B.K. Pavitra v. Union of India & Ors.

(Case Study)

INTRODUCTION

This is one of the most significant cases pertaining to the issue of seniority and promotion which is based on reservations, in the jobs for the State of Karnataka. The case has to be understood into different domains and timelines, the BK Pavitra I as well as the BK Pavitra II. The present commentary would also dissect the case in a way in which it traces the history of the judicial pronouncement.

This case gives a unique and lesser-known idea of what constitutes merit and efficiency in the social sphere, as well as the interplay between the two concepts. In this particular case, the Hon'ble Supreme Court conferred constitutionality to the idea of reservations in the promotions, in addition to the reservation in appointment that was already in force. The Court observed that concept of reservations in promotions, as enunciated by the **Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservations (to the Posts in the Civil Services of the State) Act, 2018**, passes the constitutional muster, and thus, the Act was held to be constitutional.

TUMULTOUS HISTORY OF CONCEPT OF RESERVATIONS IN PROMOTIONS

Indra Sawhney[1]

Tracing the issue of reservation, we come across the nine judge Constitution bench pronouncement of the Hon'ble Supreme Court. This is the case of **Indra Sawhney v. Union of India[2]**. It is a landmark judgement of the Hon'ble Apex Court. In this case, the Hon'ble Supreme Court upheld the provision of reservation for the Other Backward Classes (OBCs).

[1] AIR 1993 SC 477.
[2] *Ibid.*

The Court held that the state is empowered to make reservation provisions for the purposes of appointments for the Other Backward Classes (OBCs) under Article 16 Clause 4 of the Constitution of India.

However, the Hon'ble Supreme Court made a very interesting observation and held that such reservation in appointments under Article 16 Clause 4 does not extend to reservation in promotions. Further, the Court also held that, the reservation shall be capped to the extent of 50%. The Court also made it clear that the creamy layer must be excluded from the protection of reservation provisions made for the benefit of the Other Backward Classes (OBCs).

This clear depiction of the intention of law by the Hon'ble Supreme Court barred state from enacting any provisions for the purposes of bringing in reservations in promotions. However, to overcome this judicial pronouncement and its mandate, Parliament brought in several changes in the Constitution by way of amendments.

Constitution (77th) Amendment Act, 1995

After the Indra Sawhney judgement, the government realized that they would not be able to take refuge of Article 16 Clause 4 of the Constitution to make provision for the reservation in promotions for the reserved Classes. After being clearly barred by the Hon'ble Supreme Court, the government took the legislative route to give or confer constitutionality on the concept of reservation in promotions for the Backward Classes.

In pursuance of this, the Parliament enacted the **77th amendment** to the Constitution in the year 1995. The amendment inserted Clause 4A under Article 16, thereby conferring sufficient powers on the state and government to make any law or legislation pertaining to reservation in promotions for the Backward Classes.

Constitution (81st) Amendment Act, 2000

In keeping with its spree of amending the Constitution to make it possible for the state to enact provisions for the reservation promotions for the reserved classes, the Parliament further amended the Constitution by way of **81st amendment** in the year 2000. The amendment inserted Clause 4B

under Article 16 of the Constitution. This clause conferred power on the Parliament to carry forward the unfilled reserved seats for a particular year to the next year.

It also made it possible to carry forward such unfilled seats in excess of the 50% criteria that was established by the Hon'ble Supreme Court in the Indra Sawhney judgement. In simple words, this meant that the such extra unfilled seats would not be considered for the purposes of 50% cap limit, when their carry forwarded to the next or subsequent year.

Constitution (82nd) Amendment Act, 2000

An interesting exception was made by way of this amendment. 82nd amendment to the Constitution inserted a Proviso under Article 335 of the Constitution. Article 335 deals with the claims of Schedule Caste and Schedule Tribes to governmental services and posts, under the union or state.

The Proviso inserted by this amendment stated that the concept of "maintenance of efficiency of administration" as envisaged under this Article i.e., 335, shall not be applicable to a state at the time of relaxation of evaluations or standards in the matters of promotion.

It stated that in case any state decides to relax the qualifying marks in any particular examination, or lowers the standards of evaluation, the constitutional mandate of "maintenance of efficiency of administration" shall not apply in case such an action by the state is taken for fostering reservation in promotions.

Ajit Singh v. State of Punjab[3] (Catch-Up Rule)

The Hon'ble Supreme Court in this particular case, formulated a rule referred to as the catch-up rule. As per the **catch up rule**, any general candidate who was senior to Scheduled Caste or Scheduled Tribe candidate in a lower cadre and who subsequently could not be promoted owing to no reservation in promotions for the general candidate, whereby the Scheduled Caste or Scheduled Tribe candidates got promoted earlier because of the reservation in promotions, would regain their seniority upon being subsequently promoted to the same position to which an earlier

[3] AIR 1967 SC 856.

Scheduled Caste or Scheduled Tribe candidate was promoted (owing to reservation in promotions for them).

This was done to redress the grievances of the general category candidates who felt that due to earlier promotions of reserved candidates, owing to the reservation, such candidates became their seniors while they (general candidates) were their (reserved candidates) seniors in a lower cadre prior to promotion. The Court formulated the catch-up rule to ensure that there is no scope of "reverse discrimination" against a candidate who was senior prior to the promotion of a reserved candidate.

Further, again in the **Ajit Singh II**[4] case, the Hon'ble Supreme Court reiterated its earlier stand on the seniority rule that, a general employee, upon promotion, will regain his/her seniority over the earlier promoted reserved category employee.

Constitution (85th) Amendment Act, 2001

To overcome the judicially crafted doctrine of catch up, the Parliament brought in the **85th amendment** to the Constitution of India in the year 2001. It amended Article 16 Clause 4A to add the words "consequential seniority" within the article itself. However, it is interesting to note that the 85th Constitutional amendment was given **retrospective effect from 17th June, 1995**, the same day on which the 77th Constitutional amendment had come into force.

This amendment gave constitutional backing to the concept of "consequential seniority in reservations in promotions". This rule meant that any reserved candidate who got promoted earlier than a general category candidate, then such reserved category candidate would be considered a senior for the purposes of subsequent promotions as well. This ensured that the reserved candidate retains his seniority irrespective of whether he/she was promoted because of reservation.

M. Nagaraj v. Union of India[5]

This is a 2006 five judge constitution bench case. In this case, the Supreme Court upheld the mandate of Parliament in extending reservation for Scheduled Castes and Scheduled Tribes in

[4] (1996) 2 SCC 715.
[5] (2006) 8 SCC 212.

promotions. However, the Supreme Court stated that the promotion in reservations would extend to these classes of individuals subject to certain riders.

These riders included, proof of backwardness of the class which is benefiting from such reservation in promotions, proof of inadequacy of representation in the positions for which the reservation in promotion has been provided for and further, showcasing that reservations in promotions for these classes of individuals would further the cause of "administrative efficiency" and not undermine it.

This pronouncement received several criticisms, including the one that it purports to introduce "class within class" classification amongst the Scheduled Tribes and Scheduled Classes. Some critics even stated that the Nagaraj judgement impliedly overrules the Indra Sawhney judgement of the Hon'ble Supreme Court in which the Supreme Court had clearly stated that Scheduled Classes and Scheduled Tribes are homogeneous and they cannot be sub classified or sub categorised.

Further, in this case, the Supreme Court **upheld the 77th and 85th amendments** to the Constitution. These amendments replace the catch-up rule which was laid down by the Supreme Court, with the new consequential seniority rule in the reservation in promotions. The Court said that this replacement of the catch-up rule with consequential security rule does not violate the basic structure of the Constitution. The Parliament is absolutely within the confines of its amending powers to bring in such criterion of reservation in promotions.

Jarnail Singh v. Lachhmi Narain Gupta[6]

After severe criticism, the Nagaraj judgement was reviewed by another five-judge bench in this case. In this case, the Court held that the Nagaraj judgement was contrary to the law laid down by the Indira Sawhney judgement and therefore was bad in law. However, the Court in Jarnail Singh judgement went on to upheld the insistence of Nagaraj on getting statistics to prove inadequacy of representation of Scheduled Classes and Schedule Tribes.

[6] 2018 SCC OnLine SC 1641.

Further, the Court also upheld Nagaraj mandate of procuring statistics to showcase that such reservation in promotions for these classes of individuals would not adversely affect the administrative efficiency.

BK PAVITRA – I[7]

This case came up before the Supreme Court because of the 2002 act for the State of Karnataka which provided for the determination of seniority of certain government servants who were promoted on the basis of reservation in the civil services for the State of Karnataka. The Act had received the assent of the President.

Subsequently, the **Karnataka Determination of Seniority of the Government Submits Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act, 2002** was challenged before the Supreme Court on the ground that it was violative of the mandate Nagaraj pronouncement. The Court said that the legislation was passed without any strong backing for introducing such a provision of reservation in promotions and consequential determination of seniority.

The Supreme Court declared the legislation to be invalid and unconstitutional. The Court observed that the legislation was enacted without any quantifiable data that could take into view the requirement of appropriate representation of such backward classes in the civil services of the state. The Court also observed that there was no statistical corpus to dissect the backwardness of such classes of individuals as well as the impact or effect of such a provision of law on the overall administration of the state as well as the efficiency of the administrative machinery as provided for under Article 335 of the Constitution.

The Court further made it clear that it is not a directive condition but a mandatory and compulsory condition that certain quantifiable data be procured in order to enable the State to provide for any provisions in regards to the reservation in promotions for the Scheduled Classes and the Scheduled Tribes in the governmental sector, as per the mandate of Article 16 Clause 4A of the Constitution. It was a consolidated view of the Hon'ble Supreme Court that such conditions be fulfilled to showcase the indispensability of such a piece of legislation.

[7] (2017) 4 SCC 620.

Pursuant to the judgement, the state, in furtherance of the pre-conditions laid by the Hon'ble Supreme Court, to collect and procure quantifiable data so that it may let one form the basis for the legislation, set up a Committee under one of the additional chief secretaries to prepare and submit a report on the backwardness of such reserved classes and inadequacy of their representation in the civil services of the State of Karnataka as well as the impact of such a provision of reservation and focus on the efficiency of the State.

RATNA PRABHA COMMITTEE

Since, one of the reasons due to which the 2002 Act was declared unconstitutional and invalid by the Hon'ble Supreme Court was the absence of any quantifiable data and statistics representing the backwardness of such classes of individuals as well as their inadequacy of representation in administration. Therefore, to fill this void the State Government of Karnataka set up a one-man committee under the then Additional Chief Secretary Ratna Prabha.

The committee observed that Schedule Cast employees form about 10% of the total staff strength of the Government whereas it should be around 15% and further, it also observed that Scheduled Tribes formed 2% of the staff strength of the government whereas it should be about 3 to 4%.[8] They also analyzed statistics and data to dissect the backwardness of such classes of individuals. This data included statistics on literacy rate levels, sanitation, economic status of both the communities, size of land holdings amongst them. It is important to note that the committee submitted its report in the matter of one month to enable the State Government to quickly file a review petition before the Supreme Court.

Based on the findings of the Ratna Prabha committee and its report, the Karnataka State Legislature re-enacted the same legislation in the year 2018. The legislation also received President's assent under Article 200 of the Constitution since it is not possible for a state Legislature to override the Supreme Court judgement without prior Presidential assent. However, it would not be long before this legislation of 2018 would also be challenged before the Hon'ble Supreme Court in what came to be known as the BK Pavitra II.

[8] DHNS Bengaluru, *Committee established need for quota policy,* DECCAN HERALD (Feb. 1, 2021, 8:09 PM), https://www.deccanherald.com/state/top-karnataka-stories/ima-cbi-gets-state-nod-to-prosecute-two-ips-officers-887671.html.

BK PAVITRA II[9]

Introduction

Briefly, the petitioner in this case challenged the constitutionality and the legality of the Act of 2018. The petitioner claimed that the Act was *ultra vires* the Constitution and a mere amendment of the Act would not cure the defect on the basis of which the legislation was earlier declared to be invalid in the year 2002.

We will discuss the case in several parts for the purpose of easier understanding, these will be, first, submissions made by the petitioner, submissions made by the respondent, issues framed for the consideration by the court and finally the judgement and the basis of the judgement.

Submissions made by the petitioner

- The petitioner averred that the State Legislature has usurped the judicial power by erratically overruling the pronouncement in BK Pavitra I, even when there was no compelling reason to do the same.
- The petitioner contended that since the Indian Constitution provides for separation of powers, which also form the part of the basic structure of the Constitution, the Legislature cannot sit in appeal over a judicial decision and overturning the decision. When the basis itself has been declared to be unconstitutional, Legislature cannot just simply amend the Act and bring in the same basis again.
- Petitioner further contended that the data that was collected by the Ratna Prabha committee is not relevant and it is not in compliance with Nagaraj and Jarnail Singh pronouncements of this (Apex) Court.
- The petitioner also contended that there was no reason for the Governor to hold the bill for referring to the President. Petitioner stated that this action of the Governor was arbitrary with no sound and lawful reasoning.

[9] Civil Appeal No. 2368 of 2011.

Submissions made by the respondent

- The respondent stated that the legislation was of a curative nature and therefore does not amount to a usurpation of judicial power by the State Legislature and hence, does not violate the doctrine of separation of powers.
- It also stated that the Legislature has absolute powers which it can exercise to collect the data for public and lawful purposes. The respondent has also stated that during the compilation of data by the Ratna Prabha Committee, it was in compliance with the mandate of Nagarajan and Jarnail Singh judgements.
- The respondents also submitted that Governor has the power to exercise his/her discretion to, either assent to a bill under Article 200 of the Constitution, or to withhold the bill for the Presidential assent if there be any genuine doubt about the applicability of any of the provisions of the law.
- They stated that presidential assent could negate the possibility of constitutional complications at a later stage and therefore the Governor exercised his/her discretion to negate any such imminent complications of issues that may arise because of the complex constitutional web.

Judicial Pronouncement

The Supreme Court upheld the validity of the Reservation Act of 2018 and declared it to be within the confines of the Constitution of India. It held that the Legislature is vested with plenary powers under the law of the land which confers upon it, authority to undertake large scale public purpose-oriented procurement of data. The Apex Court held that Legislature had exercised the powers that were duly conferred upon it by constituting the Ratna Prabha Committee for the purposes of collection, consolidation, analysis and compilation of data.

The Court also upheld the submission by the respondents that they had duly followed the mandate of Nagaraj and Jarnail Singh judgments. Bench also made a very interesting observation and held that the concept of creamy layer has no applicability in cases dealing with consequential seniority. Hence, besides consolidating the basis of consequential seniority in reservations, the court also ruled out the possibility of applicability of creamy layer concept to the Scheduled Castes and the Scheduled Tribes thereby, reiterating the earlier stance under the Indira Sawhney judgement.

Besides upholding the legislation the Court also restated several important points concerning reservations such as, ceiling limits of 50%, the court also explained about the concept of creamy layer and its applicability in the present case, and the parameters or factors for reserved classes, their backwardness and the overall impact on the efficiency of the administrative machinery. The court held that these requirements ought to be fulfilled by the State for reservation laws to not be hit by the Article 16 of the Constitution.

Further, the Apex judicial forum stated that the State of Karnataka had adequately remedied, addressed and removed the fundamental basis on which the law was previously declared invalid and unconstitutional, and all this is well within the confines of the powers of the State. On the relevancy of data, it held that the data was relevant when analyzed and dissected in view of the present case at hand, this data assisted the state in formulating appropriate legal provisions for the purpose of reservation in promotions and subsequent consequential seniority in the civil posts of the State.

The court also held that the data was very specific in nature, representing the picture of different governmental departments and their representative character. It held that the present legislation does not tantamount to encroachment upon the judicial power and does not negate mandate of the court.

Explaining "efficiency" under Article 335 of the Constitution

The Court held that adequate steps have to be undertaken for the purposes of factoring in the claims of Schedule Castes and Schedule Tribes to make them a part of the mainstream society and bringing them on an equal pedestal. The court also recognised that these reserved classes had faced centuries of deeply entrenched and prejudiced discrimination in a caste-based feudal society. The court also paid heed to the proviso under Article 335 and held that the proviso embodies the realistic notion that unless special measures are undertaken for these individuals the spirit of the Constitution will remain just on the paper. The proviso in clear words states that the ground of maintenance of efficiency could not be a barrier for undertaking special steps for the upliftment and apartment on the Schedule Caste and Schedule Tribes.