Telecom equipment with each Telecom detachment.
- g. Oversee the cordial functioning of Telecom personnel vis-a-vis functionaries of other segments of the force.
- h. Planning communication configuration for ITBP in consultation with OPS Directorate.
- i. Assessing needs of frequency spots in various bands; get allotted these spots in accordance with regulation from wireless planning commission, get Standing Advisory Committee On Radio Frequency Allocation (SACFA) clearance; allotment and co-ordinating, the use of frequencies in ITBP.
- j. Functional communication co-ordination with army in consultation with OPs Directorate.
- k. Making signal plans for force-level exigencies in consultation with OPs Directorate and arrange mustering of staff and equipment from the existing resources.
- l. Liaison consistently with Joint Cipher Bureau (MOD), DCPW, ARMY for keeping track of latest communication security devices, modern crypto systems and assessing feasibility of induction in ITBP.
- m. Planning of internal communication monitoring network; scrutinizing such monitoring reports for punitive action on security violations; interact with central radio security committee of MOD.
- n. Looking for suitable security devices in consultation with NCB; DRDO, other sister organizations, open market etc.

- o. Authorization of Telecom equipment and revision thereof.
- p. Laying down specification of the authorised equipment for procurement in ITBP, Processing proposals for procurement of Telecom equipment and getting Admn approvals/financial sanctions from competent authorities.
- q. Controlling force reserve of Telecom Equipment.
- r. Scheduling Annual Technical Inspection of Telecom detachments; scrutinizing reports thereof; consolidate such reports and bring the health of Telecom set-up to the notice of DG and recommending further action for improvement.
- s. Processing condemnation proceedings in respect of Telecom equipment beyond powers of lower units and taking orders of competent authorities thereon.
- t. Processing C.O.Is involving Telecom equipment.”

35. In Part A Volume 6 of the Manual dealing with the administration, the duties of the officers Assistant Commandant (Company Commander) are listed as under:

“ 48. Asstt. Commandant (Company Commander)

While commanding a service company, Asstt. Commandant may be referred as Coy Commander for the purposes of Administration of the Company. In this capacity he will be:

- a. Responsible to the Commandant for the discipline, administration, training and overall efficiency of his Company.
- b. Responsible for the sanitation and cleanliness of his Company Barracks and area.

c. He will conduct all correspondence connected with his Company.

d. He will supervise the messing arrangements of his company and see that his men are properly fed. He will ensure that all ration items are correctly drawn from the Battalion stores as per laid down scale and also ensure that no pilferage takes place in the Coy.

e. He will take personal interest in organising and conduct of professional as well as educational of his company and will ensure that all personnel and will ensure that all personnel of his company fulfil the requisite education as well as professional qualification for next promotion. He will also see that they are put to requisite cadre and courses and their seniority is not adversely affected.

f. He will be personally responsible for correct disbursement of pay and allowances of his coy personnel and will ensure that all Battalion and Force deductions are made as per existing order. He will ensure that cash books and pay disbursement register of his company are correctly maintained, completed and such entries therein are initiated by him.

g. He will ensure that the uniform and the equipment of his Company is maintained in good order and is replaced, when required, and that all ranks of his company turn out smartly and correctly dressed both when in uniform and in mufti. He must bring to the notice of the Quarter Master without delay all misfits received on issue from the Quarter Master's store. He will personally condemn all articles of uniform and equipment needing replacement under existing order on the subject.

h. He will inspect the clothing and equipment of all men detailed to attend courses elsewhere and will ensure that all instructions are complied with.

i. He will be responsible for the security and the maintenance of all arms, ammunition, furniture and equipment on company charge, in good order and ensure the maintenance of their records and registers. He will report all losses and damages to the Adjutant as early as possible coming to his notice.

j. He will be responsible for the timely disposal of all indiscipline cases pertaining to his coy and will ensure that all cases beyond his power are submitted immediately to the commandant for further order.

k. He will be responsible for the time submission of all crime records and for the attendance of the accused before the Commandant, provide escort and necessary witnesses. He will at once report to the Adjutant, if any, Under Officer or Constable of his company is placed under arrest.

l. He will carry out the monthly inspections and checks of:

- i. Kit and equipment held on charge of his Company.
- ii. Check arms and ammunition on company charge.
- iii. Platoon Messing Accounts.

m. He will submit periodical reports and returns to various officers as directed from time to time.

n. He will be a member of the Boards or Courts of Enquiry concerning the loss or damage to any arms and ammunition on his company charge.

o. He will be responsible for the correctness of the force orders issued in respect of his company weekly, and ensure any errors and omissions are brought to the knowledge of the adjutant and amendment/corrigendum are issued. He will see that no orders of the company requiring publication in Force Orders have been omitted.

p. When a Company Commander is on detachment all correspondence will be conducted through the Adjutant but when part of a company is on detachment and the Company Commander is at Headquarters, all correspondence will be conducted by the Company Commander.

q. He will discharge other functions assigned to him by the commandant from time to time regarding movement/deployment of his company.

r. He will see that subordinate officers and other officers under his command develop their professional competence and learn to take initiative and drive to their stature.

s. He will carry out any other duties as assigned to him by the commandant from time to time.”

36. From the aforesaid, it is clear that the nature of duties as well as skill set required are extremely diverse and could not possibly be discharged by the officers who have been interchanged at the senior supervisory level simply by undergoing a short course of 16 weeks. These issues have been highlighted in a letter from the DIG (Laddakh) dated 12.2.2013 to the IG, North-West Frontier Headquarter of the ITBP wherein the officer stressed as under:

“Sir,

Kindly refer to NW Ftr HQr Fax/WT sig no.3809 Dtd 11/2/13 regarding problem being faced after merger of cadres.

2. In this regard, following points are submitted as desired:

A. CAREER PROGRESSION

Person of telecom cadre who join as HC, get a head start of 15-17 years over the CT/GD thus resulting in denial of career progression opportunities to CT/GD. Promotional opportunities available to GD cadre vis-a-vis specialised cadre after merger is evident from following illustration.

i. GD Cadre: In a unit authorised strength of SI/GD is 30, out of which 50% vacancies are filled through direct recruitment/LDCE, thus making effective available vacancy of 50. Thus ratio between total available promotional avenues and total eligible candidates stands at 1:61 (SI-15, Ors.915).

ii. Telecom Cadre: Whereas in telecom cadre of a unit, stand at this ratio is 1:5 (SI-13, Ors.-65). This anomaly gets its manifestation vide Dte Gen letter number 3542 Dtd 10-12-12 which contains list for DPC of SM/Inspector. Out of total 108 SMs/Inspectors, 49 personnel are from specialised cadre.

B. OPERATIONAL DIFFICULTIES:

Personnel enrolled in specialised cadres do not undergo essential courses/cadres as stipulated for GD troops and do not have operational experience at any stage of their careers. Thus, after becoming officers they will not have effective field/ops experience and this will result in drastic fall in operational efficiency of the Force.

C. PROBLEMS OF COMMAND AND MANAGEMENT:

Command is a virtue which is inculcated in the due course of time during the service acquired through experience and going through the vagaries of ground level soldiering over the years. With due respect to the capabilities of the Non GD Cadre, it is a fact they lack ground level command experience which will affect the proper management at unit/subunit level.

3. BASED ON THE ABOVE FACTS FOLLOWING CAN BE CONCLUDED THAT:

GD Cadre personnel right from the rank of HC commands section, perform the duties of ground commander and petrol commander and get many administrative duties. GD Cadre SOs perform duties at various level right from Section Commander, Pl. Commander, Parade Contingent Commander, Weapon Dett Commander including duties of MPC, MFC and command BOPs at high altitude and also participate in various minor ops of War in CI grid and anti naxal operations. Thus after becoming an officer after years of ground experience and command management during peace time as well as in stressful condition they are well versed with general operational and administrative affairs, whereas persons enrolled in Telecom Cadres do not undergo essential courses and do not have command experience at any stage of their careers and on becoming officers they may not be effective commanders even during peace time role which includes border guarding, IS Duties, aid to Civil Authorities, Election Duties and CI Ops etc. Consequently the troops of GD Cadre will have all the reasons to doubt the capabilities of their commander who has just emerged from a technical post as a consequence of cadre merger.

4. After inspector of technical cadres are not having any specialised officer. Thus efficiency of non GD Cadre is also going down.

So, in totality, this cadre merger has only lowered the self esteem of GD Cadre which is main component and cutting edge of the force and further command of GD Cadre by inexperienced non GD Cadre will definitely have adverse impact on the efficiency and effectiveness of force as a whole.”

37. The learned ASG submits that the Government's decision meets the broad parameters set out in *Chandrakant Anant Kulkarni (supra)*. The issue of integration of Government servants allotted to service of the new States was examined in the context of Section 115 of the States Re-organisation Act, 1956 as well as in the context of the general principles settled by the Chief Secretaries Conference of the States held at New Delhi on May 18-19, 1956 for the aforesaid purpose. The Court held that the following principles were well settled and had a statutory force in the context of fair and equitable treatment under Section 115(5) of the Act.

“10.xxxx

“In the matter of equation of posts:

i. Where there were regularly constituted similar cadres in the different integrating units the cadres will ordinarily be integrated on that basis; but

ii. Where, however, there were no such similar cadres the following facts will be taken into consideration in determining the equation of posts –

a. nature and duties of post;

b. powers exercised by the officers holding a post, the extent of territorial or other charge held or responsibilities discharged;

c. the minimum qualifications, if any, prescribed for recruitment to the post, and

d. the salary of the post.

xxxx”

38. It further held that “mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not.....”.
39. He further relies upon the judgement in ***S.L. Dutta & Ors. (supra)*** to contend that while examining the merger of cadres what is to be seen is whether they were carrying comparable/similar qualifications and had comparable duties and salaries; that the question relating to the constitution, pattern, cadre merger, prescription of qualifications and other conditions of service including avenues of promotion are within the field of policy making and therefore, in the exclusive discretion and jurisdiction of the Executive; that accordingly, the Executive/respondents could change the rules relating to service as well as alter the qualification criteria and other such conditions of service including avenues of promotion from time to time owing to administrative exigencies; that except for seeking to ensure or safeguarding the rights and benefits already accrued or earned till a particular point in time, an employee of the Government could not question the power of the State to alter the conditions of service. In other words, an employee cannot claim that the conditions governing his service should stay permanent. In support of his contention, he relies upon a decision of the Supreme Court in ***P.U. Joshi & Ors. v. Accountant General, Ahmedabad & Ors. (2003) 2 SCC 632*** which held as under:

“10.Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service.”

40. He further relies upon a judgement of the Supreme Court in ***Union of India & Ors. v. Harjeet Singh Sandhu*** AIR 2001 SC 1772 which held that judicial review of administrative action is to be

exercised on well settled parameters i.e. when the administrative action is “*shown to have been vitiated by mala fides or is found to be based wholly on extraneous and/or irrelevant grounds or is found to be a clear case of extraneous and/or abuse to power or what is sometimes called fraud on power, i.e. where the power is exercised for achieving an oblique end. The truth or correctness or the adequacy of the material available before the authority exercising the power cannot be revalued or weighed by the Court while exercising power of judicial review. Even if some of the material, on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material available on which the action can be sustained. The court would presume the validity of the exercise of power but shall not hesitate to interfere if the invalidity or unconstitutionality is clearly demonstrated. If two views are possible, the court shall not interfere by substituting its own satisfaction or opinion for the satisfaction or opinion of the authority exercising the power.*”

41. On the facts of the case, the learned ASG argues that the four Group ‘A’ cadres, which are sought to be merged, are at the supervisory/managerial level i.e. at the level of the Assistant Commandant (AC); their basic qualification is Graduation in their respective fields and upon merger, their pay-scales would become similar and the powers to be exercised by the officer would have parity *inter se* the merged cadre. He further submits that the merger has been planned in a structured manner involving several training programmes, which would impart training to all the

segments of the merged cadres including the General Duty Cadre. Thus, Group 'A' officers have merely to perform supervisory duties and the specially structured training courses would equip them sufficiently to carry out the duties cast upon the incumbent post. He further submits that the officers would be sufficiently able to handle the post by equipping them with the functioning of administrative and operational duties. He has referred to the summary of the courses to be undergone by officers of all the merged cadres. The learned ASG further contended that in other Central Paramilitary Forces like the BSF and the CRPF at the supervisory level i.e. Group 'A' posts, there were no different technical cadres and that they all were supervised by the General Duty Cadres. He refers to Section 7 of the ITBP Act as well as Rules 8(1) (5) of the ITBPF Rules to state that every member of the Force shall be liable to serve in any part of India as well as outside India and out of all the four minor cadres sought to be merged i.e. Telecom, Motor Transport, Armourer and Electronic Data Process (EDP), only the last one had to perform the duties at the administrative level, hence, they were posted at the Directorate General, New Delhi. The primary job of the Assistant Commander and the Deputy Commander in the EDP Cadre is to handle computers whereas all other personnel are required to go to the border irrespective of the merger. He submits that all personnel of the minor cadres are duly and properly combatised at the time of joining the Force by undergoing 16 weeks training; the only difference being that the personnel from the GD Cadre has to

undergo 54 weeks training to be combatised but in any case, with the special training imparted to them, they are well equipped to be termed as combatised. He also submits that even the ministerial staff is sufficiently combatised. He further submits that upon conducting the bridge course/training programme, the non-technical personnel, who is required to carry out supervisory functions, would be sufficiently equipped to discharge the duties at the Group 'A' level. Furthermore, if at any stage it is felt that there is a need for modifying or supplementing the courses, it can always be done with the help of experts. Therefore, he contends that different educational qualification, which was a pre-requisite for the personnel joining the Force in different cadres would become irrelevant after such personnel undergoes the specialised training programmes as it would render them functionally equal to discharge the duties incumbent upon the post. He further submits that prior to the merger of the cadres, due process was followed including various rounds of consultation between the concerned Ministries. The reason necessitating the merger was not only to enhance the promotional avenues of the minor cadre but also in view of unmanageability of the various cadres. Furthermore, it is submitted that the distilled wisdom from the series of presentations and discussions with the Director General and the officers of the cadres concerned led to the merger being accepted. He submits that although a similar proposal for merger did not find favour of the cadre maintaining authority in the year 1999, much water has flown since then and the MHA cannot be faulted for non-

consideration of the issues raised by a handful of officers. He submits that in the intervening period of 15 years, the size of the cadre has become different, hence, the pre-governing rejection of the earlier proposal for merger would neither be applicable nor would the absence of elaborate discussion on the issue lead to the conclusion that the matter was not discussed. He also argues that since the merger did not have financial implication, there was no requirement for the approval from the Ministry of Finance. Apropos non-submission of the proposal for approval of the Union Public Service Commission (UPSC), he submits that there was no need for the same because the UPSC had already granted such exemption vide their letter dated 9.6.1969. Finally, he submits that the availability of the large pool of officers at the Group 'A' level who would be equally equipped at the supervisory level would enhance the capability of the Force and would give the officers an opportunity of promotion which would improve their satisfaction and aspirations.

42. While adjudicating upon the issues involved in these petitions, this Court would readily not question the policy whereby promotional avenues sought to be enhanced through the amended recruitment rules as effected. The executive power and discretion of the State to merge cadres in its administrative wisdom is not in question and accordingly, it is not for the Court to impose itself by substituting its own views with that of the State. Amalgamation/ bifurcation of cadres or restructuring thereof or abolishing some of the posts cannot be questioned by an employee of the State except insofar as

rights or benefits already earned, acquired or agreed in favour of employee is sought to be secured or safeguarded. The Courts would, however, not hesitate to interfere if the invalidity or unconstitutionality is clearly demonstrated and in this regard, what would be required to be seen is whether the points raised in ***Chandrakant Anant Kulkarni (supra)*** are satisfied or not, i.e., (a) nature and duties of post; (b) powers exercised by the officers holding a post, the extent of territorial or other charge held or responsibilities discharged; (c) the minimum qualifications, if any, prescribed for recruitment to the post; and (d) the salary of the post.

43. When the proposal for merger stood mooted, the amendment to the recruitment rules would be governed by the rules governing the same. The rules for the same are amended vide OM dated 18.3.1988. The extant rules are now embodied in the OM of 2010 which requires that all Ministries and Departments to effect necessary amendments to the recruitment rules/service rules notified by them after following the general guidelines circulated by the DoPT on 18.3.1988 and also in consultation with the related Departments. This requirement was duly notified by the Ministry of Law to the Ministry of Home Affairs when the opinion of the Law Department was taken in this matter. As noted, observations were made by the Department of Law on 5.8.2010 and the Ministry of Home Affairs was advised to consult and obtain the views of the UPSC, as it would be essential, since 50 per cent vacancies of the Assistant Commandant in the ITBP in the General

Duty Cadre are to be filled through direct recruitment, which would have a bearing on the existing cadre; 33 per cent of vacancies by promotion and 17 per cent of vacancies to be filled through Limited Departmental Competitive Examination, failing which by promotion. This consultation was all the more necessary because in the schedule relating the post of the Assistant Commandant, it had been provided that consultation with the UPSC was necessary **and LDCE**. The Law Ministry pointed out that the UPSC had not agreed to the merger of the cadres of the General Duty and the Telecommunication on the proposal of the SSB to have a common cadre for Assistant Commandant (GD). The Ministry of Law further advised and cautioned the Ministry of Home Affairs that the approval of 6.8.1969 exempting the ITBP from seeking approval of the UPSC prior to the merger of the cadres was misplaced because the recruitment in this case was to be conducted through the UPSC and the proposal of SSB regarding the merger of technical posts, which was referred to in the aforesaid letter, had yet to be decided due to the UPSC's objection. Therefore, the approval of the UPSC was essential. Thus, subject to the above observations, the modified draft was approved by the Ministry of Law. The Ministry of Home Affairs, however, gave its own justification for not referring the matter to the UPSC again based on the same letter of 1969. Furthermore, it sought to overcome the other objections of the Ministry of Law by providing an explanation that no separate cadres of Motor Transport, Telecommunication and Armourer existed in the CRPF; Motor

Transport and Telecommunication had already been merged in the BSF and the proposed merger was on the same lines and besides, the DoPT had already indicated the merger. Therefore, since the matter had already been pending for quite some time, it was ultimately approved. This, however, can hardly be any justification to overcome the procedure prescribed for effecting the amendment to any recruitment rules. The Government of India (Transaction of Business) Rules under Article 77(3) of the Constitution of India, notified on 14.1.1961, require inter-departmental consultations on the conduct of business of the Government. Clause 4 thereof requires as under:

“4. Inter-Departmental Consultations. – (1) When the subject of a case concerns more than one department, no decision be taken or order issued until all such departments have concurred, or, failing such concurrence, a decision thereon has been taken by or under the authority of the Cabinet.

Explanation – Every case in which a decision is taken in one Department, is likely to affect the transaction of business allotted to another department, shall be deemed to be a case the subject of which concerns more than one department.

(2) Unless the case is fully covered by powers to sanction expenditure or to appropriate or re-appropriate funds, conferred by any general or special orders made by the Ministry of Finance, no department shall, without the previous concurrence of the Ministry of Finance, issue any orders which may –

a. xxxx.

b. xxxx.

c. relate to the number or grade of posts, or to the strength of a service, or to the pay or allowances of Government servants or to any other conditions of their service having financial implications;...”

44. Furthermore, Clause 7 of the said Business Rules stipulates the submission of cases to the Cabinet. The said Rule reads as under:

“7. Submission of Cases to the Cabinet. – (i) all cases specified in the Second Schedule to these Rules except cases covered by sub-rule (5) of rule 6, shall be brought before the Cabinet.”

45. These include proposal (m), i.e. proposals to vary or reverse a decision previously taken by the Cabinet.
46. The learned Senior Counsel for the petitioners has drawn the attention of the Court to the fact that the recruitment rules formulated had received the approval of the Cabinet before they were enacted by the Parliament and laid on the table of the House respectively and then notified. Therefore, in terms of this decision, any proposal to vary or reverse a decision already taken would require the previous approval of the Cabinet which in the present case was not obtained. This Court is in agreement with this contention raised on behalf of the petitioners and finds that the case was not put before the Cabinet for approval of amendment of a decision already taken i.e. amendment of the RRs. The guidelines for framing relaxation of recruitment rules were also not followed which required consultation with the UPSC. The

relevant paragraphs of the OM dated 31.12.2010, notified by the DoPT reads as under:

“CONSULTATION WITH UPSC

2.5 After obtaining the concurrence of the Department of Personnel & Training, the Administrative Ministry/ Department should refer the draft Recruitment Rules for posts/services which are within the purview of the UPSC in a self-contained letter to the Commission, along with the information in the prescribed proforma (Annexure II). It should be stated in the letter to the Commission whether the clearance of the Department of Personnel & Training (and also the Department of Pension & Pensioners' Welfare where required) has been obtained in respect of the proposals in question. Where the procedure for consultation with the Commission has been followed and information necessary for consideration of the proposal has been fully given, it should be possible for the Commission to convey their advice ordinarily within 4 to 5 weeks. If the Commission's advice is not received within this time, the administrative Ministry/Department may settle the matter by personal discussion with the officers concerned in the Commission.”

47. Furthermore, this Court notices that the number of posts are sought to be increased. Therefore, logically there would be some element of financial outlay and even if the same was not so, the rules governing the Government of India (Transaction of Business) Rules require that a proposal relating to number or grade of posts, or to the strength of a service, or to the pay or allowances of Government servants or to any other conditions of their service having financial implications would be required to be placed before the Ministry of Finance. This too was not done by the MHA

on the ground that there was no additional financial outlay. This was an error since it was not for the MHA to decide if there was a financial outlay or not. The procedure of consultation is clearly laid down which was to be strictly followed. It could well be that the Ministry of Finance could have concluded that there was no financial outlay and could well have approved the MHA's proposal but that decision would lie entirely in the domain of the Ministry of Finance. The MHA could not vest itself with the power to determine whether there was a financial outlay. There may well be so many other factors to be taken into consideration from a financial perspective about which the MHA may not be adequately equipped.

48. Most importantly, the non-consultation of the UPSC is fatal to the entire process of decision-making. Furthermore, it is noticed that the notification of the Ministry of Home Affairs dated 30.4.2003 amending the ITBP General Duty Cadre Group 'A' Recruitment Rules, 1999, in particular mentions in the Schedule thereto that: "(g) in column 14 for the entry, the following entry shall be substituted, namely:-

"Exempted from the purview of the Union Public Service Commission but consultation with Union Public Service Commission shall be necessary for direct recruitment."

49. In the additional affidavit filed in July 2013, on behalf of respondent No.2, it is admitted that before taking a final decision on the merger, there were inter-ministerial deliberations, i.e. the MHA, the DoPT and the Ministry of Law on the issue of fixation

of *inter se* seniority. However, it clearly excludes the consultation with the Ministry of Finance which otherwise was a requisite under the Government of India (Transaction of Business) Rules. Furthermore, the approval of the Ministry of Finance/Cabinet was required since the proposed merger involved transfer of posts up to the level of the Inspector General, which in the present case had not been obtained. In this regard, advice was given by the Ministry of Law vide their note dated 29.3.2010.

50. This Court has perused the Main (Original) file produced by the respondents regarding the correspondence and notings, etc. apropos the proposal for merger of the cadres. We find that there is no discussion or examination of the technical aspects with respect to the Minor Cadres being merged with the General Duty Cadre particularly from the viewpoint of the Minor Cadres being duly equipped or trained to be able to discharge the new duties that may be assigned to them post the merger. The letter of the Inspector General (Training Zone) raises serious issues for consideration regarding the very efficacy and combat-readiness of the Force. His views were sought for preparation of the Draft SOP to streamline the Annual Inspection and other periodical inspections of SPT, TPT and Telecom battalion after the merger of these cadres. The IG (Training) was of the view that there is no likelihood of the personnel of the GD Cadre acquiring the requisite technical qualifications, therefore, the need for revision of the existing SOP would not be necessary at any stage and the merger of the specialist cadre with the General Duty Cadre would be “a great

drawback and a minus point.” This conclusion was based on the basis that persons who were inducted into and had worked in the technical cadres, would have acquired sufficient technical knowledge and technical competence about the safety, security and management of the equipment and other related matters because of their experience in the job, as well as having sufficient professional qualification in the subject relating to its technical aspects. This competence comes about as a result of 10-15 years of experience in the respective field of specialization, which would subsequently equip the cadre with sufficient know-how to conduct annual and periodical technical inspection of in respective areas of operation. The IG (Training) also cautioned that the annual inspection and other periodical inspections of equipments/Arms & Ammunition is to ensure safety, security, serviceability and management of equipments and other related aspects. The GD officers cannot effectively carry out such inspections. Therefore, not only for the present but also in the future, the services of technically qualified officers of specialist cadres would be continuously required for effectively carrying out various technical inspections. In other words, specialised cadre officers would be mostly employed to perform the same nature of duties at Battalion Headquarter, Sector Headquarters and Frontier Headquarters while GD officers shall remain to be deployed for LRPs, SRPs, BOPs and other operational duties including deployment in ANOs. A comparison was drawn between the nature of training undertaken by the officers of different cadres. The same are:

“A. Armr Cadre

A person having minimum Matriculate qualification with science background on remusteration as Armourer is required to undergo the following courses:

- | | | |
|--------------------------|---|-------------------|
| i. Armr Basic Course | - | 50 weeks duration |
| ii. Armr Grade-II | - | 12 weeks duration |
| iii Armr Grade-I | - | 08 weeks duration |
| iv Armr Refresher Course | - | 06 weeks duration |

B. Telecom Cadre

A person with 10+2 with physics, chemistry & mathematics or 10th pass with two years ITI certificate in Electronics/Electrical/computer or 10th pass (with PCM) with three years diploma in Electronics/Communication/Instrumentation/computer sciences/IT/Electrical is required to undergo the following courses:

- | | | |
|------------|---|-------------------|
| i. RTG-III | - | 46 weeks duration |
| ii. RTG-II | - | 26 weeks duration |
| iii. RTG-I | - | 26 weeks duration |

C. Motor Transport Cadre

A person with Matriculate (science) having ITI certificate with 3 years experience or Diploma in Mechanical or Automobiles Engineering is directly appointed in the rank of HC (Motor Mechanic). A mechanic in ITBP is required to undergo the following courses:

- | | | |
|--|---|----------|
| i. Auto Fitter course | - | 12 weeks |
| ii. Short welder course | - | 04 weeks |
| iii. Auto Electrician course | - | 08 weeks |
| iv. HC/MM upgradation course | - | 08 weeks |
| v. MT Management course for
GOs/SOs | - | 04 weeks |

vi. MT Refresher course for SI(MM)
SI(MT) - 02 weeks”

51. The IG (Training) further cautioned the Government that the aforesaid courses/qualifications were never likely to be acquired due to certain eligibility restrictions and administrative constraints. It also referred to certain restrictions in the Fundamental Rules for deputing officers for certain essential training on duty and in that context referred to FR-9(6).
52. This Court is of the view that the officers of the General Duty Cadre may face some handicap in appreciating the technical and scientific aspects involved in the Telecom and Motor Transport Cadres. Their reason for induction for presence into these Cadres required a background in physics, chemistry and mathematics, and otherwise a certificate in Electronics/Electrical/Computer or 10th Pass (with PCM) with three years diploma in Electronics/Communication/Instrumentation/Computer Science/IT/Electrical courses. For the Motor Transport Cadre, it required a Matriculation in Science or ITI certificate with three years experience or Diploma in Mechanical or Automobiles Engineering. The educational qualification was deemed necessary under the RRs to facilitate a better understanding of the technical aspects of the nature of the job. A person who does not have this preliminary or basic academic background would either not be able to discharge the duties effectively or would otherwise be constrained from appreciating the technical and scientific aspects

of the work. At the supervisory level, i.e. Group 'A' level, where the merger is sought to be done, such technical knowledge with the background in Science or technical proficiencies would be all the more necessary. It is for these reasons that the matter should have been examined by the UPSC which is the requisite technical body concerning the induction of personnel into the cadres. There is no response by the respondents to these serious issues of concern raised by the IG (Training) which would affect the efficacy of the Force. Any action of the respondents, which affects the efficacy of the Force ought need to be duly deliberated upon and approached with caution and prudence.

53. This Court is unable to accept the argument of the learned ASG that the cadres are comparable because they would be carrying out similar duties and have same salaries, besides their qualifications are also similar. From the Recruitment Rules, it is apparent that the induction of personnel into different cadres is on the basis of different educational qualifications as discussed hereinabove. The nature, content and duration of training they undergo in each specific cadre is entirely different and so are the respective duties they discharge. There is indeed, no similarity in the duties discharged by them except that they work together as a team for the effectiveness of the Force. Simply by seeking to merge the officers at the supervisory level cannot make their cadres comparable.
54. In *P.U. Joshi & Ors.* (supra), the Hon'ble Supreme Court dealt with parity in employment of supervisors engaged in accounting.

The Supreme Court observed that Supervisors in the Accountant General (Accounts & Entitlement) who have failed to pass the Section Officers (SOs) Grade Examination cannot be treated at par with the SOs solely based on a seniority list. The Court went on to observe that the SOs are considered senior to the unqualified Supervisors. However, the facts of the present case are very different. In the present petition the technical qualifications, nature of training and experience of work is as diverse as chalk and cheese. For the petitioners, at a supervisory level i.e. Group 'A' level, it was necessary to have specific technical qualification to understand the technical aspects for the work for which they were inducted whereas in *P.U. Joshi* (supra) all persons concerned had only to do the work of accounting, albeit at different levels. In this writ petition however, the distinction and diversity in qualification extends from being trained in arms and ammunition, combat and assault on the actual front lines, by the personnel and communication, technical or logistic support from a far off non combat locations.

55. The contention of the respondents that a larger number of officers likely to be affected by the impugned notification have already agreed to the new arrangement, hence these petitions by a handful of employees ought to be dismissed, is untenable because change of the Recruitment Rules effecting service conditions is not a democratic process where the will of the majority prevails; nor can there be any place for ex post facto justification for an action which is fundamentally flawed in law and procedure. The actions of the Government have to be governed by law and must have the flavour

of equity. The Recruitment Rules can be changed only by the procedure prescribed in law, which is spelt out in the Conduct of Business Rules as well as the in extant Recruitment Rules themselves. The letter of August 1969, upon which the respondents rely, for according exclusion to the BSF, CRPF, ITBP and CISF from the purview of the UPSC need to be examined. The letter observed that “the posts in the Forces mentioned above are not a charge on the Defence Services Estimates, though it should be argued that some of them involve duties “connected with defence”. The Commission are, therefore, unable to accept the view that the posts in any of these Forces should not be treated as civil posts for purposes of Article 320 of the Constitution of India. However, having regard to the nature of duties to be performed by *the Central Reserve Police Force, the Indo-Tibetan Border Force and the Border Security Force, and the special conditions of service of persons belonging to these Forces, the Commission agree that the posts in the above Forces may be excluded from their purview on a permanent basis under Regulation 2 of the Union Public Service Commission (Exemption from Consultation) Regulations, 1958. I am accordingly to request that formal amendments to the Schedule to the Regulations may kindly be notified in due course.*” Evidently, the requisite amendment has not been effected till date. Therefore, till such time that the amendment comes about, the extant Schedule would be applicable. The opinion of the UPSC was for a situation in *futuro* and would come into effect only upon the notification of the due amendments.

It is another matter though that such amendments may well entail challenges in law. The advise of the Ministry of Law was brushed aside on the ground that the ITBP had already been exempted from the purview of the UPSC because the recruitment into the merged cadre was to be conducted through the UPSC itself, but oddly enough another very pertinent objection of the Ministry of Law that the proposal of the SSB regarding merger of technical posts which is also akin to the present proposal, had not been decided due to objection of the UPSC, was not even addressed or responded to by the MHA.

56. As held in *S.L. Dutta & Ors.* (supra), judges and lawyers can hardly be expected to have much knowledge by reason of their training and experience about the highly technical and scientific nature concerning the discharge of duties by the personnel of the five cadres of ITBPF sought to be merged. Therefore, a technical body such as the UPSC would have best examined it or there ought to have been, at least, some discussion on record in this regard. The respondents have not shown any discussion or application of mind in this regard, in the original file. The procedure laid down in the conduct of business rules has not been followed nor have the RRs themselves been followed. Therefore, the action of the Government cannot be sustained.
57. The Court is neither commenting upon nor adjudicating upon the wisdom of the Government's decision to merge the cadres. Such action of the Government would fall in the realm of policymaking. While it is not open for the court to examine whether the equation

of posts made by the Central Government is right or wrong¹; there is no such bar in examining whether merger of cadres, which is a wholly different result, has been reached after following the due procedure. However, every policy making process must be based upon relevant materials and with due deliberation with the requisite agencies/authorities concerned. Any default in this process would result in ill-informed and half-baked policies which in turn would defeat the very objective of the policy. Hence, in public interest, such flaws in decision making need to be reviewed. Judicial Review of policy decisions would be permissible to this extent. Accordingly, the Court is only examining whether due process was followed in such decision making.

58. We have seen the original file of the respondents. It is devoid of the consultative process and silent on the vital issues concerning the efficacy of the Indo Tibetan Border Police Force as a Paramilitary Force. There is no deliberation at all in this regard let alone sufficient deliberation.
59. From the preceding discussion, it is evident that the impugned Notification dated 26.11.2010 is premature, violative of the prescribed procedure for due consultation and in the face of the extant Recruitment Rules. The Notification is without the approval of the Ministry of Finance as well as of the UPSC. The approval of the Ministry of Law was upon the condition that the approval of the UPSC too would be sought in this regard. The latter was never sought. Therefore the approval of the Ministry of Law cannot be

¹ *The State of Maharashtra & Anr. v. Chandrakant Anant Kulkarni & Ors.*, AIR 1981 SC 1990

said to have come into effect. In the circumstances, the impugned Office Memorandum dated 26.11.2010 cannot be sustained and hence, it is quashed. Should the respondents desire to pursue the matter, it would always be open to them to have the proposal examined by the Ministry of Finance as well as by the UPSC before any fresh Notification is issued purporting to amend the Recruitment Rules.

60. The writ petitions are accordingly allowed. No order as to costs.

NAJMI WAZIRI, J.

MAY 25, 2015
b'nesh

KAILASH GAMBHIR, J.