



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Case Comment: B K Pavitra and Ors v Union of India and Ors

Aryan Birewar^a

^aSymbiosis International University, Pune, India

Received 02 September 2021; *Accepted* 29 September 2021; *Published* 04 October 2021

INTRODUCTION

Case Category: Government Service – Reservation in Services for SC/ST.

Relevant Provisions: Article 14, Article 15(4), Article 16(1), Article 16(4), Article 16(4A), Article 16(4B), and Article 335.

The present case is concerning the constitutionality of the Karnataka Extension of Consequential Seniority to Government Servants Promoted on Basis of Reservation (to Posts in Civil Services of the State) Act, 2018. Section 3 of the act provides for consequential seniority to servants belonging to SC/ST community. Section 4 provides protects the promotion of SC/ST servants through constitutional seniority from 27th April 1978. This act was a successor of the 2002 act, which provided for a 15% reservation in promotion to SC and a 3% reservation to ST in promotion in Group-A posts of Karnataka State Civil Services. A two-judge bench of the Supreme Court held the legislation *ultra vires* of Articles 14 and 16 in *B.K. Pavitra & Ors v. Union of India & Ors*¹ⁱ (BK Pavitra I).

¹ *BK Pavitra & Ors v Union of India & Ors* AIR 2017 SC 820

The requirements of “inadequacy of representation” “backwardness” and “overall efficiency” were not examined by the Karnataka legislature, as mandated in *M. Nagaraj v. Union of India*²ⁱⁱ. Thus, Reservation Act 2002, was held invalid by the Supreme Court in 2017. In March 2017, Karnataka Legislature formed the Ratna Prabhakar Committee to (i) Collect information of SC/ST candidates in state civil services; (ii) Obtain information on their backwardness, and (iii) Study the impact of reservation in the promotion of SC/ST on “Efficiency in Administration”. The report was examined by the Cabinet Sub-Committee and accepted by the Cabinet in August 2017. Primarily, the challenge was not concerning the degree or extent of reservation but about the entire validity of consequential seniority. The 85th Constitutional Amendment 2002, amended Article 16(4A) to introduce reservation in the promotion of SC/ST officers through consequential seniority in public employment.

Constitutional seniority allowed SC/ST servants to protect their seniority over unreserved category servants. The former will be able to retain the seniority if he is accorded promotion because of reservation policy. This struck down the “catch-up” rule under which unreserved category servants could be catch-up with promoted reserved category servants. The Ratna Prabha Committee obtained data for 31 departments of the Government of Karnataka, based on which the State Legislature said in absence of consequential seniority there will be under-representation of SC/ST servants.

The Supreme Court held the Reservation Act 2018, as compliant with the requirement of the *Nagaraj case*. The concerned legislation lawfully exercises the *enabling power* provided under Article 16(4A). Thus, the Reservation Act 2018 was upheld, and the review petition was dismissed.

ISSUES

1. Whether the Reservation Act 2018 overrules *BK Pavitra I* Judgment?
2. Whether the Reservation Act 2018 in consonance with the *Nagaraj* and *Jarnail Singh* judgments?

² *M Nagaraj v Union of India* AIR 2007 SC 71

3. Whether the deficiency identified in the Reservation Act 2002 has been cured in the Reservation Act 2018?
3. Whether Article 16(4) is an exception to Article 16(1)?
4. Whether the “*Creamy-Layer*” Test is applicable to Consequential Seniority through reservation in promotion for SC/ST?
5. Whether Efficiency in administration should be compromised by Reservation in Public Employment?

RULES

- **Article 14** - Article 14 says that every person living in India has the right to equality before and after law and equal protection of the law. Every person is equal before the law and it does not discriminate based on religion, race, caste, sex, or place of birth.
 - **Article 16(1)** - Article 16(1) is applicable for services under the state or public departments under the government. This ensures equal opportunity in public employment to every citizen of India, without discrimination based on religion, race, caste, sex, or place of birth.
 - **Article 16(4)** - Article 16(4) gives power to the State to make provisions to reserve posts for the backward class of citizens if the State believes that they are under-represented in the services under the State.
1. **Clause (4A):** The State can determine the “backwardness” of a particular class of citizens. Initially, the 77th Amendment 1995, inserted Article 16(4A) for “reservation in matters of promotion”. The 85th amendment 2002, inserted **Article 16(4A)** to provide reservation in promotions for SC/ST with consequential seniority.
 2. **Clause (4B):** The 81st Amendment 2000, inserted Article 16(4B) to separate unfilled vacancies, which are reserved under Article 16(4A), in succeeding years from vacancies of that particular year to calculate the ceiling limit of 50%.

- **Article 335** - The State shall consider the claims, while making appointments to the services under the Union or State, consistently maintaining the efficiency in administration.

Proviso: The State can make provisions to reduce the qualifying marks for SC/ST candidates, lower standards of evaluation, in matters of reservation in promotion of services under the State. This proviso was added by the 82nd Amendment 2000.

ANALYSIS

The legislature cannot overrule a judgment, but it can re-enact the legislation by removing deficiencies identified by the Courts. Similarly, Reservation Act 2018 does not nullify BK Pavitra I but it ensures to fulfill the criteria, whose non-fulfillment held Reservation Act 2002 unconstitutional. In *State of Tamil Nadu v Arooran Sugars Ltd.*³ⁱⁱⁱ, Supreme Court held, “The legislature could remove fault in a provision pointed by the courts. This is not encroachment of judicial power.” Moreover, in *Utkal Contractors & Joinery Pvt. Ltd. v the State of Orissa*^{4iv}, Supreme Court held, “Under Article 245 and 246, the legislature can exercise full power by correcting a legislation based on the judicial decision, thus validating the invalid legislation.” However, explicitly reversing or overruling a judgment is unconstitutional.

The Statement of Objects and Reasons of Reservation Act 2018 directly acknowledges the failure of previous legislation in proving “compelling reasons” for reservation in promotion of SC/ST, as held in the *Nagaraj* case. This report submitted in August 2017, accepts the backwardness of SC/ST in Karnataka, inadequate representation in State Civil Services, and no effect on efficiency in administration. The judiciary can examine the subjectivity of Clause (4A) but the legislature should have the power to form an opinion on it. This is because of the basic constitutional principle that legislature is answerable to the citizens. Even in *State of Himachal Pradesh v Satpal Saini*^{5v}, Supreme Court held, “Legislature formulates policies because it is accountable to the citizens. Owing to this factor of subjectivity, the constitutional courts shouldn’t decide whether the state needed to enact legislation, under Article 16(4).” Moreover, in *Barium*

³ *State of Tamil Nadu v Arooran Sugars Ltd* AIR 1997 SC 1815

⁴ *Utkal Contractors & Joinery Pvt Ltd v State of Orissa* (1988) 1 SCR 314

⁵ *State of Himachal Pradesh v Satpal Saini* AIR 2017 SC 810

Chemicals v Company Law Board^{6vi}, the Supreme court held, “The legislature is vested with the authority to form an opinion on matters of subjectivity; thus, the Courts cannot examine the suitability of the opinion in any case.” Even in the *Nagaraj* case, Supreme Court held, “State is in the best position to measure merit, as it will suffer the outcome of the same. Equity, Justice, and Efficiency are situation-specific, and the State is most apt to measure the three factors.” The importance of leaving the discretion of reservation in promotional posts with the state is highlighted by the Supreme Court in *Jarnail Singh v Lachhmi Narain Gupta*^{7vii}. The Court said, “Since the reservation in promotion of SC/ST must go in-tandem with the efficiency in administration, the power under Article 16(4) should be left with State.”. Hence, it should suffice that the Karnataka legislature formed a committee to collect quantifiable data to ensure “compelling necessity” to re-enact the legislation.

Article 16(4), through the reservation in public employment, ensures, equality in opportunity, envisaged in Article 16(1). While the principle of equality of opportunity was being debated in Constituent Assembly, Shri. P. Kakkam had stated, “Merit alone cannot bring the Harijans forward. The State must make a reservation in appointments of Harijans.” In my opinion, Article 16(1) guarantees equality in opportunity which is substantive and not formal. Through Constituent Assembly debates, it can be concluded that Article 16 also recognizes the widespread inequalities in society.

The Reservation Act 2018 does not provide any benefit concerning the “Creamy Layer” status. As held in *Jarnail Singh's* judgment, this test applies to entry in government services and not promotion. Consequential seniority is incidental to partly merit-based promotion, it is a result of promotion and does not violate Articles 14 and 16(1). Thus, the creamy layer test cannot be applied to consequential seniority through reservation in promotion for SC/ST. This test is core to Articles 14 and 16(1) but does not apply to consequential seniority, as it is merely a result of promotion.

⁶ *Barium Chemicals v Company Law Board* AIR 1967 SC 295

⁷ *Jarnail Singh v Lachhmi Narain Gupta* (2018) SCC OnLine SC 635

The substantive meaning of equality can further be found in the proviso of Article 335. This proviso adds meaning to Article 335, as without affirmative action for SC/ST their claim will have no value. The SC/ST has been meted to years of social discrimination and prejudice; the inefficiency assumption caused by the promotion of SC/ST servants is also an example of the same. In *K.C. Vasanth Kumar v the State of Karnataka*,⁸ the Supreme Court held, “Reservation is a conflict between classes entrenched in backwardness and those with convenient living.” Justice O. Chinappa Reddy said, “Assumption of upper classes placed at senior posts will outperform the candidates at reserve posts is an elitist vicious assumption.

“Moreover, the determination of “Merit” is unjust, as most SC/ST candidates do not have the resources to outperform unreserved candidates in such standardized government examinations. The proviso of Article 335 and Article 16(4) precisely try to maintain equality and diversity in public administration, thereby reducing the structural inequality in our society.

CONCLUSION

The Reservation Act 2018 does not overrule the BK Pavitra I judgment. It is merely curative legislation, which has been validated by removing deficiencies pointed by the constitutional courts in the previous legislation. This legislation complies with the “compelling necessity” criteria stated in the *Nagaraj* case and the Ratna Prabha Committee collected “quantifiable data” on the backwardness of SC/ST, despite this criterion being struck down in *Jarnail Singh* case. Article 16 recognizes the deep inequality and discriminatory past of our society. Thus, 16(4) provides reservation in public employment to ensure substantive equality of opportunity, mentioned in Article 16(1). The creamy layer test is not applicable to consequential seniority of SC/ST, as it is an outcome attained from promotion and not a benefit. Consequential seniority is not a benefit, but a result of the promotion secured by the SC/ST candidates, it is incidental to the seniority-cum merit system, based on the promotion. Lastly, the promotion of unreserved candidates to senior posts to secure merit is prejudiced. The proviso of Article 335 ensures SC/ST representation to ensure equality for the

⁸ *KC Vasanth Kumar v State of Karnataka* 1985 AIR 1495

disadvantaged in services under the State. Thus, the Reservation Act 2018 was held constitutionally valid, and all review petitions were dismissed.
