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12 RMLNLUJ (2020) 211

Case Comment : The Issue of Consequential Seniority Pursuant to Reservation in Promotion in Government Services : Comment on B.K. Pavitra v. Union of India

CASE COMMENT : THE ISSUE OF CONSEQUENTIAL SENIORITY PURSUANT TO RESERVATION IN PROMOTION IN GOVERNMENT SERVICES : COMMENT ON B.K. PAVITRA V. UNION OF INDIA

by

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ABSTRACT

*Reservation in public employment in general and reservation in promotion for SCs/STs in particular has remained a complex subject to comprehend within the constitutional matrix, both for the courts and legislatures in India. A concomitant issue of reservation in promotion is the question of consequential seniority. The rider of collecting quantifiable data for determining backwardness, inadequacy of representation in public employment and efficiency in administration as put forth by the Supreme Court in M. Nagaraj case for the exercise of enabling provision under Art. 16(4-A) of the Constitution made it cumbersome for the legislatures to invoke this enabling provision. The judgment of the Supreme Court in Jarnail Singh made it less onerous for the legislature to invoke this provision but the requirement of excluding creamy layer within SCs/STs by the Supreme Court, made the task odious. In B.K. Pavitra v. Union of India, the Supreme Court has disentangled the question of consequential seniority from the reservation in promotion in a meaningful way, whereby, the exclusion of creamy layer within SCs/STs is not required when it comes to the grant of consequential seniority.*



Page: 212

Keywords: Reservation, Consequential Seniority, Creamy Layer, Judicial Review

On May 10, 2019 a two Judge Bench of the Supreme Court of India speaking through D.Y. Chandrachud J. delivered a very significant judgment in *B.K. Pavitra v. Union of India*<sup>1</sup> (*B.K. Pavitra II*). The issue relates to the constitutional validity of the grant of consequential seniority to the government servants belonging to Scheduled Castes and Scheduled Tribes (hereinafter referred to as SCs/STs) under the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act, 2018.

The constitutional validity of the aforesaid Act was challenged. The Act not only provided consequential seniority to the government servants promoted on the basis of reservation in promotion but also gave it with retrospective effect from 17 June 1995. It is however important to note that the Act in question only provided for consequential seniority to those promoted by way of reservation in promotion. So, the Act did not provide for reservation in promotion. The reservation in promotion applicable to such government servants was provided in the State of Karnataka by way of a Government Order dated 27 April, 1978. For implementing this Government Order an official Memorandum was issued on 1 June, 1978 which also provided for

consequential seniority to the promotees.

#### I. HISTORICAL CONTEXT

In order to understand the present issue a journey into the historical context of the issue of reservation in promotion and consequential seniority is inevitable. In *B.K. Pavitra II* as well, Chandrachud J. undertook this journey in order to have a sense of history to comprehend the issue at hand. On 16 November, 1992 a nine judge bench of the Supreme Court delivered a landmark judgment in *Indra Sawhney v. Union of India*<sup>2</sup>. B.P. Jeevan Reddy J. speaking for four Judges of the Bench held that reservation under Art. 16(4) is only meant for getting entry into public employment and not any further. However, he stated that this judgment shall apply prospectively and promotion already made shall not be affected. He further held that the reservation given already shall operate for a further period of five years from the date of judgment.

Thus the promotions already given under the Government Order of 1978 got saved and the provision for reservation continued upto 16 November, 1997.



Page: 213

On 17 June, 1995 the 77<sup>th</sup> Constitutional Amendment came into force and Art. 16(4-A) was inserted as an enabling clause into the Constitution of India which allowed reservation in promotion for SCs and STs. Thus the 1978 Government Order stood saved under it as well and continued to operate.

On the issue of consequential seniority, a five Judge Constitution Bench of the Supreme Court finally gave its decision in *Ajit Singh v. State of Punjab*<sup>3</sup> (*Ajit Singh II*) after the two, three Judge Benches of the Supreme Court had given contrary verdicts namely in *Ajit Singh Januja v. State of Punjab*<sup>4</sup> (*Ajit Singh I*) and *Jagdish Lal v. State of Haryana*<sup>5</sup>. In *Ajit Singh II* the Constitution Bench denied the benefit of consequential seniority to persons promoted by reservation in promotion. The Court upheld what is known as catch-up rule, whereby, an officer promoted to a senior cadre subsequently would catch-up and retain her seniority over an officer from SC/ST who was promoted in that senior cadre prior to her because of reservation in promotion, if she was senior to her in the lower cadre. However, it also held that the candidates promoted contrary to the above principle of law before 1 March, 1996<sup>6</sup> need not be reverted to. In *M.G. Badappanavar v. State of Karnataka*<sup>7</sup> a three Judge bench of the Supreme Court held that Art.16(4)(A) does not permit consequential seniority to beneficiaries of promotion in reservation and stated that there is no rule in the State of Karnataka which provides counting of seniority to roster point promotees belonging to SCs/STs. It observed that if rules were to be interpreted in a manner giving seniority to roster point promotees belonging to SCs/STs then it would be *ultra vires* being violative of Art.14. Thus the court ordered that the promotions and seniority list in the State be reviewed accordingly except the ones already promoted before 1 March 1996.

Thereafter the Parliament of India amended Art. 16(4-A) by way of the Eighty-fifth Amendment Act of 2001 with a view to recognise consequential seniority to the beneficiaries of reservation in promotion which came into effect from 17 June, 1995. Acting on the mandate of the aforesaid constitutional amendment, in the year 2002, the legislature of the State of Karnataka enacted the Reservation Act, 2002 which provided for the consequential seniority to the promotees belonging to SCs/STs under the reservation in promotion from 17 June, 1995 and thus the absence of rule for the same as pointed out by the Supreme Court in *Badappanavar* was substituted by a legislative mandate. The constitutionality of Seventy-seventh and Eighty-fifth

constitutional



Page: 214

amendments was challenged on the grounds of violation of basic structure and equality principle before the Supreme Court in *M. Nagaraj v. Union of India*<sup>8</sup> wherein the five Judge Constitution Bench of the Supreme Court held that catch-up rule and consequential seniority are the concepts of service jurisprudence evolved by the courts and these concepts cannot be elevated to level of being constitutional axioms. Thus the deletion of catch-up rule by consequential seniority has got no bearing on the equality code under the Constitution of India. The Court reiterated what was said in *Virpal Singh Chauhan*<sup>2</sup> by observing that neither catch-up rule nor the consequential seniority is implicit in Arts. 16(1) and 16(4). The Constitution Bench held that Art.16 (4)(A) is an enabling provision and therefore it not compulsory for the State to give reservation in promotion. However, if it attempts to do so, it must collect quantifiable data which substantiates the following three claims:

- a) The backwardness of the class.
- b) The inadequacy of representation of that class in public employment.
- c) No adverse effect of such a measure on the general efficiency of administration as mandated by Art. 335 of the Constitution.

In *B.K. Pavitra v. Union of India*<sup>10</sup> (*B.K. Pavitra I*) the constitutional validity of the 2002 Reservation Act providing for consequential seniority in civil services in the State of Karnataka was challenged before the Supreme Court on the ground that the exercise mandated by the constitution bench in *M. Nagaraj* has not been adopted prior to the enactment of the Act and that creamy layer have not been excluded. Relying on its earlier decisions in *Suraj Bhan Meena v. State of Rajasthan*<sup>11</sup>, *U.P. Power Corpn. Ltd. v. Rajesh Kumar*<sup>12</sup> and *S. Panneer Selvam v. State of T.N.*<sup>13</sup> the two Judge Bench of the Supreme Court accepted the challenge by holding that the exercise mandated as aforesaid in *M. Nagaraj* cannot be dispensed with and that the State of Karnataka has failed to show the compelling reasons by way of quantifiable data which merits the giving of consequential seniority. The Court clarified that the decision though would not affect those who have already retired and availed financial benefits. However, promotions given to the existing employees based on consequential seniority were to be reviewed and revised in terms of this decision. The Court gave three months' time to the State of Karnataka to take the consequential action.

In the present case (*B.K. Pavitra II*) the petitions seeking review of *B.K. Pavitra I* were also tagged. After the decision in *B.K. Pavitra I*, the State of



Page: 215

Karnataka appointed the Ratna Prabha Committee presided by the Additional Chief Secretary of the State of Karnataka to study the backwardness and inadequacy of representation of SCs/STs in the Civil Services of the State and the possible adverse effect of reservation on the overall administrative efficiency in the State of Karnataka. The Committee submitted its report and based on the report, the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act was passed by the Karnataka State legislature. Under Art. 200 of the Constitution, the Governor of Karnataka reserved the bill for consideration of the President of India and thereafter on

14 June, 2018 the bill received the President's assent and it was notified in the official gazette on 23 June, 2018. S. 1(2) of the Act provided that the Act came into effect from 17 June, 1995. In *B.K. Pavitra II* this law came to be challenged before the Supreme Court on the ground that the law does not take away the basis for the decision of the Court in *B.K. Pavitra I* and is therefore *ultra vires*.

While *B.K. Pavitra II* was pending for adjudication before the Supreme Court, a Constitution Bench of the Supreme Court in *Jarnail Singh v. Lachhmi Narain Gupta*<sup>14</sup> considered whether the judgment of the Court in *M. Nagaraj* needs to be referred to a larger Bench since:

- (i) Contrary to the nine Judge Bench judgment in *Indra Sawhney*, it mandates the State to collect quantifiable data showing backwardness of SCs/STs;
- (ii) The creamy layer principle was not applied to SCs/STs in *Indra Sawhney*; and
- (iii) In applying creamy layer principle to SCs/STs, *M. Nagaraj* goes against the judgment of the Supreme Court in *E.V. Chinnaiah v. State of A.P.*<sup>15</sup>

The Constitution Bench in *Jarnail Singh* on the issue of collecting quantifiable data to show the backwardness of SCs/STs, unanimously held the same to be bad in law, being contrary to *Indra Sawhney* decision. Insertion of creamy layer in SCs/STs was held to be not contrary to *Indra Sawhney* and that the court will be well within its right to advert to it, in order to harmoniously construct Arts. 14, 16, 341 and 342 of the Constitution. The Bench further added that the creamy layer principle is an essential aspect of the equality code. In relation to *E.V. Chinnaiah*, the Bench in held that *E.V. Chinnaiah* did not deal with constitutional amendment and therefore there was no need for the court in *M. Nagaraj* to advert to it.



## II. CHALLENGE TO THE CONSTITUTIONALITY OF THE 2018 LAW

The constitutionality of the 2018 Act was challenged in *B.K. Pavitra II* by the petitioner on the ground that the foundation of the decision in *B.K. Pavitra I* was nullified by enacting the 2018 Act. *B.K. Pavitra I* held the 2002 Act unconstitutional because it did not fulfill the requirements regarding the existence of quantifiable data on backwardness, inadequacy of representation and general efficiency as read into Art. 16(4-A) in *M. Nagaraj* by the Supreme Court. However, before the enactment of the 2018 Act, Ratna Prabha Committee was constituted by the State Government to study the three aspects so identified. The Supreme Court in *B.K. Pavitra I* did not restrain the State from carrying out the exercise of collecting quantifiable data. The Court in *B.K. Pavitra II* pointed this out and also stated that the legislature has the plenary power to enact a law either prospectively or retrospectively. The legislature cannot overrule the court but it can remove the cause of invalidation identified by the court while invalidating the law and enact the law again and it can be done even with retrospective effect. In this case, in order to do so the same, the 2018 law was preceded by a Committee report providing quantifiable data on the grounds mandated by *M. Nagaraj*.

It is important however to point out that sometimes the cause of invalidation for a law may even be removed by way of a constitutional amendment, as it was done by the Seventy-seventh and Eighty-fifth constitutional amendments. It is significant that except for the legislation which in these cases was constitutional amendments, there is nothing else that has been done to remove the cause of invalidity. But a

constitutional amendment would alter the very constitutional yardstick to determine the *vires* of the law and the constitutionality of the amendments can only be examined judicially on the yardstick of basic structure. So, a constitutional amendment in this case may appear to be a case of legislative overruling but a constitutional amendment route to nullify the judicial verdict is not *per se* a case of legislative overruling, as the amendment itself in a unique way removes the cause of the invalidation. However, a constitutional amendment does not give absolute immunity and *M. Nagaraj* is a testimony to the fact that the constitutionality of Art. 16(4-A) was saved by the Supreme Court by attaching the condition of compelling interest by way of the existence of quantifiable data of backwardness, representation in service and efficiency in administration.

### III. STANDARD OF JUDICIAL REVIEW

The Supreme Court in *B.K. Pavitra II* showed its deference to the legislative wisdom and therefore did not adopt a strict parameter for scrutiny of the legislation. Reasons for the same are evident, as the legislation is not directly



Page: 217

affecting the civil rights adversely; rather it is an attempt to address the structural inequalities present in our society. It is primarily an attempt by the legislature to give and not take away rights. The Court emphasized that reservations are not an exception to equality of opportunity principle rather it helps in attaining the goal of effective and substantive equality. The court also therefore highlighted the transformative potential of the Constitution and identified it as a transformative document. Therefore, when the methodology adopted by the Ratna Prabha Committee was impugned before the court, it observed that methodology of sampling adopted by the Ratna Prabha committee is a known method in the social science discipline and therefore it cannot be treated as arbitrary. If samples from few departments were not taken, it cannot be said that the data collected is not representative, which had otherwise taken into account the data from 31 departments. The State has based its conclusion on the analysis of the data collected. The Court also acknowledged that there are limits on judicial review when it comes to scrutinizing a process of collection, collation and analysis of data.

### IV. EFFICIENCY IN ADMINISTRATION

Ratna Prabha Committee in its report had concluded that analysis of the State in economic development clearly indicates that reservations in promotions had not affected the efficiency of administration. Chandrachud J. accepted this conclusion of the Committee to be good enough for the fulfillment of *M. Nagaraj's* requirement on efficiency of administration being not adversely affected. However, Chandrachud J. addressed the question of efficiency of administration separately as well, in a two pronged approach. Firstly and most significantly he highlighted that efficiency in administration cannot be seen in isolation and that it must be seen in an inclusive sense and therefore diverse representation in public employment reflects a true governance aspiration. He observed that that if substantive equality is the goal of the Constitution, then in the engagement of fundamental rights with the directive principles of state policy, an inclusive approach encompassing the concerns of diversity and plurality of the nation, itself, constitutes a valid constitutional basis for defining efficiency. This is very significant, as the Court carved out a new approach wherein one does not have to start with the premise of resolving the apparent conflict between efficiency and reservation. Chandrachud J. innovatively argues that the two are not opposing ideas under the Indian Constitution and that attainment of substantive equality is in itself reflective of efficiency in administration.

The second point that he highlighted was about the lack of any empirical evidence, about reservation having an adverse bearing on the efficiency of administration.<sup>16</sup> He argued that it is an assumption that appointment of



Page: 218

candidates to government posts based on "merit" increases efficiency in the administration. He also critiqued the popular perception about meritorious being identified as only those who cross the cut-off mark and referred to Prof. Amartya Sen's, wherein Prof. Sen says that there is no natural order of merit and the notion of merit is not independent of our value system.<sup>17</sup>

Both these arguments about the fulfillment of the mandate of efficiency in administration under *M. Nagaraj* as per Art. 335 of the Constitution of India demonstrates that achieving efficiency in administration by simultaneously providing for reservation in promotion is not so onerous and tenuous given the overarching goal of substantive equality for which our Constitution possesses the great transformative potential. It is incumbent upon the conscientious civil society to ensure that this understanding percolates down to the masses, so that reservation does not remain a tool to divide but to unite our society.

One can still argue though that the grant of consequential seniority pursuant to reservation in promotions may have adverse effects on administration, if not vis-à-vis the beneficiary but vis-à-vis others, from the unreserved category working in the same departments. The denial of catch-up rule may have demoralizing effect on them and such the efficiency of administration may be adversely affected. This argument is applicable in relation to reservation in promotions also. However, in juridical terms, the efficiency in administration argument is only seen through the impact, affirmative action policies may have vis-à-vis the beneficiaries and not others. An empirical account nevertheless of this, would certainly add a new dimension to this debate.

#### V. CREAMY LAYER

The constitution bench of the Supreme Court in *Jarnail Singh* had held that the creamy layer principle is an essential attribute of the code of equality. But the Supreme Court in *B.K. Pavitra II* identified the distinction between reservation in promotion and consequential seniority because the 2018 law which was challenged before the court only provided for consequential seniority and not reservation in promotion. Chandrachud J. pointed out the fact that in *M. Nagaraj* the Constitution Bench had held catch-up rule and consequential seniority to be judicially evolved concepts in service jurisprudence which are not central to the constitutional mandate of equality under the Constitution under Art. 16(1) or Art. 16(4). Hence neither obliteration nor insertion of these concepts would violate the equality code. Therefore, creamy layer is an essential



Page: 219

aspect of equality whereas consequential seniority is not. Consequential seniority therefore, as an incident of reservation in promotion does not require the application of the creamy layer test. The Court also accepted the argument that progression in cadre based on promotion cannot be treated as acquisition of creamy layer status.

The logic given certainly makes sense when looked at through the prism of judicial

precedents but it may seem odd to argue that reservation in promotion requires the exclusion of creamy layer but consequential seniority does not. Conferment of consequential seniority would be logical if it is extended to the promotees under reservation in promotion belonging to non-creamy layer. However, since in this case the Government Order providing reservation in promotion was not challenged, all the promotees under reservation in promotion without the application of creamy layer would get consequential seniority. At the same time, this judgment also highlights the problems which the implementation of creamy layer test to reservation in promotion of SCs/STs will bring as per the directions of *Jarnail Singh*. Perhaps *Jarnail Singh* itself needs to be reconsidered on this point by a larger Bench. If quantifiable data is not required to show the backwardness among SCs/STs, why insist on exclusion of creamy layer among SCs/STs.<sup>18</sup>

## VI. CONCLUSION

The judgment of the Supreme Court in *B.K. Pavitra II* highlights how the Supreme Court has not been able to identify even the first principles when it comes to issue of reservation in promotion and its consequential effects for close to three decades now. However, the judgment authored by Chandrachud J. is laudable for clarity with which it dealt with the issue of consequential seniority and its adherence to judicial discipline. It showed how novel arguments may not necessarily be carved out as judicial creations rather it can also be weaved from the insightful and clear analysis and articulation of the existing laws and precedents. Novelty of the judgment, in interpreting the efficiency of administration to be enhanced by the existence of diversity and plurality itself, presents a new perspective to the often repeated reservation versus merit debate.

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<sup>1</sup> (2019) 16 SCC 129 : 2019 SCC OnLine SC 694.

<sup>2</sup> 1992 Supp (3) SCC 217.

<sup>3</sup> (1999) 7 SCC 209.

<sup>4</sup> (1996) 2 SCC 715. The decision was delivered on 1 March, 1996. The Court in this case upheld catch-up rule. Prior to this a two judge bench in *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684 had also held in favour of the catch-up rule.

<sup>5</sup> (1997) 6 SCC 538. The Court in this case rejected the catch-up rule and went with the principle of continuous officiation and thus held in favour of the grant of consequential seniority.

<sup>6</sup> The day the judgment in *Ajit Singh I* was delivered by the Supreme Court, wherein the court denied giving of consequential seniority.

<sup>7</sup> (2001) 2 SCC 666.

<sup>8</sup> (2006) 8 SCC 212.

<sup>9</sup> See, *Supra* note 4.

<sup>10</sup> (2017) 4 SCC 620.

<sup>11</sup> (2011) 1 SCC 467.

<sup>12</sup> (2012) 7 SCC 1.

<sup>13</sup> (2015) 10 SCC 292.

<sup>14</sup> (2018) 10 SCC 396.

<sup>15</sup> (2005) 1 SCC 394.

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<sup>16</sup> See, Sukhadeo Thorat, Nitin Tagade, Ajaya K. Naik, "Prejudice Against Reservation Policies : How and Why", 51 (8) EPW 61; Ashwini Deshpande and Thomas E. Weisskopf, "Does Affirmative Action Affect Productivity in the Indian Railways?", Working Paper No. 185, Centre for Development Economics, Delhi School of Economics, Delhi, 2010. These papers demonstrate that the popular argument of reservation reducing efficiency in administration is not backed by the empirical facts.

<sup>17</sup> Amartya Sen, "Merit and Justice" in K.J. Arrow (ed.), *Meritocracy and Economic Inequality* (Princeton University Press, 2000).

<sup>18</sup> Prof. Sukhadeo Thorat in an interview to *The Hindu* in K. Venkataramanan, "Should the Creamy Layer Norm be Extended to SC/STs?" *The Hindu*, 13 December, 2019. Available at <<https://www.thehindu.com/opinion/op-ed/should-the-creamy-layer-norm-be-extended-to-scsts/article30291026.ece>> (last visited on 10 September, 2020). Here, the Hindu newspaper has carried the interview with Prof. Sukhadeo Thorat and Prof. Ashwini Deshpande, who have argued that in case of SCs/STs, the reservation is not given for economic considerations but to overcome the existence of discrimination and social stigma, therefore, the introduction of creamy layer in SC/STs is problematic.

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