

Dr. Chakradhar Paswan vs State Of Bihar & Ors on 8 March, 1988

Equivalent citations: 1988 AIR 959, 1988 SCR (3) 130, AIR 1988 SUPREME COURT 959, 1988 (2) SCC 214, 1988 LAB. I. C. 619, (1988) 2 SCJ 57, (1988) 1 JT 496 (SC), (1988) 3 SERVLJ 110, (1988) 1 APLJ 21, (1988) 1 LAB LN 940, (1988) MAH LJ 565, (1988) BLJ 577, (1988) 7 ATC 104, (1988) MPLJ 411, 1988 UJ(SC) 1 747, (1988) 2 SERVLR 119, (1988) 1 CURLR 408, 1988 BLJR 269, (1988) 2 LABLJ 66, 1988 SCC (L&S) 516

Author: A.P. Sen

Bench: A.P. Sen, B.C. Ray

PETITIONER:

DR. CHAKRADHAR PASWAN

Vs.

RESPONDENT:

STATE OF BIHAR & ORS.

DATE OF JUDGMENT 08/03/1988

BENCH:

SEN, A.P. (J)

BENCH:

SEN, A.P. (J)

RAY, B.C. (J)

CITATION:

1988 AIR 959 1988 SCR (3) 130

1988 SCC (2) 214 JT 1988 (1) 496

1988 SCALE (1) 459

ACT:

Constitution of India-Article 16(4)- Reservation of posts and appointments for members of backward classes read with Art. 16(1)- Equal opportunity to all citizens relating to public employment-Reservation of posts for scheduled castes/tribes must not be so excessive which would in effect efface the guarantee of equal opportunity Reservation of the only post in cadre for scheduled caste candidate amounts to 100 per cent reservation-100 per cent reservation is excessive and is not permissible under Art. 16(4)- Reservation of first vacancy in a particular cadre for scheduled caste candidate is violative of Art. 16(1).

HEADNOTE:

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The State of Bihar had a Directorate of Indigenous Systems of Medicines which was a part of its Health Department and one Dr. Nagesh Dwivedi was its Director. On 6.5.1978 the State Government created a separate Directorate of Indigenous Medicines, the Director being from one of the systems of medicines consisting of Ayurvedic, Unani and Homeopathic. At the time of creation of the separate Directorate, the Government sanctioned the posts of two Deputy Directors for each of the two remaining systems. The State Government had in the meanwhile prescribed a 50 point roster to implement the policy of reservation to posts and appointments for members of the backward classes under Art. 16(4). It was laid down that 'if in any grade, there is only one vacancy for the first time, then it will be deemed to be unreserved and for the second time also, if there be only one vacancy, then it will be deemed to be reserved'. Acting upon this roster the Government reserved the post of Deputy Director (Homeopathic) for a scheduled caste candidate. The Public Service Commission on being moved by the Government, issued an advertisement inviting applications from members of the scheduled caste and the appellant was selected for appointment to the post. Respondent No. 4 challenged the selection of the appellant in the High Court by filing a petition under Article 226 of the Constitution. In October, 1982 an additional post of Deputy Director (Ayurvedic) was created and filled.

The High Court allowed the writ petition and quashed the said advertisement and the consequent order of appointment of the appel-

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lant. The High Court was of the view that the post of Director and three Deputy Directors could not be clubbed together for reservation of posts and appointments. Nor could the posts of Deputy Directors Homeopathic, Ayurvedic and Unani which form distinct and separate systems of medicines be grouped for purposes of reservation.

The appellant contended that there were four posts in the Directorate of Indigenous Medicines and all the posts were Class I posts and therefore according to the 50 point roster the post of Director having been treated as unreserved by the Rotational system, the post of Deputy Director (Homeopathic) was rightly reserved for a scheduled caste candidate.

Dismissing the appeal, this Court,

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HELD: The posts of the Director and those of the Deputy Directors constitute different cadres of the service. It is manifest that the post of the Director of Indigenous

Medicines, which is the highest post in the Directorate carried on a higher grade or scale, could not possibly be equated with those of the Deputy Directors on a lower grade or scale. In view of this, according to the 50 point roster, if in a particular cadre a single post falls vacant, it should, in the case of first vacancy, be considered as general. That being so, the State Government could not have directed reservation of the post of Deputy Director (Homeopathic) which was the first vacancy in a particular cadre i.e. that of the Deputy Directors, for candidates belonging to the schedule castes. Such reservation was not in conformity with the principles laid down in the 50 point roster and was impermissible under Art. 16(4) of the Constitution and clearly violative of the guarantee enshrined in Art. 16(1) of equal opportunity to all citizens relating to public employment. Clause (4) of Art. 16 is by way of an exception of the proviso to Art. 16 (i). The High Court rightly held that the reservation of the post of Deputy Director (Homeopathic) amounted to 100% reservation which was impermissible under Art. 16(4) as otherwise it would render the guarantee of equal opportunity in the matter of public employment under Art. 16(1) wholly elusive and meaningless. [137F-H; 138A-C]

If there is only one post in the cadre, there can be no reservation under Art. 16(4) of the Constitution. The whole concept of reservation for application of the 50 point roster is that there are more than one posts, and the reservation as laid down by this Court in M.R. Balaji's case can be upto 50%. The Government cannot, for instance, declare that the post of the Director of Indigenous Medicines shall be reserved

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for candidates belonging to scheduled castes. The Directorate is a paramedical service with Director as its head and the three Deputy Directors belonging to three distinct and separate disciplines viz. Homeopathic, Unani and Ayurvedic under him. In the para-medical system the three posts of Deputy Directors pertain to three distinct systems and therefore each of them is an isolated post by itself. The same principles should, we think, as in the case of Director, apply. We refrain from expressing any opinion on the aspect whether the isolated posts like those of the Deputy Directors can be subjected to the 50 point roster by the rotational system as it does not arise in the present case. Assuming that the 50 point roster applied, admittedly, the first vacancy in the cadre of Deputy Directors was that of the Deputy Director (Homeopathic) and it had to be treated as unreserved, the second reserved and the third unreserved. The first vacancy of the Deputy Director (Homeopathic) in the cadre being treated as unreserved according to the roster, had to be thrown open to all. A candidate belonging to the Scheduled caste had therefore to compete with others. [138C-G]

The three posts of Deputy Directors of Homeopathic Unani and Ayurvedic are distinct and separate as they pertain to different disciplines and each one is isolated post by itself carried in the same cadre. There can be no grouping of isolated posts even if they are carried on the same scale. The Government of India instructions relating to reservations of posts and appointments for the scheduled castes and scheduled tribes contained in the Brochure on Reservation for Scheduled Castes and Scheduled Tribes in Services and which have been issued to carry out the mandate of Art. 16(4) consistent with the equality clause under Art. 16(1) and 16(2) and the requirements of Art. 335, namely, the maintenance of efficiency of administration clearly show that there can be no grouping of one or more isolated posts for purposes of reservation. To illustrate, Professors in medical colleges are carried on the same grade and scale of pay but the posts of Professor of Cardiology, Professor of Surgery, Professor of Gynecology pertain to particular disciplines and therefore each is an isolated post. [138H; 139A-F]

Article 16(4) is an exception to Art. 16(1) and Art. 16(2) and therefore the power to make a special provision for reservation of posts and appointments in favour of the backward classes must not be so excessive which would in effect efface the guarantee of equal opportunity in the matter of public employment or at best make it illusory. We are not aware of any decision of this Court where excessive reservation of appointments or posts in favour of any backward class of citizens to the extent of 100% has been upheld, except in the application of the carry forward rule. [139G-H]

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M.R. Balaji & Ors. v. State of Mysore, [1963] Suppl. 1 S.C.R. 439; T. Devadasan v. Union of India & Anr., [1964] 4 S.C.R. 680; State of Kerala & Anr. v. N.M. Thomas & Ors., [1976] 1 S.C.R. 906; Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India & Ors., [1981] 2 S.C.R. 185; State of Karnataka v. Shivaji Y. Garge (C.A. No. 4117 of 1984 decided on 19th October, 1984; K.C. Vasanth Kumar & Anr. v. State of Karnataka, [1985] Suppl. S.C.C. 714 and Arati Ray Choudhury v. Union of India & Ors., [1974] 1 S.C.R. 1, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2315 of 1981.

From the Judgment and order dated 16.5.1980 of the Patna High Court in Writ Jurisdiction Case No. 1430 of 1979.

S.R. Srivastava for the Appellant.

D. Goburdhan and A. Sharan, for the Respondents. The Judgment of the Court was delivered by SEN, J. This appeal by special leave is against the judgment and order of the Patna High Court dated 16th May, 1980 allowing the writ petition filed by respondent No. 4 Dr. Kameshwar Prasad and quashing the impugned advertisement No. 121/1978 issued by the Bihar Public Service Commission inviting applications for the post of Deputy Director (Homeopathic) in the Directorate of Indigenous Medicines, Health Department, State of Bihar from scheduled caste candidates, and the consequent order of the State Government dated 30th May, 1979 for the appointment of the appellant Dr. Chakradhar Paswan to that post.

A few essential facts would elucidate the nature of the controversy. Prior to 1974 the Directorate of Indigenous Systems of Medicines was a part of the Health Department. On 14th March, 1974 the State Government appointed Dr. Nagesh Dwivedi, Manager, State Ayurvedic and Unani Medical Pharmacy, Bihar on an ad-hoc basis to the post of Director (Indigenous Medicines). He assumed charge on the next day and was confirmed in that post on 11th December, 1976. The State Government on 6th May, 1978 directed the creation of a separate Directorate of Indigenous Medicines, the Director being from one of the systems of medicines consisting of Ayurvedic, Unani and Homeopathic. At the time of creation of the separate Directorate, the Government sanctioned the posts of two Deputy Directors for each of the two remaining systems. The State Government had in the meanwhile on the basis of the decision of this Court in *M.R. Balaji & Ors. v. State of Mysore*, [1963] Suppl. 1 SCR 439 by its circular dated 8th November, 1975 prescribed a 50 point roster to implement the policy of reservation to posts and appointments for members of the backward classes under Art. 16(4). It was laid down that 'if in any grade, there is only one vacancy for the first time, then it will be deemed to be unreserved and for the second time also, if there be only one vacancy, then it will be deemed to be reserved'. Acting upon the roster the Joint Secretary to the Government, General Administration Department (Personal) made a proposal on 13th June, 1978 for reservation of the post of Deputy Director (Homeopathic) for members of the scheduled castes. He said that in the Directorate of Indigenous Medicines, three posts had been sanctioned-(1) Director of Indigenous Medicines (2) Deputy Director (Homeopathic) and (3) Deputy Director (Unani). All these posts were Class I posts. He suggested that according to the roster of appointments, out of these three posts the first, namely, that of Director which had been filled by Dr. Nagesh Dwivedi, be treated as unreserved, the second should be treated as a reserved for a scheduled caste candidates and the third should be unreserved. According to him, all the posts could be grouped together from the view-point of reservation. After the qualifications had been prescribed in consultation with Dr. Jugal Kishore, Advisor to the Government, the Health Minister passed an order on 28th July, 1978 for the reservation of the post of Deputy Director (Homeopathic) for a scheduled caste candidate. The Public Service Commission on being moved by the Government, issued the impugned advertisement inviting applications from members of the scheduled castes and the appellant was selected for appointment to the post. Apprehending that the Government would appoint the appellant to the post, respondent No. 4 moved the High Court by a petition under Art. 226 of the Constitution for the grant of an appropriate writ, direction or order. The Government however by order dated 30th May, 1979 appointed the appellant to the post of Deputy Director (Homeopathic) and he assumed charge to that post, and was later confirmed in the post. Although the appointment of the appellant has

been declared to be invalid by the High Court, he is continuing to hold the post by virtue of the interim stay granted by this Court on 26th June, 1980.

It appears that steps were thereafter taken to fill up the post of Deputy Director (Unani) and Dr. Mohammad Kamruzzama Kamar, Pradhyapak, Government Tibbia College, Patna was promoted and appointed to that post, and he is working on regular basis. On 5th October, 1982 the Government sanctioned the additional post of Deputy Director (Ayurvedic) and this post was filled up by promotion of Dr. (Smt.) Uma Sinha, who is holding additional charge of the post in addition to the charge of her own post as Pradhyapak, Government Ayurvedic College, Patna. Thus, in the Directorate of Indigenous Medicines for the present there are four posts, all being Class I posts. Out of these, the post of Deputy Director (Homeopathic) is held by the appellant who belongs to a scheduled caste, and the remaining three posts including the post of Director are held by members belonging to the general category Lalit Mohan Sharma, J. speaking for a Division Bench held that (1) Reservation to the only post of Deputy Director (Homeopathic) for members belonging to the scheduled castes is tantamount to 100% reservation. (2) The two posts of Deputy Director (Homeopathic) and Deputy Director (Ayurvedic) cannot be linked together for purposes of reservation of posts. And (3) The order reserving the post of Deputy Director (Homeopathic) infringes the principle embodied in the Government circular introducing 50 point roster according to which, if in a particular cadre, a single post falls vacant, it should, in the case of first vacancy, be considered as general and on the second occasion when a single post again falls vacant, the same must be treated as reserved. The learned Judge also said that it has been laid down that if in a particular cadre there is only one post, then in case when it is being filled up for the second time, it will be considered reserved, that is, on the first occasion it must be treated as a general seat. In substance, the High Court was of the view that the posts of Director and three Deputy Directors could not be clubbed together for reservation of posts and appointments. Nor could the posts of Deputy Directors of Homeopathic, Ayurvedic and Unani which form distinct and separate systems of medicines be grouped for purposes of reservation.

The main contention of Dr. Y.S. Chitale, learned counsel for the appellant, is that there are four posts in the Directorate of Indigenous Medicines and all the posts are Class I posts and therefore according to the 50 point roster, the post of Director having been treated as unreserved, by the rotational system, the post of Deputy Director (Homeopathic) was rightly reserved for a scheduled caste candidate. According to him, the High Court fell into an error in assuming that the reservation of the post of Deputy Director (Homeopathic) for a scheduled caste candidate under Art. 16(4) amounted to 100% reser-

vation and suffered from the vice of offending against the equality clause under Art. 16(1) read with Art. 14 of the Constitution. In answer to the argument Shri L.N. Sinha, learned counsel appearing for respondent No. 4, submits that firstly, the posts of Director and Deputy Directors are not carried in the same cadre and therefore they could not be grouped for purposes of implementing the policy of reservation under Art. 16(4), and secondly, the three systems of indigenous medicines, namely, Homeopathic, Ayurvedic and Unani are distinct and separate systems of medicines and thus the 50 point roster could not be applied.

As we had doubt and difficulty as to whether the posts of Director and Deputy Directors were Posts belonging to the same cadre, we called upon the parties to file further and better affidavits to elucidate the point. The State Government has now placed on record the additional affidavit of the Law officer in the Health Department, State of Bihar dated 10th November, 1987. The affidavit discloses certain facts, namely: (1) The pay scale of Director of Indigenous Medicines is different from that of the Deputy Directors. (2) The posts of the Deputy Director (Homeopathic), Deputy Director (Ayurvedic) and Deputy Director (Unani) are carried in the pay scale of Rs.1900-75-2500. (3) Although the pay scale of all the three Deputy Directors is identical, the posts are filled by doctors belonging to different branches of indigenous medicines, namely, Homeopathic, Ayurvedic and Unani. (4) The post of Director is the highest post in the Directorate of Indigenous Medicines and the said post is in the higher pay scale of Rs.2225-75-2675. (5) Though the posts of Director and Deputy Directors in the Directorate do not belong to unified grade, but for the purpose of determining the quantum of reservation the three posts i.e. that of the Director, Deputy Director (Homeopathic), and Deputy Director (Unani) were grouped together as all of them were Class I posts. (6) The newly-created post of Deputy Director (Ayurvedic) which at present is vacant is being filled up by following the principle of 50 point roster. These facts are not controverted by the appellant by any affidavit-in-rejoinder.

The questions that fall for our determination are: (1) Is the post of Deputy Director (Homeopathic) an 'isolated post' and therefore reservation of the post for a scheduled caste candidate amounts to 100% reservation and must therefore be declared to be impermissible under Art. 16(4)? (2) Whether the posts of the Director and the three Deputy Directors could be grouped together for purposes of implementing the policy of reservation, according to the 50 point roster.

And (3) Could the posts of the Director and the three Deputy Directors in. the Directorate of Indigenous Medicines although they are posts carried on different grades, still be clubbed together for purposes of reservation merely because they are Class I posts?

The argument of learned counsel for the appellant suffers from the infirmity that it overlooks that though the Directorate of Indigenous Medicines comprises of four posts, namely, that of the Director and three Deputy Directors, which are Class I posts, the posts of Director and Deputy Directors do not constitute one 'cadre'. They are members of the same Service but do not belong to the same cadre. According to the 50 point roster, if in a particular grade a single post falls vacant, it should, in the case of first vacancy, be considered as unreserved i.e. general and on the second occasion when a single post again falls vacant, the same must be treated as reserved. Admittedly, the post of the Director is the highest post in the Directorate of Indigenous Medicines and is carried in the higher pay scale or grade of Rs.2225-75-2675 while the posts of the Deputy Directors are carried in the pay scale of grade of Rs.1900- 75-2500. In service jurisprudence, the term 'cadre' has a definite legal connotation. In the legal sense, the word 'cadre' is not synonymous with 'service'. Fundamental Rule 9(4) defines the word 'cadre' to mean the strength of a service or part of a service sanctioned as a separate unit. The post of the Director which is the highest post in the directorate, is carried on a higher grade or scale, while the posts of Deputy Directors are borne in a lower grade or scale and therefore constitute two distinct cadres or grades. It is open to the Government to constitute as many cadres in any particular service as it may choose according to the administrative

convenience and expediency and it cannot be said that the establishment of the Directorate constituted the formation of a joint cadre of the Director and the Deputy Directors because the posts are not interchangeable and the incumbents do not perform the same duties, carry the same responsibilities or draw the same pay. The conclusion is irresistible that the posts of the Director and those of the Deputy Directors constitute different cadres of the Service. It is manifest that the post of the Director of Indigenous Medicine, which is the highest post in the Directorate carried on a higher grade or scale, could not possibly be equated with those of the Deputy Directors on a lower grade or scale. In view of this, according to the 50 point roster, if in a particular cadre a single post falls vacant, it should, in the case of first vacancy, be considered as general. That being so, the State Government could not have directed reservation of the post of Deputy Director (Homeopathic) which was the first vacancy in a particular cadre i.e. that of the Deputy Directors, for candidates belonging to the scheduled castes. Such reservation was not in conformity with the principles laid down in the 50 point roster and was impermissible under Art. 16(4) of the Constitution and clearly violative of the guarantee enshrined in Art. 16(1) of equal opportunity to all citizens relating to public employment. Clause (4) of Art. 16 is by way of an exception of the proviso to Art. 16(1). The High Court rightly held that the reservation of the post of Deputy Director (Homeopathic) amounted to 100% reservation which was impermissible under Art. 16(4) as otherwise it would render the guarantee of equal opportunity in the matter of public employment under Art. 16(1) wholly elusive and meaningless.

Another serious infirmity in the argument of the learned counsel for the appellant is that it overlooks the basic principle that if there is only one post in the cadre, there can be no reservation under Art. 16(4) of the Constitution. The whole concept of reservation for application of the 50 point roster is that there are more than one posts, and the reservation as laid down by this Court in M.R. Balaji's case can be upto 50%. The Government cannot, for instance, declare that the post of the Director of Indigenous Medicines shall be reserved for candidates belonging to scheduled castes. The Directorate is a para- medical service with Director as its head and the three Deputy Directors belonging to three distinct and separate disciplines viz. Homeopathic, Unani and Ayurvedic under him. In the para-medical system the three posts of Deputy Directors pertain to three distinct systems and therefore each of them is an isolated post by itself. The same principle should, we think, as in the case of the Director, apply. It is a moot point whether the isolated posts like those of the Deputy Directors can be subjected to the 50 point roster by the rotational system. We refrain from expressing any opinion on this aspect, as it does not arise in the present case. Assuming that the 50 point roster applies, admittedly, the first vacancy in the cadre of Deputy Directors was that of the Deputy Director (Homeopathic) and it had to be treated as unreserved, the second reserved and the third unreserved. The first vacancy of the Deputy Director (Homeopathic) in the cadre being treated as unreserved according to the roster, had to be thrown open to all. A candidate belonging to the scheduled caste had therefore to compete with others.

There is another aspect. The three posts of Deputy Directors of Homeopathic, Unani and Ayurvedic are distinct and separate as they pertain to different disciplines and each one is isolated post by itself carried in the same cadre. There can be no grouping of isolated posts even if they are carried on the same scale. The instructions issued by the Government of India from time to time relating to reservations of posts and appointments for the scheduled castes and scheduled tribes are contained

in the Brochure on Reservation for Scheduled Castes and Scheduled Tribes in Service. Chapter 2 Part I gives the percentage of reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. These instructions have been issued to carry out the mandate of Art. 16(4) consistent with the equality clause under Art. 16(1) and 16(2) and the requirements of Art. 335, namely, the maintenance of efficiency of administration. Para 2.4 provides that the reservations will be applied to each grade or post separately but isolated posts will be grouped as provided in Chapter 6. Paragraph 6.1 of Chapter 6 which is relevant for our purposes, states that in the case where the posts are filled by direct recruitment, 'isolated individual posts and small cadres may be grouped with posts in the same class for purpose of reservation, taking into account the status, salary and qualifications prescribed for the posts in question'. For this purpose, it provides that a cadre or a grade or a division of a service consisting of less than 20 posts may be treated as a small cadre. A group so formed should not ordinarily consist of 25 posts. It then adds:

"It is not intended that isolated posts should be grouped together only with other isolated posts. "

That precisely is the situation here. The Government of India instructions clearly show that there can be no grouping of one or more isolated posts for purposes of reservation. To illustrate, Professors in medical colleges are carried on the same grade or scale of pay but the posts of Professor of Cardiology, Professor of Surgery, Professor of Gynaecology pertain to particular disciplines and therefore each is an isolated post.

We are not aware of any decision of this Court where excessive reservation of appointments or posts in favour of any backward class of citizens to the extent of 100% has been upheld, except in the application of the carry forward rule. Art. 16(4) is an exception to Art. 16(1) and Art. 16(2) and therefore the power to make a special provision for reservation of posts and appointments in favour of the backward classes must not be so excessive which would in effect efface the guarantee of equal opportunity in the matter of public employment or at best make it illusory. In Balaji's case which has now become locus classicus on the subject, the Court attempted to impose a constitutional limit to the extent of preference, not on 'narrower ground of reservation' but on broader grounds of policy. It spoke of 'adjusting' the 'interests of the weaker sections of society to the interests of the community as a whole' and declared that a 'formula must be evolved which would strike a reasonable balance between the several relevant considerations'. While striking down as unconstitutional government order by which 68% of the seats in educational institutions were reserved for Scheduled Castes, Scheduled Tribes and other Backward Classes on the ground of excessive reservation and as a fraud on the Constitution, the Court observed:

"Speaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case."

It is quite obvious that the observations in Balaji about 50% limit were not to be taken as a precise formula.

In less than a year, the Court in *T. Devadasan v. Union of India & Anr.*, [1964] 4 SCR 680 while dealing with the effect of a carry forward rule which permitted reservation of over 50% posts (in the third year) held that reservation of 64.4% posts was unconstitutional. The Court by a majority of 4: 1 held that Art. 16(4) was a proviso or an exception to Art. 16(1) and therefore should not be interpreted so as to nullify or destroy the main provision, as otherwise it would in effect render the guarantee of equality of opportunity in the matter of public employment under Art. 16(1) wholly illusory and meaningless, and added:

"The overriding effect of cl. (4) of Art. 16 on cls. (1) and (2) could only extend to the making of a reasonable number of reservations of appointments and posts in certain circumstances. A 'reasonable number' is one which & strikes a reasonable balance between the claims of the backward classes and those of other citizens "

Thus, reservations are legitimate to the extent that they provide the backward classes with an 'opportunity equal to that of members of the more advanced classes'. The maximum permissible limit for the backward classes, according to the majority in *Devadasan's* case, is that under which both they and others would enjoy 'equal opportunity'. The Court further added that the reservation for backward communities should not be so excessive as to create a monopoly or unduly disturb the legitimate claims of other communities. In *State of Kerala & Anr. v. N.M. Thomas & Ors.*, [1976] 1 SCR 906 the majority accepted the dissenting opinion of Subba Rao, J. in *Devadasan's* case and held that Art. 16(4) is not an exception to Art. 16(1), but is a legislative device by which the framers of the Constitution have preserved a power untrammelled by the other provisions of the Article. It is a facet of Art. 16(1) as it fosters and furthers the idea of equality of opportunity with special reference to under-privileged and deprived classes of citizens. In his dissenting opinion, Khanna, J. speaking for himself and A.C. Gupta, J. adhered to the majority view in *Devadasan's* case that Art. 16(4) was an exception to Art. 16(1) and (2). According to the learned Judges, Art. 16(1) only embodies the notion of formal or legal equality and therefore there is no scope for spelling out any concept of preferential treatment from the language of cl.(1) of Art. 16. In *Thomas*, the Court upheld reservation to the extent of 68% on the basis of a carry forward rule which related to Class III posts and allowed relaxation to the scheduled caste candidates from appearing in the examination for promotion.

What is of significance is that Krishna Iyer, J. who formed the majority in *Thomas*, has gone back upon his view in *Akhil Bharatiya Soshit Karamchari Snagh(Railway) v. Union of India & ors.*, [1981] 2 SCR 185, and held that Art. 16(4) is an exception to Art. 16(1) and (2). While considering whether scheduled castes or scheduled tribes were already duly represented or not in specific cadres of the service, the Court reaffirmed the principle of reservation of appointments or posts under Art. 16(4) and upheld the carry forward rule. It was emphasised that what had to be seen was the overall picture and not restricted to a particular service or cadre. The maximum of 50% for reserved quotas in their totality was held to be fair and reasonable. Chinnappa Reddy, J. in his concurring judgment observed:

"(W)hen posts whether at the stage of initial appointment or at the stage of promotion are reserved or other preferential treatment is accorded to members of the

Scheduled Castes, Scheduled Tribes and other socially and economically backward classes it is not a concession or privilege extended to them; it is in recognition of their undoubted Fundamental Right to Equality of opportunity and in discharge of the Constitutional obligation imposed upon the State to secure to all its citizens 'Justice, social, economic and political', and 'Equality of status and opportunity', to assure 'the dignity of the individual among all citizens; to 'promote with special care the educational and economic interests of the weaker section of the people', to ensure their participation on equal basis in the administration of the affairs of the country and generally to foster the ideal of a 'Sovereign, Socialist, Secular, Democratic Republic'. Every lawful method is permissible to secure the due representation of the Scheduled Castes and Scheduled Tribes in the Public Services. There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty per cent."

It follows that though the maximum limit of 50% as indicated was not an inflexible rule but in making special provision for reservation of posts or appointments, the State must seek to strike a balance of adjusting the interests of the weaker sections of society to the interests of the community as a whole. In *State of Maharashtra v. Shivaji Y. Garge* C.A. No. 4117/84 decided on 19th October, 1984 this Court held the reservation of posts to the extent of 80% as excessive and destructive of the principle of equality of opportunity in matters relating to public employment guaranteed under Art. 16(1) of the Constitution and directed that the State Government would step down the reservation for economically weaker sections of the society from 46% to 21% in future, leaving in tact 34% posts reserved for scheduled castes, scheduled tribes, denotified nomadic tribes and other backward classes. Thus, the overall picture was that reservation of posts and appointments under Art. 16(1) was reduced from 80% to 55%.

Once the power to make reservation in favour of scheduled castes and scheduled tribes is exercised, it must necessarily follow that a roster pointwise for the purpose of vacancies for which reservation has been made, must be brought into effect and in order to do full justice, a carry forward rule must be so applied that in any particular year, there is not more than 50% reservation. According to the SO point roster, admittedly, the post of Deputy Director (Homeopathic) was the first vacancy in the cadre of Deputy Directors and therefore it had to be treated as general i.e. unreserved.

In the recent case of *KC. Vasanth Kumar & Anr. v. State of Karnataka*, [1985] Suppl. SCC 714, one of us (Sen, J.) dealing with the extent of reservation under Art. 15(4) and Art. 16(4), observed that the doctrine of protective discrimination embodied therein and the mandate of Art. 29(2) was subject to the requirements of Art. 335 and could not be stretched beyond a particular limit. It was observed:

"Questions as to the validity or otherwise of reservations have been agitated several times before this Court and resolved. The frequency and vigour with which these questions are raised is a disturbing indication of the tension and unease in society in regard to the manner in which Art. 15(4) and Art. 16(4) are operated by the State. The Preamble to our Constitution shows the nation's resolve to secure to all its citizens:

Justice-social, economic and political. The State's objective of bringing about and maintaining social justice must be achieved reasonably having regard to the interests of all. Irrational and unreasonable moves by the State will slowly but surely tear apart the fabric of society. It is primarily the duty and function of the State to inject moderation into the decisions taken under Arts. 15(4) and 16(4), because justice lives in the hearts of men and a growing sense of injustice and reverse discrimination, fuelled by unwise State action, will destroy, not advance, social justice. If the State contravenes the constitutional mandates of Art. 16(1) and Art. 335, this Court will of course, have to perform its duty."

A note of caution was then added:

"The State exists to serve its people. There are some services where expertise and skill are of the essence. For example, a hospital run by the State serves the ailing members of the public who need medical aid. Medical services directly affect and deal with the health and life of the populace. Professional expertise, born of knowledge and experience, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. There are other similar fields of governmental activity where professional, technological, scientific or other special skill is called for. In such services or posts under the Union or States, we think there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments."

There is one more decision that calls for our attention, namely, that of *Arati Ray Choudhury v. Union of India & Ors.*, [1974] 1 SCR 1 where the effect of a carry forward rule resulted in 100% reservation. After the decision in *Devadasan's case*, the Ministry of Home Affairs issued a memorandum modifying the carry forward rule so as to comply with the decision. The said memorandum was suitably modified by the Railway Board in its application to Railway Services by its letter dated 6th October, 1964. The Railway Board prepared a model roster signifying the turns of reserved and unreserved vacancies. The Note appended to the roster provided:

"If there are only two vacancies to be filled on a particular occasion, not more than one may be treated as reserved and if there be only one vacancy, it should be treated as unreserved. If on this account a reserved point is treated as unreserved, the reservation may be carried forward in the subsequent two recruitment years."

In order to minimise chances of reserved posts being converted into unreserved posts, the Railway Board modified the reservation rule in 1971 by adding the following words:

"If there is one post to be filled, selection should invariably be held for two posts, i.e., one actual and the other to cover unforeseen circumstances."

It was contended on behalf of the petitioner that the carry forward rule was violative of Arts. 14 and 16 of the Constitution and the vacancy in the post of Headmistress of the Kharagpur School ought to

be treated as unreserved vacancy. In repelling the contention, Chandrachud, J. observed:

"The model roster accompanying the letter of the Railway Board dated January 16, 1964 is designed to meet the requirements of the new situation arising out of the rules framed in deference to the judgment in Devadasan's case. Both the letter and the Note appended to the roster state expressly that if "there are only two vacancies to be filled on a particular occasion, not more than one may be treated as reserved and if there be only one vacancy, it should be treated as unreserved". The words "on a particular occasion"

were substituted on September 2, 1964 by the words "year of recruitment". Thus, in the first place each year of recruitment is directed to be considered separately and by itself as laid down in Devadasan's case so that if there are only two vacancies to be filled in a particular year of recruitment, not more than one vacancy can be treated as reserved. Secondly, and that is directly relevant for our purpose, if there be only one vacancy to be filled in a given year of recruitment, it has to be treated as unreserved irrespective of whether it occurs in the model roster at a reserved point. The appointment then is not open to the charge that the reservation exceeds 50% for, if the very first vacancy in the first year of recruitment is in practice treated as reserved vacancy, the system may be open to the objection that the reservation not only exceeds 50% but is in fact cent per cent. But if "on this account", that is to say, if on account of the requirement that the first vacancy must in practice be treated as unreserved even if it occurs in the model roster at a reserved point, "a reserved point is treated as unreserved", the reservation can be carried forward to not more than two subsequent years of recruitment. Thus, if two vacancies occur, say, within an initial span of three years, the first vacancy has to be treated as an unreserved vacancy and the second as reserved."

The learned Judge held that the open class reaped a benefit in 1966-67 when a reserved vacancy was treated as unreserved by the appointment of an open candidate, Smt. Gita Biswas. If the carry forward rule had to be given any meaning, the vacancy had to be carried forward for the benefit of scheduled castes and scheduled tribes until the close of the financial year 1968-69. The Kharagpur vacancy could not therefore go to the petitioner which, admittedly, did not belong to the reserved class. It was further observed that the construction sought to be put on the rule by the petitioner would perpetuate a social injustice which has clouded the lives of a large section of humanity which is struggling to find its feet. Such a construction was contrary to the plain language of the letter of the Railway Board, the intendment of the rule and its legislative history. The decision in Arati Ray Choudhury's case therefore turned on the carry forward rule and is clearly distinguishable on facts. It is quite clear after the decision in Devadasan's case that no reservation could be made under Art. 16(4) so as to create a monopoly. Otherwise, it would render the guarantee of equal opportunity contained in Arts. 16(1) and 16(2) wholly meaningless and illusory.

These principles unmistakably lead us to the conclusion that if there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up a future vacancy in respect of that post. A reservation which would come under Art. 16(4), pre-supposes the availability of at least more than one posts in that cadre.

We would, for these reasons, uphold the judgment of the High Court quashing the impugned advertisement issued by the Bihar Public Service Commission as also the appointment of the appellant to the post of Deputy Director (Homeopathic). We direct the Public Service Commission to take steps to re- advertise the post with advertence to the observations made above. However, having regard to the fact that the appellant has continued to hold that post ever since 30th May, 1979 and confirmed against that post, we direct the State Government to adjust him in an equivalent post in the Health Department. At the time of his appointment, the appellant was Medical officer (Homeo) of Government Homeopathic Dispensary, Raharia (Saharsa) and his appointment to the higher grade of Deputy Director (Homeopathic) in the directorate of Indigenous Medicines was virtually a promotion for him. This may be kept in view by the Government while passing suitable orders.

There shall be no order as to costs.

H.S.K.

Appeal dismissed.