

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NO. 4360 OF 2010

STATE OF U.P. & ORS.

APPELLANT(S)

VERSUS

SANGAM NATH PANDEY & ORS.

RESPONDENT(S)

WITH

CIVIL APPEAL NO. 4381 OF 2010

U.P. PUBLIC SERVICE COMMISSION

APPELLANT(S)

VERSUS

MANOJ KUMAR SINGH & ORS.

RESPONDENT(S)

J U D G M E N T

SURINDER SINGH NIJJAR, J.

1. This appeal has been filed by the State of Uttar Pradesh challenging the order passed by the High Court of Judicature at Allahabad, in Special Appeal No.1202 of

2006 whereby the Division Bench of the High Court observed that the action of the State in treating 367 vacancies belonging to the reserved category as backlog vacancies was legally not justified and further issued a direction to the State Government to declare the result afresh in respect of these vacancies as if they are not backlog vacancies and that appointments may be offered in terms of the roster provided under notification dated 25th May, 2002 issued in exercise of powers under Section 3 (5) of the U.P Act No. 4 of 1994.

2. In order to appreciate the factual and legal controversies raised in this matter, it would be necessary to notice the various legislative provisions which govern the field of reservation in Public Services, in the State of Uttar Pradesh. Initially, the reservation in public services in the State of Uttar Pradesh was regulated through various Government orders, issued from time to time. The Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (U.P. Act No. 4 of 1994) (hereinafter

referred to as “1994 Act”) was enacted by the State of Uttar Pradesh following the judgment of this Court in **Indra Sawhney Vs. Union of India**¹. The aforesaid act repealed the Uttar Pradesh Public Services (Regulation for Backward Classes) Act, 1989 and the Uttar Pradesh Public Services (Reservation for Scheduled Castes and Scheduled Tribes) Act, 1993 and the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and the other Backward Classes) Ordinance, 1994.

3. The 1994 Act itself was amended by the Uttar Pradesh Public Service (Reservation for Scheduled Castes, Scheduled Tribes and Other Backwards Classes) (Amendment) Act, 2001(U.P. Act No. 21 of 2001). Some provisions of this Act were challenged in this Court in a writ petition. This Court, by Interim Order dated 21st January, 2002 directed that no executive order, in pursuance of the aforesaid Act of 2001, shall be passed during the pendency of the writ petition. Since a

¹ (1992) Supp 3 SCC 217

large number of vacancies in public service is lying vacant, the State of Uttar Pradesh decided to restore the original position as obtained under the 1994 Act, i.e. before the amendment by the U.P. Act No. 21 of 2001. Thereafter, the Governor of Uttar Pradesh on 6th June, 2002 promulgated the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backwards Classes) (Amendment) Ordinance 2002. This was subsequently replaced by the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backwards Classes) (Amendment) Act, 2002 (U.P. Act No. 1 of 2002).

4. Under the 1994 Act, very comprehensive provisions have been made to provide for reservation in Public Services and Posts in favour of the person belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens and for matters connected therewith or incidental thereto. Section 3 of the aforesaid Act provides certain percentages of vacancies reserved for

different categories of backward classes of citizens. The following percentages were prescribed:-

Scheduled Castes	21%
Scheduled Tribes	2%
Other Backward Classes	27%

These vacancies were to be filled in accordance with the roster provided under sub-section 5 of Section 3. The aforesaid percentages remained the same even under the amended Section 3 as contained in the Amendment Act, 2002. In accordance with the aforesaid formula, a requisition was made by the Irrigation Department Government of Uttar Pradesh on 20th October, 1999 to the Uttar Pradesh Public Service Commission, for initiating the process of selection of candidates for the posts of Junior Engineer (Civil). Pursuant to this request, an advertisement was issued on 22nd December, 2000 for filling up 945 such posts. The last date for making the applications was 27th January, 2001. The break up of the said posts sought to be filled up was as follows:

477 general category

257 backward classes

200 Schedule Caste category

The written examinations were conducted on 22nd/23rd December, 2001. The aforesaid examination was conducted without taking into consideration the reorganization of the State of Uttar Pradesh and the creation of the State of Uttaranchal on 9th November, 2000. There was a 2 per cent reduction in vacancies upon creation of the aforesaid new State. There was also an increase in the number of available vacancies by inclusion of the recruitment year 2003-2004. Thus, the total number of posts against which the selection was to be conducted was reduced from 954 to 887. The break up was as follows:-

General Category	260
Backward Classes	391
Scheduled Castes	223
Scheduled Tribes	13

Consequently, by letter dated 6th November, 2003, the State Government informed the Public Service

Commission to take further action for selection of 887 posts for the year 2003-2004 as opposed to the earlier requisition for 954 posts. Acting upon the aforesaid requisition, the result of the written examination was declared on 6th October, 2005.

Thereafter by a letter dated 13th October, 2005, the Government informed the Public Services Commission that at the time of sending of the original requisition, the posts of reserved category have been incorrectly got included in the general selection process. Therefore, the requisition be amended. In this requisition, the following description of the general selection posts was given and a request was made to initiate the process of selection:-

General Category	260
Scheduled Castes	109
Scheduled Tribes	10
Backward Classes	141

Thereafter, the Government addressed another letter dated 25th October, 2005 to the Public Service

Commission with a request to initiate the process of selection of the vacant posts meant exclusively for the reserved categories of Scheduled Castes, Scheduled Tribes and Backward Classes. It was stated that there are a total number of 367 posts in the aforesaid reserved categories for which, it was necessary to initiate the process of selection as a special recruitment. The break up of the posts category wise was:-

Scheduled Castes	114
Scheduled Tribes	3
Backward Classes	250

5. The Public Service Commission, thereafter, initiated the selection process by incorporating the various changes noticed above. Consequently, an option was given to the reserved category candidates as to their choice for being considered against the 520 posts of general recruitment or against 367 posts of special recruitment meant exclusively for the reserved category. The reserved category candidates appear to have given their option for the Special recruitment category of 367

posts. The interview was held thereafter between 21st November, 2005 to 12th January, 2006 for 520 posts for general recruitment and 367 posts for special recruitment. The final results were declared on 12th March, 2006. It is not disputed that respondent No. 1 to 3 and 5 had qualified in the written examination and had appeared in the interview. It is also not disputed that all these respondents remained unsuccessful in the final selection.

6. Aggrieved by the exclusion of 367 posts for the special recruitment, eight unsuccessful candidates belonging to the General category filed four writ petitions in the High Court of Judicature at Allahabad. It was the claim of the writ petitioners that the advertisement dated 20th/22nd December, 2000 was to fill the 954 posts, which was subsequently modified to 887. 50 per cent of the posts were reserved for different categories of Scheduled Castes, Scheduled Tribes and Other Backward Classes. The petitioners had no grievance about the reduction of vacancies as indicated above. They also do

not have any grievance about the 50 per cent of the posts reserved for the different categories. The only grievance made by the writ petitioners is the exclusion of 367 vacancies on the basis that they are backlog vacancies which have remained unfilled and are to be filled up by way of a special recruitment. According to them, by exclusion of 367 vacancies, the total vacancies for the general recruitment have been reduced to 520. This has unnecessarily resulted in a reduction of the posts which could be filled by all the categories in the general recruitment. The petitioners claimed that the exclusion of 367 vacancies from the general recruitment was without any legal sanction. It was the case of the petitioners that a vacancy can only be declared as a backlog vacancy provided there was a complete selection procedure in any recruitment year and the vacancy remained unfilled. Since there had been no efforts earlier to fill in all the 367 posts and declared as backlog, the exclusion of the same from the general recruitment was illegal.

7. The learned single Judge upon consideration of the various facts concluded that the general strength of the cadre being 4217 posts, 50 per cent of the general category would be 2066 posts. Out of these 2066 posts, 1808 posts were already occupied and only 260 posts were available for the non-reserved category. The learned single Judge further observed that in view of the number of posts occupied by the general category, it cannot be said that there has been any choking of the general category as indicated in the case of **Indra Sawhney** (**supra**). By reducing the number of posts for the general category, the objective of reservation policy is being achieved. The learned single Judge relied on the letter dated 4th July, 2006 to conclude that the State had endeavored to achieve the object of reservation without prejudicing the claim of the general category candidates.

The learned single Judge also observed that

“a perusal of section 3 of the act indicates that it is not necessary for any vacancy having been advertised on an earlier occasion in order to carry out the special recruitment. The special recruitment has to be made with the sole objective of achieving the target of unfilled vacancies of the reserve category after applying the roster. The State Government, in the opinion of the Court, has

segregated the 367 posts as posts for special recruitment in view of the fact that these posts exclusively belong to the reserved category remains undisputed. The petitioner, who belongs to the general category, therefore, cannot have any right or claim against the said posts, even if, they have been advertised by the State Government. The posts, which are meant to be filled up by the reserved category, cannot be offered to the general category candidates. In this view of the matter, the State Government, has to apply the roster in order to achieve the target. The questions as to whether they are backlog vacancies or not need not to be probed any further in view of the fact that the applicability of the roster against the said posts has to be determined. The aforesaid discussions, therefore, leave to only one conclusion that the State Government has not over stepped the 50 per cent reservation quota but the selections have to be finalized after applying the roster.”

8. The learned single Judge concluded that the 50 per cent limit as provided in the second proviso has not been transgressed by the State in offering the 367 vacancies for special recruitment as backlog vacancies. It is, however, observed that the State Government ought to undertake the exercise of carrying out the calculation of the exact number of vacancies on the basis of the roster provided under Section 3, sub-section 5 of the 1994 Act. The writ petitions were disposed of with the aforesaid observations.

9. Aggrieved against the aforesaid, the writ petitioners preferred Special Appeal No. 1202 of 2006 before the Division Bench. The Division Bench recorded the following conclusions:-

“In view of the aforesaid we clarify that the backlog vacancies with reference to Clause 2 of Section 3 of U.P. Act No. 4 of 1994 as amended by U.P. Act No. 1 of 2002 necessarily mean those vacancies within the reserved category which were subject matter of an earlier advertisement but remained unfilled because of non availability of suitable candidates within the reserved category after selection. It is only in respect of such vacancies that the procedure qua backlog vacancies can be adopted. We may further clarify that any vacancy in the reserved category (however old it may be), if it had not been advertised earlier and was not a part of an earlier process of selection which was completed, the same cannot be termed to be a backlog vacancy.

In the facts and circumstances of the present case it is not in dispute that the total number of vacancies which were advertised earlier i.e. 954 but subsequently reduced to 887 were not covered by any earlier advertisement nor were part of any process of selection and, therefore, none of the vacancies which were subject matter of the advertisement in question (belonging to the reserved category) can be termed to be backlog vacancy. Therefore, the action of the State respondents treating 367 vacancies belonging to the reserved category as backlog vacancies is legally not justified. Respondents are directed to declare the result afresh in respect of these vacancies as if they are not backlog vacancies and appointments may be offered in terms of the roster provided for under notification dated 25th May,

2002 issued in exercise of powers under Section 3(1) read with Section 3(5) of the U.P. Act No. 4 of 1994. The aforesaid exercise may be completed by the State respondents within two months from the date a certified copy of this order is filed before the authority concerned.”

10. We have heard the counsel for the parties.

11. Mr. Dwivedi appearing for the State of U.P. submits that the directions issued by the Division Bench would only unsettle the settled position. He submits that 703 posts have been filled up against 887 posts that were advertised. Further 183 posts would be filled in compliance with the interim order of the Division Bench. All the selected candidates have joined and have completed almost three years of service. The implementation of the directions of the High Court would create legal as well as administrative complication. He further submits that 367 posts which were segregated for special recruitment do not, in any manner, infringe the rights of the general category candidates. According to him, a conjoint reading of the second proviso to sub-

section (1) of Section 3 and sub-sections (2) and (5) of the said Section makes it abundantly clear that so long as the reservation does not exceed 50 per cent of the cadre strength, the general category candidates can have no objection in the special recruitment undertaken in order to complete the 100 points roster. According to the learned counsel, the Division Bench has misconstrued Section 3 in concluding that the action of the State Government in treating 367 vacancies as backlog was legally not justified.

12. Making a reference to the letter dated 4th July, 2006, it was submitted by Mr. Dwivedi that the State has endeavoured to achieve the object of the reservation without prejudicing the claim of the general category candidates. He pointed out that out of the total sanctioned strength of the cadre of 4127 posts, 50 per cent for general category would be 2066 posts. Out of that share, the general category already occupied 1808 posts leaving a balance of 260 posts which were available to be filled up for general category. Under

the earlier advertisement dated 22nd of December, 2000, the break up of the vacancies was as under :

(i) No. of vacancies	954
(ii) Posts for Scheduled Castes	200
(iii) Posts for Scheduled Tribes	20
(iv) Posts for O.B.C.	257
(v) General Category	477

This would have been in excess of 50 per cent which is impermissible under the law settled by this Court in the case of **Indra Sawhney (supra)**, and **R.K. Sabharwal & Ors Vs. State of Punjab & Ors.**². According to him, it would also be contrary to the provisions contained under Section 3 of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994 as amended by Act No. 1 of 2002. The total number of vacancies were reduced to 887 out of which 520 earmarked for general recruitment to ensure that the general category gets 260 vacancies i.e. 50 per cent of the total available

²(1995) 2 SCC 745

vacancies in the cadre. Remaining 367 vacancies were treated as backlog vacancies for the reserved categories. Merely because the vacancies were not advertised would not render the action of the State Government illegal. Mr. Dwivedi also submits that all the appellants having participated in the selection process cannot be permitted to challenge the same merely because they have remained unsuccessful. This apart, no relief could have been given to the appellants as the selected candidates have not been made parties.

13. On the other hand, Mr. Francis appearing for the respondents submits that by excluding 367 vacancies and earmarking the same for special recruitment, the State of U.P. has infringed the 50 per cent rule in the year of recruitment as well as in the cadre. Laying considerable stress on the second proviso to Section 3 of the Amendment Act, 2002, he has submitted that the total reservation for all categories of persons cannot exceed in any year of recruitment 50 per cent of the total vacancies of that year as also 50 per cent

of the cadre strength of the service to which the recruitment is to be made. On the basis of the calculation made by the State and by excluding 367 posts as backlog, the State has reduced the strength of the percentage meant for the general recruitment category. The recruitment of the reserved category has gone up to 71 per cent as against 50 per cent. According to the learned counsel, the interpretation placed on the statutory provisions by the Division Bench is in accordance with the law declared by this Court in **Indra Sawhney** and **R.K. Sabharwal's case** (**supra**). It is also in accordance with the law settled by this Court in the case of **M. Nagaraja** Vs. **Union of India**³ and **Ramesh Kumar** Vs. **High Court of Delhi**⁴. According to the learned counsel, the Division Bench merely directed the State Government to follow the mandate of the statute as well as the law declared by this Court by directing the State to declare the result afresh in respect of 367 vacancies by not treating them as backlog vacancies and thereafter to

³ (2006) 8 SCC 212

⁴ (2010) 3 SCC 104

offer appointments in terms of the roster provided under notification dated 25th May, 2002.

14. We have considered the submissions made by the learned counsel for the parties. The entire controversy in this case centres around the decision of the State Government to treat the unfilled vacancies undoubtedly falling to the share of the reserved categories as backlog vacancies. In order to determine as to what would be the backlog vacancies, it is necessary to have a look at the relevant provisions of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994 as amended by the Act No. 1 of 2002.

“2 (d) “year of recruitment” in relation to a vacancy means a period of twelve months commencing on the first of July of a year within which the process of direct recruitment against which such vacancy is initiated.

Amendment of Section 3 – In Section 3 of the Principal Act, -

(a) for sub-sections (1), (2) and (3) the following sub-section shall be substituted, namely :-

(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens –

- (a) in the case of Scheduled Castes Twenty one percent
- (b) in the case of Scheduled Tribes Two percent
- (c) in the case of Other Backward Twenty seven percent

Classes of citizens

Provided that the reservation under clause © shall not apply to the category of Other Backward Classes of citizens specified in Schedule II :

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty percent of the total vacancies of that year as also fifty percent of the cadre strength of the services to which the recruitment is to be made.

- (2) If, in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, such vacancy shall be carried forward and be filled through special recruitments in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty percent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in sub-section (1) ;
- (3) Where a vacancy reserved for the Scheduled Tribes remains unfilled even after three

special recruitments made under sub-section (2), such vacancy may be filled from amongst the persons belonging to the Scheduled Castes.”

- (b) (i) Sub-sections (3-A),(3-B) shall be omitted;
(ii) Sub-section (4) shall be omitted;
- (c) for sub-section (5), the following sub-section shall be substituted, namely :-

“(5) The State Government shall for applying the reservation under sub-section (1), by a notified order, issue a roster comprising the total cadre strength of the public service or post indicating therein the reserve points and the roster so issued shall be implemented in the form of a running account from year to year until the reservation for various categories of persons mentioned in sub-section (1) is achieved and the operation of the roster and the running account shall, thereafter, come to an end, and when a vacancy arises thereafter in public service or post the same shall be filled from amongst the persons belonging to the category to which the post belongs in the roster.”

15. A bare perusal of the above would show that the Act regulates the extent of reservation in Public Services and Posts in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens and for matters connected therewith or incidental thereto. It also provides for a self-contained mechanism as to how the posts shall be distributed

among the different categories according to 100 point roster. The second proviso to Section 3, which is relevant to matter in issue herein, stipulates that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment, 50 per cent of the total vacancies of that year as also 50 per cent of the cadres strength of the service to which the recruitment is to be made. The proviso clearly postulates a two-fold restriction on the extent to which vacancies can be reserved in a year of recruitment as also the cadre strength of the service. It is clearly provided that in any year of recruitment reservations of vacancies for all categories of persons shall not exceed 50 per cent of the total vacancies of the year of recruitment in which such recruitment takes place. Under the second part of the proviso, reservation can also not exceed 50 per cent of the cadre strength of the service to which recruitment is to be made.

16. In any recruitment year, it may happen that the candidates belonging to the reserved category may not be

available to fill the vacancies falling to the share of the particular reserved category. In such circumstances, sub-section (2) of Section 3 enables the State to carry forward the unfilled vacancy/vacancies to be filled through special recruitment as a separate class of vacancy. Such class of vacancy can not be intermingled with the vacancies of the year of recruitment in which it is filled. It also can not be counted for the purpose of determining of ceiling of 50 per cent reservation of the total vacancies of that year. The provision contained in sub-section 2 is, notwithstanding anything to the contrary contained in sub-section 1, which provide for a total 50 per cent reservation for the categories of Scheduled Castes, Scheduled Tribes and Other Backward Classes, i.e., 21 per cent, 2 per cent and 27 per cent respectively. The terminology of the aforesaid section is clear and unambiguous. Therefore, construed in its ordinary, literal sense, the sub section provides that the carried forward vacancies are not to be included in calculating the 50 per cent cap as contained in Proviso 2 to Section 3 (1). The special recruitment may be held in that very year or in

the succeeding year or years of recruitment as a separate class of vacancy. Sub-section 3 further provides that if vacancy/vacancies reserved for Scheduled Tribes remained unfilled even after three special recruitment made under sub-section 2, such vacancies are to be filled up from amongst persons belonging to the Scheduled Castes. In other words, unfilled vacancies falling to the share of Backward Classes and Scheduled Castes and Scheduled Tribes, can be offered to the Scheduled Castes category. These provisions clearly indicate that the posts which are meant for the reserved categories would be offered only to the reserved categories so long as the reserved roster points are not occupied by the reserved categories.

17. The aforesaid conclusion also flows naturally from sub-section 5 of Section 3. The plain language of aforesaid sub-section clearly shows that reservation under sub-section 1 of Section 3 shall be achieved by application of a roster indicating therein; the total cadre strength of the Public Service or Posts and the reserved

points in the roster. The roster so issued is required to be implemented in the form of a running account from year to year until the reservation for various categories of persons mentioned in sub-section 1 is achieved. The vacancies arising thereafter in the Public Service or Posts to be filled from among the persons belonging to the category to which the posts belong in the roster.

18. Keeping in view the aforesaid legal position, the issuance of the letter dated 4th July, 2006 would be wholly justified. A perusal of the same would clearly demonstrate the anxiety of the Government, though belated, to ensure that the action is taken in accordance with the reservation policy and the roster which is to be maintained in terms of sub-section 5 of Section 3. The aforesaid letter reads as follows:-

“No.G-223-E-2-Kal/Court Case

From:

Engineer-in-Chief,
Establishment – 2 Ka- Section,
Irrigation Department, U.P.
Lucknow.

To:

Chief Standing Counsel,
High Court, Allahabad.

Dated Lucknow : July 4, 2006.

Subject: Regarding Civil Misc. Writ Petition
No.16005/2006 titled Sangam Nath
Pandey and others vs. State of Uttar
Pradesh and others.

Sir,

Kindly have a look into the letter No.Memo/P.S./2006 dated 3.7.2006, vide which you have sought information regarding the status of the total cadre (group) of Civil Junior Engineers and regarding their reservation on the above subject.

2. On this subject, I have to say that in the Irrigation Department there are total 4217 posts of Junior Engineers (Civil) for direct recruitment and at the time when the amendment was made to Adhiyachan of 887 posts, at that time the position of the quota of reserved category was as under:

	Quota General	Quota S.C.	Quota S.T.	Quota O.B.C.	
Total sanctioned Posts	4218				
Working after Deduction of 2% From sanctioned Posts.	2066	868	83	1116	
Working	2672	1808	200	1	663
Group-wise Shortage	1461	258	668	82	453
Posts to fall Vacant in year 2003-2004	2	2	--	--	--

Requisitions forwarded	1463	260	668	82	453
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Thereafter, for completing the reserved quota of the reserved category the following requisitions have been sent.

Selection in dispute	887
Special Selection	352 SC/ST) (292 SC + 60 ST)
Special Selection	9 SC
Special Selection	153 SC
Special Selection	62 SC
Total	1463

It is clear from that the Department has with object to complete quote on sanctioned posts has forwarded requisitions as above and has requested for the action accordingly.

Yours faithfully,

Sd/-

(Gaya Prasad)
Senior Staff Officer (E-2Ka)
For Engineer in Chief, Irrigation Department”

19. A harmonious construction of sections 2(d), 3(2) and 3(5) would lead to the conclusion, as stated by the Division Bench, that only those vacancies can be declared backlog vacancies, within the reserved category, which were subject matter of advertisement but remained unfilled because of non-availability of suitable

candidates, within the reserved category, after selection. It is only in respect of such vacancy that the procedure qua backlog vacancy can be adopted. Any vacancy, which has not been subjected to a complete process of selection, even though vacant, cannot be treated as a backlog vacancy.

20. Section 2(d) defines a period of 12 months commencing on 1st of July of a year as a year of recruitment for calculation of the number of vacancies. Section 3(1) gives the different percentages of vacancies, which are reserved for different categories of backward class candidates. The percentage of vacancies reserved under Section 3(1) had to be filled according to the roster mechanism provided under sub-section 5 of Section 3. Section 2(d) would tend to indicate that the State was required to determine the number of available vacancies in every year of recruitment. Once the vacancies are determined, necessary requisition would have to be sent to the Public Service Commission for initiating the process of selection. We have noticed earlier the

correspondence of the Government with the Public Service Commission intimating the number of posts to be filled at various stages.

21. In spite of the aforesaid requests, it appears that the posts meant for the reserved categories could not be filled. The State Government had only partly performed its duties by sending the necessary requisitions to the Public Service Commission for initiating the selection process. Thereafter, the selection process ought to have been completed as provided under the Statutory Rules. It appears that the selection process for the 367 posts was not completed. Therefore, the aforesaid vacancies could not be termed as unfilled vacancies belonging to the reserved categories. But, at the same time, it also can not be disputed by anybody that the 367 posts, which are sought to be filled by special recruitment are posts, which are meant for the reserved categories and have remained unfilled. This is evident from the letter dated 25th October, 2005 pointing out that out of the 887 posts mentioned in the letter dated 13th October, 2005,

367 posts were infact reserved category posts, which had been lying vacant and had been wrongly included in the general recruitment. Hence, a request was made to exclude the aforesaid posts from the general selection and be filled by holding a special recruitment for the reserved category candidates.

22. The exercise of identifying the year-wise and cadre-wise vacancies ought to have been conducted by the State prior to the issuance of the advertisement as rightly noticed by the learned single Judge. The purpose of introducing a roster system was to ensure that the percentages of reservation provided for various categories of persons is effectively and speedily achieved. This can only be done if the department concerned identifies the year-wise vacancies in the cadre. Once the vacancies are identified, it is enjoined upon the authorities to ensure that the selection procedure is completed speedily. This is necessary to avoid uncertainty to all categories of candidates. General category, as well as, the reserved category candidates are likely to be adversely affected in

case the vacancies are not filled within a reasonable period of time. As a result of undue delay, certain candidates will always be in the danger of becoming overage to apply for some particular posts falling in a particular year of recruitment. Unnecessary lethargy in filling up the posts would also lead to further uncertainty and chaos among the recruits with regard to their seniority, confirmation and promotions. Such a situation only gives rise to unavoidable litigation, lasting for many long years. This case epitomizes such malaise.

23. In our opinion, the State Government, in the present case, ought to have initiated the necessary selection procedure upon due verification of the posts available for the reserved categories. It was not sufficient to merely send the requisition to the Public Service Commission. It was necessary for the State to pursue the matter with the Public Service Commission for completion of the selection process. Otherwise, the very purpose of introducing the roster system and a running account would be totally defeated. We may reiterate here

the observations made by this Court in the case of **R.K. Sabharwal (supra)**. With regard to the operation of the roster system, in the aforesaid case, it was observed as follows:-

“5. We see considerable force in the second contention raised by the learned counsel for the petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year. The purpose of “running account” is to make sure that the Scheduled Castes/Schedule Tribes and Backward Classes get their percentage of reserved posts. The concept of “running account” in the impugned instructions has to be so interpreted that it does not result in excessive reservation. “16% of the posts ...” are reserved for members of the Scheduled Castes and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The

“running account” is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward Classes in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the “running account” must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation.

6. The expressions ‘posts’ and ‘vacancies’, often used in the executive instructions providing for reservations, are rather problematical. The word ‘post’ means an appointment, job, office or employment. A position to which a person is appointed. ‘Vacancy’ means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a ‘post’ in existence to enable the ‘vacancy’ to occur. The

cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation.

7. When all the roster points in a cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Scheduled Castes/Tribes and Backward Classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from amongst the category of persons to whom the respective vacancies belong. Jeevan Reddy, J. speaking for the majority in *Indra Sawhney v. Union of India* (1992 Supp (3) SCC 217) observed as under: (SCC p. 737, para 814)

“Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e. 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of OBCs in the unit/service/category is only 50, a shortfall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all Backward Classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the

members of open competition category would become age-barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit as the case may be.”

The facts narrated above would indicate is that the situation in the present case is almost as it was depicted by this Court in the case of **Indra Sawhney (supra)**.

We, therefore, reiterate that it is necessary for the department to identify year-wise vacancies for the cadre. It is also necessary to fill up the posts speedily in order to avoid certain candidates being rendered ineligible as they may have become overage. It is for this reason that Section 3 has placed importance on the year of recruitment as also on the process of selection. In our opinion, the authorities have been rather casual in their approach in implementing the reservation policy, in letter and spirit. We are, however, conscious of the fact that

the 367 posts lying vacant for a number of years are meant only for the reserved categories. They have been calculated on the basis of the percentages reserved for various categories. In segregation of the aforesaid posts, none of the unreserved categories would be deprived of any posts which ought legitimately to have fallen to their share.

24. Therefore, we are of the considered opinion that the interest of justice, in the peculiar facts of this case, demands that the course adopted by the State Government in segregating 367 posts for special recruitment ought not to be disturbed. For the aforesaid reasons, we are unable to agree with the direction issued by the Division Bench in the impugned Judgment.

25. Before we part, we may also notice that all the writ petitioners have participated in the selection process and remained unsuccessful. Therefore, none of their legal rights has been infringed.

26. In view of the above, the appeal is allowed. The Judgment of the Division Bench is set aside.

Civil Appeal No. 4381 of 2010

In view of the judgment passed in Civil Appeal No. 4360 of 2010, this appeal is also allowed and the Judgment of the Division Bench is set aside. _

JUDGMENT

.....J.
[B.Sudershan Reddy]

.....J.
[Surinder Singh Nijjar]

New Delhi;

December 15, 2010.

