

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9084 of 2017

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1. Dr. Sudhir Kumar, son of Dr. Awadhesh Prasad Singh, resident of K-199, Hanuman Nagar, P.S.-Kankarbagh, Patna-800020.
 2. Dr. Pawan Kumar Jha, son of Late Jagdish Jha, resident of At & P.O.-Singhnan, P.S.-Rajoun, District-Banka at present, residing at Nursing Home, Nawab Bagh, Tilkamanjhi, Bhagalpur,
 3. Dr. Gopal Sharan Singh, son of Late Vishnudev Prasad Singh, resident of Kathalbari, Bari Khanjarpur, Rai Sukhraj Rai Path, District-Bhagalpur.
 4. Dr. Jaiprakash Sinha, son of Late Vishwanath Prasad Sinha, resident of 71-Bikramshila Colony, P.S.-Tilkamanjhi, District-Bhagalpur.
 5. Dr. Anand Sinha, son of Dr. Hemant Kumar Sinha, resident of Nayatola, Bhikhanpur, P.S.-Tilkamanjhi, District-Bhagalpur.
 6. Dr. Saiyad Anjum Parvez, son of Late Saiyad Moizurab, resident of near Grave Yard, Bhikhanpur-3, P.S.-Tilkamanjhi, District-Bhagalpur.
 7. Dr. Ashok Kumar Singh, son of Shri Kameshwar Prasad Singh, resident of Suryansh, Near Shitala Asthan, Shitala Asthan Road, P.S.-Tilkamanjhi, District-Bhagalpur.
 8. Dr. Prabhakar Bhushan Mishra, son of Late Balram Mishra, resident of Adarsh Apartment, IF, Tilkamanjhi Hatia Road, P.S.-Tilkamanjhi, District-Bhagalpur.
 9. Dr. Shakti Kishore, son of Kaushal Kishore Singh, resident of Malahi Pakri, Near Ishan International School, West Kankarbagh, P.S.-Kankarbagh, District-Patna.

... .. **PETITIONERS**

Versus

1. The State of Bihar, through the Principal Secretary, Department of Health, Government of Bihar, Patna.
2. The Principal Secretary, Department of Health & Medical Education, Government of Bihar, Patna.
3. The Principal Secretary, General Administration Department, Government of Bihar, Patna.
4. Bihar Public Service Commission, through its Secretary, 15, Jawahar Lal Nehru Marg (Bailey Road), Patna
5. The Chairman, the Bihar Public Service Commission, 15, Jawahar Lal Nehru Marg (Bailey Road), Patna
6. The Bihar Public Service Commission, through its Secretary, 15, Jawahar Lal Nehru Marg (Bailey Road), Patna.
7. The Special Secretary -cum- Controller of Examination, Bihar Public Service Commission, 15 Jawaharlal Nehru Marg (Bailey Road), Patna.

... .. **RESPONDENTS**



Appearance :

For the Petitioner/s	:	Mr. P. K. Shahi, Sr. Adv. Mr. Vikas Kumar
For the State	:	Mr. P. N. Shahi, AAG 6 Mr. Pankaj Kumar, SC12
For the BPSC	:	Mr. Sanjay Pandey

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER
ORAL

Date : 02-04-2018

This writ application involves, *inter alia*, a question of seminal significance pertaining to computation of backlog vacancies meant for reserved category candidates, in the matter of appointments to the posts of Assistant Professors in various departments of medical colleges and hospitals under the Health Department, State Government of Bihar.

2. As would be evident from the Advertisement, dated 24.04.2017, which has been brought on record by way of Annexure-1 to the writ application, altogether 1171 posts have been advertised in 25 departments and in respect of some of the departments, the posts which have been shown reserved for different reserved category candidates, is much more than 50 per cent. For quick reference, relevant portion of the advertisement showing total number of posts advertised and the number of posts reserved is being re-produced hereinbelow:-



बिहार लोक सेवा आयोग

15, जगहराल नेहरू मार्ग (बैली रोड),

पटना - 800001

स्वास्थ्य विभाग, बिहार के अन्तर्गत राज्य के जिल्ला, महानगरपालिका एवं प्रखण्डों के विभिन्न विभागों में तहसील प्रशासक के कुल 1171 (एक हजार एक सौ एकहत्तर) पदों पर नियुक्ति हेतु सुयोग्य भारतीय नागरिकों से प्रेषित एप्लिकेशन अर्जित किए जाते हैं। विभाग एवं आरक्षण कोटिदार रिक्तियों का विवरण निम्नान्वत है -

क्र. सं.	दिनांक	विभाग का नाम	साधारण कोटि (01)		अनुसूचित जाति (02)		अनुसूचित जनजाति (03)		आर्य पिछड़ा वर्ग (04)		पिछड़ा वर्ग (05)		कुल रिक्त पद
			कोटिदार रिक्तियों की संख्या	महिलाओं के लिए (25%) आरक्षित पदों की कोटिदार संख्या	कोटिदार रिक्तियों की संख्या	महिलाओं के लिए (25%) आरक्षित पदों की कोटिदार संख्या	कोटिदार रिक्तियों की संख्या	महिलाओं के लिए (25%) आरक्षित पदों की कोटिदार संख्या	कोटिदार रिक्तियों की संख्या	महिलाओं के लिए (25%) आरक्षित पदों की कोटिदार संख्या	कोटिदार रिक्तियों की संख्या	महिलाओं के लिए (25%) आरक्षित पदों की कोटिदार संख्या	
1.	07/2017	एनाटॉमी विभाग	31	11	11	04	01	00	12	04	08	03	65
2.	08/2017	फिजियोलॉजी	08	03	05	02	00	00	05	02	03	01	22
3.	09/2017	बायोकेमिस्ट्री	22	08	09	03	01	00	11	04	07	02	52
4.	10/2017	फार्माकोलॉजी	22	08	09	03	01	00	10	03	06	02	50
5.	11/2017	माइक्रोबायोलॉजी	14	05	09	03	01	00	10	03	07	02	42
6.	12/2017	फैथोलॉजी	24	08	13	05	01	00	12	04	08	03	60
7.	13/2017	पी.एस.एम.	20	07	09	03	01	00	10	03	07	02	49
8.	14/2017	एफ.एम.टी.	24	08	08	03	01	00	05	02	06	02	45
9.	15/2017	ओपेरी	14	05	16	06	01	00	19	07	11	04	65
10.	16/2017	टी.बी. एण्ड घेस्ट	28	10	09	03	01	00	11	04	07	02	58
11.	17/2017	चर्म रोग एवं स्ति रोग	26	10	09	03	01	00	11	04	07	02	56
12.	18/2017	सर्जरी	07	02	15	05	00	00	18	06	12	04	55
13.	19/2017	शिष्ट रोग	22	08	12	04	01	00	13	05	08	03	60
14.	20/2017	स्त्री एवं प्रसव रोग	30	10	13	05	01	00	18	06	10	03	74
15.	21/2017	पी.एम.आर.	18	06	07	02	00	00	08	03	05	02	39
16.	22/2017	नेत्र रोग	13	05	07	02	00	00	10	03	07	02	39
17.	23/2017	रेडियोलॉजी	27	09	10	03	01	00	12	04	08	03	60
18.	24/2017	निश्चेतना	33	12	13	05	00	00	18	06	11	04	78
19.	25/2017	मनोरोग	25	09	09	03	01	00	10	03	07	02	54
20.	26/2017	न्यूरो सर्जरी	06	02	03	01	00	00	03	01	02	01	14
21.	27/2017	कार्डियोलॉजी (सुपर-स्पेशलिटी)	08	03	03	01	00	00	03	01	02	01	17
22.	28/2017	हड्डी	10	03	07	02	01	00	10	03	06	02	36
23.	29/2017	नाक, कान एवं गला	19	07	08	03	01	00	10	03	07	02	46
24.	30/2017	नेफ्रोलॉजी (सुपर-स्पेशलिटी)	08	03	03	01	00	00	03	01	02	01	17
25.	31/2017	न्यूरोलॉजी (सुपर-स्पेशलिटी)	09	03	03	01	00	00	03	01	02	01	18
कुल योग			468		220		16		255		167		1171



3. I must, at the outset, point out, which is evident from the advertisement, that posts in superspeciality departments of *Cardiology*, *Nephrology* and *Neurology* have also been shown reserved in the said advertisement. The advertisement, to the extent it provides for reservation in superspeciality departments, is also under challenge in the present writ application.

4. The main thrust of challenge of the petitioners on the point of providing disproportionate reservation in favour of reserved category candidates is wrong and illegal calculation of backlog vacancies. They contend that the State-respondents ought to have considered only such vacancies as backlog vacancies, which remained unfilled in the past selection process(es).

5. It is evident, for example, from the advertisement, as re-produced hereinabove, that in the Surgery department, 55 vacancies have been advertised, out of which only 9 vacancies are meant to be filled up from open category; 2 out of which are again reserved for open category women candidates. Similarly, in Orthopedics department, the total number of vacancies advertised is 36, out of which 13 are to be filled up from open category; 3 out of them being reserved for open category women candidates. These are by way of illustrations. In some other departments also, number



of vacancies to be filled up by reserved category candidates is more than 50 per cent.

CASE OF THE PETITIONERS

6. It is the case of the petitioners that the number of vacancies reserved is much more than 50 per cent of the total vacancies advertised. It is also the case of the petitioners that no exercise has been undertaken to identify the backlog vacancies with reference to respective recruitment year(s) and the formula adopted by the State for computation of backlog vacancies is arbitrary, unreasonable, completely erroneous and misconceived.

7. The petitioners do not belong to any of the reserved categories and they claim that they fulfill the requisite minimum eligibility condition for their appointment to the post of Assistant Professor in their respective departments of medical colleges and hospitals. It is their case that in the year 1997, the State Government had framed the Bihar Medical Teaching Service Cadre and Appointment on the Cadre Posts Rule, 1997 (hereinafter referred to as 'the 1997 Rules'), by operation of which the doctors, who were serving as Residents/Registrars in various medical colleges, as on the date when the 1997 Rules came into force, were appointed as Lecturer. The doctors, who were working as Residents/Registrars, were appointed after following the



reservation policy in vogue at that point of time while being designated as Lecturer. Later, the Lecturers, who became eligible for promotion, were promoted to the posts of Assistant Professor in the year 2002. The said 1997 Rules were subsequently amended in the year 2008, by “Senior Resident/Tutor and Bihar Medical Education Service Recruitment, Appointment and Promotion Rules, 2008 (hereinafter referred to as ‘the 2008 Rules’)”. The said 2008 Rules, for the first time, contemplated constitution of Bihar Medical Education Service Cadre to be a separate service cadre from Bihar Health Service Cadre. Rule 3 of the 2008 Rules provides the structure and constitution of Bihar Medical Education Service Cadre. Chapter-3 of the said 2008 Rules deals with the posts of Senior Resident/Tutor in the Government Medical Colleges to be tenure teaching posts. Rule 10 of Chapter-7 of the 2008 Rules deals with superspeciality departments. After coming into force of the 2008 Rules, for the first time, the Bihar Public Service Commission came out with its first advertisement in the year 2011, notifying altogether 20 vacancies, for example, in General Surgery department, out of which 10 were reserved for the reserved category candidates. Upon completion of the process of selection, 13 posts were filled up; whereas, 7 posts remained unfilled in General Surgery department. Similarly, in other



departments also, some of the posts remained unfilled. Up to the year 2008, the posts in General Surgery department, in all medical colleges taken together, were only 55, against which 45 doctors were appointed and working and, thus, in the year 2008, there were only 11 sanctioned posts available in General Surgery department to be filled up. Accordingly, in the advertisement of 2011, the said 11 vacant vacancies and some more vacancies on account of superannuation etc. were added and 20 posts were accordingly advertised. After 2008, some more posts appear to have been sanctioned, in respect of which the petitioners do not have, in their possession, the notification of the State Government. In the year 2014, the State Government re-organized entire medical education faculty and sanctioned posts in all departments, including General Surgery department. In the General Surgery department, 42 posts were sanctioned; whereas, in the Department of Orthopedics, 32 posts were sanctioned. Similarly, in other departments also, considerable number of teaching posts in medical colleges were sanctioned. After 2014, for the first time, the advertisement has been issued, inviting applications for filling up vacant posts in teaching faculty in various departments, including General Surgery department, through Advertisement No. 18/2017, dated 24.04.2017, by the Bihar Public Service Commission.



8. In the background of aforesaid facts, it is the case of the petitioners that question of backlog of reserved vacancies did not arise at all and even if there were other reserved vacancies available, the same would be with respect to the posts, which were available prior to 2014. Highlighting the example of General Surgery department, the petitioners have attempted to make out a case that the question of backlog will arise only to the extent and only in the event of certain posts having remained unfilled in any previous process(es) of selection. It is, accordingly, the case of the petitioners that reservation in vacancies can go beyond 50 per cent in a recruitment year only when it has the objective to fill up backlog reserved vacancies.

CASE OF THE STATE OF BIHAR

9. Counter affidavits and supplementary counter affidavits have been filed on behalf of the State of Bihar and the Bihar Public Service Commission. In the counter affidavit filed on behalf of the respondent no. 2, with reference to the posts of Assistant Professor, in General Surgery department, it has been stated that in accordance with the roster points, duly approved by the General Administration Department, Government of Bihar, there were only 7 unreserved posts available for appointment against open merit. By way of Annexure-A to the said counter



affidavit, copies of relevant portion of the file, containing approval of the roster points has been brought on record.

10. On perusal of Annexure-A to the counter affidavit, it can be easily noticed that total sanctioned strength, in General Surgery department, of Assistant Professor has been shown to be 110, against which 55 have been shown as working. Out of 55, 47 have been shown as the posts hold by the persons of unreserved category, 3 belonging to Schedule Castes, 2 to Scheduled Tribes, 2 to Most Backward Classes and 1 to Backward Classes. Apparently, thus, there is vacancy of 55 ($110-55=55$) posts in the said department. It indicates that proposal was made by the General Administration Department for roster clearance of roster points 66 to 120 (Total 55). According to the said noting, the total backlog was found to be 40. Accordingly, there were 15 clear vacancies and 40 backlog. There is, however, no discussion as to how 40 vacancies emerged as backlog. There is no reference to any previous recruitment process when some of the reserved vacancies were advertised but remained unfilled because of non-availability of suitable reserved category candidates.

11. When the matter was heard on 04.09.2017, reference was made by Mr. P. K. Shahi, learned Senior Counsel, to sub-Section (6) of Section 4 of the Bihar Reservation of Vacancies



in Posts and Services (for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1991 (hereinafter referred to as 'the 1991 Act'), which lays down, in detail, the procedure for determining the roster points. Since it was not clear as to whether any such exercise was undertaken or not, in terms of the said provision, this Court had directed the State of Bihar, by order, dated 04.09.2017, to inform the Court by producing relevant documents as to whether any exercise, as contemplated under Section 4 (6) of the 1991 Act, was meticulously undertaken to determine backlog vacancies for applying the *carry forward* principle. The Court desired to know the backlog status as against various reserved categories after filling up the posts on the basis of last 2011 Advertisement. The Court posed a question to the State Government as to whether the matching number of posts could be declared to be reserved on the ground that the same number of persons of unreserved category had been found working in a particular cadre, though some of whom were holding the posts on the basis of their promotion, which they got at the point of time when there was no provision at all for reservation in the matter of promotion. The Court noticed, in the order, dated 04.09.2017 itself, that the State of Bihar had miserably failed to satisfy that there



could be any reservation for appointment in superspeciality departments.

12. In compliance of the said order, dated 04.09.2017, a supplementary counter affidavit has been filed on behalf of the State of Bihar, from which, it appears that the backlog vacancies have been calculated on the basis of the number of persons of unreserved category holding the posts. For example, in the Department of General Medicine, total number of sanctioned posts of Assistant Professor is 120, against which 55 (unreserved-46, Scheduled Castes-3, Most Backward Classes-3, Backward Classes-3) have been found to be working, 65 being, thus, the clear vacancy. For the calculation of backlog, the General Administration Department has adopted a formula by taking the reserved percentage of a particular reserved category of twice the number of the unreserved category persons working, after adjusting the number of persons working in that reserved category. For example, 18 per cent reservation is prescribed under the Act for the Extremely Backward Classes. The total number of persons of unreserved category, found working, was 46. For the purpose of calculation of backlog, the Department multiplied 46 by 2, thus, producing 92. 18 per cent of 92, coming to 16.56 (rounding off 16), according to the Department, would have been the minimum



number of candidates belonging to Most Backward Classes, who ought to have been there in the cadre. Since 3, Most Backward Classes category, were already working, the Department worked out the backlog to be 13. Apparently, the determination of backlog has not been on the basis of vacancies having remained unfilled in a previous completed selection process in a particular recruitment year(s).

13. Further, it is evident from the supplementary counter affidavit filed by the Principal Secretary, General Administration Department, Government of Bihar, that for the first time, in the year 1997, the Medical Education Wing was bifurcated from the main stream of the Health Department and at that point of time, the basic post of Medical Education was the Lecturer. In the year 2003, the aforesaid post was given nomenclature of Senior Resident and Tutor, and in the year 2004, by a policy decision; all working Senior Residents and Tutors were upgraded as Assistant Professors. In the year 2008, the 2008 Rules came into force, Rule 7 (iii) (c) of which prescribes that in those subjects where Senior Residents/Tutors were appointed on the basis of earlier panel system or as per the provisions of 1997 Rules and were working, new appointment to the post of Assistant Professor shall be made after earmarking that much number of posts for promotion for all



such working Senior Residents/Tutors. The Health Department decided to fill up the vacancies of the Assistant Professor according to the new Rules for the first time in the year 2011 and, accordingly, the roster clearance was done by the General Administration Department for recruitment against various posts. Referring to General Surgery Department, it has been stated that total sanctioned posts were reported as 60, and the working strength, at that time, was 51. Amongst them, 31 working hands were of unreserved category; whereas, the working hands of reserved category were only 8 and, therefore, there was acute shortfall of the reserved category candidates. At that point of time, the vacancies were only 9 and if the vacancies were to be filled up at that juncture, then not even a single post could be said to be admissible to unreserved category candidates. Since it was the first transaction that the vacancies were distributed among the unreserved and various reserved categories, the number of backlog vacancies was reduced. It is the case of the State of Bihar that when the number of backlog vacancies got reduced to some extent, the backlog vacancies were calculated thoroughly in the year 2014 so that the reserved and unreserved category candidates could get equal share.



14. It is the specific case of the State of Bihar that “the definition of backlog vacancies is the posts, which were admissible to reserved classes, but not allotted to them due to non-fulfillment of posts, is backlog for next transaction”. Similar process was adopted in other faculties and departments, as illustrated in the counter affidavits.

15. In response to the contention raised on behalf of the petitioners, with reference to working out the backlog vacancies, in terms of Section 4 (6) of the 1991 Act, as indicated in paragraph 2 of the order, dated 04.09.2017, it has been stated that the said process, relates to de-reservation of the posts; whereas, by the roster clearance done by the General Administration Department, the required quota has been made available for the reserved categories. It has also been stated that the roster clearance done by the General Administration Department is post-based; whereas, the petitioners are demanding vacancy-based roster clearance. It has further been stated that it is a policy matter, whereby posts are divided between reserved and unreserved classes equally in tune with the policy of 50 per cent reservation and the post-based reservation has been adopted by the State, vide Memo No. 117, dated 30.09.1995. The calculation of backlog in General Surgery department has been worked out, thus:-



“That the provision of the aforesaid circular
can be explained in the following manner:-

1. Total number of posts reported in Surgery
Department – 110
2. Category wise working strength – 55 (UR-
47, SC-03, EBC-02, BC-01)
3. For example, post admissible to EBC – 110
 $\times 18 \% = 19.8 = 20$
4. Already working – 02
5. Backlog calculated – 15
6. Post allotted against current vacancy – 3
7. Finally quota of EBC has been fulfilled as 2
 $+ 15 + 3 = 20$ ”

SUBMISSIONS ON BEHALF OF THE PETITIONERS

16. Mr. P. K. Shahi, learned Senior Counsel, leading the arguments on behalf of the petitioners, has asserted that for the first time, the post of Assistant Professor was declared as direct recruitment post after coming into force of the 2008 Rules. He has contended that there could be no question of reservation in favour of Other Backward Classes and Backward Classes and Backward Classes (Female), when the promotions were made to the post of Assistant Professor, prior to coming into force of 2008 Rules. It is his case that the State-respondents have mindlessly calculated the backlog vacancies taking the number of posts held by unreserved candidates, as the basis for computation. He has submitted that



backlog vacancies can exist only in reference to a recruitment year in which process of recruitment is undertaken in course of which the post(s) advertised and meant for reserved category candidates could not be filled up because of their non-availability. He has reiterated, with reference to Article 16 (4-B) of the Constitution of India, that the State can consider unfilled vacancies of a year, which are reserved for being filled up by reserved category candidates in that year and only 'such class' of vacancies can be considered together with vacancies of the year in which they are proposed to be filled up, if ceiling of 50 per cent reservation is to be crossed. He contends that in order to identify backlog vacancies, first of all, it is imperative to examine as to in which recruitment year, the post remained unfilled.

17. He has, next, referred to Section 4 (6) of the 1991 Act, which lays down the manner of identifying the backlog vacancies with reference to recruitment year and only such vacancies can be *carried forward* in the manner prescribed in Section 4 (6) of the 1991 Act, which remained unfilled despite completion of the process of recruitment because of non-availability of the suitable candidates belonging to reserved categories. He has relied on following Supreme Court's decisions, in support of his submissions:-



- “1. **Indra Sawhney and Others v. Union of India and Others**, reported in **1992 Supp (3) SCC 212**,
2. **R. K. Sabharwal and Others v. State of Punjab and Others**, reported in **(1995) 2 SCC 745**, and
3. **M. Nagaraj and Others v. Union of India and Others**, reported in **(2006) 8 SCC 212**.”

18. Referring to paragraph 814 of the Supreme Court’s decision, in the case of **Indra Sawhney** (supra), he submits that it has been clearly laid down that for the purpose of applying the rules of 50 per cent, as the upper limit for providing reservation, 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.

19. He has placed much emphasis on the observation made by the Supreme Court, in the case of **M. Nagaraj** (supra), and has contended that the ceiling of 50 per cent of current vacancies, as laid down in case of **Indra Sawhney** (supra), continues to remain the rule with the only relaxation introduced with insertion of Article 16 (4-B) of the Constitution of India in respect of *carry over* vacancies. He has contended, with reference to paragraph 100 of the Supreme Court’s decision, in the case of **M. Nagaraj** (supra) that the *carry over* rule cannot extend beyond three years. In order



to substantiate his case that the post of Assistant Professor was earlier a promotional post, he has relied on an unreported judgment of this Court, delivered on 14.01.1999, in CWJC No. 5577 of 1997 (**The Junior Medical Teachers Association, Bihar, through its Secretary v. The State of Bihar and Others**).

20. On the point that reservation of posts in superspeciality departments is impermissible, he has relied on paragraphs 838, 839 and 840, of the Supreme Court's decision, in the case of **Indra Sawhney** (supra). To bolster his contention, reliance has also been placed in this regard on another Supreme Court decision, in the case of **Dr. Preeti Srivastava and Another v. The State of Madhya Pradesh and Others**, reported in (1999) 7 SCC 120.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

21. Mr. Pushkar Narain Sahi, learned Additional Advocate General, appearing on behalf of the State of Bihar, has submitted, relying on the Supreme Court's decision, in the case of **R. K. Sabharwal** (supra), and **M. Nagraj** (supra), that each point, in a roster, is a post which, on falling vacant, has to be filled by the particular category of candidate to be appointed against it and any subsequent vacancies has to be filled up by that category candidate alone. Thus, the question of clubbing of unfilled vacancies with the



current vacancies does not arise, according to him, in present process of selection. He submits that since it is within the power of the State to provide for reservation in the matter of appointment to posts, it is also within its jurisdiction to accomplish it in one selection or deferred selection(s), as is found convenient for implementation of the reservation scheme, so long as it is post based. It is his contention that the State action in providing reservation of posts, as advertised in the impugned advertisement, is in conformity with the decision of the Supreme Court, in the case of **R. K. Sabharwal** (supra), which contemplates post-based reservation, which has been adopted by the State Government of Bihar, through its Memo No. 117, dated 30.09.1995. It is his further contention that for the purpose of computing backlog vacancies, the entire cadre strength, of all posts which form cadre strength, is to be taken into account and, therefore, there is no illegality in calculation of the backlog vacancies.

DISCUSSIONS:-

Reservation in Superspeciality departments.

22. It is evident from the impugned advertisement that the posts of Assistant Professor, in Cardiology, Nephrology and Neurology, which are superspeciality departments, have been reserved.



23. Article 335 of the Constitution allows the State to consider the claims of members of Schedule Castes and Schedule Tribes, in making appointments to services and posts in connection with the affairs of the Union or of a State but ‘consistently with the maintenance and efficiency of administration’.

24. Dealing with the said provisions under the Constitution, the Supreme Court held, in the case of **Indra Sawhney** (supra), that there are certain services and provisions, where either on account of duty attached to them or the level (in the hierarchy) at which they obtain, merit alone counts, in which case, it may not be advisable to provide for reservation. By way of an illustration, the Supreme Court held that it would not be advisable to make provision for reservation in technical posts, in research and development organizations/departments/institutions, in specialties and superspecialties in medicine, engineering and other courses in physical sciences and mathematics, in defence services and in the establishments connected therewith.

25. The Supreme Court enumerated in paragraph 839, in its decision, in the case of **Indra Sawhney** (supra), following services in respect of which the rules of reservation may not be advisable:-

“(1) Defence Services including all technical posts therein but excluding civil posts.



- (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment;
- (3) Teaching posts of Professors - and above, if any.
- (4) **Posts in super-specialties in Medicine, engineering and other scientific and technical subjects.**
- (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India.”

(Emphasis is added)

26. The Supreme Court has clearly observed that list is merely illustrative and not exhaustive. The Supreme Court observed, in paragraph 840, of its decision, in the case of **Indra Sawhney** (supra), that the services/posts enumerated above, on account of their nature and duties attached are such “as call for highest level of intelligence, skill and excellence” and, therefore, they form a category apart. Reservation in respect of the said posts, the Supreme Court held, would not be consistent with “efficiency of administration”, as contemplated by Article 335 of the Constitution of India.



27. In the case of **Dr. Preeti Srivastava** (supra), the Supreme Court had the occasion to deal with the permissibility of reservation of seats for admission to superspeciality courses in medicine. In no uncertain terms, the Supreme Court concluded, in paragraph 62 of the said decision, that at the level of admission to the superspeciality courses, any special provisions for any category of candidates, either in the form of reservation or relaxation or otherwise, will be against the national interest and merit alone can be the basis of selection.

28. Following the said decision of the Supreme Court, in the case of **Indra Sawhney** (supra) and **Dr. Preeti Srivastava** (supra), I have no hesitation in reaching a definite conclusion that there could be no reservation for appointment in superspecialties departments of *Cardiology*, *Nephrology* and *Neurology*. The reservation for the posts of Assistant Professor in the said departments cannot be said to be consistent with the efficiency of administration, contemplated under Article 335 of the Constitution of India. The reservation or relaxation, in any form, for any category of candidates for appointments in superspeciality department(s), being against the national interest, is unsustainable. The merit alone shall be the basis of selection for the posts in superspeciality department(s).



29. It is, accordingly, held that the said posts in superspecialties departments can be filled up only on the basis of open merit without providing for any reservation.

30. The State-respondents are directed to proceed accordingly.

CHALLENGE TO COMPUTATION OF THE BACKLOG VACANCIES

31. The challenge of the petitioners to the method adopted by the State-respondents in fixing and advertising the number of reserved posts as backlog vacancies has four facets:-

- (i) The method adopted is against the basic concept of the carry forward rule which presupposes previous recruitment process(es) in which the reserved posts were advertised, but remained unfilled because of non-availability of suitable candidates.
- (ii) The statutory prescription under the 1991 Act for determination of backlog vacancies has been breached.
- (iii) The excessive reservation beyond 50 per cent in one recruitment year without any



valid reason will have adverse impact on merit and will be against public interest.

(iv) The method adopted by the State Government in calculating the backlog vacancies, as disclosed in the counter affidavit, is arbitrary and erroneous?

32. There should not be any doubt that the question of *carry forward* rule of reservation would arise only when the reserved vacancies remain unfilled from amongst the candidates in whose favour the provision of reservation has been made, in a completed process of selection in past due to their non-availability. In order to apply the principle of *carry forward* rule in the matter of reservation in posts, the first step for the State is to identify the post-wise number of posts reserved, which could not be filled up, though advertised previously, because of non-availability of reserved category candidates. As the expressions “*carry forward/backlog*” refer to something of the past, while determining the number of reserved posts in the category of *carry forward/backlog*, the State will have to go back to the stage where despite there being provision for reservation, the same could not be filled up because of non-availability of reserved category candidates.



33. There are, thus, two most basic and fundamental requirements for determining the backlog vacancies by applying the principle of carry forward, viz. (i) existence of posts reserved for a particular category in the past and (ii) such posts having remained unfilled from amongst the candidates of respective reserved categories, despite completion of the process of selection, due to non-availability of such candidates.

34. Coming, now, to the next aspect; the reservation, in question, is governed by the 1991 Act. Section 4 of the Act deals with direct recruitment, sub-Section (6) thereof prescribes the mode of computing and filling up of backlog vacancies.

35. I will be referring to proviso to sub-Section (1) of Section 4 of the Act later, which relaxes the upper ceiling of 50 per cent of reservation for adding the quota fixed for succeeding year, since at present, I am dealing with the method prescribed under the 1991 Act for determination of backlog vacancies. Sub-Section (6) of Section 4 of the 1991 Act reads thus:-

“(6) (a) In case of non-availability of suitable candidates from the Scheduled Castes and Scheduled Tribes for appointment and promotion in vacancies reserved for them, the vacancies shall continue to be reserved for three recruitment years and if suitable candidates are not available even in the third



year, the vacancies shall be exchanged between the Scheduled Castes and Scheduled Tribes and the vacancies so filled by exchange shall be treated as reserved for the candidates for that particular community who are actually appointed.

(b) In case of non-availability of suitable candidates from the Extremely backward Classes and Backward Classes the vacancies so reserved shall continue to be reserved for them for three recruitment years and if suitable candidates are not available even in the third year also, the vacancies shall be filled by exchange between the candidates from the extremely backward and backward Classes and the vacancies so filled by Exchange shall be treated as reserved for the candidates of that particular community who are actually appointed.

(c) In case of non-availability of suitable candidates for the vacancies reserved for the women of backward classes; the vacancies shall be filled in order of preference as follows:-

(i) by the candidates from the Scheduled Castes;

(ii) by the candidates from the Scheduled Tribes;

(iii) by the candidates from extremely Backward Classes;



(iv) by the candidates from Backward Classes.

The vacancies so filled in the transaction shall be treated as reserved for the candidates of that particular community who are actually appointed.

(d) if in any recruitment year; the number of candidates of Scheduled Castes/Scheduled Tribes, extremely Backward and Backward Classes and are less than the number of vacancies reserved from even after exchange formula, the remaining backlog vacancies may be filled by general candidates after de-reserving them but the vacancies so de-reserved shall be carried forward for three recruitment years.

(e) If the required number of candidates of Scheduled Castes/Scheduled Tribes and Extremely Backward and Backward Classes and Women of Backward Classes are not available for filling up the reserved vacancies, fresh advertisement may be made only for the candidates belonging to the members of Scheduled Castes, Scheduled Tribes and Extremely Backward and Backward Classes and Women of Backward Classes, as the case may be, to fill the backlog vacancies only.

(f) Notwithstanding anything contained to the contrary in the Act or in any other law or rule for the time being in force, or in any



judgment or decree of the Court, the provisions of Section 4 shall apply to all such cases in which all formalities of selection have been completed before 28th April, 1993, but the appointment letters have not been issued.”

36. Evidently, clause (a) of sub-Section (6) stipulates that in case of non-availability of suitable candidates, from Scheduled Castes and Scheduled Tribes, for appointment and promotion, in vacancies reserved for them, the vacancies shall continue to be reserved for three recruitment years and if suitable candidates are not available, even in the third recruitment year, the vacancies shall be exchanged between Scheduled Castes and Scheduled Tribes category, and the vacancies so filled by exchange shall be treated as reserved for the candidates for that particular community, who are actually appointed. The principle of *carry forward*, as contemplated under the 1991 Act, is, thus, clear and it refers to ‘case of non-availability of suitable candidates’ for three recruitment years.

37. Similarly, clause (b) of sub-Section (6) contains similar provisions in respect of Extremely Backward Classes and Backward Classes and provides for exchange between the candidates from the Extremely Backward and Backward Classes.



38. Clause (c) of sub-Section (6) deals with a situation where the suitable candidates for vacancies reserved for the women of Backward Classes are not available and prescribes that in such circumstances, the vacancies shall be filled in order of preference, as given therein.

39. Clause (d) of sub-Section (6) is significant and it provides that if in any recruitment year; the number of candidates of Scheduled Castes/Scheduled Tribes/Extremely Backward Classes/Backward Classes is less than the number of vacancies reserved for them even after exchange formula, the remaining backlog vacancies may be filled by general candidates after de-reserving them, but the vacancies so de-reserved shall be *carried forward* for three recruitment years.

40. Clause (e) of sub-Section (6) enables the State Government to make fresh advertisement exclusively for candidates belonging to reserved categories to fill up backlog vacancies, if the required number of candidates of Scheduled Castes/Scheduled Tribes/Extremely Backward Classes/Backward Classes and Women of Backward Classes are not available, for filling up the reserved vacancies.

41. There is subtle, but significant, difference between the provisions as contemplated under Clauses (a), (b) and (c) of



sub-Section (6) of Section 4 of the 1991 Act, on the one hand and clause (d), on the other. Clauses (a), (b) and (c) contemplate filling up of the posts reserved for one reserved category by a candidate belonging to another reserved category, by exchange or otherwise, provided in Clause (c). The 1991 Act provides that in such circumstance, consequent upon filling up of the posts by exchange or in accordance with the manner prescribed under Clause (c), the vacancies shall be treated as reserved for the candidates in a community, who are actually appointed. It is evident from the said clauses (a) and (b), which lays down the *carry forward* principle that in case of non-availability of suitable candidates, the vacancies shall continue to be reserved for 'three recruitment years' and if even after third recruitment year, the candidates are not available, then, such vacancies should be filled up by exchange, as prescribed thereunder. In a situation, where, in the third recruitment year also, even upon applying the method of exchange, as contemplated under Clauses (a) and (b), the reserved vacancies cannot be filled up, clause (d) comes into operation and provides that the backlog vacancies may be filled up by general category candidates after de-reserving them. In this circumstance, however, the posts so filled by general candidates by applying the scheme under Clause (d), will not to be treated as de-reserved for 'times to come'; rather, it



says ‘the vacancies so de-reserved shall be *carried forward* for three recruitment years. The scheme, under sub-Section (6) is clear and it is, apparently, consistent with the law laid down by the Supreme Court, in the case of **Indra Sawhney** (supra), which permits that unfilled reserved vacancies may be *carried forward* for maximum period of three years. It is this reason why sub-Section (6) provides for filling up of the posts by general candidates if suitable reserved candidates of that number are not available, even in the third recruitment year.

42. The scheme, in sub-Section (6) has, apparently, a very important public purpose to achieve, which is to ensure that the posts do not remain unfilled only on the ground of non-availability of the candidates belonging to a particular class/ category by filling up such posts either by applying the formula of exchange or even if it fails, by de-reserving the posts and thereby filling up the posts by general candidates. There is no scintilla of doubt upon plain reading of the provisions under Sub-Section (6) of Section 4 of the 1991 Act that *carry forward* principle or backlog vacancies for the purpose of filling up the posts reserved for reserved category candidates, which remained unfilled because of non-availability of the suitable reserved category candidates is only with reference to previous recruitment year(s) and not



otherwise. If there had been no recruitment under the service rules, there would be no question of any backlog in the first recruitment year. If recruitment(s) is/are held subsequently, the backlog will have to be referred to the previous recruitment year when the vacancies, though advertised, remain unfilled because of non-availability of suitable reserved category candidates.

43. My view finds support from Supreme Court's decision, in the case of **State of Uttar Pradesh and Others v. Sangam Nath Pandey and Others**, reported in (2011) 2 SCC 105. The provisions under the Uttar Pradesh Public Service (Reservation of Scheduled Castes, Scheduled Tribes and other Backward Class) Act, 1994, were under consideration before the Supreme Court and a question had arisen in respect of computation of backlog vacancies. Upon consideration of the provisions under the Uttar Pradesh Public Service (Reservation of Scheduled Castes, Scheduled Tribes and other Backward Class) Act, 1994, the Supreme Court held, in paragraph 33, that only those vacancies could be declared backlog vacancies, within the reserved category, which were subject matter of advertisement, but remained unfilled because of non-availability of suitable candidates, within the reserved category, after selection. In clear terms, the Supreme Court held that it is only in respect of such vacancies that the



procedure *qua* backlog vacancies can be adopted and any vacancy not subjected to complete process of selection, even though vacant, cannot be treated as backlog vacancy. Paragraph 33 of the said decision, in the case of **Sangam Nath Pandey** (supra), is relevant for the present and is being reproduced hereinbelow:-

“33. A harmonious construction of Sections 2(d), 3(2) and 3(5) would lead to the conclusion, as stated by the Division Bench, that only those vacancies can be declared backlog vacancies, within the reserved category, which were subject matter of advertisement but remained unfilled because of non-availability of suitable candidates, within the reserved category, after selection. It is only in respect of such vacancy that the procedure *qua* backlog vacancy can be adopted. Any vacancy, which has not been subjected to a complete process of selection, even though vacant, cannot be treated as a backlog vacancy.”

44. The Supreme Court, in the case of **Sangam Nath Pandey** (supra), was, however, considering a situation where there was no dispute in respect of the post to be filled up by reserved category candidates and in that background, the Supreme Court, in the peculiar facts and circumstances of that case, refused to disturb the course adopted by the State Government in segregating 367



posts for special recruitment. Paragraph 44 of the said decision is indicative of the fact that the Court issued the direction, in **Sangam Nath Pandey** (supra), exercising power under Article 142 of the Constitution of India, observing ‘in peculiar facts of this case’. The Supreme Court reiterated, however, that it was necessary for the department to identify year-wise vacancy for the cadre.

45. The Supreme Court reiterated the Court’s observation, in the case of **R. K. Sabharwal** (supra), that the roster provided under the scheme of reservation are to be maintained in each department, which is implemented in the form of running account from year to year.

46. After having noticed the decision, in the case of **R. K. Sabharwal** (supra), and having considered the observation made, in paragraph 814, by the Supreme Court, in the case of **Indra Sawhney** (supra), the Supreme Court held that it was necessary for the department to identify year-wise vacancies for the cadre.

47. In the present case, in the absence of any exercise having been done by the State-respondents in identifying year-wise vacancies for the cadre and number of posts having remained unfilled meant for reserved category candidates in any of the



previous selections, determination of number of backlog vacancies, in my view, cannot be approved.

48. I consider it apt to notice the Constitution Bench decision, in the case of **Indra Sawhney** (supra), of the Supreme Court, in paragraph 814, which clearly laid down that for the purpose of applying the rule of 50 per cent, as maximum limit for reservation, a year should be taken as unit and not the entire strength of the cadre, service or the unit, as the case may be, relevant portion thereof is being reproduced herein below:-

“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 OB Cs in the unit/service/category is only 50, a shortfall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all



Backward Classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age-barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by Clause (1) is to each individual citizen of the country while Clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. **For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit as the case may be.”**

(Emphasis is supplied)

49. Thereafter came the Constitution (81st Amendment) Act, 2000, leading to insertion of, *inter alia*, sub-Article 4-B, in Article 16 of the Constitution of India, which reads as under:-

“16 (4-B) 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.”

50. Apparently, in order to overcome the ceiling of maximum of 50 per cent of reservation in a recruitment year for the purpose of applying *carry forward* rule, the said 81st Amendment has been introduced, in the Constitution, in the year 2000, which can be seen from the statement of objects and reasons of the Constitution (81st Amendment) Act, 2000, which reads thus:-

“Statement of Objects and Reasons:-
Prior to August 29-8-1997, 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.”

51. The Supreme Court, in the case of **M. Nagraj** (supra), observed that in substance, the Constitution (81st Amendment) Act, 2000, gave legislative assent to the Court’s decision, in the case of **R. K. Sabharwal** (supra). Paragraph 96 of the said judgment, in the case of **M. Nagraj** (supra), is being reproduced hereinbelow:-

“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.”

52. This has to be kept in mind the Supreme Court’s decision, in the case of **R. K. Sabharwal** (supra), enunciated two significant principles. It *firstly* discussed the importance of roster in the form of running account from year to year for the purpose of implementing the policy of reservation to make sure that Scheduled Castes, Scheduled Tribes and Backward Class candidates get their percentage of reserved posts and at the same time, it did not result in excessive reservation. It further held that when total number of posts in a cadre is filled by the operation of



the roster, the said running account/roster shall cease to operate. The filling up of the vacancies, arising in the cadre, once the initial posts are filled, would pose no difficulty since as and when there is a vacancy, whether permanent or temporary, in a particular post, the same has to be filled up from amongst the category of which the post belong in the roster. Clarifying, the Supreme Court held, in the case of **R. K. Sabharwal** (supra), with the aid of example, that if Scheduled Castes persons hold the post at roster point 1, 7 and 15 retire, then those slots would be filled from the persons belonging to the Scheduled Casts. The Supreme Court held that by following the procedure, there shall neither be shortfall nor any excess in the percentage of reservation. *Secondly*, the Supreme Court stated that the cadre strength is always measured by the number of posts comprising the cadre and percentage of reservation has to be worked out in relation to number of posts, which form the cadre strength. Before declaring so, the Supreme Court ruled that the word 'post' means an appointment, job, office or employment, i.e. a position to which a person is appointed; whereas 'vacancy' means an unoccupied post or office. Upon distinguishing the two terms, the Supreme Court held that the concept of vacancy has no relevance in operating the percentage of reservation.



53. In the case of **M. Nagraj** (supra), after having noted the decision, in the case of **R. K. Sabharwal** (supra), and the Constitutional Amendment, the Supreme Court has conclusively held that ceiling limit of 50 per cent of current vacancy continues to remain and in working out the *carry forward* rule, two factors would be required to be kept in mind, namely, unfilled vacancies and the time factor. It laid down clearly, in paragraph 100, in the case of **M. Nagraj** (supra), that Article 16 (4-B) of the Constitution of India lifts the 50 per cent cap for backlog vacancies. The Supreme Court held that if the ceiling limit of **carry over** or unfilled vacancies is removed, the alternative time factor comes in and in that event, the time score has to be imposed in the interest of efficiency in administration, as mandated by Article 335 of the Constitution of India.

54. The Supreme Court, in the case of **M. Nagraj** (supra), has directed that the appropriate Government will have to introduce the time-cap, depending upon the fact situation.

55. I must hasten to add that sub-Section (6) of Section 4 of the 1991 Act, which has already been taken note of, envisages a definite method for determining backlog vacancies.

56. In tune with the Constitutional (81st Amendment) Act, 2000, leading to insertion of Article 16 (4-B), a proviso to



Section 4 (i) of the 1991 Act has been added which lifts the ceiling limit of 50 per cent reservation. Nonetheless, sub-Section (6) of Section 4 of 1991 Act lays down the method for calculation of the backlog vacancy.

57. Mr. P. N. Shahi, learned Additional Advocate General, has given much emphasis on the observation made by the Supreme Court, in the case of **R. K. Sabharwal** (supra), to put forth his point that for the purpose of computing the vacancies available for reserve category candidates, the entire cadre strength is required to be taken into account and accordingly the posts, which were found reserved for various reserve category candidates have been included as backlog vacancies in the advertisement, in question.

58. The Supreme Court, in the case of **R. K. Sabharwal** (supra), lays down that the entire cadre strength should be taken into account to determine whether reservation up to required limit has been reached. It lays down that once ceiling limit of 50 per cent is achieved, subsequent vacancy will have to be filled up by that category candidate alone.

59. It is noteworthy that it has never been the stand of the State of Bihar that there has been any breach of reservation policy, as contained in the 1991 Act, at any point in any process of



selection in the past, in the matter of appointment either by direct recruitment or through promotion to the posts, in question. It is admission of the State Government that the posts of Assistant Professor were filled up by way of promotion in accordance with 2008 Rules in the year 2011.

60. Most of the persons holding the post of Assistant Professor presently in various departments are holding such post by way of promotion in accordance with the 2008 Rules. It is the clear case of the State of Bihar that the Health Department had decided to fill up the vacancy of Assistant Professor according to the new Rules, for the first time in the year 2011 and the roster clearance was done by the General Administration Department.

61. It is further case of the State of Bihar that since only 09 (nine) vacancies were available in the General Surgery Department out of total 60 sanctioned posts in the recruitment year 2011 and if *carry forward* rule was to be applied, no vacancy would have been available for the unreserved category candidates and since it was the first transaction, the said 09 vacancies were distributed among various reserved categories and backlog vacancies were reduced. The Health Department, now, seeks to achieve the target of filling up of all posts reserved for reserved category candidates, i. e. 50 per cent of total cadre strength through



the present process of selection, taking aid of the *carry forward* principle. The Department has attempted to substantiate its stand mainly in view of the law laid down by the Supreme Court, in the case of **R. K. Sabharwal** (supra). The decision, in the case of **R. K. Sabharwal** (supra), in most unequivocal terms, states that percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. It further says that operation of roster for filling up of cadre strength survives till the reservation limit is achieved. The operation of roster is to ensure that the desired percentage of reservation is achieved and no post meant for reserved category candidate is filled up by general category candidate. It further holds that once the desired percentage is achieved, there would be no question of operation of roster any further, as the subsequent post becoming vacant because of retirement etc. shall be filled up by the same category of person, whose retirement etc. has caused the said vacancy. Paragraph 10 of the decision, in the case of **R. K. Sabharwal** (supra), explains by way of illustration, the effect of operation of roster even after achieving the target of filling up the posts reserved for reserve category candidates, which reads thus:-

“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 December 31,1994. 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 even 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.”

62. The decision, in the case of **R. K. Sabharwal** (supra), can be better understood by way of illustration. Suppose, there is cadre ‘A’, consisting of 30 posts. The reservation policy prescribes reservation for different reserved categories. At a relevant point of time, there are 06 (six) vacancies. In the process of selection for filling up all the 06 posts, the percentage of reservation is not to be determined with reference to the number of vacancies; rather, with reference to the number of total posts. For the purpose of determination as to from which category of candidates, the said vacancies are to be filled up, there can be roster points right from post no. 1. Each post having been earmarked in the roster for unreserved or if reserved, with the category of reservation. Once the posts are identified, the process of selection can begin providing for reservation in accordance with the roster points. The reservation for the purpose of selection cannot exceed 50 per cent in one recruitment year in view of the law laid down by the Supreme Court, in the case of **Indra Sawhney** (supra). This is how the post-based reservation can be described instead of vacancy-based. The upper-cap of 50 per cent, as laid down in the case of **Indra Sawhney** (supra), has



subsequently been relaxed with insertion of Article 16 (4-B) in the Constitution of India, only for the purpose of application of *carry forward* rule.

63. While filling up of the vacancy on the basis of reservation, rule of 50 per cent ceiling could be relaxed only to the extent it is permissible in accordance with Article 16 (4-B) of the Constitution of India.

64. In the present case, however, the core issue, which is involved, is clearly different. The question is whether the State-respondents have carried out any exercise for identifying backlog vacancies in accordance with the 1991 Act or not. The answer, in my view, is in negative, after having seen the pleadings and the documents on record, which have already been discussed.

65. In view of the above discussions, following conclusions are reached:-

(i) The impugned advertisement of the Bihar Public Service Commission inviting applications for appointment to the posts of Assistant Professor, to the extent it provides for reservation in superspeciality departments, namely, *Cardiology*, *Nephrology* and *Neurology*, cannot be sustained, in view of the Supreme Court's decisions, in the cases of **Indra Sawhney** (supra), and **Dr. Preeti Srivastava** (supra). The Bihar Public Service



Commission is accordingly directed to proceed with the process of selection purely on the basis of merit for appointment in these superspeciality departments.

(ii) In view of clear language used in Section 4 of the 1991 Act, only those vacancies can be declared backlog vacancies within the reserved category, which, though, were subject matter of a previous advertisement, but remained unfilled because of non-availability of suitable candidates, within the reserved category, after selection. No vacancy, which has not been subjected to a complete process of selection could be treated as backlog vacancy, in view of the law laid down by the Supreme Court, in the case of **Sagam Nath Pandey** (supra). (See, paragraph 30)

(iii) The relaxation given by the Supreme Court, in the case of **Sagam Nath Pandey** (supra), to the State Government to fill up backlog vacancy has no application in the present case, since the said relaxation, as is evident, was given in peculiar facts and circumstances of that case.

(iv) Though, it is open to the State-respondents to *carry forward* a point in the event of non-availability of a suitable reserved candidate at a roster point, the same has to be done in just and fair manner, as observed by the Supreme Court, in the case of **R. K. Sabharwal** (supra).



66. The expression 'just and fair manner', in the case of **R. K. Sabharwal** (supra), essentially refers, *inter alia*, to Article 335 of the Constitution of India, which commands the State to consider the claim of the members of the Scheduled Castes and Scheduled Tribes 'consistently with the maintenance of efficiency of administration in the making of appointments to the service and posts in connection with the office affairs of the Union or of a State'.

67. These aspect has been highlighted, in the case of **M. Nagraj** (supra). The said expression 'just and fair', in addition, means balancing of interest of the candidates of open merit, as noticed in the case of **Indra Sawhney** (supra), in the following words:-

“.....Meanwhile, the members of open competition category would become age-barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by Clause (1) is to each individual citizen of the country while Clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other.”



68. In view of the above conclusions, this application is allowed with the following directions:-

(i) The State of Bihar is directed to identify the year-wise backlog vacancies to be filled up by reserved category candidates in conformity with the conclusion recorded hereinabove, within one month from today and communicate the same to the Bihar Public Service Commission forthwith.

(ii) Since the selection in question pertains to appointment of skilled Doctors for teaching and providing health services to the common mass, in Government medical colleges and hospitals in the State of Bihar, which is of immense public interest and importance, it is directed that if the said exercise is not done within the aforesaid period of one month, the Bihar Public Service Commission will be required to proceed with the process of selection and make recommendation of names on the basis of reservation quota fixed under Section 4 (i) read with Section 4 (ii) of 1991 Act.

This Direction, I am issuing in view of the emergent situation prevailing in the State of Bihar where many of the medical colleges and many courses in the medical colleges are either facing threat of de-recognition by the Medical Council of



India or unable to get recognition because of the lack of teachers/faculty members.

(iii) The Bihar Public Service Commission is directed to make selection for appointment in superspeciality departments of *Cardiology, Nephrology* and *Neurology*, strictly on the basis of merit alone.

69. Before I close this judgment, I consider it appropriate to express my view in respect of filling up the posts in question, which has significance in the backdrop of the ground realities of this State. A society with huge population, like one in the State of Bihar, cannot afford to sustain in the absence of skilled doctors and teachers in State Government owned medical colleges and hospitals since majority of the mass depend on the medical facilities available in Government medical colleges and hospitals. Therefore, the State Government must make all possible endeavors to ensure that these positions do not remain vacant. It will not be in the public interest; rather, against the national interest if such positions are allowed to remain vacant for long on the ground of non-availability of suitable candidates belonging to a particular reserved category. The State Government, the Court expects, shall keep in mind the interest of those under-privileged, who depend on the facilities available in the Government medical



colleges and hospitals only and cannot afford the luxury of availing health care and medical treatment in exorbitantly expensive privately managed hospitals.

70. There shall be no order as to costs.

(Chakradhari Sharan Singh, J.)

Prabhakar Anand/-

AFR/NAFR	AFR
CAV DATE	N/A
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Transmission Date	N/A

