

(A Government of India Enterprise)
CORPORATE OFFICE
TE Section

5th floor, Bharat Sanchar Bhawan, Janpath, New Delhi -1

F. No. 22-28/2010-TE

Dated : 05-12-2012

To

All Heads of Telecom Circles,
Metro Districts & Administrative Units,
Bharat Sanchar Nigam Limited.

SUB: Application of reservation roster for SC/ST employees in the Non-Executive Promotion Policy (NEPP) – Circulation of CAT, Madras Bench judgment and Hon'ble High Court of Madras judgement.

I am directed to forward herewith a copy CAT, Madras Bench judgement dated 22/10/2010 in O. A. No. 831/2010 in the matter of BSNL SC/ST Employees' Association and Shri K. Velusamy Vs. BSNL & Others and a copy of Hon'ble High Court of Madras judgement dated 03/10/2012 in W.P. No. 8499/2011 in the matter of of BSNL SC/ST Employees' Association and Shri K. Velusamy Vs. BSNL & Others, vide which the aforesaid cases have been dismissed by the Courts on the ground that if there is mere upgradation of posts, as contrasted from promotion, the reservation provisions would not apply, on the basis of ratio decided by Hon'ble Supreme Court 06/09/2011 in C.A. Nos. 5286-87/2005 in the matter of BSNL Vs. R. Santhakumari Velusamy & Others with C.A. Nos. 3405/2006 and 4542-4546/2006, for information and guidance.

If required, further details regarding the said case may be obtained from Chennai Telephones/this Office.

(A. Sinha)
Assistant General Manager (TE)
TEL. No. 23737886
FAX No. 23734365

Copy to : BSNL C.O. Intranet Portal

**CENTRAL ADMINISTRATIVE TRIBUNAL
MADRAS BENCH**

Friday, the Twenty Second day of October, Two Thousand
Ten

P R E S E N T

**THE HON'BLE MR. K. ELANGO, JUDICIAL MEMBER
AND
THE HON'BLE MR. R. SATAPATHY, ADMINISTRATIVE
MEMBER**

ORIGINAL APPLICATION NO.831 OF 2010

1. BSNL SC/ST Employees' Welfare
Association(Regd),
rep by its General Secretary,
Plot No.47, Balakrishnapuram IV Street,
Adambakkam, Chennai.

2.K. Velusamy
S/o Krishnan,
Telecom Mechanic Ext.II,
Mylapore Telephone Exchange,
Chennai.

.. Applicants

Vs.

1. Union of India
rep by the Chairman and
Managing Director,
BSNL Corporate Office,
Harishchandramathur Lane,
Janpath, New Delhi.

2.The Deputy General Manager(Estt),
Corporate Office(TE Section),
5th Floor, Bharat Sanchar Bhavan,
Janpath, New Delhi.

3.The Chief General Manager,
BSNL, Chennai Telephones,
Purasawalkam High Road,
Chennai.

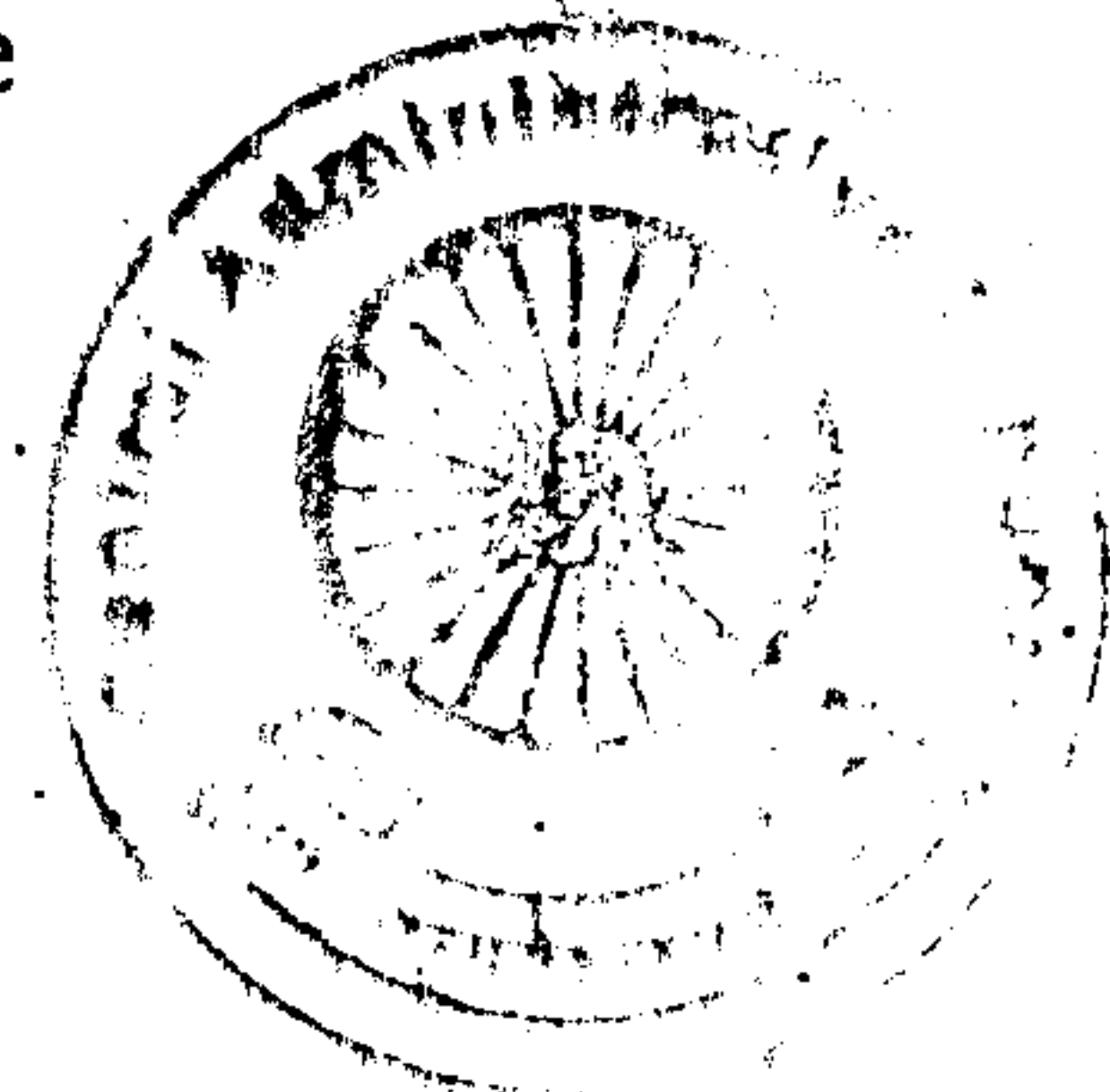
.. Respondents

Mr. R. Selvakumar

.. Counsel for the
applicant

Mr. M. Govindaraj

.. Counsel for the
respondents

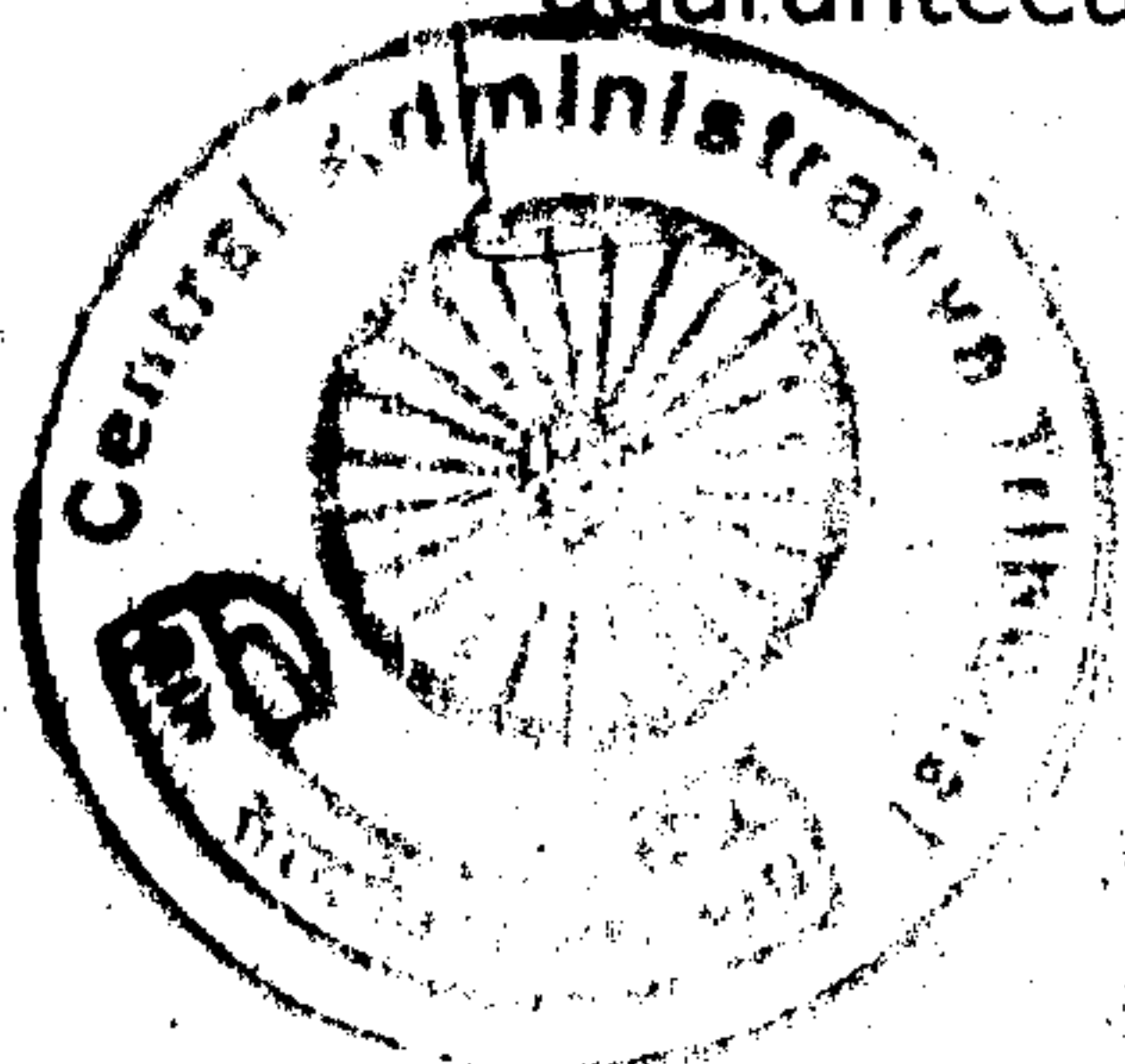


ORDER

(Pronounced by The Hon'ble Mr. K. Elango, Judicial Member)

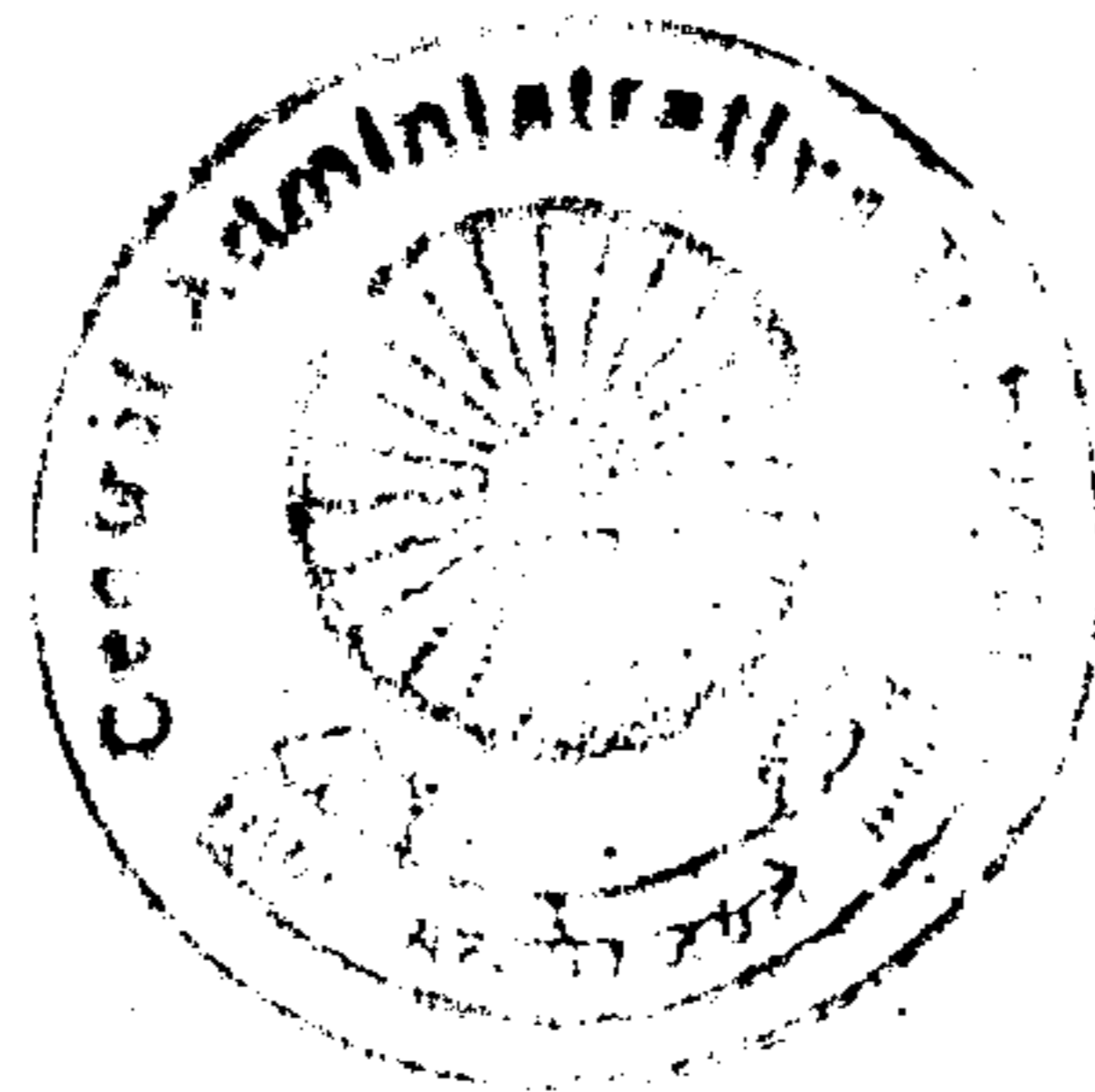
The facts leading to the filing of the above application is as set out hereunder. The BSNL is a Public Sector organisation with the employees' strength of more than 2.00 lac. Amongst the said 2.00 lac employees, for appointment etc., the reservation policy adopted by the Government of India is being followed till this date in a uniform manner. All employees are entitled to claim benefits as envisaged in the constitution as a matter of right and the authorities are bound to provide those benefits. Suddenly, the second respondent has announced a policy in the impugned proceedings dated 23.03.2010 with regard to the promotion of non-executive employees in the IDA pay scale. The above policy proceeds to the effect that the object of the policy is to provide upgradation of pay scales to all the non-executive employees of BSNL on time bound scheme. The impugned order further proceeds to the effect that the pay scale upgradation is awarded on the basis of performance rating without any change in the substantive status of non-executive. In the impugned order guidelines have also been issued as to how upgradation of pay scales should be effected.

2. The promotion policy /scheme does not provide for reservation to the SC/ST which is a constitutionally guaranteed right and as such, it is illegal. The policy is a



strict violation of the Rule of Reservation. The upgradation of pay ^{Scale} means it is further promotions which is to circumvent to the Rule of Reservation and as such the same is illegal. When similar schemes were drawn up without reservation by the erstwhile P & T Department, the Supreme Court issued a direction to enforce the Rule of Reservation. The Supreme Court has passed similar orders in respect of other schemes and accordingly, the application is filed to quash the impugned policy in proceedings dated 23.03.2010 of the second respondent.

3. The respondents filed a reply which proceeds to the effect that the policy contemplates only grant of financial benefits and shall not amount to actual / functional promotion of the employee concerned. It is further contended that the norms for promotion are ensured at the time of regular promotion though upgradation of pay scales does not confer any promotion and as such, Rule of Reservation cannot be enforced into upgradation of pay scales. In fact, while framing policy, necessary safety measures are taken to protect the SC/ST employees and as a concession to such employees the grading criteria have been relaxed in comparison with OC employees. For the reasons stated, the respondents prayed for the dismissal of the application.



4. We have heard the learned counsels appearing on either side and perused the relevant materials available on record.

5. For the purpose of deciding the issue, at first instance, we have to examine the policy/scheme as to whether it is merely an upgradation in the pay scale or promotion to the higher category. Eventhough in the subject column of the impugned proceedings dated 23.03.2010 a reference is made that it is a "non-executive promotion policy", the policy contains various clauses and in the entire clauses there is no whisper at all in any of the clauses that policy could be construed as promotion to the higher cadre/post. In fact, clause 3.2 proceeds to the effect that non-executives who have been recruited by DOT prior to 01.10.2010 will, as a concession, be considered for time bound IDA pay scale upgradations in the manner stated therein. The policy proceeds to the effect that there will be a pay scale upgradation only. In para II it is specifically indicated that regular promotions would continue to be regulated as per the provisions of Recruitment Rules of the posts already notified/to be notified by the BSNL. This would mean that the policy has got nothing to do with the regular promotions with reference to the actual number of posts/vacancies existing.

6. As rightly contended by the learned counsel for the respondents, the impugned order is a policy made for the



welfare of the employees as a goodwill measure on the basis of the recommendation of the promotion committee comprising of the members of the management and members of the recognised union of non-executives by replacing the erstwhile policies. A perusal of the policy as well as the records make it clear that it is only time bound pay scale upgradation which are not linked with the availability of posts. It is a settled law that the Rule of Reservation is applicable only to the post/vacancy and not for upgradation of the pay scales, particularly when the upgradation is not to be construed as a promotion. Assuming that the upgradation of pay scale is to be construed as promotion, no one can claim that the Rule of Reservation should be implemented in the matter of promotion as a matter of right in the absence of existence of Rules in that regard.

7. Eventhough it is only upgradation of the pay scale, for which norms of promotion, rules of reservation cannot be forced, necessary safety measures are also taken to protect the interest of the SC/ST employees for whom grading criteria have been relaxed in comparison with the OC employees.

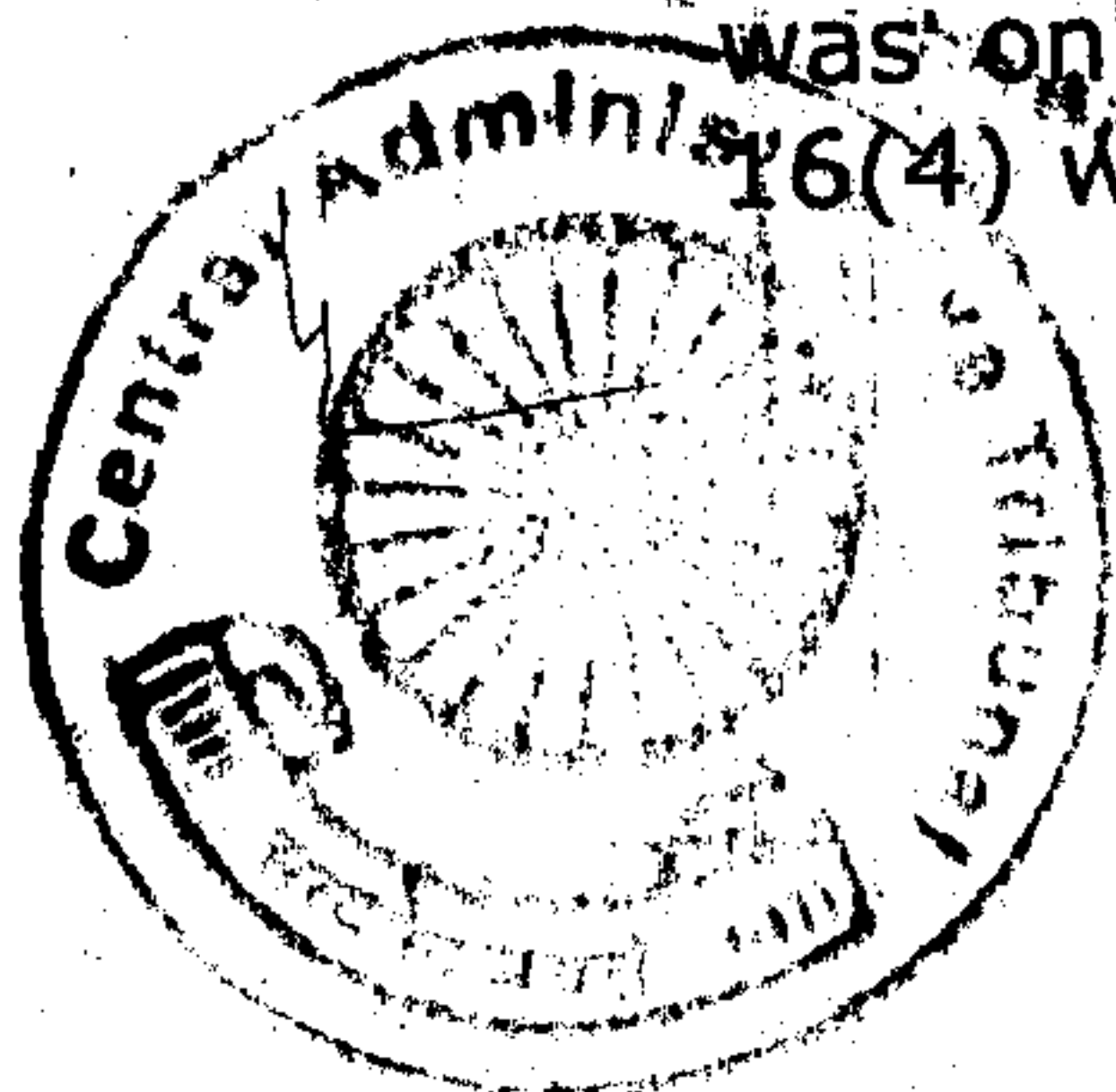
8. Though a contention is raised that in terms of Article 16(4-A), it is a fundamental right for SC/ST employees to claim reservation, we are afraid to accept the said contention in the light of the decision rendered by



the Constitution Bench of the Apex Court in its decision rendered in 1999 (7) SCC 209 Ajit Singh II case. As per the above decision, the right guaranteed to the employees for being considered for promotion is only a statutory right and not a fundamental right. As per the above decision, Article 16(4) and 16(4-A) do not confer any fundamental right to reservation. Their Lordships have come to the conclusion by considering various decisions of the Apex Court pertaining to the Rule of Reservation including Indra Sawhney's case. The relevant principles which are dealt with in the above decision is as set out hereunder:

"28. We next come to the question whether Article 16(4) and Article 16(4-A) guaranteed any fundamental right to reservation. It should be noted that both these articles open with a non obstante clause- "Nothing in this Article shall prevent the State from making any provision for reservation..."(emphasis supplied). There is a marked difference in the language employed in Article 16(1) on the one hand and Article 16(4) and Article 16(4-A) on the other. There is no directive or command in Article 16(4) or Article 16(4-A) as in Article 16(1). On the face of it, the above language in each of Articles 16(4) and 16(4-A) is in the nature of an enabling provision and it has been so held in judgments rendered by Constitution Benches and in other cases right from 1963.

29. We may in this connection point out that the attention of the learned Judges who decided Ashok Kumar Gupta and Jagdish Lal was not obviously drawn to a direct case decided by a Constitution Bench in C.A. Rajendran V. Union of India which arose under Article 16(4). It was clearly laid down by the five-Judge Bench that Article 16(4) was only an enabling provision, that Article 16(4) was not a fundamental right and that



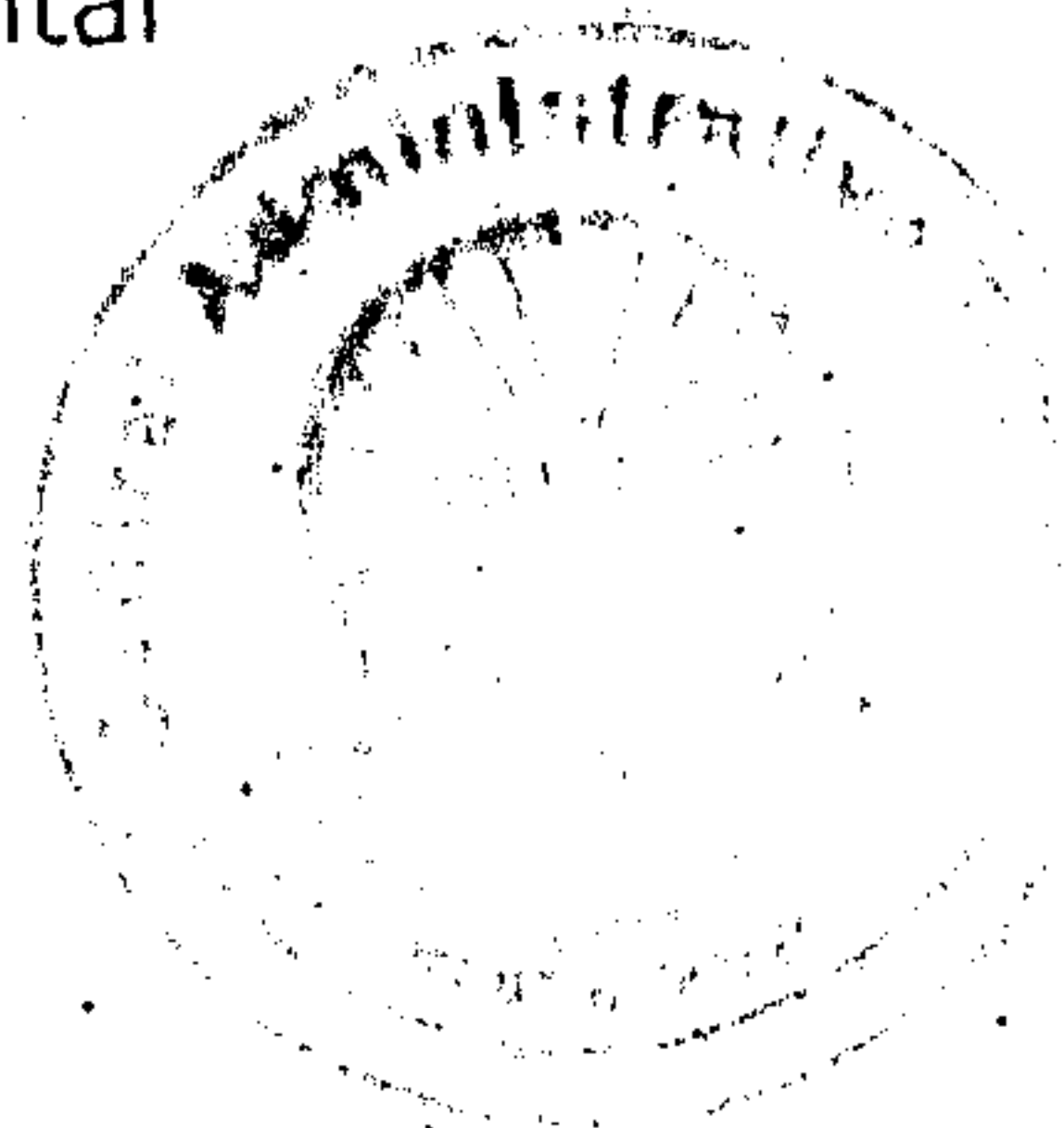
it did not impose any constitutional duty. It only conferred a discretion on the State. The passage in the above case reads as follows:

"Our conclusion therefore is that Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the Government to make a reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage of recruitment or at the state of promotion. In other words Article 16(4) is an enabling provision and confers a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens which, in its opinion, is not adequately represented in the services of the State." (emphasis supplied).

30. The above principle was reiterated in two three-Judge Bench judgments in P&T Scheduled Caste/Tribe Employees' Welfare Assn.(Regd.) v. Union of India and in State Bank of India Scheduled Caste/Tribe Employees' Welfare Assn. v. State Bank of India. Infact, as long back as in 1963, in M.R. Balaji vs. State of Mysore (SCR at p.474) which was decided by five learned Judges, the Court said the same thing in connection with Article 15(4) and Article 16 (4). Stating that Articles 15(4) and 16(4) were only enabling provisions, Gajendragadkar, J.(as he then was) observed:

"In this connection, it is necessary to emphasise that Article 15(4) like Article 16(4) is an enabling provisions, it does not impose an obligation, but merely leave it to the discretion of the appropriate Government to take suitable action, if necessary."

31 Unfortunately, all these rulings of larger Benches were not brought to the notice of the Bench, which decided Ashok Kumar gupta and Jagdish Lal and to the Benches which followed these two cases. In view of the overwhelming authority right from 1963, we hold that both Articles 16(4) and 16(4-A) do not confer any fundamental

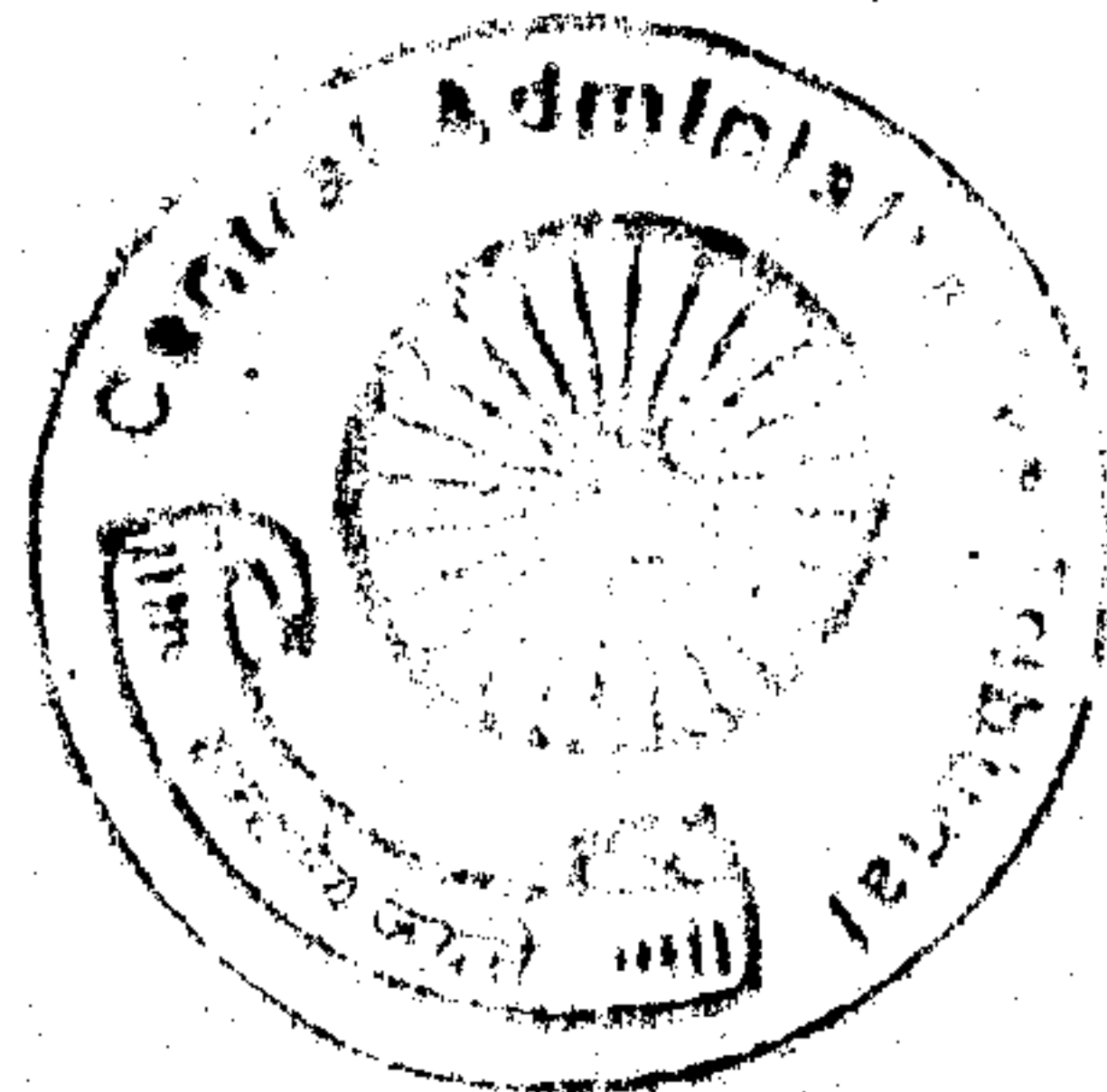


rights not do they impose any constitutional duties but are only in the nature of enabling provisions vesting a discretion in the State to consider providing reservation if the circumstances mentioned in those articles so warranted. We accordingly hold that on this aspect Ashok Kumar Gupta, Jagdish Lal and the cases which followed these cases do not lay down the law correctly."

A perusal of the above paragraphs makes it clear that the constitution does not confer any fundamental right nor do they impose any constitutional duties to adopt the Rules of Reservation but they are only in the nature of enabling provisions vesting a discretion to provide for reservation to the state/authority. Admittedly in the case on hand, the Recruitment Rules do not provide any reservation with reference to the impugned policy.

9. Infact, the Apex Court has considered a question as to whether Art. 16(4) and 16(4-A) confer a power coupled with a duty and it would be permissible to enforce such a duty by issuing a Writ of Mandamus or not. The above point was considered in paragraph 32 of the decision and it was held that no mandamus can be issued to provide for reservation or for relaxation.

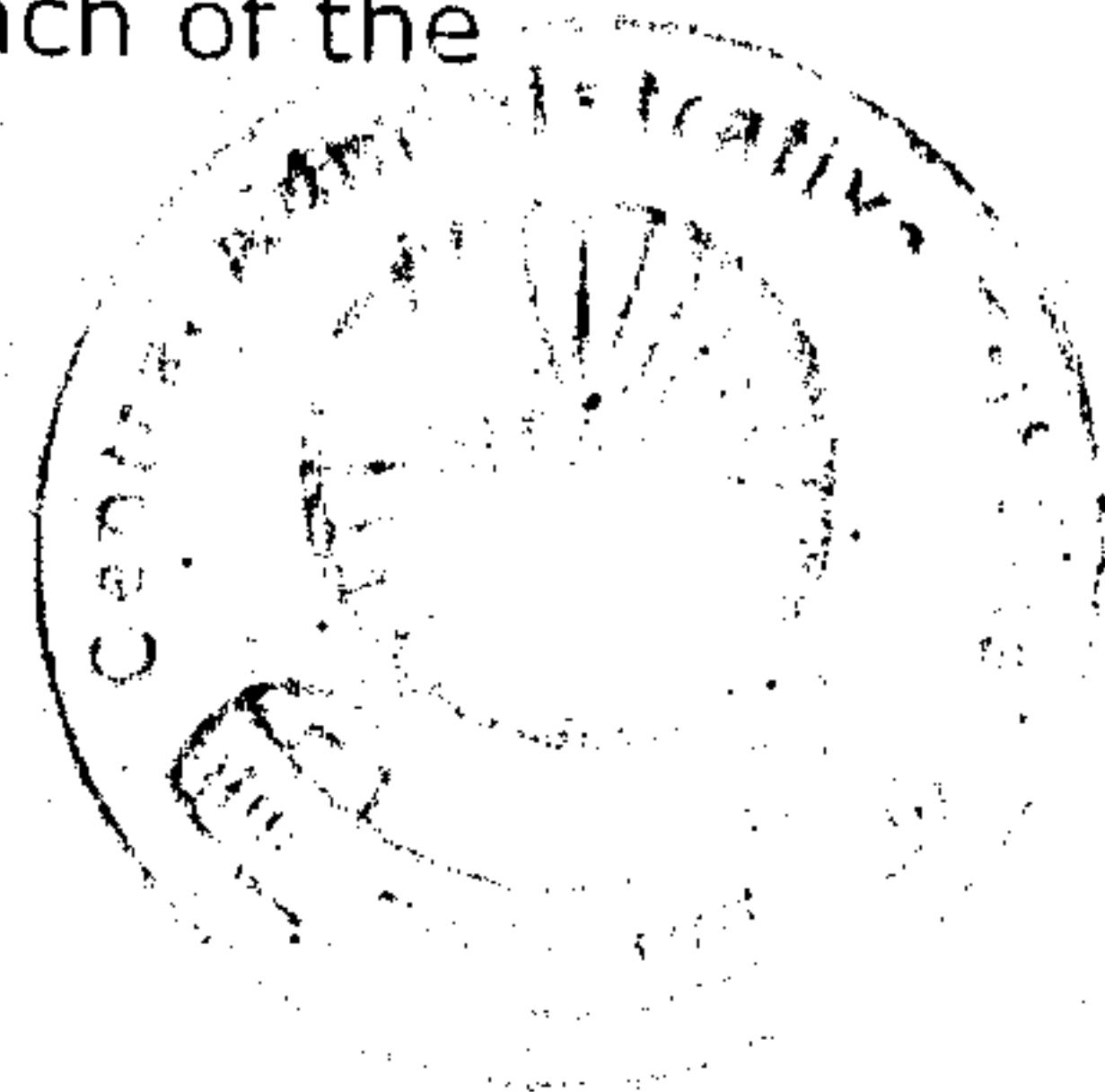
10. The Apex Court in an yet another decision reported in 2001 (10) SCC 165 held that when certain employees are entitled for the fixation of higher pay scale due to upgradation, Rule of Reservation is not applicable. The Apex Court observed therein that when the total number



of posts remained unaltered, as a result, regrouping of some employees who are given higher pay scales it should be construed as a case of upgradation of posts and not as a case of additional vacancy or post for which Rule of Reservation would apply.

11. The Apex Court while defining the expressions "posts" and "vacancies" in the decision rendered in Writ Petition (C) 79/1979 R.K.Sabharwal v. State of Punjab dated 10.02.1995, observed that the right to be considered for appointment can only be claimed in respect of posts in a cadre and the percentage of reservation to be worked out with regard to the number of posts which formed the cadre strength. In the instant case, upgradation of pay scale is introduced amongst the employees who are working in the same cadre and the applicants cannot claim that such upgradation is to a higher post or higher cadre to which a claim can be made for reservation.

12. That apart, the challenge before us is the policy introduced by the respondents to provide upgradation of pay scale. It is a settled law that the Courts/Tribunals would not ordinarily interfere with the policy decision of the Government. The policy decision of the State would be quashed if it is illegal or unconstitutional or shockingly arbitrary as understood in wednesbury-sense. The above principles are well defined by the Division Bench of the



Madras High Court in its judgment rendered in N.Priyadarshini's case reported in 2005 (3) CTC 449 by their Lordships Hon'ble Mr.Justice Markandey Katju, CJ and M.Ibrahim Kalifulla (J). The relevant portion is extracted as set out hereunder:

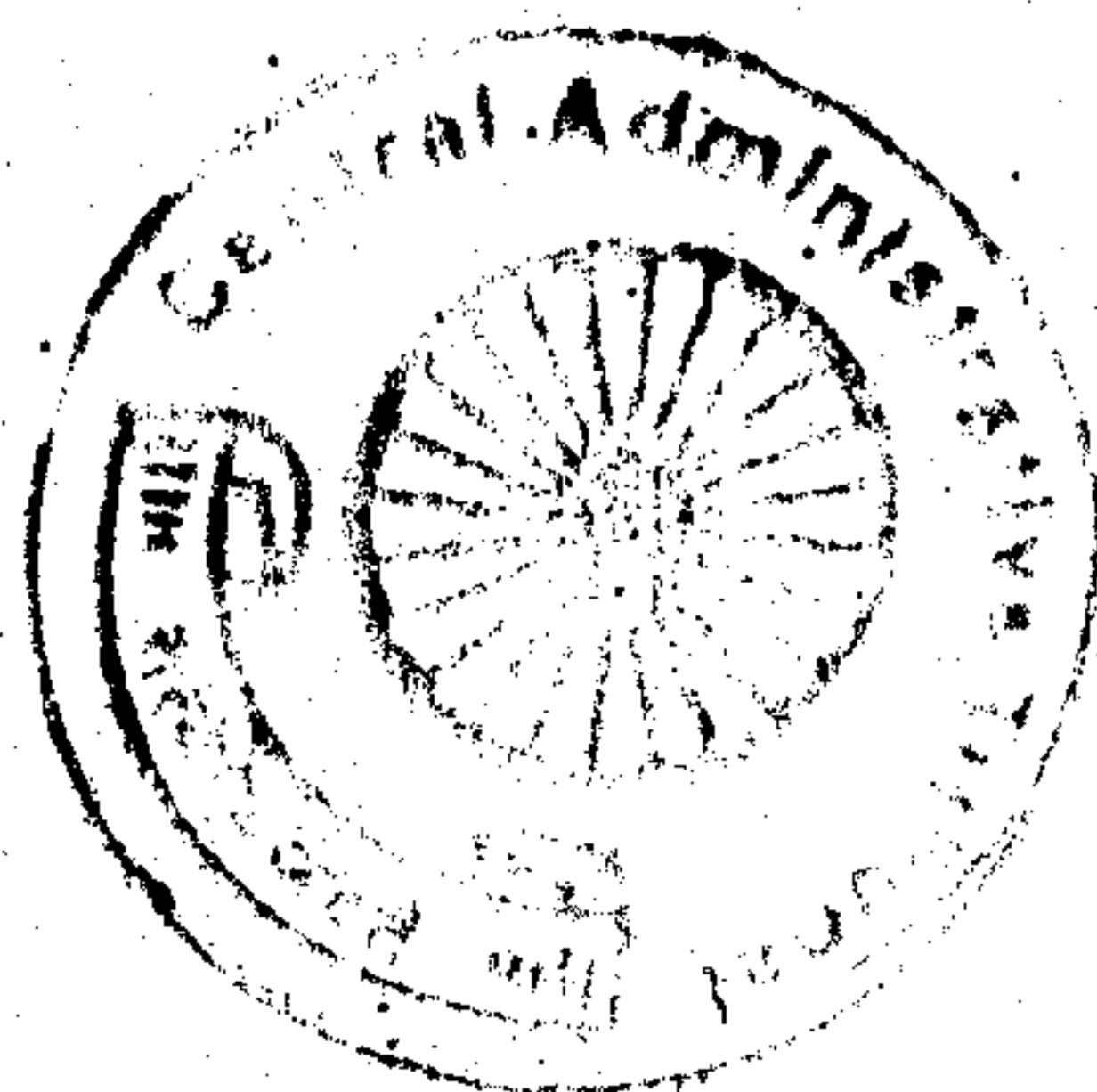
"25. It is no doubt true that ordinarily this Court does not interfere with policy decision of the State Government vide Union of India v. International Trading Company, JT 2003(4) SC 549; Tamil Nadu Electricity Board v. Tamil Nadu Electricity Board Engineers Association, 2005(1) MLJ 507; Chairman and MD, BPL Ltd., v. S.P.Gururaja and others, 2003(8) SCC 567; Indian Charge Chrome Ltd. v. Union of India, 2003(2)SCC 533; Union of India v. Kannadapara Sanghatanegala Okkuta & Kannadigara, 2002(10) SCC 226; Federation of Railway Officers Association v. Union of India, 2003(4) SCC 289; etc. However as observed by the Supreme Court in State of N.C.T. Of Delhi v. Sanjeev, AIR 2005 SC 2080 (vide paragraph 16), there can be no judicial review of administrative action on three grounds namely;

- (i) Illegality
- (ii) Irrationality
- (iii) Procedural impropriety

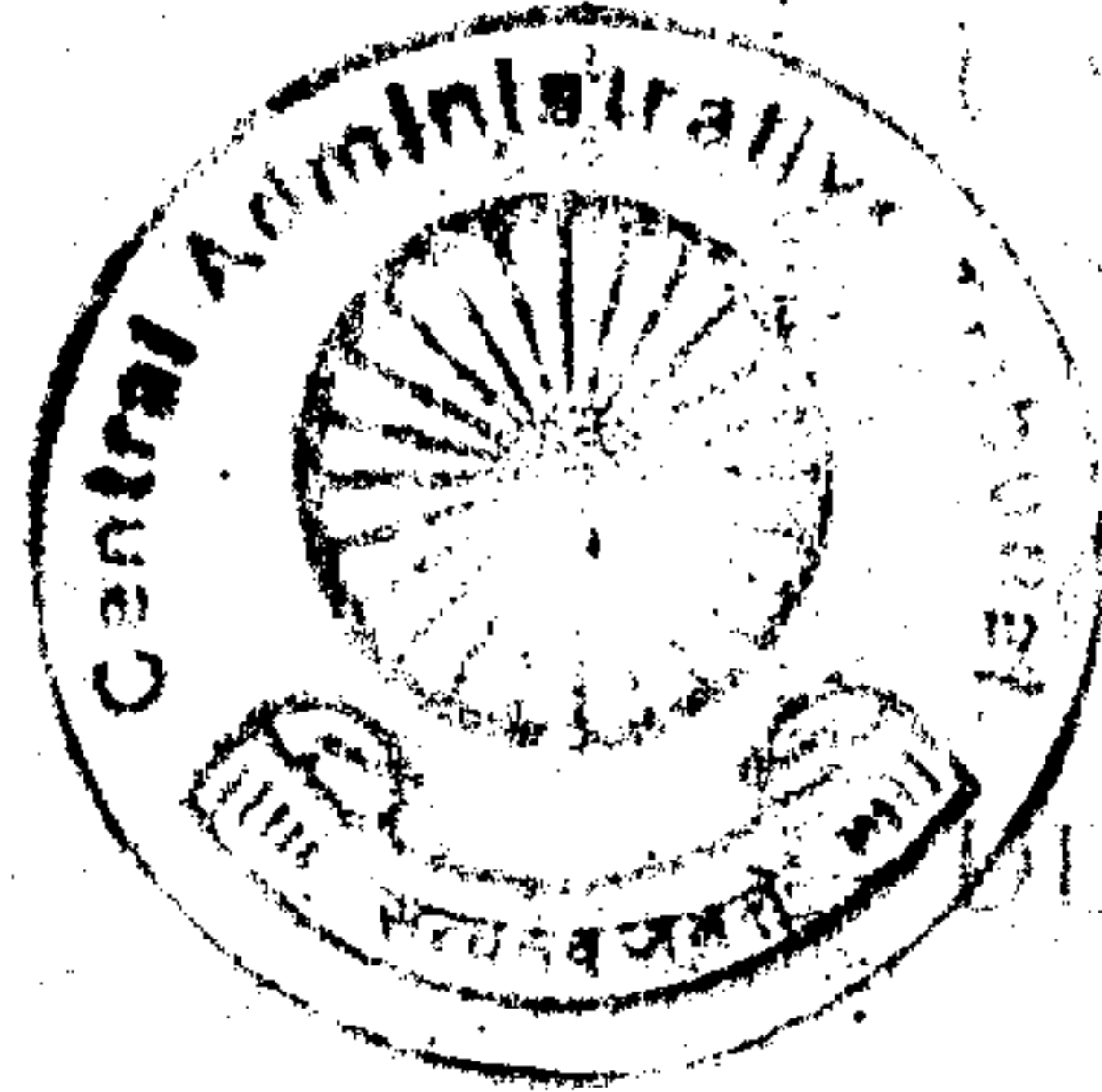
Thus the policy decision of the State Government will have to be quashed if it is illegal or unconstitutional, or shockingly arbitrary in the Wednesbury sense."

13. In the light of the above observations, we do not see any reason to interfere with the impugned policy of the respondents.

14. For the reasons stated above we see no reason to set aside the impugned order. Accordingly, the application



is dismissed and however, there will be no order as to



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Administrative Tribunal

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28/11/10

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.10.2012

CORAM

THE HON'BLE MR. JUSTICE ELIPE DHARMA RAO

&

THE HON'BLE MR. JUSTICE M. VENUGOPAL

W.P. NO. 8494 OF 2011

1. BSNL ST/ST Employees' Welfare Association (Regd.)

rep. by its General Secretary, Plot No. 47

Balakrishnapuram, IV Street, Adambakkam

Chennai - 60

Z. K. Velusamy

.. Petitioners

vs.

1. The Registrar

Central Administrative Tribunal

Madras Bench, Chennai - 104

2. Union of India rep. by

The Chairman & Managing Director

BSNL Corporate Office

Harishchandramathur Lane

Janpath, New Delhi - 110 001

3. The Deputy General Manager (Estt.)

Corporate Office (TE Section)

5th Floor, Bharat Sanchar Bhavan

Janpath, New Delhi - 110 001

4. The Chief General Manager

BSNL, Chennai Telephones

Purasawalkam High Road

Chennai - 600 007

.. Respondents

Prayer: Writ petition under Article 226 of the Constitution of India praying to issue a writ of certiorari calling for the records relating to the order dated 22.10.2010 passed in O.A.No.831 of 2010 on the file of the first respondent and the "Non-Executive Promotion Policy in No.27-7/2008-TE-II for employees in the IDA pay scales of NE-1 to NE-10 of Bharat Sanchar Nigam Limited" dated 23.03.2010 on the file of the third respondent and to quash the same.

For Petitioners

: Mr. R. Selvakumar

For R2 to R4

: Mr. M. Govindaraj

R1

: Tribunal

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