
(1995) 08 GAU CK 0001
In the Gauhati High Court
Case No : Civil Rule No. 510 of 1994

Suresh Singh

APPELLANT

Vs

State of Tripura and Ors.

RESPONDENT

Date of Decision : 07-08-1995

Acts Referred:

Constitution of India, 1950 — Article 16(4), 16(4), 16(4A), 16(4A)

Citation : (1996) 1 GLJ 388 : (1996) 1 GLR 128 : (1996) 1 GLT 454

Hon'ble Judges : A.Deb, J

Bench : Single Bench

Advocate : S.Roy, A.Ghosh, M.L.Roy, A.Chakraborty, B.Das, Advocates
appearing for Parties

Judgement

1.This application for modification and/or alteration of the interim order dated November 18, 1994 raises certain vital and interesting issues in the light of the cases *Indra Sawhney vs. Union of India & others* reported in AIR 1993 SC 477 and *RK Sabharwal & others vs. State of Punjab & others* reported in (1995) 2 SCC 745. The interim order was passed on the basis of the submissions made by the learned Advocate General that in view of law laid down by the Apex Court in the case of *Indra Sawhney (supra)* that it was no longer possible ; to take provision for more than 50% reservation of appointments or posts in any service whatsoever on any ground including the "carry forward rule" in a particular year. Now the respondents filed application for modification and/or alteration of the interim order as aforesaid in view of the latest decision of the Apex Court in the case of *RK Sabharwal & others (supra)*.

2. The present matter under disposal involves complicated questions of fact and law and it is therefore considered necessary to discuss in details for proper understanding of the issues involved therein which would appear herein below.

3. The petitioners have not filed separate misc case seeking any interim order or relief. It is, therefore necessary to state the brief facts stated in the writ petition. These seven petitioners have been working in the Civil Secretariat under the

Government of Tripura for a long time as LD AssistantcumTypists/Assistants/ Head Assistants/Office Superintendents/ Section Officers. According to the petitioners there was no separate rules for Secretariat employees and of late, Secretariat Service Rules, 1989 (for short the Rules) was introduced with effect from January 1,1989 and the Rules provide for six grades under subrule (2) of Rule 7. The rules provide for special provisions for representation of the Scheduled Castes and Scheduled Tribes in the matter of direct recruitment and promotion and according to petitioners in the Rules, the provisions for reservations of Scheduled Castes and Scheduled Tribes have not given retrospective effect. The petitioners stated that for more than one year 22 Grade II posts (under Secretary) are lying vacant to be filled up by promotion as per Rules and that the petitioners are eligible for promotion to the Grade II posts according to the Rules. The petitioners' further case is that to deprive them from their due legitimate entitlement of promotion, the Commissioner cum Secretary to the Government of Tripura, Department of Welfare for Scheduled Castes and OBC, the respondent No.3 issued Memorandum No. 1225356/F 2151 /SCW/GL/90 dated May 24,1994 which is Annexure A by which clarification on 100 point roster was issued. The said memorandum dated May 24, 1994 reads as follows : (not quoted : Editor)

The Secretary to the Government of Tripura, Department of Welfare for Scheduled Tribes, the respondent No.4 vide Memo No.1709318070/F.458 (VOL II)TW/R.Cell/94 (L) dated August 23, 1994 reiterated the views and decision of the Government of Tripura taken in aforementioned memorandum dated May 24, 1994. The said memorandum dated August 23, 1994 reads as follows : (not quoted : Editor).

The petitioners further stated that the State Government had circulated that while reservation in respect of promotion ought to have been effective from February 19,1977, the State Government has no intention for reopening any of the past cases. According to the petitioners the Press Release dated July 26, 1994 is a misleading one in view of the decision of the Government issued vide Memo No.14222320/F.2151 SCW/GL/90 dated June 25,1994 to carry forward by bringing all the cases of backlog at the time of allowing promotion to the unreserved category, the State Government is factually reopening all the past cases of reserved quota for Scheduled Tribes and Scheduled Castes candidates for adjustment against the unreserved posts depriving the petitioners. The petitioners' further alleged that the respondents paved way for adjusting all the posts of backlog against unreserved posts of 100 point roster with utter deprivation of eligible candidates of unreserved general category and factually so long deprived the eligible candidates of unreserved category by not issuing any promotion order to the petitioners. The petitioners further alleged that the respondents have no right to deprive the eligible petitioners and other unreserved general category from being promoted to the post of Under Secretary by arbitrarily bringing all the cases of backlog of Scheduled Tribes and Scheduled Castes and adjusting the backlog against unreserved quota.

The petitioners further case is that all the posts under the Civil Secretariat have not been included in the Secretariat Services since it is constituted as a new cadre service and hence in filling up any post in any cadre 100 point roster will be from the date of inception of the service. The petitioners further stated that as per decision of the Supreme Court appointment of any person either directly or by promotion from the reserved category in any recruitment year shall have to be restricted within 50% of the total vacancy available in the year. Petitioners' further case is that the memorandum dated May 24, 1994 and August 23, 1994 are required to be quashed and respondents are required to be restrained from implementing the aforesaid two memoranda otherwise petitioners' fundamental rights guaranteed under Article 14 and 15 of the Constitution of India would be infringed. For the purpose of determination of the present interim matter it is considered appropriate to incorporate the prayers (c) of the writ petition which are quoted below:

"(c) pass order staying the operation of the aforesaid impugned two Memoranda (Annexure A and B) issued by the Govt in the Departments of Welfare of Scheduled Castes and Scheduled Tribes in any manner till the disposal of this writ petition."

4. The respondents by filing an application for modification/alteration of interim order which is also the affidavit in opposition have, inter alia, stated that there had been reservation for the Scheduled Castes and Scheduled Tribes according to the Central Government policy during the entire period when Tripura was Union Territory. When Tripura attained full Statehood in 1972, the State Government introduced its own policy of reservation for Scheduled Castes and Scheduled Tribes in employment on the basis of the population percentage. The State Government first introduced reservation in direct recruitment in 1974 vide memorandum dated September 13, 1974 being Annexure R1 to the affidavit in opposition and application for modification/alteration of interim order dated November 18, 1994 filed on May 8, 1995 (hereinafter referred to as the said application) and in promotion vide memorandum dated February 19, 1977 being Annexure R 2 to the said application. The percentage of reservation for Scheduled Castes was then 15% and for Scheduled Tribes 29%. On account of increase in the Scheduled Castes population and Scheduled Tribes population in the State in 1991 census, the State Government has increased reservation percentage of Scheduled Castes 16% and Scheduled Tribes 31% in March, 1994.

It is further stated in the said application that though reservation was followed from 1974 in direct recruitment and from 1977 for promotion, eligible Scheduled Castes and Scheduled Tribes candidates were not available and the Scheduled Castes and Scheduled Tribes vacancies had to be carried forward and the State Government have now taken a special measure to send the Scheduled Tribes and Scheduled Castes students outside the State for various higher course of studies and professional studies and now there has been a trend of availability of Scheduled Tribes and Scheduled Castes candidates and the carried forward

Scheduled Castes/Scheduled Tribes vacancies can now be filled up. It is further stated in the opposition that in the posts and services under the State Government as in 1991 the average overall percentage of representation for Scheduled Castes was 11.42% and average overall percentage of representation of Scheduled Tribes was 13.89% as against the prescribed reservation of 16% and 31% respectively. Because of the poor representation of Scheduled Castes and Scheduled Tribes in the service the State Government made an enactment namely "the Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Service A and Posts) Act, 1991". Rules under the said Act were framed in 1993. The Act and the Rules were given effect from October 2, 1992 i.e. before the judgment in Indra Sawhney (supra) (popularly known as Mandal Commission case). The Scheduled Castes Welfare Department and Scheduled Tribes Welfare Department after thorough inspection of the 100 point roster maintained by various department/appointing authority have now found that there is a need for taking expeditious action by various departments to fill up existing vacancies of a particular year or years. The respondents denied in the said application that all the six grades appearing in Tripura Secretariat Service Rules, 1989 are analogous old posts which existing as were held by the existing incumbents prior to coming into force of the said Tripura Secretariat Service Rules, 1989. The respondents further asserted in the said application that in view of the Government memorandum dated September 13, 1994 and February 19, 1977 it is immaterial whether there was/is special provisions of representation of Scheduled Castes and Scheduled Tribes in Tripura Secretariat Service or not. Reservation for Scheduled Castes and Scheduled Tribes had already been in force since 1974 and 1977 and the same had/has to apply to Tripura Secretariat Service both in direct recruitment and promotion. The reservation in appointment or promotion in respect of the Scheduled Castes and Scheduled Tribes are their fundamental rights and it is necessary to incorporate the same in any particular service rules. Rule 16 of the Tripura Secretariat Rules, 1989 reads as follows:

"16. Special provision for Scheduled Castes and Scheduled Tribes : Appointment to the service made by direct recruitment as well as by promotion shall be subject to the orders regarding special representation in the service for the Scheduled Castes and Scheduled Tribes etc issued by the Government from time to time."

Moreover, there were/are Government orders for special representation of Scheduled Castes and Scheduled Tribes i.e. for reservation of Scheduled Castes and Scheduled Tribes in service in force since 1974 in case of direct recruitment and since 1977 in case of promotion. Therefore, initial constitution of Secretariat Service under Rule 5 of the Service Rules, 1989 cannot remain outside the purview of the reservation in any way. The respondents in the said application categorically asserted that 100 point roster maintained for reservation of Scheduled Castes and Scheduled Tribes candidates with effect from January 1, 1989 was not correct. Because the posts to which the officers were appointed

existed prior to January 1, 1989 i.e. prior to the coming into force of the Tripura Secretariat Service Rules, 1989 and the backlog of the reserved vacancies against those promotion posts were not carried forward. The respondents further stated that if the reserved Scheduled Castes and Scheduled Tribes vacancies are not carried forward, the reserved vacancies would automatically lapse and the Scheduled Castes and Scheduled Tribes candidates would be deprived of their legitimate claim and benefit. The respondents denied and disputed most of the allegations made by the petitioners regarding recommendation of DPC and Press Release and on other factual aspects.

The respondents categorically asserted that maintenance of 100 point roster for reservation is a continuous process with carry forward system. The process does not and cannot stop so long as the posts continue to exist in ex cadre form or in any other redesignated or changed form. So the 100 point roster for the officers who remained outside the newly created cadre service will continue to be maintained outside the cadre posts of excadre posts and the 100 point roster for the officers, who come within the fold of cadre service, will continue to be maintained as a part of cadre service posts or as cadre post. The respondents further asserted that there is no reason why the 100 point roster prior to the commencement of the Service Rules, 1989 should be closed and fresh roster should be opened only to facilitate lapse of carry forward reserved vacancies for the purpose of depriving backward Scheduled Castes and Scheduled Tribes candidates from their rightful claim. The intention of the State Government in introducing reservation for Scheduled Castes and Scheduled Tribes and maintaining the 100 point roster is to give benefit to the Scheduled Castes and Scheduled Tribes categories of people and not to deprive them by allowing lapse of backlog vacancies. The respondents categorically stated that by virtue of the carry forward system State Government is not reopening any past case. The Government have only been carrying forward those reserved vacancies which have been utilised to accommodate unreserved category of candidates. The petitioners cannot claim that the number of Scheduled Castes and Scheduled Tribes reserved vacancies which were occupied by unreserved category of candidates in the past should not be counted for carrying forward so that the future vacancies can also be occupied by the unreserved category of candidates. The respondents further asserted that circulating of clarification of 100 point roster does not mean reopening of past cases. The reserved vacancies when carried forward are always adjusted against the unfilled future vacancies against unreserved points. Thus there is no question of depriving the general category of candidates.

The respondents categorically stated that the petitioners cannot claim that unreserved category of candidates were lawfully entitled to occupy the Scheduled Tribes and Scheduled Castes reserved posts in the past and they are also entitled to occupy the Scheduled Tribes and Scheduled Castes reserved vacancies in future. Because this will mean abolition of the carry forward system and ultimately abolition of the reservation system.

The respondents further stated that they simply followed the carry forward system accepted all over the country. The carry forward system is applied not only to Secretariat Service but also all other posts or service. The respondents denied that they have been favouring the Scheduled Castes and Scheduled Tribes candidates and in detriment to the interest of the unreserved category of candidate and the petitioners. The respondents further stated that the Annexure D to the writ petition (memo dated 4.2.1994) clearly shows that six Scheduled Tribes candidates senior to the petitioners could not also be given promotion.

With regard to Annexure A and B to the writ petition as quoted herein above, the respondents categorically asserted that there is nothing regarding percentage of reservation. Those two Annexures contain clarification regarding the method of carrying forward reserved vacancies and nothing about the process of recruitment. The respondents also denied the petitioners' attack on Annexure A and B on the ground that the said Annexures provide for 100 percent reservation. The respondents stated that there is nothing illegal, unconstitutional, arbitrary and against the principles of natural justice in calculating Scheduled Castes and Scheduled Tribes reserved vacancies occupied by unreserved category of candidates in earlier recruitment years and in carrying forward these reserved vacancies. The respondents stated that maintenance of 100 point roster from the date of commencement of Tripura Secretariat Service Rules, 1989 will be utterly to the detriment to the interest of the Scheduled Castes and Scheduled Tribes and that this type of claim is a dangerous technique to perpetuate deprivation of the Scheduled Castes/Scheduled Tribes candidates and to usurp the benefit lawfully available to those backward people. The posts which have been included in the cadre service shall continue to have 100 point roster as ex cadre posts and posts included in the cadre service shall continue to have 100 point roster as CL cadre post. If fresh 100 point roster are to be opened after redesignation of some posts or after bringing some old posts within the fold of any cadre service, without maintaining continuity and without carry forward the very purpose of reservation for Scheduled Castes/Scheduled Tribes would be frustrated and the Scheduled Castes/Scheduled Tribes candidates will never get their due share of posts. In the said opposition the respondents stated that in *Sabharwal's* case (supra), the Apex Court did not prevent carry forward policy which might cross 50% in case of subsequent recruitment. The respondents further stated that in *Indra Sawhney's* case (supra) also it was not observed that in promotion matter carry forward rule cannot exceed 50%. Respondents further stated that if in promotion matter carry forward of backlog cannot exceed 50% limit then the whole purpose of reserving posts for Scheduled Castes/Scheduled Tribes and Backward communities would be frustrated. The respondents stated that Tripura is in a far flung State having special circumstances and special conditions which warrant relaxation of 50% rule. But in spite of having extraordinary circumstances the extent of reservation proper (horizontal reservation) in the State is only 47% (16% for Scheduled Castes and 31% for the Scheduled Tribes). As per administrative order, though

as per Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Service and Posts) Act, 1991 the said percentage is 15% (fifteen) percent for Scheduled Castes and 29% for the Scheduled Tribes. But subsequently due to increase in population in 1991 census the reservation for Scheduled Castes has increased to 16% and for Scheduled Tribes 31% ie 1% in case of Scheduled Castes and 2% in case of Scheduled Tribes by administrative order. The 2% reservation for physically handicapped and 2% reservation for Exservice man, in total 4% are vertical reservation ie not reservation proper and hence these reservation not proper is outside the purview of 50% limit.

The respondents have right to calculate the reserved vacancies diverted in earlier recruitment years and prepare an account of reserved and unreserved vacancies before making any recruitment. It is after preparation of this account that the respondents will take step for recruitment. The question of restricting the recruitment of Scheduled Castes and Scheduled Tribes candidates with 50% limit or the extent to which the 50% limit will be exceeded comes only at the time of actual recruitment. The respondents further stated that there is no meaning in holding a premature view that by carrying forward reserved vacancies the respondents are going to make recruitment of Scheduled Castes and Scheduled Tribes exceeding 50% limit only to deprive unreserved category of candidates or the petitioners. The respondents disuted that they should fill up vacancies on the basis of 100 point roster to be maintained with effect from January 1, 1989 i.e. from the inception of the Service Rules, 1989. The respondents lastly stated that such action on the part of the respondents will be partiality and a trachery to the backward section of people like Scheduled Castes and Scheduled Tribes.

5. Heard Mr. ML Roy and Mr. Sudeb Roy both appearing for the petitioners and learned Advocate General with Mr. A. Ghosh, Advocate for the respondents.

6. Before discussing the rival contentions of the parties in the preceding paragraphs, it is necessary to discuss about the earlier order passed by this Court.

7. Vide order dated November 18, 1994 this Court, inter alia, passed the following orders:

"As regards prayer for interim order, learned Advocate General fairly submits that in view of the law laid down by the Apex Court of the land in Indra Sawhney vs. Union of India, 1992 Supp (3) SCC 217, it is no longer permissible to make provision for more than 50% reservation of appointments or posts in any service whatsoever on any ground including the principle of "carry forward rule" in any particular year.

In that view of the matter, it is directed that the respondents shall not make any reservation for appointments or posts of more than 50% in any particular year in any service on any ground whatsoever including what is called "carry forward rule". To that extent the impugned memorandum under Annexure A and Annexure B to the petition snail remain suspended.

However, respondents are given liberty to seek modification/alteration of this interim order at any time during pendency of the Rule."

8. This Court vide order dated June 28, 1995 ordered that the matter be listed on July 3, 1995 for disposal of the interim prayer made by the respondents vide their application dated May 8, 1995 for modification and/or alteration of the interim order passed on November 18, 1994. The matter came up for disposal of the interim prayer of the respondents on July 3, 1995 and Mr. B. Das, learned senior counsel submitted that he has given mentioned slip for listing a similar matter in which he has been appearing but his matter has not been listed. The Court directed that the junior of Mr. B. Das, senior counsel should furnish the case number and name of the parties before 1 PM on July 3, 1995 so that the case may appear in the list on July 4, 1995 and the Registrar has given a note on July 3, 1995 that no mention slip has been submitted in the Registry till 2.10 PM on July 4, 1995, during the course of hearing of the matter Mr. B. Das, learned Senior Advocate gave particulars of his case being COP (Contempt) No. 35 of 1995. It, therefore, appears that no similar case or a regular Civil Rule was pending but a contempt matter was pending. It appears from the order dated March 9, 1995 passed in COP (Contempt) No. 35 of 1995 that the Court directed to issue notice to the respondents to show cause as to why a contempt of Court proceeding should not be initiated against the respondents for alleged willful violation of the order of this Court dated November 18, 1994 passed in the present Civil Rule on July 4, 1995. Learned Advocate General appearing for the respondent-contemners prayed for six weeks time to submit reply and Mr. Das learned Senior Advocate had no objection to such prayer of adjournment made by the learned Advocate General. Thus, the case of Mr. Das cannot be said to be a similar matter and need not be disposed of along with the present matter. The Court has not as yet taken cognizance of the COP (Contempt) No. 35 of 1995 and only notice has been issued to the respondents-contemner. The contempt matter is between the Court and the contemner as soon as cognizance of the contempt application will be taken.

9. The hearing of the case could not be concluded on July 3, 1995 as learned counsel for the petitioners wanted to submit synopsis of argument.

10. The petitioners have not filed any affidavit by way of affidavit in opposition against the application for modification of the interim order filed by the respondents on May 8, 1995 which the respondents have also treated as affidavit in opposition against the writ petition and no affidavit in reply about the statement of facts made by the respondents have been filed by the petitioners. Liberty was given to the petitioners to file further affidavit for clarification of the case which was submitted by the learned counsel for the petitioners by July 4, 1995. Further liberty was given to them to the effect that since this is a matter relating to disposal of the interim stay and/or suspension of Annexure A and B and not relating to the disposal of the main Civil Rule, necessary affidavits for the purpose of disposal of the interim order may be filed July 4, 1995 with an

advance copy to the respondents. The petitioners filed an affidavit with certain lists of documents along with the documents and they have notified any affidavit in opposition or affidavit in reply against the application dated May 8, 1995 although opportunities were given to them at the hearing stage. Petitioners filed a written argument on July 5, 1995 and learned Advocate General filed short note on July 7, 1995 in addition to synopsis of argument filed on July 5, 1995. The petitioners again filed documents on July 24, 1995 but did not file any affidavit in pursuance of the liberty given vide order July 4, 1995 against the application for modification/alteration of the interim order filed by the respondents on May 8, 1995. The respondents filed a short written argument on August 1, 1995 in reply to the points raised by the petitioners in their written note dated July 24, 1995 and this Court passed order on August 2, 1995 with the observation that the parties will not be permitted to file any documents in connection with disposal of the interim order under any circumstances.

11. I have very carefully gone through the written arguments, synopsis of arguments and documents filed by the contending parties in the present matter and considered the rival contentions and it is not necessary to incorporate the said arguments to avoid repetition.

12. Learned Advocate General relied upon the case *T. Devadasan vs. Union of India* reported in AIR 1964 SC 179, the case *Indra Sawhney vs. Union of India & others* reported in AIR 1993 SC 477 and the case *RK Sabharwal & others vs. State of Punjab & others* reported in (1995) 2 SCC 745.

13. Learned counsel appearing for the petitioners have drawn my attention to the order of this Court passed on September 1, 1994 in Civil Rule No.454 of 1994 and memo dated February 2, 1977, memo dated July 22, 1994. My attention has also been drawn to the fact that a writ appeal bearing No.37 of 1994 has been filed by the State of Tripura and 5 others against the judgment and order dated September 1, 1994 passed by Single Bench of this Court in Civil Rule No.454 of 1994. I have also perused the order dated September 28, 1994 passed in Writ Appeal No.37 of 1994. But the copy of the writ petition and memo of appeal in the aforesaid matters have not been made available to me by the petitioners. It has been stated on behalf of the respondents by submitting a written argument on August 1, 1995 that the Civil Rule No.454 of 1994 and Writ Appeal No.37 of 1994 were heard analogously in the aforesaid Civil Rule and appeal were to decide whether reservation will be applicable in case of movement of officers from Tripura Civil Services Grade II to Tripura Civil Services Grade I and also to decide whether movement from Tripura Civil Services Grade II to Tripura Civil Services Grade I is a case of promotion or simple gradation. At the time of argument the learned Advocate General argued that the aforesaid case and appeal are not simple case of gradation and a case of promotion as the principle of reservation as embodied in the memorandum dated February 19, 1977 will apply and whether it is a case of promotion or gradation is awaiting decision of the Division Bench. Learned Advocate General further stated that the present

case is a case of promotion from the post of Section Officer to the post of Under Secretary and corresponding promotion to higher post consequent to vacancy carried on account of such promotion in terms of memorandum dated February 19, 1977 and in terms of the provision of Tripura Scheduled Tribes (Reservation of Vacancy in Service and Posts) Act, 1991. Thus the present case and the Civil Rule No.454 of 1994 are not identical.

14. Learned Advocate General has further referred to two decisions of the Division Bench of this Court passed on April 22, 1986 and March 12, 1992 in Civil Rule No.61 of 1979 and Civil Rule Nos.104,158,159,180 and 181 of 1982 respectively being Annexure R 3 to the said application and the aforesaid two decisions of the Division Bench upheld the validity of the memo dated February 19, 1977 and the writ petitions were dismissed. In my view, since validity of the memo dated February 19, 1977 was not declared null and void and was upheld by two Division Benches of this Court, the aforesaid two decision are binding on the Single Bench of this Court. I have already stated that since the record such as writ petition, affidavit in opposition, affidavit in reply, memo of appeal etc of Civil Rule No.454 of 1994 and memo of appeal in Writ Appeal No.37 of 1994 have not been filed by the petitioners it is very difficult to ascertain the scope of the present case and that of Civil Rule No.454 of 1994. That apart, if the order dated September 1, 1994 passed in Civil Rule No.454 of 1994 covers the case of the petitioners there has been no necessity to file the present writ petition and the interim order is being disposed of by this Bench in view of the order dated June 28, 1995 passed by another Single Bench of this Court. In such view of the matter I do not consider it fit and proper to wait for the decision of the Division Bench in Appeal No.37 of 1994.

15. In the present Civil Rule, a separate application seeking interim relief or otherwise has not been filed. The petitioners in their writ petition has made prayer for interim relief in terms of prayer (c).

16. History shows that Tripura was earlier a princely State having majority of tribal population, now reduced to microscopic minority due to unexpected influx of refugees from erstwhile East Pakistan now known as Bangladesh.

17. The present percentage of Scheduled Tribes and Scheduled Castes in Tripura is 31 percent and 16 percent respectively and the Government of Tripura has provided reservation for both Scheduled Tribes and Scheduled Castes 47 percent in total in direct recruitment and promotion in all categories of service and posts. It is, therefore, clear that Government of Tripura never provided reservation in direct recruitment and promotion exceeding 50% according to law laid down by the Apex Court.

18. But on record, it is found that the adequate representation of Scheduled Tribes and Scheduled Castes could not yet be achieved due to non availability of eligible candidates from those two communities. Whatsoever, reasons may it be, but it is the duty of the State to endeavour to achieve the constitutional mandate

as enshrined in clause (4) and clause (4A) of Article 16 of the Constitution. The Constitution (Seventy Seventh Amendment) Act, 1995 by which clause (4A) to the Constitution has been inserted reads as follows :

"Ministry of Law, Justice and Company Affairs (Legislative Department) New Delhi, the 19th June, 1995/Jyaistha 29, 1917 (Saka)

The following Act of Parliament received the assent of the President on the 17th June, 1995, and is hereby published for general information :

The Constitution (Seventy Seventh Amendment) Act, 1995 (17th June, 1995) An Act further to amend the Constitution of India. Be it enacted by Parliament in the Fortysixth year of the Republic of India as follows:

1. This Act may be called the Constitution (SeventySeventh Amendment) Act, 1995.

2. In Article 16 of the Constitution, after clause (4) the following clause shall be inserted, namely:

"(4A) Nothing in this Article shall prevent me State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and Scheduled Tribes which in the opinion of the State, are not adequately represented in the services under the State.

KL Mohanpuria, Secretary to the Govt. of India."

19. In the event of necessity, the State may strive to fill up the vacancies even exceeding 50% considering the extraordinary situations as prevailing in the farflung area like Tripura as observed in paragraph 94A in Indra Sawhney's case. The relevant portion of paragraph 94A of Indra Sawhney's case (supra) is extracted below:

"94A... ... While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of the conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

In this connection it is well to remember that the reservation under Article 16 (4) do not operate like a communal reservation. It may well happen that some members belonging to say, Scheduled Castes get selected in the open competition filed on me basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

Paragraph 96 of Indra Sawhney's case observed as follows :

"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."

Subparagraph (4) of paragraph 122 of Indra Sawhney's case is also relevant and extracted thus :

"(4) The reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing extreme caution is to be exercised and a special case made on."

20. Now question arises whether "carry forward" of reserved vacancies can be made in the event of nonavailability of eligible candidates from reserved category and if possible to what extent. In this connection it is clear from the relevant paragraphs of "Brochure" on reservation as submitted by the petitioners on July 24, 1995 that the "carry forward" of reserved vacancies is made permissible for 3 recruitment year" and "carry forward is not applicable in case g of Class 1 posts." It is also found that Government of Tripura has provided reservations in direct recruitment hi 1974 and reservation in promotion with effect from February 19, 1977. It must be remembered that reservation is very much correlated with the roster system coupled with any forward in case of non availability of reserved candidates. It is admitted fact that "State" as defined under Article 12 of the Constitution is the only competent authority to provide h reservation to achieve the goal as enshrined in the clause (4) and (4A) of the Article 16 of the Constitution. Naturally, the extent of percentage of reservation, policy of reservation in respect of certain categories of services and posts or in respect of roster system coupled with carry forward system etc may vary from State to State as would appear from the following instances :

(a) Central Government provided reservations in direct recruitment and promotion and maintaining 40 point roster system prior to reservation for the other backward communities. Central Government has not been maintaining "carry forward" in Class 1 posts.

(b) West Bengal Government has been maintaining 20 point roster system under section 4 of the West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976.

(c) The Government of Assam has been maintaining 20 percent roster under section 4 of the Assam Scheduled Castes and Scheduled Tribes (Reservation of

Vacancies in Services and Posts) Act, 1978.

(d) The Bihar Government has been maintaining 100 point roster for direct recruitment and 50 point roster for promotion under section 6 of the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes and Other Backward Classes) Act, 1991.

21. But Tripura has been maintaining 100 point roster system since 1974 in respect of direct recruitment and in promotion since February, 1974 and, thereafter, the Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1991 has been enacted and 100 point roster also under this Act is being maintained would be evident from paragraph 1 to 10 of the Schedule of the said Act.

22. While "Carry forward" is not permissible in case of Class 1 posts under the Central Government, the same is permissible in case of Tripura because reservation has been provided in Tripura in all categories of services and posts. Therefore, it is evident that the Brochure" as submitted by the petitioners cannot be binding upon the policy of the reservation upon a particular State and as such the Government of Tripura is directed to act according to the Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1991.

23. Secondly, the Supreme Court has rightly observed in RK Sabharwal's case that Indra Sawhney's case (known as Mandal Commission case) is not the authority on the roster system and/or roster point since Mandal Commission judgment has not discussed and decided on the roster system coupled with "carry forward" system. Paragraph 5, 7 and 8 of RK Sabharwal's case (supra) is relevant and is quoted below:

"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/Scheduled 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 me 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 Castes 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 Castes 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.

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 vs. Union of India* observed as under : (SCC 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 agebarred 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 units and not the entire strength of the cadre, service or the unit as the case may be."

8. The quoted observations clearly illustrate that the rule of 50% a year as a unit and not the entire strength of the cadre has been adopted to protect the rights of the general category under clause (1) of Article 16 of the Constitution India. These observations in Indra Sawhney case are only in relation to posts which are filled initially in a cadre. The operation of a roster, for filling the cadre strength, by itself ensures that the reservation remains within the 50% limit. Indra Sawhney case is not the authority for the point that the roster survives after the cadre strength is full and the percentage of reservation is achieved."

24. It is evident that Indra Sawhney's case is very much concerned on the percentage of reservation, that is, not to exceed 50% of the vacancies. It has not discussed the roster system and its consequence "carry forward". Supreme Court in RK Sabharwal's case has observed that roster point will be maintained as "running point" and no general category candidate can be appointed in the slot as shown reserved for the Scheduled Castes and Scheduled Tribes candidates. But the Scheduled Castes and Scheduled Tribes candidates may be appointed in the slot as shown from general category if they are found superior in merit etc. It has been observed by the Supreme Court in RK Sabharwal's case at paragraph 10 as follows:

"10. We may examine the likely result if the roster is permitted to operate in respect of the vacancies arising after the total posts in a cadre are filled. In a 100 point roster, 14 posts at various roster points are filled from amongst the Scheduled Castes/Scheduled Tribes candidates, 2 posts are filled from amongst the Backward Classes and the remaining 84 posts are filled from amongst the general category. Suppose all the posts in a cadre consisting of 100 posts are filled in accordance with the roster by 31.12.1994. Thereafter, in the year 1995, 25 general category persons (out of the 84) retire. Again in the year 1996, 25 more persons belonging to the general category retire. The position which would emerge would be that the Scheduled Castes and Backward Classes would claim 16% share out of the 50 vacancies. If 8 vacancies are given to them then in the cadre of 100 posts the reserve categories would be holding 24 posts thereby increasing the reservation from 16% to 24%. On the contrary if the roster is

permitted to operate till the total posts in a cadre are filled and thereafter the vacancies falling in the cadre are to be filled by the same category of persons whose retirement etc. caused the vacancies then the balance between the reserve category and the general category shall always be maintained. We make it clear that in the event of nonavailability of a reserve candidate at the roster point it would be open to the State Government to carry forward the point in a just and fair manner."

25. Therefore, making of carry forward has been left out within the jurisdiction of the State that is within the jurisdiction of a particular Government of a State.

26. The roster and carry forward must survive till the achievement of adequate representation in all categories of services and posts. If it is handled in a very heartless technique, the purpose and goal of reservation can never be achieved. For example, say there are ten vacancies in the post of Executive Engineer, out of which five for general candidates and five for the reserved candidates. The posts of Executive Engineer are to be filled up by promotion from the feeder post of Assistant Engineer having 7 years qualifying service under the Tripura Engineering Service Rules. Now, in 1980 all five posts meant for general category have been filled up, but due to non availability of eligible candidates from the reserved category, not a single post could be filled up till 1980 as all 5 reserved category officers in the feeder post of Assistant Engineer completed only three years service in 1980. They will be eligible after lapse of four years that is in 1984. These posts will have to be carried forward beyond three years otherwise there will be no vacancy in 1984 when all five reserved category officers will be eligible for promotion to the posts of Executive Engineer. Now it is the duty of the State Government to look into the matter in a "just and fair" manner so that due share of the long deprived Scheduled Castes and Scheduled Tribes candidates could be appropriately compensated. At the same time if all these five posts of reserved vacancies of the posts of Executive Engineer are carried forward till 1984 and if five eligible reserved candidates are available in 1984 whether all these posts can be filled up by the candidates of reserved categories in a year. It can be filled up in a year as discussed and clarified by the Supreme Court in RK Sabharwal's case (supra). The case has been categorically said that 50% in a year as unit is in respect of appointment in initial cadre, not to subsequent promotion.

27. It is expected that the administration will be very much serious to uplift the conditions of the Scheduled Castes and Scheduled Tribes in the State of Tripura and sufficient facilities be provided to these poor and backward communities in the field of education and other social advancement otherwise they shall continue to be backward for which back log was created and such back log will go on increasing. In future State Government shall avoid creating back log in the matter of filling up of reserved posts according to 100 point roster. The State Government shall carry out Special Recruitment Drive in the spirit of the letter dated April 25, 1995 of Ministry of Personnel etc. Govt. of India which is

extracted below : (not quoted : Editor).

28. The instant case is in respect of appointment on promotion to the post of Under Secretary from Section Officer in Tripura Secretariat Service and consequential promotion to other posts. It must be made clear that rule of 50% is to be applied in case of cadre strength in a year as unit. So in view of the observation in RK Sabharwal's case (supra) and example as cited above, in my view there is no bar for appointments as per the provisions of Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Service and Posts) Act, 1991.

29. In the instant case, I direct that in the event of nonavailability of a reserve candidate at the roster point it would be open to the State Government to carry forward the point in a just and fair manner. I further direct that the case of the petitioners shall be considered for promotion to the post of Under Secretary, all efforts are to be made to safeguard their rights and interest according to law.

30. In the result, the application for modification and/or alteration dated May 8, 1995 filed by the respondents succeeds and the order dated November 18, 1994 is vacated. I make it clear that all promotions likely to be made now, will be subject to the final decision of the Civil Rule.