

## **BRIEF NOTE ON RESERVATION FOR SCHEDULED CASTES AND SCHEDULED TRIBES –IMPORTANT CONSTITUTIONAL PROVISIONS, AMENDMENTS AND COURT CASES**

1. **Nodal Departments/Ministries for the Development of SCs and STs**
  - 1.1 **Reservation in Services and Posts:** Department of Personnel & Training is responsible for implementation of policies of reservation in services and posts under the Central Government for Scheduled Castes, Scheduled Tribes, Other Backward Classes, Economically Weaker Sections and Persons with Disabilities (PwDs).
  - 1.2 **Social, Educational and Economic Empowerment:** Department of Social Justice and Empowerment, Ministry of Social Justice and Empowerment is the nodal Department for the overall policy, planning and coordination of programmes including special schemes aimed at social, educational and economic empowerment of SCs e.g. scholarships, hostels, residential schools, skill training, concessional loans and subsidy for self-employment, etc.
  - 1.3 **Ministry of Tribal Affairs:** Ministry of Tribal Affairs is the nodal Department for the overall policy, planning and coordination of programmes including special schemes aimed at social, educational and economic empowerment of STs e.g. scholarships, hostels, skill training, concessional loans and subsidy for self-employment, etc.
  - 1.4 **Department of Disability Affairs:** Department of Disability Affairs is the nodal Department for the overall policy, planning and coordination of programmes including special schemes aimed at social & economic empowerment and welfare of Persons with Disabilities.

2. **Constitutional and Legal Provisions on Reservation in Services and Posts**

Objective of providing reservations to the Scheduled Castes(SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs) in services is not only to give jobs to few persons belonging to these communities, but also aims at empowering them and ensuring their participation in the decision making process of the State. The Constitution has, therefore, made provisions for providing equality of opportunity to them in the matter of public employment. Clauses (4) and (4A) of Article 16 of the Constitution provide for reservation in appointments to posts and services in favour of backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

3. **Implementation of Post based Roster in reference of the Supreme Court judgment in the case of R. K. Sabharwal Vs. State of Punjab**

Reservation till 01.07.1997 was computed on the basis of number of vacancies to be filled. The Supreme Court in the case, titled R. K. Sabharwal Vs. State of Punjab, held that the reservation should be determined on the basis of number of posts in the cadre and not on the basis of vacancies. Accordingly, post based reservation was introduced w.e.f. 02.07.1997. The basic principle of post based reservation is that the number of posts filled by reservation for any category in a cadre should be equal to the quota prescribed for that category. Prior to introduction of post based reservation, there was a provision of exchange of reserved posts between SCs and STs. After implementation of the post based reservation such exchange is no more permissible.

**4. Adequate reservation, not proportional representation- Extent of reservation as on date**

A Nine judge Bench of the Hon'ble Supreme Court, in its judgment dated 16.11.1992 in the matter of 'Indra Sawhney Vs. Union of India [WP(C) No. 930/1990]', inter-alia, observed that clause (4) of Article 16 speaks of adequate representation and not of proportionate representation. The Apex Court has held that it is not possible to accept the theory of proportionate representation though the proportion of population of Backward Classes to the total population would certainly be relevant and held that the power conferred by clause (4) of article 16 should be exercised in a fair manner and within reasonable limits so that reservation does not exceed 50%. At present, reservation in case of direct recruitment on all India basis by open competition is 49.5% (i.e. 15% for SCs, 7.5% for STs and 27% for OBCs) and reservation in case of direct recruitment on all India basis otherwise than by open competition is 50% (i.e. 16.66% for SCs, 7.5% for STs and 25.84% for OBCs).

**5. Reservation in promotion struck down in Indira Sawhney case - 77<sup>th</sup> (Seventy Seventh) Amendment**

**5.1.** The Hon'ble Supreme Court, in the case of 'Indra Sawhney vs. Union of India and Ors.', *inter-alia*, held that reservation in promotion is *ultra-virus*, as much as, there is no provision in the Constitution to provide for reservation in promotions. However, it continued the provision of reservation in promotion to Scheduled Castes and Scheduled Tribes for five years from the pronouncement of the judgment i.e. upto 15.11.1997. Thus the reservation for Scheduled Castes and Scheduled Tribes after 15.11.1997 would have ceased to exist. In order to continue reservation in promotion beyond 15.11.1997, the **77<sup>th</sup> Amendment** was made to incorporate clause (4A) in Article 16 of the Constitution. The Statement of Objects and Reasons appended to the Bill leading to the enactment of Constitution (Seventy Seventh Amendment) Act, 1995 stated that the object of the incorporation of Article 16 (4A) was to continue the then existing dispensation relating to reservation in promotion.

**5.2.** The 77<sup>th</sup> amendment inserted Article 16(4A) in the Constitution provides as under:

*"(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."*

**6. DoPT OM dated 13.08.1997**

Accordingly, with Cabinet approval, the OM, dated 13.08.1997, was issued to convey the decision of the Government to continue the reservation in promotion for the SCs/STs in services/ posts under the Central Government beyond 15.11.1997, till such time the representation of each of the above two categories, in each cadre reaches the prescribed percentages whereafter the representation in promotion shall be continued to be maintained to the extent of the prescribed percentages for the respective categories.

## 7. Applicability at 'Reservation in Promotions'

Reservation to the members of the Scheduled Castes and the Scheduled Tribes is provided in the matter of promotion when promotions are made:

(a) Through Limited Departmental Competitive Examination in Group B, Group C and Group D posts;

(b) By seniority cum fitness from Group B post to the lowest a Group A post or within Group B, Group C and Group D posts

However, reservation in promotion is not given in the grades in which the element of direct recruitment, if any, exceeds 75 per cent [36012/17/88-Estt.(SCT) dated 25/4/1989].

## 8. Backlog Vacancies to be treated as a separate class of vacancies - 81<sup>st</sup> (Eighty First) Amendment

8.1. Any vacancy/vacancies which was/were earmarked reserved in an earlier recruitment year but could not be filled in the previous attempt and remained vacant is/are treated as backlog reserved vacancy/vacancies in the subsequent recruitment year(s).

8.2. The Supreme Court, in the case of 'Indira Sawhney Vs Union of India', *inter-alia* held that the number of reserved vacancies in a year in any cadre, including backlog reserved vacancies, should not exceed 50 per cent of the total number of vacancies of the year.

8.3. In order to overcome the limitation imposed by the Judgement of the Supreme Court, the 81<sup>st</sup> (Eighty First ) Amendment was made to the Constitution, whereby Clause (4B) was incorporated in Article 16 of the Constitution. Clause 16 (4B) reads as follows:-

*"Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause (4) or Clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year."*

8.3. After the above mentioned amendment to the Constitution, Department of Personnel & Training issued O.M. No. 36012/5/97-Estt (Res) Vol.II, dated 20.7.2000, laying down that the backlog reserved vacancies would be treated as a separate and distinct group and would not be considered together with the reserved vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation on total number of vacancies of that year. In other words, the ceiling of 50% on filling up of reserved vacancies would apply only on the reserved vacancies pertaining to that year in which the said vacancies arise and the backlog reserved vacancies of earlier years would be treated as a separate and distinct group and would not be subject to any ceiling.

## **9. Vinod Kumar Vs Union of India and 82<sup>nd</sup> (Eighty Second) Amendment**

The Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of relaxation in qualifying marks and standards of evaluation in the matters of reservation in promotion. The Supreme Court, in its judgment, dated 1-10-1996, in the case of 'S. Vinod Kumar Vs. Union India' held that *such relaxations in matters of reservation in promotion were not permissible under article 16(4) of the Constitution in view of the command contained in article 335 of the Constitution*. The Apex Court also held that the law on the subject of relaxations of qualifying marks and standards of evaluation, in matters of reservation in promotion, is the one laid down by the nine-judge Constitution Bench of the Supreme Court in the case of 'Indira Sawhney and others Vs. Union of India' and others. Para 831 of Indira Sawhney judgment also held that such relaxations, is not permissible under article 16(4) in view of the command contained in article 335 of the Constitution. In order to implement the judgments of the Supreme Court, such relaxations had to be withdrawn with effect from 22.07.1997. In view of the adverse impact of the order, dated 22.07.1997, on the interests of Scheduled Castes and Scheduled Tribes, the 82<sup>nd</sup> (Eighty Second) Amendment was made to the Constitution whereby in Article 335 of the Constitution, the following proviso was inserted:

*"Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State".*

## **10. Virpal Singh Chauhan Vs. UOI and Ajit Singh Janjua Vs. State of Punjab - 85th (Eighty-Fifth) Amendment – Consequential Seniority.**

**10.1.** The Hon'ble Supreme Court in the case of Indra Sawhney & Ors. Vs. Union of India & Ors, reported in 1992 Supp.(3) SCC 217, has held that Article 16(4) of the Constitution does not permit reservations in the matter of promotion. Thereafter, the Constitution (Seventy-Seventh) Act, 1995 came into force on 17.6.1995 (as explained in para 8 above). Later on, the Hon'ble Supreme Court in the cases of Union of India & Ors. Vs. Virpal Singh Chauhan & Ors., reported in (1995) 6 SCC 684, Ajit Singh Janjua & Ors, Vs. State of Punjab & Ors. (Ajit Singh-I), reported in (1996) 2 SCC 715 and & Ors. Vs. State of Punjab & Ors. (Ajit Singh-II), reported in (1999) 7 SCC 209, introduced the catch-up rule and did away with the principle of consequential seniority and held that when the senior general candidate is promoted, he will regain his seniority vis-a vis his junior reserved candidate, promoted to the higher post earlier than the general candidate as a result of reservation policy. It was also held that consequential seniority on promotion post is not covered by Article 16(4A).

**10.2.** The Government servants belonging to the Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation. The above judgments of the Supreme Court would have adversely affected the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes category in the matter of seniority on promotion to the next higher grade. In order to remove this inconsistency and to dilute & repeal the catch

up principle, the Parliament of India, again amended the Constitution of India [85<sup>th</sup> **(Eighty-Fifth) Amendment**] whereby the term consequential seniority was added in Article 16(4A).

**10.3.** The amended Article 16 (4A) provides as under:-

*Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, **with consequential seniority**, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.*

**10.4. Apex Court judgment, dated 19.10.2006, on the legality off the above constitutional Amendment in the case of M.Nagaraj & Others Vs. Union of India & Ors.**

The Apex Court ruled as follows:

*"The impugned constitutional amendments by which Articles 16(4A) and 16(4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one hand and SCs and STs on the other hand as held in Indra Sawhney, the concept of post-based Roster with in-built concept of replacement as held in R.K. Sabharwal.*

*We reiterate that the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.*

*However, in this case, as stated, the main issue concerns the "extent of reservation". **In this regard the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.***

*Subject to above, we uphold the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-First*

*Amendment) Act, 2000, the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act, 2001.*

*We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate bench in accordance with law laid down by us in the present case.*

*Reference is answered accordingly”.*

## **11. Own Merit in reservation in promotion**

- 11.1.** The concept of 'own merit' was introduced, vide Department of Personnel and Training's Office Memorandum No. 36028/17/2001-Estt (Res), dated 11.07.2002. The O.M dated 11.07.2002, inter- alia, provided that the SC/ST candidates appointed on their own merit and not owing to reservation or relaxation of qualifications will not be adjusted against the reserved points of the reservation roster. They will be adjusted against unreserved points. However, the said O.M did not clarify the following two points:
- (i) The date of effect of the O.M No. 36028/17/2001-Estt (Res), dated 11.07.2002.
  - (ii) Whether the orders will apply in case of promotion made by non-selection method.
- 11.2.** To clarify these above two points, an O.M No. 36028/17/2001-Estt (Res), dated 31.01.2005, was issued by the Department of Personnel and Training, which clarified that OM dated 11.07.2002 be applicable w.e.f. 11.07.2002. It also clarified that in case of promotions by non-selection, promotions are made on the basis of seniority-cum-fitness and the concept of own merit is not involved in such promotions.
- 11.3.** The O.M. dated 31.01.2005 was challenged in the Hon'ble Central Administrative Tribunal, Madras Bench, in O.A No. 900/2005 [S. Kalugasalamoorthy vs Union of India & Ors]. The Hon'ble CAT quashed the O.M dated 31.01.2005, and held that when a person is selected on the basis of his own seniority, the scope of considering and counting him against quota reserved for SCs does not arise. The Judgment of CAT, dated 14.9.2006, was challenged in the Hon'ble High Court of Madras which upheld the decision of the CAT Madras, vide judgment, dated 20.08.2009.
- 11.4.** After consultation with D/o of Legal Affairs, the O.M No. 36012/45/2005-Estt (Res), dated 10.08.2010, was issued to withdraw the Office Memorandum No. 36028/17/2001-Estt(Res), dated 31.01.2005, and to, *inter-alia*, clarify that SC/ST candidates appointed by promotion on their own merit and seniority, and not owing to reservation or relaxation of qualifications, will be adjusted against unreserved points of reservation roster, irrespective of the fact whether the promotion is made by selection method or non-selection method. It was also clarified that the OM dated 10.08.2010 will take effect from 2.7.1997, the date on which post based reservation was introduced.

**12. Punjab & High Court's Decision on Own Merit in Jarnail Singh and Ors. Vs. Lachmi Chand Gupra & Ors.**

- 12.1. The said O.M, dated 10.08.2010, was challenged in the Hon'ble High Court of Punjab & Haryana, in CWP No. 13218/2009 [Shri Lachhmi Narain Gupta & Ors Vs Jarnail Singh & Ors]. The Hon'ble High Court Punjab & Haryana, vide judgment, dated 15.07.2011, quashed the O.M dated 10.8.2010 stating as under:

*"In the absence of any survey with regard to inadequacy as also concerning the overall requirement of efficiency of the administration where reservation is to be made alongwith backwardness of the class for whom the reservation is required, it is not possible to sustain these notifications. Accordingly, it has to be held that these notifications suffers from violation of the provisions of Articles 16(4A), 16(4B) read with Article 335 of the Constitution as interpreted by the Constitution Bench in M. Nagaraj's as well as in Suraj Bhan Meena's case."*

- 12.2. Union of India through Department of Revenue has filed an SLP (C) No. 6915/2014 which has been clubbed with SLP(C) No. 30621/2011, filed by Shri Jarnail Singh in the matter. The Hon'ble Supreme Court, vide order, dated 03.02.2015, stated as under:

*".... Status quo existing as on today in respect of the promotional matters that are covered by the impugned judgment shall be maintained till the next date of hearing".*

- 12.3. Subsequently, a Contempt petition was filed by the Samta Andolan Samiti alleging that DoPT and Ministry of Railways have reportedly implemented the provisions of OM, dated 10.08.2010, inspite of the abovesaid Interim Order dated 03.02.2015.
- 12.4. In order to preclude any interim order in the contempt case, the Ld. Solicitor General, in the hearing held in Supreme Court on 29.09.2016, has undertaken that till such time the main matter along with the Contempt Petition is decided, no further promotions of reserved category persons to unreserved posts will be made based on the DOPT O.M. dated 10.08.2010. Accordingly, instructions were issued by the Establishment (Reservation) Division to all departments, vide O.M.36012/11/2016-Estt.(Res.), dated 30.09.2016.

**13. Delhi High Court Judgement dated 23.08.2017 on 'Reservation in Promotion'**

- 13.1. In WP(C) 3490/2010 & CM No. 6956/2010, filed by All India Equality Forum Vs Union of India, the Hon'ble High Court, Delhi vide para 15 of its judgment dated 23.08.2017, has held as under:-

*"...The impugned OM No. 36012/18/95-Estt.(Res.) Pt. II dated 13.08.1997, issued by DOPT, is quashed and set aside. The respondents are restrained from granting any reservation, in promotion, to Scheduled Castes or Scheduled Tribes, in exercise of the power conferred by Article 16(4A) of the Constitution of India, without, in the*

*first instance, carrying out the necessary preliminary exercise of acquiring quantifiable data indicating inadequacy of representation, of the said categories, in service, and evaluating the situation by taking into consideration the said data, along with the competing considerations of backwardness and overall efficiency in administration, and arriving at an empirical decision on the basis thereof.”*

- 13.2 An SLP vide No. 31288/2017 has been filed by this Department against the judgment, dated 23.08.2017, of the Hon'ble Delhi High Court. This SLP has been tagged with the SLP No. 30621/2011 of Jarnail Singh.
- 13.3. Hon'ble Supreme Court, vide order, dated 14.11.2017, in CA No. 4562-4564/2017, in the matter of the State of Tripura & Ors. Vs Jayanta Chakraborty & Ors and vide order, dated 15.11.2017 in SLP(C) No. 28306/2017 in the matter of the State of Maharashtra & Anr Vs Vijay Ghogre & Ors stated that the case of M. Nagaraj may be referred to larger Constitutional Bench to examine if the M. Nagaraj judgement needs re-examination.
- 14.1 In the mean time, promotion orders by many States were struck down by the Hon'ble Supreme Court, being non compliant with Nagaraj Judgement. Promotions were further withheld because of orders of the Hon'ble High Court of Delhi.
- 14.2 Hence, there was a big hue and cry. Promotions were withheld and People were retiring without getting benefit of promotion. As a result, an interim application was filed, requesting Supreme Court to allow holding of DPC and effect promotions. The Hon'ble Supreme Court, in the matter related to I.A. No. 25195/2018 in SLP (C) No. 30621/2011 (Jarnail Singh & Ors Vs Lachhmi Narain Gupta & Ors), on 17.05.2018 has passed the following Order:

*“It is directed that the pendency of this Special Leave Petition shall not stand in the way of Union of India taking steps for the purpose of promotion from ‘reserved to reserved’ and ‘unreserved to unreserved’ and also in the matter of promotion on merits. Post for further orders after summer vacation.”*

15. In another interim Order, dated 05.06.2018, in SLP No. 31288/2017, the Hon'ble Supreme Court stated as follows:

*“It is made clear that the Union of India is not debarred from making promotions in accordance with law, subject to further orders, pending further consideration of the matter. Tag to SLP (C) No. 30621/2011.”*

16. Consequently, DoPT vide Office Memorandum No. 36012/11/2016- Estt.(Res-I) {Pt-II}, dated 15.06.2018, issued instructions to all Ministries/Department to carry out promotions in accordance with the directions of the Hon'ble Supreme Court dated 17.05.2018, in the matter related to SLP (C) No. 30621/2011 and interim order dated 05.06.2018 in the matter related to SLP(C) No. 31288/2017.

**17. Decision in Jarnail Singh Case - Whether it should be referred to Larger Bench**

The Constitutional Bench on 26.09.2018, held that it is not required to be referred to Larger Bench and that the State is not required to collect

quantifiable data on the backwardness of SCs/STs. However, it is required to collect data on the inadequacy of representation and to see that the efficiency is not affected. The major observations in the judgement are summarised below:-

(i) “..... we have confined arguments on two points which requires serious consideration. The two points are (a) whether State has to collect quantifiable data as observed in Nagaraj judgment, which is contrary to nine-judge Bench in Indra Sawhney Vs Union of India and (b) whether creamy layer concept will be applicable in the case of SCs/STs.” **(Para 3 of the judgment)**

(ii) “ .... When Nagaraj applied the creamy layer test to SCs and STs in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16 (4-A) and 16(4-B), it did not in any manner interfere with Parliament’s power under Article 341 or 342. We are, therefore, clearly of the opinion that this part of the judgment does not need to be revised.....”. **(Para 17 of the judgment).**

(iii) “..... Thus, we may make it clear that quantifiable data shall be collected by the State, on the parameters as stipulated in Nagaraj on the inadequacy of representation, which can be tested by the Courts. We may further add that the data would be relatable to the concerned cadre. “ **(Para 17 of the judgment)**

(iv) “... According to us, Nagaraj has wisely left the test for determining adequacy of representation in promotional posts to the States for the simple reason that as the post gets higher, it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of SCs and STs in promotional posts, as one goes upwards. This is for the simple reason that efficiency of administration has to be looked at every time promotions are made. .... For this reason, we make it clear that Article 16 (4-A) has been couched in language which would leave it to the States to determine adequate representation depending upon the promotional post that is in question.” **(Para 20 of the judgment)**

(v) “.... However, the conclusion in Nagaraj that the State has to collect quantifiable data showing backwardness of the SCs and STs being contrary to the nine-judge Bench in Indra Sawhney is held to be invalid to this extent “**(Para 21 of judgment).**

It was also held that the State is required to see the efficiency of administration while making provision for reservation.

## **18. Supreme Court judgment dated 27.8.2015 and 9.2.2017 in the case of S.Paneerselvam and B.K.Pavitra - Consequential Seniority issue**

**18.1.** Subsequent to the judgment of the Supreme Court in M. Nagaraj case, the enactments/policy of various State Governments on the issue of consequential seniority to SC/ST candidates after fast track promotion through reservation/roster points were decided by the Supreme Court in the following two cases:

- 1) S.Paneerselvam and others Vs. Government of Tamil Nadu vide Supreme Court Judgement dated 27.8.2015.

2) B.K. Pavitra and others Vs. UOI and others vide Supreme Court Judgment dated 9.2.2017

**18.2.** Both the judgements of the Supreme court, in the cases of S. Paneerselvam as well as B.K. Pavitra are based on the law laid down by the Supreme Court in M. Nagaraj i.e., the State has to collect quantifiable data indicating 'backwardness of the class', 'inadequacy of representation' and 'overall efficiency of the State administration under Article 335. In other words, in the absence of such data, the State cannot provide 'consequential seniority' to those who are promoted against reservation/roster points.

**19. Hon'ble Supreme in the case of B.K. Pavitra had held as under:-**

*"It is clear from the above discussion that exercise for determining inadequacy of representation', 'backwardness' and overall efficiency', is a must for exercise of power under Article 16(4A). Mere fact that there is no proportionate representation in promotional posts for the population of SCs and STs is not by itself 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. It is for the State to place material on record that there was compelling necessity for exercise of such power and decision of the State was based on material including the study that overall efficiency is not compromised.....In absence of exercise under Article 16(4A), it is the catch up'rule which is fully applies. It is not necessary to go into the question whether the concerned Corporation had adopted the rule of consequential seniority."*

**20. B.K. Pavitra and Ors vs. The Union of India and Ors (Pavitra -2)**

In B.K. Pavitra and Ors. Versus The Union of India and Ors.( to be referred to as B.K. Pavitra 2), the validity of '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' was challenged on the grounds that the state legislature has virtually re-enacted the earlier legislation without curing its defects. Further, it is not open to legislative body governed by the parameters of a written constitution to override a judicial decision without taking away its basis. The State Government defended its legislation on the grounds that it has fulfilled the constitutional requirements of collecting quantifiable data before it enacted the law. The Hon'ble Supreme Court concluded its judgement in the following manner:

*".....we have come to the conclusion that the challenge to the constitutional validity of the Reservation Act 2018 is lacking in substance. Following the decision in B K Pavitra I, the State government duly carried out the exercise of collating and analysing data on the compelling factors adverted to by the Constitution Bench in Nagaraj. The Reservation Act 2018 has cured the deficiency which was noticed by B K Pavitra I in respect of the Reservation Act 2002. The Reservation Act 2018 does not amount to a usurpation of judicial power by the state legislature. It is Nagaraj and Jarnail compliant. The Reservation Act 2018 is a valid exercise of the enabling power conferred by Article 16 (4A) of the Constitution." ( Para 144)*

**21. Interim Order dated 15.04.2019**

**21.1.** In a hearing on 15.04.2019 in respect of SLP No. 31288/2017 related to Reservation in promotion and SLP No. 31621/2011 relating to own merit, alongwith other tagged cases, the Hon'ble Supreme Court made the following Order:

*“Issue notice in the fresh matters. Until further orders, status quo, as it exists today, shall be maintained. List all the matters on 15.10.2019.”*

**21.2.** In view of the above order of the Hon'ble Supreme Court, an application has been filed before the Hon'ble Court seeking clarification whether in the light of the Interim order dated 15.4.2019 the Government can go ahead with promotion.

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