

PROCEEDINGS OF THE GOVERNMENT OF KARNATAKA

Subject: Implementation of the judgment dated 09.02.2017 of the Hon'ble Supreme Court of India in Civil Appeal No. 2368/2011 & connected Civil Appeals– B.K. Pavitra and Others-vs-Union of India and Others, regarding revision of seniority lists.

Read:

1. Government Order No. DPAR 29 SBC 1977, dated: 27.4.1978.
2. O.M. No. DPAR 29 SBC 77, dated 01.06.1978.
3. The judgment dated: 16.11.1992 of the Hon'ble Supreme Court of India in Indra Sawhney Vs Union of India.
4. Judgment dated: 16.09.1999 of the Hon'ble Supreme Court of India in Ajith Singh (II) Vs State of Punjab and others.
5. Judgment dated: 01.12.2000 of the Hon'ble Supreme Court in Badappanavar and others Vs State of Karnataka and Others.
6. 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.
7. Judgment dated: 19.10.2006 of the Hon'ble Supreme Court of India in M. Nagaraj and Others Vs Union of India and others.
8. Judgment dated: 9.2.2017 of the Hon'ble Supreme Court of India in B.K. Pavitra Vs Union of India and others.

MAHANTAGOUD T PATIL.SWCM KSPSTA

Preamble:

The Hon'ble Supreme Court, in its judgment dated 09-02-2017, in the case of B.K. Pavitra & Ors. -vs- Union of India & Ors. – Civil Appeal No. 2368/2011 & connected Civil Appeals; ['Pavitra case' – in short], read at 8 above has set aside Sections 3 and 4 of the "Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (To Posts in the Civil Services of the State) Act, 2002" ['2002 Act' –in short] which provided for consequential seniority to employees belonging to the Scheduled Castes and Scheduled Tribes and directed the State Government, among others, to revise the seniority list in the light of this judgment within three months from the date of judgment and to take further consequential action accordingly within the next three months.

2. In its judgements relating to the State of Karnataka in the case of M.G. Badappanavar, M. Nagaraj and B.K.Pavitra , read at (5), (7) and (8) above, the Hon'ble Supreme Court, has, interalia relied upon its judgements in Indra Sawhney and Ajit Singh (II) read at 3 and 4 above.

3. The policy of reservation in promotion in the State Civil Services was introduced by the Order read at (1) above, with effect from 27th April 1978. For the implementation of this policy, detailed instructions along with a roster of 33 points were also given. The relevant portion of the order is reproduced below :-

"2. Government are accordingly pleased to direct that there shall be reservations for persons belonging to Scheduled Castes and Scheduled Tribes at 15 percent and 3 percent respectively of vacancies to be filled by promotion in all the cadres upto and inclusive of the lowest category of Class I posts in which there is no element of direct recruitment and if there is an element of direct recruitment, such element of direct recruitment does not exceed 66 2/3 percent.

Paragraph 7 of the said order provided for determination of seniority, based on the length of service in cadre to which promoted. The same is reproduced below;

"7. Inter-se seniority amongst persons promoted on any occasion shall be determined in accordance with Rule 4 or 4 A (as the case may be) of the Karnataka Government servants (Seniority) Rules, 1957."

4. Further by the O.M. dated 01-06-1978, read at (2) above, detailed instructions were issued to implement the policy of reservation in promotion and also to determine the inter-se seniority of employees belonging to reserved categories and general category along with illustrations.

5. The Hon'ble Supreme Court in its judgment dated 16.11.1992 in the case of Indra Sawhney read at (3) above, held that Article 16(4) of the Constitution of India provided for reservation in direct recruitment only and reservation in promotion was impermissible. It was further held that wherever the policy of reservation in promotion was already in vogue, it may be continued for a further period of five years.

6. Thereafter Clause (4A) in Article 16 was inserted in the Constitution of India by "The Constitution (77th Amendment) Act, 1995 dated, 17.06.1995, which reads as follows:

"(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."

7. Subsequently, the Hon'ble Supreme Court while dealing with the issues relating to the seniority of reserved category promotees in its judgment dated: 16.09.1999 in Ajith Singh (II) read at (4) above, framed the following issues for consideration:

"13. On the above contentions, the following four main points arise for consideration:

- (1) Can the roster-point promotees (reserved category) count their seniority in the promoted category from the date of their continuous officiation vis-a`-vis general candidates who were senior to them in the lower category and who were later promoted to the same level?*
- (2) Have Virpal, Ajit Singh been correctly decided and has Jagdish Lal been correctly decided?*
- (3) Whether the "catch-up" principles contended for by the general candidates are tenable?*
- (4) What is the meaning of the "prospective" operation of Sabbarwal and to what extent can Ajit Singh be prospective?"*

8. Dealing with these points at length, the Hon'ble Supreme Court came to the following conclusions; [extracts of relevant paras are reproduced herein]:

" Our conclusions on Points (1) and (2)

77. We, therefore, hold that the roster-point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, – vis-a`-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the

lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate – he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level. We shall explain this further under Point 3. We also hold that Virpal and Ajit Singh have been correctly decided and that Jagdish Lal is not correctly decided. Point 1 and 2 are decided accordingly.

Point(3)

78. During the discussion under this “catch up” point – for purposes of convenience, – we take the example of the cadres in Ajit Singh i.e. there is roster-point promotion for reserved candidates for promotion from Level 1 to Level 2 and from Level 2 to Level 3. There is no roster for promotion from Level 3 to Level 4.

Two “catch-up” rules contended for by general candidates

79. Now, as stated earlier, the counsel for the general candidates argued for acceptance of two catch-up rules.

Extreme “catch-up” rule

[80. Rejected]

Other “catch-up” rule

81. As accepted in Virpal (SEE 1995(6)SCC 684 at 702) and Ajit Singh (SEE 1996(2) SCC at p.729), we hold that in case any senior general candidate at Level 2 (Assistant) reaches Level 3 (Superintendent Grade II) before the reserved candidate (roster –point promotee) at Level 3 goes further up to Level 4 in that case the seniority at Level 3 has to be modified by placing such a general candidate above the roster promotee, reflecting their inter-se seniority at Level 2. Further promotion to level 4 must be on the basis of such a modified seniority at Level 3, namely, that the senior general candidate of Level 2 will remain senior also at Level 3 to the reserved candidate, even if the latter had reached Level 3 earlier and remained there when the senior general candidate reached that Level 3. In cases where the reserved candidate has gone up to Level 4 ignoring the seniority of the senior general candidate at Level 3, seniority at Level 4 has

to be refixed (when the senior general candidate is promoted to Level 4) on the basis of when the time of reserved candidate for promotion to Level 4 would have come, if the case of the senior general candidates was considered at Level 3 in due time. To the above extent, we accept the first part of the contention of the learned counsel for the general candidates. Such a procedure in our view will properly balance the rights of the reserved candidates and the fundamental rights guaranteed under Article 16(1) to the general candidates.”

“85. It is true that the roster-point promotee who has reached the promotional Level 3 even if he is not entitled to seniority would have gained considerable “experience” at that level. That experience is, no doubt, of considerable relevance in considering his case for further promotion to Level 4. But, at the same time, it is to be noted that the general candidates had longer experience at Level 1 and Level 2 and have come up to Level 3 by way of competition among the general candidates at two stages. The said longer “experience” gained by them at lower Levels 1 and 2 and the manner in which they have reached the Level 3 to which the reserved candidates had reached earlier, are also relevant factors. The quality of the experience of these groups also needs to be kept in view. The above principle would be an equitable balancing of the “experience” of the candidates at various levels. It will be appropriate for the Government of India or the State Government, as the case may be, to formulate guidelines by way of administrative orders or by way of rules in this behalf. Point(3) is disposed of accordingly.”

Prospectivity of Sabharwal

“(i) What Sabharwal said in regard to “prospectivity”:

87. Before Sabharwal was decided on 10.2.1995, it appears that, in several services, the roster was initially put in operation and promotions at all the roster points were filled up. But the roster was once again operated on future vacancies, even though all the required reserved candidates were in position at the promotional level. It was not realised that once the roster points were all filled, the roster had served its purpose and fresh members of the reserved classes could claim promotional posts only if any promotional posts already filled by the reserved candidates fell vacant. This misapplication of the roster came to be removed for the first time on 10.2.95

when Sabharwal was decided. Obviously, by that time several reserved candidates had got promotion in excess of their quota because of the wrong "re-operation" of the roster points. If the law declared in Sabbarwal were to be treated as retroactive as is the normal position whenever the law is declared by this Court, it would have resulted in reversions of several officers of the reserved classes as their promotions before 10.2.95 by the fresh operation of the roster as aforesaid was wholly unjustified. This Court in Sabbarwal therefore tried to prevent such reversions and declared (p.753 of SCC para 11) as follows at the end of the judgment:

"We, however, direct that the interpretation given by us to the working of the roster and our findings on this point shall be operative prospectively".

Prospectivity of Ajit Singh:

90. Coming to the 'prospectivity' of Ajit Singh, decided on 1.3.96 the question is in regard to the seniority of the reserved candidates at the promotional level where such promotions have taken place before 1.3.96.

92. Where, before 1.3.96, i.e. the date of Ajit Singh's judgment, at the level 3, there were reserved candidates who reached there earlier and also senior general candidates who reached there later, (but before the reserved candidate was promoted to level 4) and when in spite of the fact that the senior general candidate had to be treated as senior at level 3 (in view of Ajit Singh), the reserved candidate is further promoted to level 4 - without considering the fact that the senior general candidate was also available at level 3 - then, after 1.3.96, it becomes necessary to review the promotion of the reserved candidate to level 4 and reconsider the same (without causing reversion to the reserved candidate who reached level 4 before 1.3.96). As and when the senior reserved candidate is later promoted to level 4, the seniority at level 4 has also to be refixed on the basis of when the reserved candidate at level 3 would have got his normal promotion, treating him as junior to the senior general candidate at level 3. *Chander Paul Vs. State of Haryana (1997 (10) SCC 474)* has to be understood in the manner stated above.

93. We hold accordingly on Point 4."

9. The Hon'ble Supreme Court, in its judgment dated 01.12.2000 in the case of M G Badappanavar read at (5) above, in the light of its ruling in Judgement dated: 1.3.1996 in the case of Ajit Singh Januja V.State of Punjab (1996) 2 SCC 715 has interpreted Rules 2, 4 and 4A of the "Karnataka Government Servants' (Seniority) Rules, 1957 and in the matter of determination of seniority of employees promoted on the basis of reservation in promotion and the general candidates as well as retired Government servants has observed as follows:-

"20. In fact, some general candidates who have since retired, were indeed entitled to higher promotions, while in service in first Ajit Singh's case, supra, is to apply, they would, get substantial benefits which were unjustly denied to them. The decision in first Ajit Singh's case, supra, is binding on us. Following the same, we set aside the judgment of the Tribunal and direct that the seniority lists and promotions be reviewed as per the directions given above, subject of course to the restriction that those who were promoted before 1-3-96 on principles contrary to first Ajit Singh's case, supra, need not be reverted and those who were promoted contrary to Sabharwal case, supra case, supra before 10-2-95 need not be reverted. This limited protection against reversion was given to those reserved candidates who were promoted contrary to the law laid down in the above cases, to avoid hardship.

21. We are here adding one more protection to the retired reserved candidates in these cases. Though their seniority is revised at the level of Executive Engineer or above and though they might not have been promoted if the law laid down by this Court in first Ajit Singh's case, supra, and Sabharwal case, supra (as explained in first Ajit Singh's case, supra) were applicable to them at the relevant time, still for purposes of their retiral benefits, the said benefits shall be computed on the basis of the posts factually held by them at the time of retirement and on the emoluments actually drawn by them and not on the basis of the result of any review that is now directed.

22. So far as the general candidates are concerned, their seniority will be restored in accordance with first Ajit Singh's case, supra, and Sabharwal case, supra (as explained in first Ajit Singh's case, supra) and they will get their promotions accordingly from the effective dates. They will get notional promotions but will not be entitled to any arrears of salary on the promotional posts. However, for purposes of retiral benefits, their position in the promoted posts from the notional dates - as per this judgment - will be taken into account

and retiral benefits will be computed as if they were promoted to the posts and drawn the salary and emoluments of those posts, from the notional dates.”

10. Subsequent to these rulings, the Constitution of India was further amended by the Constitution (85th Amendment) Act, 2001 by which in Clause (4A) of Article 16, for the words *“in matter of promotion to any class”* the words *“in matters of promotion, with consequential seniority to any class”* was substituted. This amendment was brought into force with retrospective-effect from 17th day of June 1995.

11. Based on the Constitution (85th Amendment) Act, 2001, the State Government has enacted 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 read at 6 above.

12. In its judgment dated: 19.10.2006, read at (7) above, the Hon'ble Supreme Court of India in M. Nagaraj and Others Vs Union of India and others has held 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 Sawhney⁵, the concept of post-based Roster with in-built concept of replacement as held in R.K. Sabharwal⁸.

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.”

13. Thereafter, the Hon'ble Supreme Court remitted the matter back to the High Court for deciding the question of validity of the 2002 Act. The Petition was renumbered by the High Court as W.P.No.14672/2010. The Hon'ble High Court by its order dated 23.12.2010 upheld the validity of the 2002 Act.

14. Challenging the said order dated 23-12-2010 of the Hon'ble High Court, B.K.Pavitra and others filed the Civil Appeal No.2368 /2011 before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court of India in its judgement dated: 09.02.2017 in Pavitra case read at (8) above has held as follows :-

“In view of the above, we allow these appeals, set aside the impugned judgment and declare 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 to be ultra vires Articles 14 and 16 of the Constitution. The judgment will not affect those who have already retired and will not affect

financial benefits already taken. Consequential promotions granted to serving employees, based on consequential seniority benefit, will be treated as ad hoc and liable to be reviewed. Seniority list may be now revised in the light of this judgment within three months from today. Further consequential action may be taken accordingly within next three months”.

15. In the light of the rulings of the Hon'ble Supreme Court, read above, guidelines are required to be issued. The Government has taken all the relevant aspects into consideration and examined the matter in detail. In the foregoing circumstances, the Government hereby orders as follows.

GOVERNMENT ORDER NO. DPAR 182 SRR 2011, BENGALURU,

DATED:06.05.2017

16. The seniority lists of all cadres in which promotions have been made in accordance with the existing policy of reservation in promotion and the seniority lists of all cadres higher than such cadres shall be reviewed and action taken as under in respect of every cadre:

- (1) The review shall be undertaken with effect from 27-04-1978 and all the promotions made and seniority lists published on or after 27-04-1978 to all the cadres shall be subject to such review.
- (2) As a result of the policy of reservation contained in the Government Order dated 27.4.1978, O.M dated: 01.06.1978 and 2002 Act, read at (1), (2) and (6) above, a junior reserved category employee [JRCE – in short] would have got promotion earlier to a senior general category employee [SGCE – in short]. As and when the SGCE (in the feeder cadre) gets his promotion, his seniority in the cadre to which he is promoted shall be restored and he shall be placed above the JRCE though the JRCE got his promotion earlier as consequential promotions granted to serving employees, based on consequential seniority benefit have to be treated as adhoc as directed by the Hon'ble Supreme Court. In such a case, the date of eligibility to be assigned to a SGCE shall be the date of promotion of the JRCE in accordance with Section 4 read with Section 6 and 9 of the Karnataka State Civil Services (Regulation of Promotion, pay and Pension) Act, 1973.

- (3) On such restoration of seniority, the SGCE shall be deemed to have been promoted with effect from the date his Junior (JRCE) got his promotion earlier and the seniority of the SGCE shall count notionally from that deemed date of promotion.
- (4) Such exercise shall be carried out in respect of every cadre. If by the time the SGCE reaches the higher cadre, the JRCE has already got his promotion to the next higher cadre, the seniority of JRCE in that cadre shall not be altered. However, the exercise, as explained above, shall be repeated when the SGCE is also promoted to the next higher cadre.
- (5) Consequent on review of seniority, while assigning the deemed date of promotion the eligibility and suitability for promotion as on that date of shall be assessed as in the case of normal promotion.
- (6) In the case of serving employees, consequent upon review, if any JRCE does not get deemed date of eligibility in the cadre under review, he shall not be reverted if he has been promoted on the basis of consequential seniority prior to 01-03-1996. Only his position in the seniority list may be refixed. The benefit of consequential seniority which he might have derived after 01-03-1996 shall be subject to review. The post, to which JRCE has to be finally fitted against will be determined after revision of seniority lists of all cadres up to and inclusive of his current cadre is completed.
- (7) In the case of SGCEs, if they have retired and consequent on review if they get a date of eligibility earlier to the actual date of promotion they shall be deemed to have been promoted from such date.
- (8) A JRCE may be considered for promotion to the next higher cadre to which reservation in promotion applies if he has the required qualifying service based on the deemed date of eligibility assigned to him and if he is otherwise eligible.
- (9) When promotions are to be made to a cadre from two or more lower (feeder) cadres, the deemed dates of eligibility to be assigned shall be determined on the basis of the quota prescribed in the rules of recruitment.

- (10) Promotions made against backlog in favour of the employees belonging to the Scheduled Castes and the Scheduled Tribes in accordance with instructions contained in Government Order No. DPAR 10 SBC 97, dated: 24.6.1997 and instructions issued from time to time in this regard shall also be subject to review of seniority lists and assignment of dates of eligibility as above.
- (11) While reviewing the seniority lists as above, the question of determining the dates of eligibility in respect of direct recruits does not arise since their seniority is determined in accordance with Rule 5 of the Karnataka Government Servants' (Seniority) Rules, 1957, keeping in view the instructions contained in the O.M. No. DPAR 48 SSR 75, dated: 5.7.1976.

By Order and in the name of the
Governor of Karnataka

Gayathri.M.R
060517
(Gayathri.M.R)

Under Secretary to Government,
Department of Personnel & Administrative Reforms
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