



## CRITICAL ANALYSIS OF JUDICIAL DECISIONS ON RESERVATION IN PROMOTION

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### ABSTRACT

India, after more than seventy years of independence, has moved ahead and is being recognized as a future superpower. It is now true that the social background of the nation has changed and even the Scheduled Castes and Scheduled Tribes are moving forward and members belonging to SCs and STs enjoy higher positions in the services under the state. In this backdrop, it is necessary to revisit the existing reservation policies and the principles laid down by the Judiciary which govern the reservation system in the country. The present article aims to understand the existing scenario of reservation in promotion in the country and offers suggestions for the future course of action.

### 1.1 Introduction

Article 16 of the Constitution guarantees equality of opportunity in matters of public employment. This equality of opportunity is guaranteed to all citizens in matters relating to employment or appointment to any office under the state.<sup>1</sup> The equality of opportunity provided under clause (1) is further strengthened by the non-discrimination on the grounds of religion, race, caste, sex, descent, place of birth or residence.<sup>2</sup> Article 16(1) is a facet of Article 14. While Article 14 is cast in negative terms and bars the state

from denying any person equality before the law or equal protection of laws, Article 16 imposes a duty upon the state to take positive steps for ensuring such equality. Also, since Article 16(1) is a facet of Article 14, reasonable classification is permitted even under Article 16 and therefore, Article 16(4) which provides for reservation of appointments or posts in favour of any backward classes of citizens, which, in the opinion of the State, is not adequately represented in the services under the State, is not an exception to Article 16(1) but must be read harmoniously with Article 16(1).

### 1.2 Concept of Reservation in Promotion

The term “matters relating to employment” in clause (1) has been interpreted by the courts time and again and for the first time, in *The General Manager, Southern Railway v. Rangachari*<sup>3</sup>, it was interpreted as to include promotions within its ambit as well. In *Rangachari*, the question before the court was the scope and effect of Article 16(4). It was argued by the respondents that reservation as provided under Article 16(4) applied only to reservation of posts at the initial stage of appointment and not for reservation of posts for promotion.

The Court held that Article 16(1) must be liberally construed and the “matters relating to employment” cannot be confined only to initial stage of employment. Therefore, it concluded that promotion to a selection post is also included in the matters relating to employment. The Court thus concluded<sup>4</sup>:

*It would not be reasonable to hold that the inadequacy of representation*

<sup>1</sup> INDIAN CONST. art 16, cl. 1.

<sup>2</sup> INDIAN CONST. art 16, cl. 2.

<sup>3</sup> AIR 1962 SC 36.

<sup>4</sup> *Supra* Note at 3.



*can and must be cured only by reserving a proportionately higher percentage of appointments at the initial stage. In a given case the state may well take the view that a certain percentage of selection posts should also be reserved, for reservation of such posts may make the representation of backward classes in the services adequate, the adequacy of such representation being considered qualitatively.*

Therefore, for the first time, power of the State under Article 16(4) was held to include the power of providing for reservation of posts in matters of promotion as well. A year later, in 1963, in *M.R. Balaji and Ors. v. State of Mysore*<sup>5</sup>, the Supreme Court also laid down the ceiling limit for reservation and capped it a maximum of 50% reservation. Even though such a limit was laid down by the court in respect of Article 15(4), but the court remarked that what is true in regard to Article 15(4) is equally true in regard to Article 16(4).

To further advance the interests of the backward classes and to provide more opportunities to them in public employment, various constitutional amendments were brought out by the government from time to time, viz., the 77<sup>th</sup> Amendment adding Article 16(4A) to the Constitution, the 81<sup>st</sup> Amendment adding Article 16(4B) to the Constitution, 82<sup>nd</sup> Amendment adding the proviso to Article 335 which provides for relaxation in qualifying marks in any examination or lowering the standards of evaluation for reservation in matters of

promotion and the 85<sup>th</sup> Amendment, providing for consequential seniority in matters of promotion to the members of the reserved class.

### **1.3 Constitutional Validity of 77<sup>th</sup>, 81<sup>st</sup>, 82<sup>nd</sup> and 85<sup>th</sup> Amendment Acts: *M. Nagaraj and Ors. v. Union of India and Ors.*<sup>6</sup>**

The slew of amendments brought out by the Government pertaining to reservation in promotion were eventually challenged in *M. Nagaraj and Ors. v. Union of India and Ors.* The Constitution (Seventy-seventh Amendment), 1995, (Eighty-first Amendment), 2000, (Eighty-second Amendment), 2000 and (Eighty-fifth Amendment), 2001 Acts were challenged as violative of Articles 14 and 16 and 335 of the Constitution. It was contended that these amendments were brought out to overrule the judicial decisions in the cases of *Indra Sawhney and Ors v. Union of India and Ors.*<sup>7</sup>, *R.K. Sabharwal and Ors. v. State of Punjab and Ors.*<sup>8</sup> and *Ajit Singh and Ors. v. The State of Punjab and Ors.*<sup>9</sup> (hereinafter referred to as *Ajit Singh II*).

The Constitutional validity of the impugned Amendment Acts was upheld. It was ruled by the Court that these amendments retain the controlling factors, viz., backwardness, inadequacy of representation and the efficiency of administration keeping in mind the constitutional mandate under Article 335. Further, these amendments are confined only to the SCs and STs and do not apply to the OBCs. The other constitutional requirements, namely, ceiling-limit of 50%, the concept of creamy layer, the sub-classification between

<sup>5</sup> AIR 1963 SC 649.

<sup>6</sup> (2006) 8 SCC 212.

<sup>7</sup> AIR 1993 SC 477.

<sup>8</sup> AIR 1995 SC 1371.

<sup>9</sup> AIR 1999 SC 3471.



OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney* and the concept of post-based Roster with in-built concept of replacement as held in *R. K. Sabharwal* are also not obliterated<sup>10</sup>.

Prior to the judgment in *Indra Sawhney*, SCs and STs enjoyed reservation in promotion. However, the Supreme Court in *Indra Sawhney* restricted reservation at the entry-level only and disallowed reservation in promotion. To protect the interests of the SCs and STs, the government brought in the 77<sup>th</sup> Amendment in 1995 which added Article 16(4A) to the Constitution. Article 16(4A) emphasised upon the opinion of the State to decide upon the “backwardness” and ‘inadequacy of representation’ for providing reservation in promotion. However, such an opinion has to be formed on the basis of quantifiable data and if the above two reasons do not exist, then reservation in promotion is not permissible since Article 16(4A) is only an enabling provision and will come into operation only on the fulfilment of certain prior prerequisites.

The Court observed that ‘catch-up rule’ and ‘consequential seniority’ are not implicit in clauses (1) to (4) of Article 16. These are judicially evolved concepts whose basis lie in service jurisprudence. These are not axiomatic concepts such as secularism and judicial review and deletion of ‘catch-up rule’ and insertion of ‘consequential seniority’ are therefore not violative of Articles 14 and 16 of the Constitution.

The Court in *Indra Sawhney* also ruled that the number of vacancies to be filled up on the basis of reservation in a year must not exceed 50% and these include the carried forward

vacancies. This made it difficult for the Government to fill the backlog vacancies. To overcome this problem, Government introduced the 81<sup>st</sup> Amendment, adding Article 16(4B) to the Constitution which excluded the carried forward vacancies from the ceiling limit of 50%. The Court while upholding the constitutional validity of the impugned act observed that<sup>11</sup>:

“The Constitution (Eighty-First Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in *R.K. Sabharwal*. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies do not arise.”

To maintain the efficiency of administration as mandated by Article 335, a time-scale was also ordered to be imposed by the Supreme Court with regard to the carried forward reserved vacancies.

The Constitution (Eighty-fifth Amendment) Act, 2001 was added to overcome the basis of the decision of the court in *Indra Sawhney* and *S. Vinod Kumar and Ors. v. Union of India and Ors.*<sup>12</sup> Reading Article 335 with Article 46 of the Constitution, the Amendment was upheld by the Court because the proviso to Article 335 only relaxed the constitutional limitation and did not obliterate it altogether. However, such relaxation depends on case on case basis.

<sup>10</sup> *Supra* Note at 6.

<sup>11</sup> *Supra* Note at 6, ¶ 63.

<sup>12</sup> (1996) 6 SCC 580.



Thus, the above constitutional amendments were upheld as valid provided, in each and every case the state has to collect quantifiable data on the backwardness and inadequacy of representation of SCs and STs before introducing any provision for reservation in promotion and consequential seniority and the impact of such reservation in promotion on the administrative efficiency. If these compelling reasons are not adhered to by the Government, it is very well within the power of the Court to strike down such a provision as violative of the Constitution.

#### 1.4 Recent Developments on the issue of Reservation of Promotion

After *Nagaraj*, the law on reservation in promotion remained quite settled with no major issues cropping up. The Constitutional Amendments which were declared as valid became the basis for development of reservation policies throughout the states in the country. However, recently, the Supreme Court has demanded strict application of the constitutional provisions and has come down heavily on any legislation/provision which is in violation of the constitutional mandate.

##### 1.4.1 *B.K. Pavitra and Ors. v. Union of India and Ors.*<sup>13</sup>

In *B.K. Pavitra and Ors. v. Union of India and Ors.* (hereinafter referred to as *B.K. Pavitra I*), the Court considered the validity of the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Act, 2002. The Act provided for grant of consequential seniority to the Government Servants belonging to the SC and ST category with retrospective effect. The validity of the Act was under challenge in *Nagaraj* as well but

after deciding the constitutional validity of the Amendments, the Apex Court remitted the individual matters back to the Appropriate benches to be decided in accordance with the decision of the Court in *Nagaraj*.

Section 3 of the Act provided for an inbuilt mechanism for providing reservation in promotion to the extent of 15% and 3% respectively for the SCs and STs. The High Court held that the argument cannot be accepted that if all the posts in higher echelons may be filled by SCs and STs, the promotional prospects of general merit candidates will get choked or blocked because reservation in promotion was provided only up to the cadre of Assistant Executive Engineers. The High Court thus held the act to be valid and in appeal, the matter reached back to the Supreme Court.

The decision of the High Court was reversed in appeal by the Supreme Court. It was held by the Court that the collection of quantifiable data pertaining to backwardness, inadequacy of representation and impact upon the overall efficiency is a necessary prerequisite without which the enabling provisions under Article 16(4A) and (4B) cannot be given effect to. If the State wishes to exercise its discretion under Article 16(4A), then it has to first collect quantifiable data pertaining to the above-mentioned factors and even if it comes to the conclusion on the basis of such data that compelling reasons exist for providing reservation in promotion with consequential seniority, the ceiling of 50% cannot be breached and creamy layer has to be necessarily excluded. "Mere fact that there is no proportionate representation in promotional posts for the population of SCs and STs is not by itself

<sup>13</sup> AIR 2017 SC 820.



enough to grant consequential seniority to promotees who are otherwise junior and thereby denying seniority to those who are given promotion later on account of reservation policy.”<sup>14</sup> The Court observed that the mandatory exercise was not carried out by the Government of Karnataka and in the absence of such an exercise, the ‘catch-up rule’ enunciated by *Union of India and Ors. v. Virpal Singh Chauhan and Ors.*<sup>15</sup> still holds the field.

It was thus declared that the provisions of the impugned Act to the extent of doing away with the ‘catch up’ Rule and providing for consequential seniority under Sections 3 and 4 to persons belonging to SCs and STs on promotion against roster points are ultra vires Articles 14 and 16 of the Constitution.

#### 1.4.2 Collection of Quantifiable Data regarding “Backwardness” of SCs and STs not Necessary: *Jarnail Singh and Ors. v. Lachmi Narain Gupta and Ors.*<sup>16</sup>

As noticed above, the Supreme Court in *Nagaraj* laid down a categorical imperative of collection of quantifiable data relating to “backwardness”, “inadequacy of representation” and “impact on the overall efficiency” before the State can exercise its power of providing reservation in promotion for SCs and STs in view of the enabling provision under Article 16(4A).

The law laid down by the Apex Court in *Nagaraj* was challenged on two grounds:

- 1) It was contended that *Nagaraj* should be declared as invalid to the extent it demanded collection of quantifiable data pertaining to the “backwardness” of SCs and STs. It was contended that such an exercise is contrary to

the decision of the Court in *Indra Sawhney* wherein it was held that “the Scheduled Castes and the Scheduled Tribes are the most backward among backward classes and it is, therefore, presumed that once they are contained in the Presidential List Under Articles 341 and 342 of the Constitution of India, there is no question of showing backwardness of the Scheduled Castes and the Scheduled Tribes all over again.”<sup>17</sup>

- 2) Challenge was also made to the application of creamy layer to the SCs and STs on the ground that *Indra Sawhney* did not apply the test of creamy layer to SCs and STs and it was made applicable only to the OBCs. It was contended that any exercise of amending the Presidential List by the Executive would be violative of the doctrine of Separation of Powers since the list can be amended only by the Parliament and none else.
- 3) It was also argued that *Nagaraj* did not lay down any test for determining the adequacy of representation in service and the Court should lay down such a test which could be made applicable to all stages of promotion.

The Court agreed with the contention that insofar as *Nagaraj* mandates collection of quantifiable data pertaining to “backwardness” of SCs and STs, it is impermissible. This portion of the judgment in *Nagaraj* is clearly contrary to the nine-judge bench decision of the Supreme Court in *Indra Sawhney*. Thus, the law in *Nagaraj* mandating collection of quantifiable data pertaining to “backwardness” of SCs and STs was declared to be bad.

With respect to the application of creamy layer to SCs and STs, the Court held that application of creamy layer to SCs and STs

<sup>14</sup> *Supra* Note at 13.

<sup>15</sup> AIR 1996 SC 448.

<sup>16</sup> AIR 2018 SC 4729.

<sup>17</sup> *Supra* Note at 7.



does not in any manner tinker with the Presidential Lists under Articles 341 and 342 of the Constitution. When the creamy layer is excluded, the caste or group or sub-group mentioned in the List remains the same and it is only the advanced sections of the caste or group or sub-group which are excluded. This is, in effect, the true objective of providing reservations. Only when the well-to-do and advanced sections are weeded out from being the beneficiary of reservations that the actual backward classes are identified who should enjoy the fruits and benefits of reservation so that they can be uplifted. Thus, *Nagaraj* was upheld as valid in its application of the creamy layer to SCs and STs and it did not, in any manner, interfere with the power of Parliament under Articles 341 and 342.

As far as laying down a test for determining the adequacy of representation was concerned, the Court felt it better to leave it to the appropriate government only for the simple reason that as one goes higher in the level of posts, efficiency in administration assumes even greater importance and it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, as one goes upwards.”<sup>18</sup> The Court placed reliance on *Indra Sawhney* wherein the nine-judge ruled that in some cases, reservations are not desirable and should not be allowed. For example,<sup>19</sup>-

- 1) Defence Services including all technical posts therein but excluding civil posts;
- 2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and

space and establishments engaged in production of defence equipment;

- 3) Teaching posts of Professors - and above, if any;
- 4) Posts in super-specialties in Medicine, engineering and other scientific and technical subjects;
- 5) Posts of pilots (and copilots) in Indian Airlines and Air India.

The Court made it clear that is not an exhaustive list and can include various other top-level posts. Thus, the two important conclusions which can be drawn from *Jarnail Singh* are-

- 1) The law in *Nagaraj* mandating collection of quantifiable data pertaining to “backwardness” of SCs and STs is bad and to that extent *Nagaraj* stands overruled.
- 2) The concept of creamy layer is applicable even to SCs and STs as was held in *Nagaraj* and the principle is re-affirmed.

#### 1.4.3 Limited Power of Judicial Review on the Opinion formed by the State after collection of Quantifiable Data: *B.K Pavitra and Ors. v. The Union of India and Ors.*<sup>20</sup>

In *B.K. Pavitra I*, the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Act, 2002 which provided for grant of consequential seniority to the Government Servants belonging to the SC and ST category with retrospective effect was held as invalid to the extent of doing away with the ‘catch up’ Rule and providing for consequential seniority under Sections 3 and 4 to persons belonging to SCs and STs on promotion against roster points because the State had failed to collect quantifiable data on

<sup>18</sup> *Supra* Note at 16.

<sup>19</sup> *Supra* Note at 7.

<sup>20</sup> AIR 2019 SC 2723.



the “backwardness”, “inadequacy of representation” and “impact on overall efficiency”. In 2018, the Government again brought out the Karnataka Extension of Consequential Seniority to Government Servants Promoted on Basis of Reservation (to Posts in Civil Services of the State) Act, 2018 providing, among other things, for consequential seniority to persons belonging to the Scheduled Castes and Scheduled Tribes promoted under the reservation policy of the State of Karnataka with retrospective effect from 24 April 1978.

The Act was challenged in *B.K Pavitra and Ors. v. The Union of India and Ors.* (hereinafter referred to as *B.K. Pavitra-II*) on the basis that the 2018 Act has failed to cure the infirmity pointed out by the Court in the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Act, 2002 in the case of *B.K. Pavitra I*. It was contended by the petitioners that the provisions of the Reservation Act 2018 are virtually the same as those of the Reservation Act 2002 and the Reservation Act 2018 is based on a report which furnishes factual data which could have been furnished in the earlier round. Therefore, all that the legislature had done was take recourse to exercise of judicial power which is constitutionally impermissible.

The State contended that it had in fact carried out the exercise as mandated by *Nagaraj* before enacting the 2018 Act. After the decision rendered in *B.K. Pavitra I* on 9<sup>th</sup> February, 2017, the Government of Karnataka constituted the Ratna Prabha Committee on 22<sup>nd</sup> March, 2017 to submit a

report on the backwardness and inadequacy of representation of SCs and STs in the State Civil Services and the impact of reservation on overall administrative efficiency in the State of Karnataka. The Committee submitted its Report on 5<sup>th</sup> May, 2017 titled as “Report on Backwardness, Inadequacy of Representation and Administrative Efficiency in Karnataka” which was submitted further to the Law Commission of Karnataka on 8<sup>th</sup> June, 2017. It was on the basis of the Ratna Prabha Committee Report that the Government of Karnataka introduced 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) Bill 2017. The Bill was passed by the Legislative Assembly on 17<sup>th</sup> November, 2017 and by the Legislative Council on 23<sup>rd</sup> November, 2017. On 16<sup>th</sup> December 2017, the Governor of the Karnataka reserved the Bill for the consideration of the President of India under Article 200 of the Constitution. The Bill received the assent of the President on 14<sup>th</sup> June, 2018 and was published in the official Gazette on 23<sup>rd</sup> June, 2018. It is pertinent to note here that even though the law after *Jarnail* did not require collection of quantifiable data on the point of “backwardness” of SCs and STs, the Ratna Prabha Committee still contained data on the “backwardness” aspect.

The Court held that by constituting the Ratna Prabha Committee after the decision in *B.K. Pavitra I*, the State fulfilled the constitutional mandate as laid down in *Nagaraj* and successfully overruled the basis of the decision of the Court in *B.K. Pavitra I*. The Apex Court further observed<sup>21</sup>:

<sup>21</sup> *Supra* Note at 20, ¶ 101.



*We are of the view that once an opinion has been formed by the State government on the basis of the report submitted by an expert committee which collected, collated and analysed relevant data, it is impossible for the Court to hold that the compelling reasons which Nagaraj requires the State to demonstrate have not been established. Even if there were to be some errors in data collection, that will not justify the invalidation of a law which the competent legislature was within its power to enact.*

It was further pointed out that once the categorical imperative as laid down in *Nagaraj* has been carried out by the Government, the Court must be circumspect in exercising the power of judicial review to re-evaluate the factual material on record.

#### **1.4.4 Reservation in Promotion is not a Fundamental Right: Mukesh Kumar and Ors. v. The State of Uttarakhand and Ors.**<sup>22</sup>

While dealing with the issue of consequential seniority in matters of promotion, the Apex Court in *Ajit Singh II* observed that every individual has a fundamental right to be “considered for promotion” by virtue of Article 16(1). However, Articles 16(4) and (4A) do not confer any fundamental right to reservation. The same principle was laid down by a Constitution bench of the Court in *C.A. Rajendran v. Union of India*<sup>23</sup> wherein the Court observed:

*Our conclusion therefore is that Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the government to make reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage*

*or at the stage of promotion. In other words, Article 16(4) is an enabling provision and confers discretionary power on the State to make a reservation of appointment in favour of backward class of citizens which, in its opinion, is not adequately represented in the services of the State.*

Yet again in 2020, the Supreme Court has reiterated that the Government is not bound to make reservations in public posts and there is no fundamental right inherent in an individual to claim reservation in promotion. Articles 16(4) and 16(4A) are merely enabling provisions which vest the discretion in the state whether to provide or not to provide for reservations. Further, where the State decides not to provide for reservation, the exercise of collection of quantifiable data as mandated by *Nagaraj* and modified by *Jarnail* is not necessary and no mandamus can be issued by the Court directing the State Government to provide reservations.

In *Mukesh Kumar and Ors. v. The State of Uttarakhand and Ors.*, Section 3(7) of Uttar Pradesh Public Services Act, 1994 (which was modified and made applicable to the newly created State of Uttarakhand in 2001), which provided reservation for appointment to public posts filled up by promotion was declared as unconstitutional by the High Court. By way of implementation of the judgement of the High Court, the State Government constituted a committee for collection of quantifiable data relating to backwardness and inadequacy of representation of SCs and STs in public posts and even though the committee report suggested inadequate representation, the Government decided that there will be no reservations to the SCs and STs in posts in

<sup>22</sup> (2020) 1 SLJ 350 (SC).

<sup>23</sup> (1997) 3 SCR 269.



public services. Writ petition was filed against this proceeding of the State Government and it was struck down by the High Court as being contrary to law. The High Court clarified in review that in light of the decision of the Supreme Court in *Jarnail Singh*, it was not necessary to collect data on backwardness of SCs and STs but the State Government had an obligation to collect quantifiable data regarding inadequacy of representation in state services before providing reservation in promotion. The High Court further directed that the decision whether to provide reservation in promotion or not is to be made by the Government only after considering such data.

In appeal, the decision of the High Court was reversed by the Supreme Court. It was ruled by the Supreme Court that since Article 16(4A), which provides for reservation in promotion for SCs and STs in the services under the State, is an enabling provision, therefore, the Government is not bound to provide reservations and as such, such a proceeding undertaken by the Government cannot be declared as illegal. The collection of quantifiable data is mandatory before reservation in promotion can be provided. However, when the government decides not to provide reservation, it is not required to justify its decision on the basis of quantifiable data, showing that there is adequate representation of the members belonging to SC and ST in the services under the state.

Reservation in promotion is not a fundamental right. Even if there is inadequate representation of the members belonging to SC and ST in the services under the state, no mandamus can be issued by the Court directing the state to provide for reservation. Collection of quantifiable data pertaining to

backwardness and the impact of reservation on the overall efficiency is a *sine qua non* before providing for reservation in promotion. However, the *vice versa* does not stand true and the decision for not providing reservation need not be based on quantifiable data showing that there is adequate representation of the members of Scheduled Castes and Scheduled Tribes in the services under the State.

### 1.5 Critical Analysis of the Judicial Decisions

The timeline for the concept of reservation in promotion and the issue of seniority which runs along with it can be divided into three parts-

- 1) Pre *Indra Sawhney* Period
- 2) Post *Indra Sawhney* Period
- 3) Post *Nagaraj* Period

Prior to *Indra Sawhney*, reservation in promotion was enjoyed by the members belonging to Scheduled Castes and Scheduled Tribes. At the time, it had not been long that the country had gained independence and the evils of caste system were still prevalent. Therefore, it was necessary to provide special opportunities to the backward classes not only at entry level but also in higher posts so that they could be uplifted in the social strata. However, to maintain equality of opportunity under Article 16(1) and avoid over-representation of the backward classes, reserved posts were not allowed to be carried forward to the next year, although relaxation of time period was granted to them to prove themselves worthy of higher posts. In the initial period after independence, it was necessary to provide such opportunities to the SCs and STs to allow them to be uplifted in the social strata and get over and above the evils of the caste



system. However, at the same time, the constitutional mandate of efficiency of administration had to be kept in mind while considering the claims of the SCs and STs in the services under the State.

In 1992 came the nine-judge bench decision of the Supreme Court in *Indra Sawhney* whose purpose was to finally settle the issues pertaining to reservation. This decision came after four and a half decades of country's independence. At this point of time, the onus of development of the country was largely on the public sector. Therefore, efficiency of administration became an important factor while considering the claims of SCs and STs in the services of the State. Reservation in promotion was rightly disallowed by the court fearing that excessive reservation even in higher posts would largely undermine the efficiency in the working of public sector. Reservation in higher posts would breed discontent among the general category members who might lose their will to work as a result. Also, it would make the members belonging to SC and ST inefficient because of a virtual guarantee of promotion.

Further, realizing that there are classes other than the SCs and STs which are backward and which constitute a major chunk of the country's population which need reservation for their upliftment, 27% reservation was granted to such OBCs, while excluding the advanced sections, called the creamy layer, which was restricted only at the entry level. Also, keeping in view that the equality of opportunity under Article 16(1) does not become a mere illusion, the reservation was capped at a ceiling limit of 50% including the carried forward reserved vacancies. Therefore, the Court through its decision in *Indra Sawhney* reconciled the equality of

opportunity with the directive principles of development of Scheduled Tribes, Scheduled Castes and other weaker sections of the society.

However, the limitations set up by the Court were overcome by the Government by adding Articles 16(4A) and (4B) to the Constitution. But the Court was conscious enough to notice the fact that such untrammelled power in the hands of government without any limitations would wreak havoc among the members of the general category. Therefore, certain constitutional limitations were set out by the Court through its decision in *M. Nagaraj* before any reservation under Article 16(4A) could be brought into force. This was the collection of quantifiable data relating to "backwardness", "inadequacy of representation" and the impact of the reservation policy on the overall efficiency. This was laid down as a categorical imperative and without such exercise, the reservation can be struck down as violative of Articles 14, 16 and 335 of the Constitution.

However, the decision in *Jarnail Singh* which negated the need for collection of quantifiable data pertaining to "backwardness" of SCs and STs can have serious consequences. Such a decision was based on the observation of the nine-judge bench *Indra Sawhney* that the SCs and STs are permanently backward. While this certainly might have been the case in 90s, it is clearly not in 2020. The submission that a member of SC or ST who reaches a higher post no longer has a taint of untouchability or backwardness was rejected in *Jarnail Singh* which is blatantly wrong. For example- If a reserved category candidate becomes an IAS Officer, he has obviously risen in his status and clearly does not have a taint of untouchability or backwardness anymore.



Even the SCs and STs have risen in the social strata and cannot be deemed to be permanently backward. Attaching permanent backwardness to them would mean attaching the historical social stigma of backwardness on the basis of caste. The purpose of reservation is not to perpetuate the caste system but to transcend it. Therefore, collection of data pertaining to backwardness should still remain a constitutional mandate even for the SCs and STs while providing for reservation in promotion. This argument gains even more importance because reservation in promotion is not a fundamental right. It is an enabling provision which must come into action only after fulfilling all the necessary conditions lest adverse consequences occur.

It is an obvious fact that a person belonging to general category and a person belonging to reserved category working on the same post can do only equal things for their well-being. It is not the case that the general category is in anyway treated specially in comparison to the reserved category candidate. Rather, it is the opposite since the reserved category candidates have the special provision of reservation at their disposal. Therefore, once they enter the services under the state, further promotion should purely be based on merit since both the candidates have equal resources at their disposal. It is a fact that reserved category candidates can and they do perform better than the general category candidates and occupy posts against the general seats and not the reserved ones. Therefore, there is no reason why such candidates should be allowed to be promoted to higher posts only on the basis of merit. Also, even at the entry level, like the OBCs, the creamy layer among the SCs and STs

should be excluded from the benefit of reservation so that the actually backward SCs and STs can take advantage of the beneficial provision.

Recently, in *Chebrolu Leela Prasad Rao and Ors. v. State of A.P. and Ors.*<sup>24</sup>, a judgement delivered by the Apex Court on 22<sup>nd</sup> April, 2020, the Supreme Court while observing that the 'creamy layer' among the SCs and STs are taking all the benefits of reservation, called for a revision of the Presidential Lists under Articles 341 and 342 of the Constitution. This observation was made by a 5-judge bench of the Supreme Court while holding 100% ST reservation provided by the erstwhile State of Andhra Pradesh in Scheduled Areas is unconstitutional. It was observed that:

*By now, there are affluents and socially and economically advanced classes within Scheduled Castes and Scheduled Tribes. There is voice by deprived persons of social upliftment of some of the Scheduled Castes/Tribes, but they still do not permit benefits to trickle down to the needy. Thus, there is a struggle within, as to worthiness for entitlement within reserved classes of scheduled castes and scheduled tribes and other backward classes.*

The times have changed and so has the condition of SCs and STs. They are educationally, economically and socially stronger. When creamy layer has emerged among the SCs and STs, it is evident that the reservation policies need to be revisited, especially with regard to reservation in promotion. Collection of numerical data on their backwardness which helps the state in forming an opinion is a necessity without which undue benefits would be awarded to

<sup>24</sup> 2020 SCC OnLine SC 83.



the SCs and STs and other weaker sections of the society. Also, it is time to give more regard to efficiency so that the Public Sector grows and develops and does not lag behind in contributing to the economic development of the nation.

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