

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

+ W.P (C) No. 16955-60/2004

% Judgment reserved on: 13th September, 2012
Judgment delivered on: 21 December, 2012

BRAHAM PAL SINGH & ORS. Petitioners

Through: Mr.Rajat Aneja, Advocate.

versus

M.C.D. & ORS. Respondents

Through: Mr.Arun Birbal and
Mr. Paramhans, Advocates for Respondent
DDA.

Mr.Jagat Rana, Advocate for
Respondent No.2/ Delhi Urban
Shelter Improvement Board.

Mr. Ashim Vachar, Advocate for
Respondent No.4.

Mr. H. D. Birdi, Advocate for
Respondent No.5.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide the instant petition petitioners are seeking the reliefs as under: -

“i. Issue a Writ in the nature of Prohibition and / or any other appropriate writ / order / direction of like nature thereby restraining the respondents no. 1 to 3 from giving promotion to the respondent no. 4 and anybody else from the reserved category to the post of Assistant Engineer (Civil)

ii. Further issue a Writ in the nature of Mandamus and / or any other appropriate writ / order / direction of like nature thereby directing the respondents no. 1 and 2 to adopt the Post-Based Roster for the purposes of promotion formulated on 02.07.1997 by the Department of Personnel and Training, Government of India under the directions of Hon'ble Supreme Court of India."

2. Brief facts of the case are that petitioners were appointed as JE (Civil) from General Category on 10.01.1983 by the Office of the Slum and J.J. Department, which was under the Delhi Development Authority at that point of time. The petitioners are qualified Engineers holding Diploma in Civil Engineering from the respective Universities.

3. In the year 1992, Office of the Slum and JJ Department was transferred to Municipal Corporation of Delhi on as is where is basis and thus the petitioners continued to work as JEs.

4. The Department of Personnel and Training, Government of India vide O.M. No. 36012/2/96-Estt. (Res.) dated 02.07.1997 decided that the existing 200-point, 40-point and 120-point Vacancy-Based Rosters shall be replaced by Post-Based Rosters. Thus, all the Departments were required to prepare respective Rosters based on the principle elaborated in the aforesaid O.M. and illustrated by the Model Rosters annexed to the O.M. as Annexure II, III and IV. Annexure III, which is the Model Roster of reservation with reference to posts for the purposes of promotion, is annexed as Annexure P-2 to the present Writ Petition.

5. It is submitted by the petitioners that the promotions made after

1997 to the Post of AE in the Department specifically keeping in view the backlog to be completed and in this respect the last promotions carried out on 05.09.2002 which were 18 in number, 06 candidates from the Reserved Category i.e. SC/ST whereas from the General Category there were 12 promotions in total which means that it clearly exceeded the reservation quota of 22.5% for the Reserved Category. Even prior to that, i.e. on 06.08.1996 there were total promotions of 16 persons, out of which six persons belonged to Reserved Category and 10 persons from General Category.

6. Mr. Rajat Aneja, Id. Counsel appearing on behalf of the petitioners has pointed out that the backlog had already been achieved and prescribed percentage of reservation, i.e., 15% for SC and 7.5% for ST had also been put in place. Therefore, any more promotion from the Reserved Category would exceed the prescribed percentage of 22.5% and would thus be in violation of Post-Based Roster formulated under the direction of the Apex Court. The copy of the Chart relating to the promotion made in the Department with respect to the said Post after 1996 is annexed as Annexure P-4, which is as under:

“The Addl. Commissioner (S&JJ) vide his order dated 04.09.2002 has been pleased to promote the following Junior Engineers (C) to the post of Asst. Engineer (C) in the pay scale of Rs.6,500-200-10,500/- purely on ad-hoc and emergent basis with immediate effect:

<u>S. NO.</u>	<u>Name</u>
1.	Sh. Subodh Kumar Mittal.
2.	Sh. Y.P. Burmee

3. *Sh. Karan Lal Maurya (SC)*
4. *Sh. Avinash Kumar Ghai*
5. *Sh. Anil Kumar Chaddha*
6. *Sh. Rakesh Kumar*
7. *Sh. Anil Kumar (SC)*
8. *Sh. Bal Raj (ST)*
9. *Sh. Dev Anand Yadav*
10. *Sh. Suresh Kumar (SC)*
11. *Sh. P.S. Gulati*
12. *Sh. R.K. Narula*
13. *Sh. Ashok Kumar*
14. *Sh. D.K. Arora*
15. *Sh. Rajender Singh Dahiya*
16. *Sh. Naveen Gulati*
17. *Sh. Dori Lal (SC)*
18. *Sh. V.S. Fonia (ST) ”*

7. The petitioners, being aggrieved, made a representation on 04.10.2004 through their Association in the light of the fact that SC Assistant Engineers were already in excess of 4 seats in respect of their existing quota earmarked for the Scheduled Castes by the Government of India, no further promotion could be given to the SC Categories as proposed by them.

8. Counsel for the petitioners have further submitted that the respondents did not reply to the representation of the petitioners and on the contrary issued a letter dated 06.10.2004 fixing the date of review DPC as 08.10.2004 at 4 PM in the Chamber of Chief Engineer, Chairman of DPC. The said meeting notice also referred to some recommendations by National Commission for Scheduled Caste.

9. Another representation made on 20.10.2004 reiterating the

earlier request was again sent to the respondents, however, the respondents failed to accede to the legitimate request of the petitioners and proceeded with the promotion process by conducting review DPC in the near future.

10. Counsel for the petitioners has pointed out that DDA (Slum) SC/ST Engineers Association (Regd.) filed a Writ Petition (C) No. 3126/1992 titled as DDA (Slum) SC/ST Engineers Association (Regd.) and Ors. vs. DDA and Ors. In the said petition, Engineers Association made the following prayers:

(i) That the act of non consideration of the petitioner 2 to 5 and other similarly placed persons in the Cadre of JE (Civil) for promotion to the post of Assistant Engineer (Civil) under Respondent no. 2 against the reserved post of AE (Civil) for SC / ST Candidates by the respondents 1 & 2 is arbitrary, illegal, discriminatory and consequently further declaration that the petitioners and other similarly placed persons are entitled for being considered for promotion to the posts of AE (Civil) under Respondent no. 2 against 14 posts reserved for SC / ST Category.

(ii) That the proposed act of the Respondent for de-reserving the 14 Posts of A.E (Civil) or any other posts – reserved for SC / ST Category of candidates is arbitrary, discriminatory and illegal.

(iii) That act of Respondent 1 & 2 appointing the JE (Civil) as AE (Civil) as on current basis and non grant of pay based on equal pay for equal work and other consequential relief.

(iv) Direction / order against all the respondents and in particular 1 to 4 restraining them from de-reserving the 14

posts or any other posts for AE (Civil) arbitrarily and without following the due procedure on the subject.

(v) Direction, order against respondent 1 & 2 directing them to consider the plaintiffs and other similarly placed JEs (Civil) for promotion to the 14 posts of AE (Civil) against the reserved posts for SC / ST Category and further directions to give them consequential benefits therefor within the stipulated period by holding special D.P.C.

11. Ld. Counsel for the petitioners has submitted that respondents have no power or authority to promote respondent no. 4 & 5 in the light of the dictum laid down by the Apex Court in the case of ***R.K. Sabharwal vs. State of Punjab*** (1995) 2 SCC 745 wherein it is held that the reservation of jobs for the backward classes, i.e., SC / ST / OBC should apply to the post and not to vacancies. It is further held that the Vacancy-Based Roster can operate only till such time the representation of persons belonging to the Reserved Category in a cadre reaches a prescribed percentage of reservation. Therefore, the Roster cannot operate and vacancies released by recruitment, resignation, promotion etc. of the persons belonging to General and Reserved Categories are to be filled up by appointment of the persons from the Reserved Categories so that prescribed percentage of reservation is maintained.

12. Pursuant to these observations, the Department of Personnel and Training (DOP&T) vide O.M. dated 02.07.1997 decided that existing 200-point, 40-point and 120-point Vacancy-Based Roster shall be replaced by the Post-Based Roster. Thus, all the Departments were required to prepare their respective Rosters based on the principle

elaborated in the aforesaid O.M. and illustrated by the Model Rosters annexed to the said O.M. The aforesaid Roster clearly stipulates 16 seats cumulatively for Reserved Category, i.e., SC/ST which is calculated on the basis of current sanctioned strength of 76 AEs in the Department. Moreover, it is also not a matter of dispute that there were 14 SC candidates who were functioning as AEs which were in excess of 3 seats. Thus, respondent Nos. 4 & 5 who are from the Reserved Category could not be allowed to be promoted to the Post of AEs.

13. It is pertinent to mention here that by amending the Writ Petition respondent no. 5 Sh. D.K. Singh was also made a party to the instant petition.

14. Counsel for the petitioner has relied upon a clarification dated 23.01.1998 made on Post-Based Reservation Roster. The same is as under:

***“C. & A.G, Cir. No. 9/NGE/98 No. 108/NGE (App.)/3-97
dated 23-1-1998***

Subject:- Clarifications regarding Post-Based reservation rosters.

Consequent on issue of Government of India, Department of Personnel & Training O.M. NO. 36012/296-Estt. (Res.) dated 2-7-1997 under Headquarters Circular Letter No. 27/NGE/97/1082-NGE (App.)/3-97, dated 10-9-1997 on the above subject, various doubts were raised by the field offices on the operation of the post-based revised reservation rosters.

The doubts are clarified herewith in consultation with the Department of Personnel & Training in the enclosed

Annexure.

***DOUBTS AND CLARIFICATIONS IN RESPECT OF
MAINTENANCE OF POST-BASED REVISED
RESERVATION ROSTERS (REF. DOP&T O.M. No.
36012/2/96-Estt.(RES.) DATED 2-7-1997***

<i>Doubts</i>	<i>Clarifications</i>
<i>1. Whether the new revised rosters will be effective from the panel year 1998, i.e., 1-1-1998 and whether the concept of 'panel year' and 'cut off date' (1st October of the panel year) will continue to be applicable?</i>	<i>Government orders on post-based rosters are effective from July 2, 1997. Recruitments/promotions made on or after July 2, 1997 have to be based on post-based Rosters.</i>
<i>7.(a) How the total representation of reserved categories in a cadre is to be determined when the percentage of reservation in promotion and in direct recruitment are different?</i>	<i>Representation of each reserved category is first to be determined separately as per the prescribed percentages of reservation applicable to different methods of appointment, i.e. promotion and direct recruitment and then the total representation of respective reserved category in the cadre is to be worked out</i>
<i>7.(c) How the excess or less representation of a reserved category (or categories) in separate methods of appointment in a cadre are to be adjusted?</i>	<i>The representation of respective reserved categories should not exceed the prescribed percentages, as worked out in Sl. No. 7(a), taking into account their combined representation in direct recruitment as well as promotion. Adjustments of</i>

	<i>representation of reserved categories between different methods of appointment in a cadre may be effected accordingly.</i>
<i>8. How the backlog of SC/ST/OBCs is to be cleared through future recruitments in view of the 50% limitation on recruitment and the total reservation limit being 50% of the posts?</i>	<i>Backlog of SC/ST/OBCs is to be determined afresh as per the revised post-based rosters. Vacancies against reserved points will continue to be filled keeping in view the limit of 50% reservation on total vacancies being filled in a panel year.</i>
<i>9.(a) Whether the existing practice of dereservation would continue in the cases of non-availability of eligible reserved category candidates or the reserved points in the roster are to be kept unfilled till eligible candidates of reserved category become available.</i>	<i>Yes, the practice of dereservation would continue.</i> <i>Detailed instructions in this regard will follow</i>
<i>9.(b) Whether carried-forward reserved vacancies would be considered in fresh panels or would lapse due to implementation of post-based revised rosters?</i>	<i>The reserved vacancies are to be determined afresh on the basis of post-based revised rosters and are to be carried forward for future adjustments.</i>

15. Ld. Counsel for the petitioner has also relied upon Office Memorandum dated 20.07.2000, on backlog, which is reproduced as under:

**“ G.I., Dept. Of Per. & Trg., O.M. No. 36012/5/97-
Estt.(Res.)Vol.II dated 20.07.2000**

Subject:-Backlog vacancies reserved for SCs & STs would be treated as a distinct group and would not be subject to 50% ceiling.

2. In pursuance of the provisions of Article 16 (4-B) of the Constitution, it has been decided that in partial modification of the instructions issued vide this Department's O.M. No. 36012/5/97-Estt.(Res.) dated 29-8-1997, the reserved vacancies for Scheduled Castes and Scheduled Tribes in all cases of direct recruitment and promotion, wherever applicable, which have remained unfilled in the earlier year(s), i.e., backlog and / or carried forward vacancies would be treated as a separate and distinct group and will not be considered together with the reserved vacancies of the year in which they are being filled up for determining the ceiling of 50 per cent reservation on total number of vacancies of that year. In other words, the ceiling of 50 per cent on filling up of reserved vacancies would apply only on the reserved vacancies which arise in the current year and the backlog / carried forward reserved vacancies for SCs/STs of earlier years would be treated as a separate and distinct group and would not be subject to any ceiling. However, backlog and/or carried forward reservation will automatically lapse in a cadre as soon as combined representation of a reserved category in direct recruitment as well as promotion is either equal to or more than the prescribed number of reserved posts in the relevant post-based rosters.

3. As the Ministries are aware, reservation with effect from 2-7-1997 is linked to post-based rosters. The backlog of vacancies would be determined with reference to the post-based rosters keeping in view the instructions issued vide this Department's O.M. No. 36012/2/96-Estt.(Res.) dated 2-7-1997."

16. He further relied upon Office Memorandum dated 31-01-2005, which is reproduced as under:

**“ G.I., Dept. Of Per. & Trg., O.M. No.
36028/17/2001-Estt.(Res.) dated 31.01.2005**

Subject:- Reservation in promotion – Treatment of SC / ST candidates promoted on their own merit.

The undersigned is directed to refer to this Department’s O.M. No. 36028/17/2001-Estt. (Res.) dated 11-7-2002 whereby it was clarified that the Scheduled Caste and Scheduled Tribe candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualification will be adjusted against unreserved points. References have been received seeking clarification on the following points:-

- (i) The date of effect of the O.M. No. 36028/17/2001-Estt. (Res.), dated 11-07-2002; and*
- (ii) Whether the order will apply in case of promotions made by non-selection method.”*

17. Further relied upon Office Memorandum dated 06-11-2003, which is reproduced as under:

**“ G.I., Dept. Of Per. & Trg., O.M. No.
36012/17/2002-Estt.(Res.) dated 06.11.2003**

Subject:- Non-permissibility of exchange of reservations between SC and ST.

The undersigned is directed to say that after introduction of post-based reservation, various Ministries / Departments have been seeking clarification whether it is possible to fill up a post reserved for Scheduled Tribes by a Scheduled Caste candidate or vice versa by applying the principle of exchange of reservation between Scheduled Cates and Scheduled Tribes as was possible when vacancy-based rosters were in vogue.

2. *Basic principle of post-based reservation is that, the number of posts filled by reservation by any category in a*

cadre should be equal to the quota prescribed for that category. If exchange of reservation between SCs and STs is permitted, number of employees of one reserved category of employees appointed by reservation will go beyond reservation prescribed for that category. It would be against the spirit of post-based reservation. Therefore, after introduction of post-based reservation, it is not permissible to fill up a post reserved for Scheduled Tribes by a Scheduled Caste Candidate or vice versa by exchange of reservation between SCs and STs.”

18. Respondents no. 1 & 2 have filed their Counter affidavits to the instant petition wherein it is stated that only 13 persons were working against SC / ST quota and two persons namely Sh. Suresh Kumar and Sh. K.L. Morya were promoted as AE (C) on 05.09.2002 at their own seniority and not based upon the quota.

19. It is further stated that in the last promotion carried out on 05.09.2002, six candidates from the Reserved Category were promoted. However, 2 candidates out of 6 candidates were promoted on the basis of their own seniority. It is denied that reservation quota of 22.5% for Reserved Category had been exceeded. It is specifically denied that any more promotion from the Reserved Category would exceed the prescribed percentage of 22.5% or would be in violation of the Post-Based Roster formulated under the direction of the Apex Court.

20. As stated above, only 13 persons from SC / ST Category against 16 Reserved Posts were working as AE (C) and 2 Assistant Engineers (C) namely Sh. K.L. Morya and Sh. Suresh Kumar had been promoted

at their own seniority. Therefore, if the above persons were promoted at their own seniority and not based upon the quota, they would not be considered in 22.5% reservation quota for the said Category. Therefore, the respondents have not violated the Post-based Roster and have fully followed the same in promoting the aforementioned two persons.

21. Respondent no. 5 has filed their counter-affidavit wherein it is stated that petitioner Association moved an application under Order VI Rule 17 read with Section 151CPC in W.P.(C) 3126/1992 for taking additional grounds in the said W.P.(C) as the respondent Department had held DPC ignoring the claim of JE(C) belonging to SC / ST Category for promotion to AE (C) against 14 reserved backlog vacancies and had promoted General Category JE (C) as AE (C). The additional grounds (a) to (i) are contained in Para 11 of the said application dated 17.01.1994 moved in the aforesaid petition and made additional prayer as under:-

“In the premises set forth above it is most respectfully prayed that this Hon’ble Court be pleased to:-

i) Allow the application and set aside the promotion orders dated 22.03.1993 and 30.04.1993.

ii) Take grounds (a) to (i) in this application on record and treat them the grounds in the Writ Petition, in addition to the grounds taken in the writ petition.”

22. Ld. Counsel further submitted that petitioners in TA 282/2009 filed the amended Petition impleading respondent no. 4 (Shri Ram Dayal Ram) and respondent no. 5 (Shri D.K. Singh) in the array of

parties dated 10.01.2006 filed Under Order VI Rule 17 r/w Section 151 CPC.

23. Respondent no. 5 filed reply on 18.10.2006 where it was brought to the notice of this Court that another W.P. (C) 3126/1992, which was admitted by this Court and made Rule vide order dated 23.07.1993. Some of the Members of the Association had applied for copy under the RTI Act which reveals that backlog of 4 Reserved Categories for members of SC / ST have been worked out. This fact has been made by the DPC starting from the beginning indicating the number of sanctioned post at the point reserved for SC / ST category in the vacancy Roster.

24. After review made by the DPC in its meeting held on 28.01.2010, there were still reserved posts which were required to be filled up from amongst the SC / ST category JEs who were junior to Sh. Ram Dayal Ram and Sh. D.K. Singh, R4 & R5.

25. The arguments of the Id. Counsel for the petitioner is that respondent no. 4 & 5 have been promoted wrongly and in excess of the percentage of reservation.

26. It is submitted that the provision of switching over from the Vacancy-Based Roster to Post-Based Roster is that no promotion can be made against the reserved vacancy after issuance of DOP&T Memorandum dated 02.07.1997.

27. Ld. Counsel has submitted that on perusal of the Office

Memorandum as mentioned above, the Vacancy-Based Roster shall continue to operate from the backlog vacancy as the Department is bound to fill up the vacancy to the prescribed percentage of Reserved Category as stipulated therein. The Government of India has further issued clarification in this respect on 20.05.1998 wherein at Serial no. 13, Government had clarified the position that they have decided to continue reservation for SC / STs under the Central Government beyond 15.11.1997 till such time as representation reaches the prescribed percentage of the Reservation.

28. During the year 1993-1996 DPCs were held to fill up Reserved Posts for SC / ST from amongst the General Category candidates without getting the reserved posts de-reserved by following the prescribed procedure as laid down by Government of India from time to time.

29. Ld. Counsel appearing on behalf of respondents no.4 & 5 have submitted that Office Memorandum dated 31.01.2005 have been withdrawn by the DOP&T vide Office Memorandum dated 10.08.2010. Same is reproduced as under:

“The matter has been examined in the light of the above referred judgments and it has been decided to withdraw O.M. NO. 36028/17/2001-Estt. (Res.) dated 31.01.2005 referred to above. It is clarified that SC/ST candidates appointed by promotion on their own merit and seniority and not owing to reservation or relaxation of qualifications will be adjusted against unreserved points of reservation roster, irrespective of the fact whether the promotion is made by selection method or non-selection

method. These orders will take effect from 02.07.1997, the date on which post based reservation was introduced.”

30. He further relied upon Office Memorandum dated 20.07.2000. Same is reproduced as under:

***“G.I., Dept. of Per & Trg., O.M. NO. 36012/5/97-Estt.
(Res.) Vol. II dated 20.07.2000***

Subject:- Backlog vacancies reserved for SCs & STs would be treated as a distinct group and would not be subject to 50% ceiling.

The undersigned is directed to invite a reference to Department of Personnel and Training’s O.M. NO. 36012/5/97-Estt. (Res.) dated 29.08.1997 wherein it was laid down that 50 per cent limit on reservation shall apply to current as well as backlog vacancies and that backlog of reserved vacancies shall not be treated as distinct group for the purpose of 50 per cent limit on reservation and to say that the matter has been reviewed. Consequently, Article 16 (4-B) has been incorporated in the Constitution by the Constitution (Eighty-First Amendment) Act, 2000, which provides as under:-

“Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause (4) or Clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies, shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.”

2. *In pursuance of the provisions of Article 16 (4-B) of the Constitution, it has been decided that in partial modification of the instructions issued vide this*

Department's O.M. No. 36012/5/97-Estt.(Res.) dated 29-8-1997, the reserved vacancies for Scheduled Castes and Scheduled Tribes in all cases of direct recruitment and promotion, wherever applicable, which have remained unfilled in the earlier year (s), i.e., backlog and / or carried forward vacancies would be treated as a separate and distinct group and will not be considered together with the reserved vacancies of the year in which they are being filled up for determining the ceiling of 50 per cent reservation on total number of vacancies of that year. In other words, the ceiling of 50 per cent on filling up of reserved vacancies would apply only on the reserved vacancies which arise in the current year and the backlog / carried forward reserved vacancies for SCs/STs of earlier years would be treated as a separate and distinct group and would not be subject to any ceiling. However, backlog and/or carried forward reservation will automatically lapse in a cadre as soon as combined representation of a reserved category in direct recruitment as well as promotion is either equal to or more than the prescribed number of reserved posts in the relevant post-based rosters."

31. He has also Relied upon Office Memorandum dated 20.05.1998.

Same is reproduced as under:-

“G.I., Dept. of Posts, New Delhi Lr. No. 137-10/97-SPB-II, dated 20.05.1998

<i>Doubts</i>	<i>Clarifications</i>
<i>13. It has been mentioned that as per Judgment in the Indira Sawhney case the reservations in the matter of promotion are to continue for a period of five years with effect from 16-11.1992. Since the</i>	<i>DOP&T, O.M. no. 36012/18-95-Estt. (Res.) Pt. II dated 1-8-1997 is being circulated in which it has been decided to continue reservations for SCs / STs as at present in services / posts under the Central Government beyond</i>

stipulated period is already over, it may be clarified whether the reservations for SCs / STs in promotion are still in operation or to discontinue with effect from 17.11.1997.	15.11.1997 till such time as the representation reaches the prescribed percentages of reservation whereafter the reservation in promotion shall continue to maintain the reservation to the extent of the prescribed percentages for the respective categories.
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32. They further relied upon a case of **R.K. Sabharwal & Ors. v. State of Punjab & Ors. 1995 (1) SLR**, wherein it is held as under:

“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 Back ward 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 there by 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 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 non-availability 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.”

33. After hearing Id. Counsel for the parties, it is established that only 13 persons were working against SC / ST quota and two persons namely Sh. Suresh Kumar and Sh. K.L. Maurya were promoted as AE (C) on 05.09.2002 at their own seniority and not based upon the quota.

34. The issue for consideration is whether the petitioners are entitled to get promotion on the basis of the implementation of the post based roster system. It is undisputed that the post –based roster came into effect on 02-07-1997 subsequent to the judgement in ***R.K. Sabharwal and others(supra)***. It is also not disputed that the vacancy based roster system had been existing in the respondent department, prior to the implementation of the post based roster system. The main legal grievance of the petitioner is that the respondent department is not following the principle of reservation as it is envisaged in the post based roster system, thus, promotions were denied. In consequence of the non-compliance of reservation scheme in the post based roster system, leads to the promotion of respondent No 4 and 5.

35. One of the objective that has been intended to achieve by implementing the model roster of ‘reservation in promotion’ with reference to posts, is that at no point of time the reservation prescribed shall not exceed, and simultaneously it guarantees that the prescribed reservation in promotion for the scheduled caste and scheduled tribes are achieved. Accordingly, 15% of posts are reserved for SC and 7.5 % are reserved for ST respectively. Thus, at that point of time, the

strength in the cadre of Assistant Engineers (Civil) was 76. Therefore, 16 posts of Assistant Engineer (Civil) were earmarked for the SC and ST category as per the roster. It is pertinent to mention that the respondents, who were promoted to the post of Assistant Engineer, (Civil) were eligible to be promoted as per the recruitment rules.

36. The contention of the petitioners is that the irregularity exists, in the form of crossing the ceiling limit that is prescribed in the post based roster. In this context, the implementation of the post based roster system need to be examined in the light of ***M. Nagaraj Vs. Union Of India***(2006) 8 SCC 212, wherein, the Apex Court also examined and evaluated the theory of post based roster and its practical application, and observed as under:-

*“62. In **R.K. Sabharwal**, the issue was concerning operation of roster system. This court stated that the entire cadre strength should be taken into account to determine whether reservation up to the required limit has been reached. It was held that if the roster is prepared on the basis of the cadre strength, that by itself would ensure that the reservation would remain within the ceiling-limit of 50%. In substance, the court said that in the case of hundred-point roster each post gets marked for the category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate alone (replacement theory).*

*The question which remained in controversy, however, was concerning the rule of 'carry-forward'. In **Indra Sawhney** this Court held that the number of vacancies to be filled up on the basis of reservation in a year including the 'carry-forward' reservations should in no case exceed the ceiling-limit of 50%.*

However, the Government found that total reservation in a year for SCs, STs and OBCs combined together had already reached 49 % and if the judgment of this Court in Indra Sawhney had to be applied it became difficult to fill "backlog vacancies". According to the Government, in some cases the total of the current and backlog vacancies was likely to exceed the ceiling- limit of 50%. Therefore, the Government inserted Clause (4B) after Clause (4A) in Article [16](#) vide the Constitution (Eighty-First Amendment) Act, 2000.

63. By Clause (4B) the "carry-forward"/"unfilled vacancies" of a year is kept out and excluded from the overall ceiling-limit of 50% reservation. The clubbing of the backlog vacancies with the current vacancies stands segregated by the Constitution (Eighty-First Amendment) Act, 2000. Quoted hereinbelow is the Statement of Objects and Reasons with the text of the Constitution (Eighty-First Amendment) Act, 2000:

**THE CONSTITUTION (EIGHTY FIRST
AMENDMENT) ACT, 2000**

(Assented on 9th June, 2000 and came into force 9.6.2000)

STATEMENT OF OBJECTS AND REASONS

Prior to August 29, 1997, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes, which could not be filled up by direct recruitment on account of non-availability of the candidates belonging to the Scheduled Castes or the Scheduled Tribes, were treated as "Backlog Vacancies". These vacancies were treated as a distinct group and were excluded from the ceiling of fifty per cent reservation. The Supreme Court of India in its judgment in the Indra Sawhney v. Union of India held that the number of vacancies to be filled up on the basis of reservations in a year including carried forward reservations should in no case exceed the limit of fifty per cent. As total reservations

in a year for the Scheduled Castes, the Scheduled Tribes and the other Backward Classes combined together had already reached forty-nine and a half per cent and the total number of vacancies to be filled up in a year could not exceed fifty per cent., it became difficult to fill the "Backlog Vacancies" and to hold Special Recruitment Drives. Therefore, to implement the judgment of the Supreme Court, an Official Memorandum dated August 29, 1997 was issued to provide that the fifty per cent limit shall apply to current as well as "Backlog Vacancies" and for discontinuation of the Special Recruitment Drive.

Due to the adverse effect of the aforesaid order dated August 29, 1997, various organisations including the Members of Parliament represented to the central Government for protecting the interest of the Scheduled castes and the Scheduled Tribes. The Government, after considering various representations, reviewed the position and has decided to make amendment in the constitution so that the unfilled vacancies of a year, which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause (4) or Clause (4A) of Article [16](#) of the Constitution, shall be considered as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent, reservation on total number of vacancies of that year. This amendment in the Constitution would enable the State to restore the position as was prevalent before august 29, 1997.

The Bill seeks to achieve the aforesaid object.

**THE CONSTITUTION (EIGHTY-FIRST
AMENDMENT) ACT, 2000**

(Assented on 9th June, 2000 and came into force 9.6.2000)

An Act further to amend the Constitution of India. BE it enacted by Parliament in the Fifty- first Year of the Republic of India as follows:

*1. **Short title:** This Act may be called the Constitution (Eighty-first Amendment) Act, 2000.*

*2. **Amendment of Article 16:** In Article 16 of the Constitution, after Clause (4A), the following Clause shall be inserted, namely: -*

(4B) Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause (4) or Clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

*The Constitution (Eighty-First Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in **R.K. Sabharwal**. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies do not arise. Therefore, in effect, Article 16(4B) grants legislative assent to the judgment in **R.K. Sabharwal**. If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter.*

*As stated above, Clause (4A) of Article 16 is carved out of Clause (4) of Article 16. Clause (4A) provides benefit of reservation in promotion only to SCs and STs. In the case of **S. Vinod Kumar and Anr. v. MANU/SC/1284/1996 : Union of India and Ors.** (1996)6SCC580 this Court held that relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion was not permissible under Article 16(4) in view of Article 335 of the Constitution. This was also the view in **Indra Sawhney**.*

64. By the Constitution (Eighty-Second Amendment) Act, 2000, a proviso was inserted at the end of Article 335 of the Constitution which reads as under:

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

*This proviso was added following the benefit of reservation in promotion conferred upon SCs and STs alone. This proviso was inserted keeping in mind the judgment of this Court in **Vinod Kumar** which took the view that relaxation in matters of reservation in promotion was not permissible under Article 16(4) in view of the command contained in Article 335. Once a separate category is carved out of Clause (4) of Article 16 then that category is being given relaxation in matters of reservation in promotion. The proviso is confined to SCs and STs alone. The said proviso is compatible with the scheme of Article 16(4A).”*

37. As stated above, Article 16(4B) lifts the 50% cap on carry-over vacancies (backlog vacancies). The ceiling- limit of 50% on current vacancies continues to remain.

38. The office memorandum issued on 29-8-1997, in pursuance of judgment of the Apex Court in the case of *Indira Sawahney vs Union of India*, (2000)1SCC168 reiterated the scheme of reservation based on 50% ceiling limit. In other words, the number of vacancies to be filled on the basis of reservation in a year, including the carried forward, however, the reservation should not exceed 50 % limit. In consequence of the same, the Article 16(4B) incorporated in the constitution and subsequently, the office memorandum dated 20-7-2000 has been issued wherein, it prescribes the limit of reservation shall be based on the post based roster system. It is also significant to note that the office memorandum dated 29-8-1997 has been modified by the office memorandum dated 20-7-2000. The said office memorandum also clarifies the aspect of treating the backlog/ carried forward as a separate and distinct group. In other words, the ceiling of 50 % would apply on the reserve vacancies which arise in the current year and the backlog/ carried forward vacancies for SC/ST of earlier years would be treated as a separate and distinct group, and would not be subject to any ceiling. Therefore, the general rule of reservation at present is post based roster system; but as per the special provision, which regulate the scheme of reservation, is based on the 50 % ceiling limit. The case of the petitioner is not that the ceiling of 50 % has been breached in the process of reservation in promotion; in turn, the reservation limit of 22.5% got violated by promoting the respondent no. 4-5. The court also took in to account the rights flowing from the Article 16 (1) and the enabling powers vest in article 16 (4) (4A), (4B). The promotions to the respondent No 4 & 5 as Assistant Engineers (Civil) were not

eclipsed the right accrued in favour of the Petitioner under article 16(1), since, there is no breaching in the maximum ceiling limit.

39. Importantly, the list of the persons, working as Assistant Engineer (Civil) from the reserved category, has been placed on record in the writ petition. Out of which fourteen people are belonging to the SC quota and two persons belonging to ST quota. The significant point to be noted is that two persons, namely, K.L. Maurya and Suresh Kumar were promoted on the basis of merit. Therefore, they were not placed in the category of reserved quota; but in the general category. The promotion of two SC candidates based on the merit would fall under the general category. The Apex Court has already examined this issue and held in ***R.K.Sabharwal vs State of Punjab and others***, (1995)2 SCC 745 as under:-

“4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserve posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation.”

40. Accordingly, the Office Memorandum dated 31.01.2005 has been withdrawn by Memorandum dated 10.08.2010 wherein it is clarified that SC / ST candidates appointed by promotion on their own merit and seniority and not owing to reservation or relaxation of

qualifications will be adjusted against unreserved points. It is further clarified that these orders will take effect from 02.07.1997, the date on which post-based reservation was introduced.

41. Therefore, the tag of caste loses its identity when the promotions are effected on merit. Accordingly, the promotion that has been carried out by the respondent department does not cross the prescribed limit.

42. In view of the above reasons the petition is dismissed with no order as to costs.

43. Before parting with this judgment, it is also important to note that the promotion in question in the instant petition is related to 19-4-2005. Prior to the said promotion, the respondent department had also carried out the promotions on 05.09.2002 and 06.08.1996. The Petitioners have placed the reliance on the facts and figures of the said promotion. The respondent brought to the notice of the Court that the Writ Petition no. 3126/1992 titled as *DDA (SLUM SC/ST Engineers Association (Regd.) and Others Vs. D.D.A and others* is related to the promotion to the post of Assistant Engineers (Civil) which is due from 1988. Therefore, the dismissal of this writ petition shall not stand in the way of the implementation of the orders passed in the Writ Petition No.3126/1992 as mentioned above.

SURESH KAIT, J

DECEMBER 21, 2012

Jg/RS