Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/INHERENT/ORIGINAL JURISDICTION

M A No. 1151 of 2018

In

Civil Appeal No. 2368 of 2011

B K Pavitra and Ors **...Appellants**

Versus

The Union of India and Ors **...Respondents**

With

Review Petition (c) Diary No. 7833 of 2017

With

Review Petition (c) Diary No.10240 of 2017

With

Review Petition (c) Diary No.10258 of 2017

With

Review Petition (c) Diary No.10859 of 2017
With

Review Petition (c) Diary No.12622 of 2017

With

Review Petition (c) Diary No.12674 of 2017

With

Review Petition (c) Diary No.13047 of 2017

With

Review Petition (c) Diary No.14563 of 2017

With

Review Petition (c) Diary No.16896 of 2017

With

M A No. 1152 of 2018

In

Civil Appeal No. 2369 of 2011

With

Writ Petition (c) No. 764 of 2018

With

Writ Petition (c) No. 769 of 2018

With

Writ Petition No.791 of 2018

With

Writ Petition (c) No.823 of 2018

With

Writ Petition (c) No. 827 of 2018

With

Writ Petition (c) No. 850 of 2018

With

Writ Petition (c) No.875 of 2018

With

Writ Petition (c) No. 872 of 2018

With

Writ Petition (c) No. 901 of 2018

With

Writ Petition (c) No. 879 of 2018

And

With

Writ Petition (c) No. 1209 of 2018

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J.

This judgment has been divided into sections to facilitate analysis. They are

A The constitutional challenge

B The constitutional backdrop to reservations in Karnataka

C Submissions

- C.I Petitioners
- C.2 Submissions for the respondents and intervenors

D Assent to the Bill

E Does the Reservation Act 2018 overrule or nullify B K Pavitra I

- E.I Is the basis of B K Pavitra I cured in enacting the Reservation Act 2018
- E.2 The Ratna Prabha Committee report

F Substantive versus formal equality

- F.I The Constituent Assembly's understanding of Article 16 (4)
- F.2 The Constitution as a transformative instrument

G Efficiency in administration

H The issue of creamy layer

I Retrospectivity

J Over representation in KPTCL and PWD

K Conclusion

A The constitutional challenge

1 The principal challenge in this batch of cases is to 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[1]. The enactment provides, among other things, for consequential seniority to persons belonging to the Scheduled Castes[2] and Scheduled Tribes[3] promoted under the reservation policy of the State of Karnataka. The law protects consequential seniority from 24 April 1978.

2 The Reservation Act 2018 was preceded in time by the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of the Reservation (to the Posts in the Civil Services of the State) Act 2002[4]. The constitutional validity of the Reservation Act 2002 was challenged in **B K Pavitra** v **Union of India**[5], ("**B K Pavitra I**"). A two judge Bench of this Court (consisting of Justice Adarsh Kumar Goel and Justice U U Lalit) held Sections 3 and 4 of the Reservation Act 2002 to be *ultra vires* Articles 14 and 16 of the Constitution on the ground that an exercise for determining "inadequacy of representation", "backwardness" and the impact on "overall efficiency" had not preceded the enactment of the law. Such an exercise was held to be mandated by the decision of a Constitution Bench of this Court in **M Nagaraj** v **Union of India**[6] ("**Nagaraj**").

1 Reservation Act 2018
2 SCs
3 STs
4 Reservation Act 2002
5 (2017) 4 SCC 620
6 (2006) 8 SCC 212

In the absence of the State of Karnataka having collected quantifiable data on the above three parameters, the Reservation Act 2002 was held to be invalid.

3 The legislature in the State of Karnataka enacted the Reservation Act 2018 after this Court invalidated the Reservation Act 2002 in **B K Pavitra I**. The grievance of the petitioners is that the state legislature has virtually re-enacted the earlier legislation without curing its defects. According to the petitioners, it is not open to a legislative body governed by the parameters of a written constitution to override a judicial decision, without taking away its basis. On the other hand, the State government has asserted that an exercise for collecting "quantifiable data" was in fact carried out, consistent with the parameters required by the decision in **Nagaraj**. The petitioners question both the process and the outcome of the exercise carried out by the state for collecting quantifiable data.

B The constitutional backdrop to reservations in Karnataka

4 The present case necessitates that this Court weave through the body of precedent which forms a part of our constitutional jurisprudence on the issue of reservations. In many ways, the issues before the Court are unique. For, in the post **Nagaraj** world which governs this body of law, the State government defends its legislation on the ground that it has fulfilled the constitutional requirement of collecting quantifiable data before it enacted the law. If such an exercise has been carried out, the Court will need to address itself to the standard of judicial review by a constitutional court of a legislation enacted by a competent legislature. The extent to which a data collection exercise by the

government, which precedes the enactment of the law, may be reviewed by the Court is a seminal issue. **B K Pavitra I** involved a situation where this Court invalidated a law on the ground that no exercise of data collection was carried out by the State of Karnataka. In the present batch of cases, (herein referred to as **B K Pavitra II**), there is a constitutional challenge to the validity of a law enacted after the State had undertaken the exercise of collecting quantifiable data. Whether that exercise of data collection and the enactment of the new law which has emerged on its foundation takes away the basis of or the cause for the invalidation of the Reservation Act 2002 in **B K Pavitra I** is an essential question for our consideration.

In this background, we set out the significant facts, in the chequered history of the present case.

5 In exercise of the power conferred by the proviso to Article 309 of the Constitution, the Governor of Karnataka framed the Karnataka Government Servant (Seniority Rules) 1957[7]. Rules 2 and 4 provide for seniority on the basis of the period of service in a given cadre. There was no specific rule governing seniority in respect of roster promotions.

Rule 2 *inter alia*, provides as follows:

> "2. Subject to the provisions hereinafter contained the seniority of a person in a particular cadre of service or class of post shall be determined as follows:-
>
> (a) Officers appointed substantively in clear vacancies shall be senior to all persons appointed on officiating or any other basis in the same cadre of service or class of post;

7 The Rules 1957

(b) The seniority *inter se* of officers who are confirmed shall be determined according to dates of confirmation, but where the date of confirmation of any two officers is the same, their relative seniority will be determined by their seniority *inter se* while officiating in the same post and if not, by their seniority *inter se* in the lower grade.

(c) Seniority *inter se* of persons appointed on temporary basis will be determined by the dates of their continuous officiation in that grade and where the period of officiation is the same the seniority *inter se* in the lower grade shall prevail."

Rule 4 provides for the determination of seniority where promotions are made at the same time on the basis of seniority-cum-merit to a class of posts or cadre:

"4. When promotions to a class of post or cadre are made on the basis of seniority-cum-merit at the same time, the relative seniority shall be determined.-

(i) if promotions are made from any one cadre or class of post, by their seniority *inter se* in the lower cadre or class of post;

(ii) if promotions are made from several cadres or classes of posts of the same grade, by the period of service in those grades;

(iii) if promotions are made from several cadres or classes of posts, the grades of which are not the same, by the order in which the candidates are arranged by the authority making the promotion, in consultation with Public Service Commission where such consultation is necessary, taking into consideration the order in which promotions are to be made from those several cadres or classes of post."

Rule 4-A provides for the determination of the seniority where promotion is made by selection:

"4-A When promotions to a class of post or cadre are made by selection at the same time either from several cadres or classes of post or from same cadre or class of post by the order in which the candidates are arranged in order of merit by the Appointing Authority making the selection, in

consultation with Public Service Commission where such consultation is necessary.

[Explanation – For purposes of this rule, "several cadres or classes of post" shall be deemed to include cadres or classes of post of different grades from which recruitment is made in any specified order of priority in accordance with any special rules of recruitment.]."

6 Reservation for persons belonging to SCs and STs in specified categories of promotional posts was introduced by a Government Order[8] dated 27 April 1978 of the Government of Karnataka. Reservation in promotional posts for SCs was set at 15 per cent and for STs at 3 per cent in all cadres up to and inclusive of the lowest category of Class I posts in which there is no element of direct recruitment or where the direct recruitment does not exceed $66^{2/3}$ per cent. A 33 point roster was applicable to each cadre of posts under appointing authorities. Inter-se seniority amongst persons promoted on any occasion was to be determined in accordance with Rules 4 and 4-A, as the case may be, of the Rules 1957. It also stipulated that vacancies would not be carried forward.

7 On 1 June 1978, the State government issued an Official Memorandum[9] providing guidelines and clarifications for implementing the Government Order dated 27 April 1978. The Official Memorandum stipulated that after promotion, seniority among candidates promoted on the basis of seniority-cum-merit shall, on each occasion, be fixed in accordance with Rule 4 of the Rules 1957. In other words, seniority would be governed by the *inter se* seniority in the cadre from which candidates were promoted. For candidates promoted by selection,

8 G.O. No. DPAR 29 SBC 77
9 O.M. No. DPAR 29 SBC 77

seniority would be governed by Rule 4-A : the ranking would be as assigned in the list of selected candidates by the appointing authority. The Official Memorandum dated 1 June 1978 thus provided, what can be described as the principle of consequential seniority to reserved category candidates.

8 By a notification[10] dated 1 April 1992, a proviso was inserted to Rule 8 of the Karnataka Civil Services (General Recruitment) Rules 1977[11] which provided that vacancies not filled by SCs and STs would be treated as a backlog and would be made good in the future. This provision was upheld by a two judge Bench of this Court in **Bhakta Ramegowda** v **State of Karnataka**[12] ("**Bhakta Ramegowda**").

9 On 16 November 1992, a nine judge Bench of this Court delivered judgment in **Indra Sawhney** v **Union of India**[13] ("**Indra Sawhney**"). The issue as to whether reservations of promotional posts were contemplated by Article 16 (4)[14] - when it used the expression 'appointment' was among the issues dealt with. Justice B P Jeevan Reddy speaking for a plurality of four judges held that:

(i) Reservations contemplated by Article 16 (4) of the Constitution should not exceed 50 per cent[15]. While 50 per cent shall be the rule, "it is necessary

10 No. DPAR 13 SRR 92
11 The Rules 1977
12 (1997) 2 SCC 661
13 1992 Supp (3) SCC 217
14 Clauses (1) and (4) of Article 16 provide:

> (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
>
> …
>
> (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

15 Supra 13, paragraph 809 at page 735

not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people"[16]. But, any relaxation of the strict rule must be with extreme caution and on a special case being made out[17];

(ii) Reservations under Article 16 (4) could only be provided at the time of entry into government service but not in matters of promotion. However, this principle would operate only prospectively and not affect promotions already made. Moreover, reservations already provided in promotions shall continue in operation for a period of five years from the date of the judgment[18];

(iii) The creamy layer can be and must be excluded. Justice B P Jeevan Reddy held :

> "792…While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes)."[19]

(iv) The adequacy of the representation of a backward class of citizens in services "is a matter within the subjective satisfaction of the State"[20], since the requirement in Article 16 (4) is preceded by the words "in the opinion of the State". The basis of the standard of judicial review was formulated thus:

> "798…This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should

16 Ibid, paragraph 810 at page 735
17 Ibid, paragraph 810 at page 735
18 Ibid, paragraphs 827, 829, 859 (7) and 860(8) at pages 745, 747, 768 and 771
19 Ibid at page 725
20 Ibid, paragraph 798 at page 728

> show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in *Barium Chemicals* v. *Company Law Board* [1966 Supp SCR 311 : AIR 1967 SC 295] which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive."[21]

(v) The backward class of citizens cannot be identified only and exclusively with reference to an economic criterion[22]. It is permissible to identify a backward class of citizens with reference to occupation, income as well caste.

10 In view of the decision of this Court in **Indra Sawhney**, the provisions for reservation in matters of promotion under the Government Order of 1978, as clarified by the Official Memorandum dated 1 June 1978 were saved for a period of five years from 16 November 1992. Promotions already made were saved.

11 On 17 June 1995, Parliament acting in its constituent capacity adopted the seventy-seventh amendment by which clause (4A) was inserted into Article 16 to enable reservations to be made in promotion in favour of the SCs and STs[23]. The amendment came into force on 17 June 1995, before the expiry of five years from

21 Ibid at page 728

22 Ibid, paragraph 799 at page 728

23 Clause 16 (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.

16 November 1992 (the date on which the decision in **Indra Sawhney** was pronounced). As a result of the decision in **Indra Sawhney** and the seventy-seventh amendment to the Constitution, the provision for reservations made by the Government of Karnataka under the Government Order of 1978 stood saved and continued to operate.

12 On 10 February 1995, a Constitution Bench of this Court rendered a judgment in **R K Sabharwal** v **State of Punjab**[24] ("**Sabharwal**") and held that:

(i) Once the prescribed percentage of posts is filled by reserved category candidates by the operation of the roster, the numerical test of adequacy is satisfied and the roster would cease to operate[25];

(ii) The percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of vacancy has no relevance in operating the percentage of reservation[26]; and

(iii) The interpretation placed on the working of the roster shall operate prospectively[27] from 10 February 1995.

13 On 1 October 1995, a two judge Bench of this Court held in **Union of India** v **Virpal Singh Chauhan**[28] ("**Virpal Singh**") that the state could provide that even if a candidate belonging to the SC or ST is promoted earlier on the basis of reservation and on the application of the roster, this would entitle such a person to seniority over a senior belonging to the general category in the feeder cadre. However, a senior belonging to the general category who is promoted to a higher

24 (1995) 2 SCC 745
25 Ibid, paragraph 5 at page 750
26 Ibid, paragraph 6 at page 751
27 Ibid, paragraph 11 at page753
28 (1995) 6 SCC 684

post subsequently would regain seniority over the reserved candidate who was promoted earlier. This rule came to be known as the catch-up rule. The two judge Bench directed that the above principle would be followed with effect from the date in the judgment in **Sabharwal**[29].

14 Six months after the decision in **Virpal Singh**, on 1 March 1996, a three judge Bench of this Court in **Ajit Singh Januja** v **State of Punjab**[30] ("**Ajit Singh I**"), adopted the catch-up rule propounded in **Virpal Singh**, to the effect that the seniority between reserved category candidates and general candidates in the promoted category shall continue to be governed by their *inter se* seniority in the lower grades. This Court held that a balance has to be maintained so as to avoid "reverse discrimination" and, a rule or circular which gives seniority to a candidate belonging to the reserved category promoted on the basis of roster points would violate Articles 14 and 16 of the Constitution.

15 On 24 June 1997, the Government of Karnataka issued a Government Order[31] formulating guidelines in regard to the manner in which backlog vacancies were required to be filled. On 3 February 1999, the Government of Karnataka issued another Government Order[32] pursuant to Article 16 (4A) stipulating a modified policy of reservation in matters of promotion. The 1999 Order provides for reservation in promotion to the extent of 15 per cent for SCs and 3 per cent for STs of the posts in a cadre up to and inclusive of the lowest

29 10 February 1995
30 (1996) 2 SCC 715
31 G.O. No. DPAR 10 SCBC 97
32 G.O. No. DPAR 21 SBC 97

category of group A posts in each service for which there is no element of direct recruitment or, where the proportionate of direct recruitment does not exceed $66^{2/3}$ per cent. While providing for the continuance of reservations in promotion, the Government Order stipulated that reservation in favour of persons belonging to the SCs shall continue to operate until their representation in a cadre reaches 15 per cent. Reservations in promotion for the STs would continue to operate until their representation in a cadre reaches 3 per cent. Thereafter, reservation in promotion shall continue only to maintain the representation to the extent of the above percentages for the respective categories. On 13 April 1999, the Government of Karnataka issued another Government Order[33] modifying the 1999 Order to provide that reservations in promotions in favour of the SCs and STs shall continue to operate by applying the existing roster to the vacancies till the representation of persons belonging to these categories reached 15 per cent or 3 per cent as the case may be, respectively. Moreover, after the existing backlog was cleared, the representation of persons belonging to SCs and STs would be maintained to the extent of 15 per cent and 3 per cent of the total working strength.

16 In **Jagdish Lal** v **State of Haryana**[34], ("**Jagdish Lal**") a three judge Bench of this Court took a view contrary to the decision in **Ajit Singh I**. The decision in **Jagdish Lal** held that by virtue of the principle of continuous officiation, a candidate belonging to a reserved category who is promoted earlier than a general category candidate due to an accelerated promotion would not lose

33 Ibid
34 (1997) 6 SCC 538

seniority in the higher cadre. This conflict of decisions was resolved by a Constitution Bench in **Ajit Singh** v **State of Punjab**[35] ("**Ajit Singh II**"). The Constitution Bench held that Article 16 (4A) is only an enabling provision for reservation in promotion. In consequence, roster point promotees belonging to the reserved categories could not count their seniority in the promoted category from the date of continuance officiation in the promoted post in relation to general category candidates who were senior to them in the lower category and who were promoted later. Where a senior general candidate at the lower level is promoted later than a reserved category candidate, but before the further promotion of the latter, such a person will have to be treated as senior at the promotional level in relation to the reserved candidate who was promoted earlier. The Constitution Bench accordingly applied the catch-up rule for determining the seniority of roster point promotees vis-à-vis general category candidates. The Court held that any circular, order or rule that was issued to confer seniority to roster point promotees would be invalid. However, the Constitution Bench directed that candidates who were promoted contrary to the above principles of law before 1 March 1999 (the date of the decision in **Ajit Singh I**) need not be reverted.

17 Contending that there was no provision permitting seniority to be granted in respect of roster point promotees belonging to the reserved categories, the reservation policy of the State of Karnataka came to be challenged before this Court in **M G Badappanavar** v **State of Karnataka**[36] ("**Badappanavar**"). A three judge Bench, relying on the decisions in **Ajit Singh I**, **Ajit Singh II** and

35 (1999) 7 SCC 209
36 (2001) 2 SCC 666

Sabharwal reiterated the principle that Article 16 (4A) does not permit the conferment of seniority to roster point promotees. This Court held that there was no specific rule in the State of Karnataka permitting seniority to be counted in respect of a roster promotion. It held thus:

> "12…The roster promotions were, it was held, meant only for the limited purpose of due representation of backward classes at various levels of service. If the rules are to be interpreted in a manner conferring seniority to the roster-point promotees, who have not gone through the normal channel where basic seniority or selection process is involved, then the rules, it was held will be *ultra vires* Article 14 and Article 16 of the Constitution of India. Article 16(4-A) cannot also help. Such seniority, if given, would amount to treating unequals equally, rather, more than equals."[37]

18 The conferment of seniority to roster point promotees of the reserved categories would, in view of the court in **Badappanavar**, violate the equality principle which was part of the basic structure of the Constitution. The Court directed that the seniority lists and promotions be reviewed in accordance with its directions but those who were promoted before 1 March 1996 on principles contrary to **Ajit Singh II** and those who were promoted contrary to **Sabharwal** before 10 February 1995 need not be reverted.

19 The Constitution (Eighty-fifth Amendment) Act 2001 was enacted with effect from 17 June 1995. Article 16 (4A), as amended, reads thus:

> "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." (Emphasis supplied)

37 Ibid at page 672

The purpose of the amendment was to enable the grant of consequential seniority to reserved categories promotees. The significance of the date on which the eighty-fifth amendment came into force – 17 June 1995 – is that it coincides with the coming into force of the seventy-seventh amendment which enabled reservations in promotions to be made for the SCs and STs.

20 In 2002, the Karnataka State Legislature enacted the Reservation Act 2002. The law came into force on 17 June 1995. It provided for consequential seniority to roster point promotees based on the length of service in a cadre, making the catch-up rule propounded in **Ajit Singh II** inapplicable. The earlier decision of this Court in **Badappanavar** had held that there was no specific rule for the conferment of seniority to roster point promotees. By the enactment of the Reservation Act 2002 with effect from 17 June 1995, the principle of consequential seniority was statutorily incorporated as a legislative mandate.

21 The validity of the seventy-seventh and eighty-fifth amendments to the Constitution and of the legislation enacted in pursuance of those amendments was challenged before a Constitution Bench of this Court in **Nagaraj**. The Constitution Bench analysed whether the replacement of the catch-up rule with consequential seniority violated the basic structure and equality principle under the Constitution. Upholding the constitutional validity of the amendments, this Court held that the catch-up rule and consequential seniority are judicially evolved concepts based on service jurisprudence. Hence, the exercise of the

enabling power under Article 16 (4A) was held not to violate the basic features of the Constitution:

> "79. Reading the above judgments, we are of the view that the concept of "catch-up" rule and "consequential seniority" are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of "consequential seniority" the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that "equality code" under Articles 14, 15 and 16 is violated by deletion of the "catch-up" rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the "catch-up" rule nor the concept of "consequential seniority" is implicit in clauses (1) and (4) of Article 16 as correctly held in *Virpal Singh Chauhan*."[38]

22 The Constitution Bench held that Article 16 (4A) is an enabling provision. The state is not bound to make reservations for the SCs and STs in promotions. But, if it seeks to do so, it must collect quantifiable data on three facets:

(i) The backwardness of the class;
(ii) The inadequacy of the representation of that class in public employment; and
(iii) The general efficiency of service as mandated by Article 335 would not be effected.

23 The principles governing this approach emerge from the following extracts from the decision:

> "107. …If the State has quantifiable data to show backwardness and inadequacy then the State can make

38 Supra 6 at page 259

> reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured…[39]
>
> …
>
> 117… in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.[40]
>
> …
>
> 123. … In this regard the State concerned 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 SCs/STs in matters 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 with 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."[41]

The Constitution Bench held that the constitutional amendments do not abrogate the fundamentals of equality:

> "110…the boundaries of the width of the power, namely, the ceiling limit of 50% (the numerical benchmark), the principle

39 Ibid at pages 270-271
40 Ibid at pages 276-277
41 Ibid at page 278

> of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside."[42]

These observations emphasise the parameters which must be applied where a law has been enacted to give effect to the provisions of Article 16 (4A). The legislative power of the state to enact such a law is preserved. The exercise of the power to legislate is conditioned by the existence of "compelling reasons" namely; the existence of backwardness, the inadequacy of representation and overall administrative efficiency. Elsewhere in the decision, the Constitution Bench treated these three parameters as "controlling factors" for making reservations in promotions for SCs and STs. They were held to be constitutional requirements crucial to the preservation of "the structure of equality of opportunity" in Article 16. The Constitution Bench left the validity of the individual enactments of the states to be adjudicated upon separately by Benches of this Court.

24 In **B K Pavitra I**, a two judge Bench of this Court considered a challenge to the Reservation Act 2002 providing for consequential seniority on the ground that

42 Ibid at page 272

the exercise which was required to be carried out in **Nagaraj** had not been undertaken by the State and there was no provision for the exclusion of the creamy layer. The validity of the Reservation Act 2002 had been upheld by a Division Bench of the Karnataka High Court. In **B K Pavitra I**, this Court struck down Sections 3 and 4 of the Reservation Act 2002 as *ultra vires* Articles 14 and 16. The petitioner contended that the law laid down by this Court in **Badappanavar**, **Ajit Singh II** and **Virpal Singh** remained applicable despite the Constitution (Eighty-fifth Amendment) Act 2001. Moreover, it was contended that the Government of Karnataka had not complied with the tests laid down in **Nagaraj** and had failed to provide any material or data to show inadequacy of representation. Moreover, no consideration was given to the issue of overall administrative efficiency. The principal challenge was that an exercise for determining "backwardness", "inadequacy of representation", and "overall efficiency" in terms of the decision in **Nagaraj** had not been carried out.

25 Relying on the decisions of this Court in **Suraj Bhan Meena** v **State of Rajasthan**[43], **Uttar Pradesh Power Corporation Ltd** v **Rajesh Kumar**[44] and **S Panneer Selvam** v **State of Tamil Nadu**[45] ("**Panneer Selvam**"), a two judge Bench of this Court affirmed that the exercise laid down in **Nagaraj** for determining "inadequacy of representation", "backwardness" and "overall efficiency" is necessary for recourse to the enabling power under Article 16 (4A) of the Constitution. The Court held that the Government of Karnataka had failed to place material on record showing that there was a compelling necessity for the

43 (2011) 1 SCC 467
44 (2012) 7 SCC 1
45 (2015) 10 SCC 292

exercise of the power under Article 16 (4A). Hence, the directions laid down by this Court in **Nagaraj** were not followed. Striking down Sections 3 and 4 of the Reservation Act 2002, this Court held thus:

> "29. It is clear from the above discussion in S. Panneer Selvam case that exercise for determining "inadequacy of representation", "backwardness" and "overall efficiency", is a must for exercise of power under Article 16(4-A). 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 the present case, no such exercise has been undertaken. The High Court erroneously observed that it was for the petitioners to plead and prove that the overall efficiency was adversely affected by giving consequential seniority to junior persons who got promotion on account of reservation. Plea that persons promoted at the same time were allowed to retain their seniority in the lower cadre is untenable and ignores the fact that a senior person may be promoted later and not at the same time on account of roster point reservation. Depriving him of his seniority affects his further chances of promotion. Further plea that seniority was not a fundamental right is equally without any merit in the present context. In absence of exercise under Article 16(4-A), it is the "catch-up" rule which fully applies. It is not necessary to go into the question whether the Corporation concerned had adopted the rule of consequential seniority."[46]

The Court clarified that the decision will not affect those who have already retired and availed of financial benefits. It was further directed that promotions granted to existing employees based on consequential seniority are liable to be reviewed and that the seniority list be revised in terms of the decision. Three months were granted to take further consequential action. Petitions seeking a review of the decision have been tagged with the present proceedings.

46 Supra 6 at page 641

26 After the decision of this Court in **B K Pavitra I**, on 22 March 2017, the Government of Karnataka constituted the Ratna Prabha Committee[47] headed by the Additional Chief Secretary to the State of Karnataka 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 tasks entrusted to the Committee were to:

> "1) Collect information on the cadre-wise representation of Scheduled Castes and Scheduled Tribes in all the Government Departments;
>
> 2) Collect information regarding backwardness of Scheduled Castes and Scheduled Tribes; and
>
> 3) Study the effect on the administration due to the provision of reservation in promotion to the Scheduled Castes and Scheduled Tribes."

27 On 5 May 2017, the Ratna Prabha Committee submitted a report, titled as the '**Report on Backwardness, Inadequacy of Representation and Administrative Efficiency in Karnataka**'[48]. The Government of Karnataka, through its Department of Personnel and Administrative Reforms, submitted the Ratna Prabha Committee report to the Law Commission of Karnataka on 8 June 2017. The Law Commission sought to opine on 'whether the data collected and reasons assigned by the Ratna Prabha Committee constitute a valid basis for validating the law' and submitted its report on 27 July 2017.

28 In the meantime, the petitioners filed contempt petitions contending that the directions of this Court in **B K Pavitra I** to the State of Karnataka to review

47 G.O. No. DPAR 182 SeneNi 2011
48 Ratna Prabha Committee report

the seniority list were not complied with. The State of Karnataka filed applications for extension of time for compliance. On 20 March 2018, this Court disposed of the petitions rejecting the applications for extension of time for compliance with the decision in **B K Pavitra I** and granted one month time to take any consequential action. The State of Karnataka subsequently filed compliance affidavits before this Court stating that the exercise directed by the decision in **B K Pavitra I** had been carried out.

29 On the basis of the Ratna Prabha Committee report, 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 November 2017 and by the Legislative Council on 23 November 2017. On 16 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 June 2018 and was published in the official Gazette on 23 June 2018.

30 Sections 3, 4 and 5 of the Reservation Act 2018 provides as follows :

> "**3. Determination of Seniority of the Government Servants Promoted on the basis of Reservation**.- Notwithstanding anything contained in any other law for the time being in force, the Government Servants belonging to the Scheduled Castes and the Scheduled Tribes promoted in accordance with the policy of reservation in promotion provided for in the Reservation Order shall be entitled to consequential seniority. Seniority shall be determined on the basis of the length of service in a cadre:

Provided that the seniority inter-se of the Government Servants belonging to the Scheduled Castes and the Scheduled Tribes as well as those belonging to the unreserved category, promoted to a cadre, at the same time by a common order, shall be determined on the basis of their seniority inter-se, in the lower cadre.

Provided further that where the posts in a cadre, according to the rules of recruitment applicable to them are required to be filled by promotion from two or more lower cadres,-

(i) The number of vacancies available in the promotional (higher) cadre for each of the lower cadres according to the rules of recruitment applicable to it shall be calculated; and

(ii) The roster shall be applied separately to the number of vacancies so calculated in respect of each of those lower cadres:

Provided also that the serial numbers of the roster points specified in the Reservation Order are intended only to facilitate calculation of the number of vacancies reserved for promotion at a time and such roster points are not intended to determine inter-se seniority of the Government Servants belonging to the Scheduled Castes and the Scheduled Tribes vis-a-vis the Government Servants belonging to the unreserved category promoted at the same time and such inter-se seniority shall be determined by their seniority inter-se in the cadre from which they are promoted, as illustrated in the Schedule appended to this Act.

4. Protection of consequential seniority already accorded from 27th April 1978 onwards.- Notwithstanding anything contained in this Act or any other law for the time being in force, the consequential seniority already accorded to the Government servants belonging to the Scheduled Castes and the Scheduled Tribes who were promoted in accordance with the policy of reservation in promotion provided for in the Reservation Order with effect from the Twenty Seventh Day of April, Nineteen Hundred and Seventy Eight shall be valid and shall be protected and shall not be disturbed.

5. Provision for review.- All promotions to the posts belonging to the State Civil Services shall be within the extent and in accordance with the provisions of the reservation orders and other rules pertaining to method of recruitment and seniority. The Appointing Authority shall revise and redraw the existing seniority lists to ensure that the promotions are made accordingly:

> Provided that subsequent to such a review, wherever it is found that Government Servants belonging to the Scheduled Castes and Scheduled Tribes were promoted against reservation and backlog vacancies in excess or contrary to extent of reservation provided in the reservation orders shall be adjusted and fitted with reference to the roster points in accordance with the reservation orders issued from time to time by assigning appropriate dates of eligibility. In case, if persons belonging to the Scheduled Castes and the Scheduled Tribes who have already been promoted against reservation or backlog vacancies in excess or contrary to the extent of reservation provisions cannot get adjusted and fitted against the roster points they shall be continued against supernumerary posts, to be created by the concerned administrative department presuming concurrence of Finance Department, in the cadres in which they are currently working, till they get the date of eligibility for promotion in that cadre."

Section 9 provides for the validation of action taken in respect of promotions since 27 April 1978:

> "**9. Validation of action taken under the provisions of this Act**.- Notwithstanding anything contained in any Judgment, Decree or Order of any court, tribunal or other authority contrary to section 3 and 4 of this Act any action taken or done in respect of any promotions made or purporting to have been made and any action or thing taken or done, all proceedings held and any actions purported to have been done since 27th April, 1978 in relation to promotions as per sections 3 and 4 of this Act, before the publication of this Act shall be deemed to be valid and effective as if such promotions or action or thing has been made, taken or done under this Act and accordingly:- (a) no suit or other proceedings shall be maintained or continued in any court or any tribunal or before any authority for the review of any such promotions contrary to the provisions of this Act; and (b) no court shall enforce any decree or order to direct the review of any such cases contrary to the provisions of this Act."

Section 1 (2) provides that the Reservation Act 2018 came into force with effect from 17 June 1995 (the effective date of the seventy-seventh and eighty-fifth constitutional amendments).

31 These proceedings were instituted to assail the vires of the Reservation Act 2018. The principal contention which has been urged is that the Reservation Act 2018 does not take away basis of the decision of this Court in **B K Pavitra I** and is *ultra vires*. All matters have been admitted for hearing and tagged together.

32 On 27 July 2018, when the batch of cases was listed for hearing, it was suggested by this Court that the status quo may not be altered pending consideration of the matter. The Advocate General for the State of Karnataka orally agreed and accepted an order of status quo. The Government of Karnataka issued a circular on 3 August 2018 with a direction to maintain *status quo* and not affect the process of promotion/demotion till further orders from the government. These directions were issued to all autonomous bodies, universities, public enterprises, commissions, corporations, boards and to institutions availing aid from the government under their administrative control.

33 In **Jarnail Singh** v **Lachhmi Narain Gupta**[49], ("**Jarnail**") a Constitution Bench of this Court considered whether the decision in **Nagaraj** requires to be referred to a larger Bench since:

(i) It requires the state to collect quantifiable data showing backwardness of the SCs and STs contrary to the nine judge Bench decision in **Indra Sawhney**;

(ii) The creamy layer principle was not applied to SCs and STs in **Indra Sawhney**; and

49 2018 (10) SCC 396

(iii) In applying the creamy layer principle, **Nagaraj** conflicts with the decision in **E V Chinnaiah** v **State of AP**[50] ("**Chinnaiah**").

34 In **Jarnail**, the Constitution Bench held that :

(i) The decision in **Chinnaiah** holds, in essence, that a state law[51] cannot further sub-divide the SCs into sub categories. Such an exercise would be violative of Article 341(2) since only an Act of Parliament and not the state legislatures can make changes in the Presidential list. **Chinnaiah** did not dwell on any aspect on which the constitutional amendments were upheld in **Nagaraj**. Hence, it was not necessary for **Nagaraj** to advert to the decision in **Chinnaiah**. **Chinnaiah** dealt with a completely different problem and not with the constitutional amendments, which were dealt with in **Nagaraj**[52];

(ii) The decision of the Constitution Bench in **Nagaraj**, insofar as it requires the state to collect quantifiable data on backwardness in relation to the SCs and STs is contrary to **Indra Sawhney** and would have to be declared to be bad on this ground[53]; and

(iii) Constitutional courts, when applying the principle of reservation will be within their jurisdiction to exclude the creamy layer on a harmonious construction on Articles 14 and 16 along with Articles 341 and 342[54]. The creamy layer principle is an essential aspect of the equality code.

35 On 12 October 2018, the State of Karnataka submitted before this Court that since a legislation has been enacted by the state legislature and in view of

50 (2005) 1 SCC 394

51 The court was considering the provisions of the Andhra Pradesh Scheduled Caste (Rationalisation of Reservations) Act 2000

52 Supra 49, paragraph 22 at page 422-423

53 Ibid, paragraph 24 at page 424

54 Ibid, paragraph 26 at page 425-426

the judgment of the Constitution Bench in **Jarnail**, the State would no longer proceed on the oral assurance of the Advocate General and would not be bound to it. On the other hand, it was urged by learned Counsel appearing for the petitioners that the intent of the Reservation Act 2018 was only to nullify the effect of the judgment in **B K Pavitra I**. Counsel urged that in view of the decisions of this Court including those in **Shri Prithvi Cotton Mills Ltd** v **Broach Borough Municipality**[55] ("**Prithvi Cotton Mills Ltd**") and **Madan Mohan Pathak** v **Union of India** ("**Madan Mohan Pathak**")[56], it was not open to the legislature to render a judgment of this Court ineffective without taking away its basis or foundation. Since the case was of an urgent nature, the proceedings were listed on 23 October 2018 for commencement of final hearing.

36 On 27 February 2019, the State of Karnataka issued a Government Order[57] directing that:

> "In the circumstances explained in the preamble, the following instructions are hereby issued subject to the conditions that the officers/officials, who have been reverted, shall be reposted to the cadres held by them immediately prior to their reversion and if vacant posts are not available in those cadres, supernumerary posts shall be created to accommodate them. It is also ordered that the officers/officials working at present in those cadres, belonging to any category, shall not be reverted."

The Government Order was made subject to the outcome of these proceedings. On 1 March 2019, this Court granted a stay on the operation of the Government Order dated 27 February 2019. This Court observed that since the case was in

55 (1969) 2 SCC 283
56 (1978) 2 SCC 50
57 G.O. No. DPAR 186 SRS 2018

the concluding stages of the hearing, it would not be appropriate to alter the present status when the matter was in *seisin* of the Court.

C Submissions

C.I Petitioners

37 In adjudicating upon the challenge to the constitutional validity of the Reservation Act 2018, we have heard the erudite submissions of Dr Rajeev Dhavan, learned Senior Counsel appearing on behalf of the Petitioners. Prefacing his submissions, Dr Rajeev Dhavan has adverted to the following issues which arise for the determination of this Court:

A Is the Reservation Act 2018 valid?

(a) Does it not peremptorily overrule the decision of this Court in B K Pavitra I without altering the basis of the decision?

(b) Does it violate the law laid down by this Court in Badappanavar on seniority?

(c) Does the background to the enactment to the Reservation Act 2018 reveal a manifest intent to overrule the decision in B K Pavitra I?

(d) Was the reference of the Bill by the Governor of Karnataka to the President under Article 200 of the Constitution and the subsequent events which took place constitutionally valid? In this context, could the Bill have been brought into force without the assent of the Governor?

B Is the Reservation Act 2018 compliant with the principles enunciated in the Constitution Bench decisions in Nagaraj and Jarnail? Does the report of the Ratna Prabha Committee dated 5 May 2017 constituted an adequate and appropriate basis to support the validity of the Act and its implementation?

C Does the Reservation Act 2018 apply in the present writ petitions (instituted by B K Pavitra and Shivakumar) to those departments where there is over representation or in public corporations not covered by the Ratna Prabha report or the legislation?

38 While we will be dealing with the submissions urged by Dr Dhavan in the course of our analysis, it would be appropriate at this stage to advert to the salient aspects of the submissions under the following heads:

A Usurpation of judicial power

39 Dr Dhavan has urged that the Reservation Act 2018 was enacted in a hurry with no purpose other than to overrule the decision in **B K Pavitra I**, while the issue of implementation was still pending. The decision in **B K Pavitra I** was rendered on 19 February 2017. On 22 March 2017, a Government Order was issued appointing the Additional Chief Secretary to submit a report on backwardness, inadequacy of representation and the impact of reservation on efficiency. The report was submitted on 5 May 2017. On 26 July 2017, the report

was accepted by the State Cabinet which constituted a sub-committee to examine the matter and submit a draft Bill. The State Law Commission recommended the State to pass a legislation with retrospective effect by curing the infirmities and factors noticed in the decision in **B K Pavitra I**. On 4 August 2017, the Cabinet Sub-Committee submitted its decision based on the report. On 7 August 2017, the Cabinet approved the proposed Bill. The Bill was introduced in the Karnataka State Legislative Assembly on 14 November 2017 and was passed on 17 November 2017. The Bill was passed by the State Legislative Council on 23 November 2017 and was submitted to the Governor on 6 December 2017. The Bill was reserved by the Governor for the consideration of the President. On 15 February 2018, 9 March 2018 and 18 April 2018, the Union Government in the Ministry of Home Affairs sought clarifications from the State government which were provided on 16 March 2018 and 23 April 2018. The Bill received the assent of the President on 14 June 2018, and was published in the official Gazette and came into force on 23 June 2018.

40 On the basis of the above facts, Dr Dhavan submitted that:

(i) There was no compelling necessity to overrule **B K Pavitra I** "except political necessities";

(ii) A comparison of the provisions of the Reservation Act 2002 with the Reservation Act 2018 indicates that:

(a) The Reservation Act 2018 is substantively the same as the Reservation Act 2002;

(b) The change in the basis of the decision in **B K Pavitra I** is on the factum of the Ratna Prabha Committee report;

(c) “Compelling necessities” are mentioned but their existence is not demonstrated;
(d) The title of the Reservation Act 2018 is limited to consequential seniority which is not mentioned in the law;
(e) Section 5 allows for an unlimited backlog and the creation of supernumerary posts for SCs and STs;
(f) Section 5 presumes the permission of the Finance Department and visualizes an “excess”, which will invalidate the law; and
(g) Section 9 brazenly overrules and goes beyond the date of 17 June 1995 and postulates that in future a review of the cases is forbidden.

B Violation of the separation of powers

41 Separation of powers postulates a constitutional division between legislative and judicial functions. In this context, the submission is:

(a) The legislative power is distinct from the judicial power;
(b) The legislature cannot lawfully usurp judicial power by sitting in appeal over any judicial decision by attempting to overturn it;
(c) Any statute which seeks to overturn a judicial decision must be within the legislative competence of the legislature under the Seventh Schedule to the Constitution;
(d) Any such statute must change the basis of the law;
(e) The decision of a court will always be binding unless the law or conditions underlying the legislation which was held to be invalid are so fundamentally altered so that a different result would enure;
(f) While a legislation may be retroactive, an interim or final direction must be obeyed especially when rights are conferred;
(g) A new legislation can be challenged on the basis that it violates the fundamental rights; and

(h) Unless the basis of a legislation which is found to be *ultra vires* has been altered, the mere enactment of a new legislation would constitute a brazen overruling of the law, which is impermissible.

42 Dr Dhavan urges that Reservation Act 2018 will not pass muster, when it is assessed in the context of the principles enunciated by the decisions of this Court in (i) **Prithvi Cotton Mills Ltd**, (ii) **Madan Mohan Pathak**, (iii) **S R Bhagwat** v **State of Mysore**[58], (iv) **Bakhtawar Trust** v **M D Narayan**[59], (v) **Delhi Cloth & General Mills Co. Ltd** v **State of Rajasthan**[60], (vi) **Re Cauvery**[61], (vii) **S T Sadiq** v **State of Kerala**[62] and (viii) **Medical Council of India** v **State of Kerala**[63].

43 Explaining the applicability of the above principles on facts, Dr Dhavan urged that after the decision of this Court in **B K Pavitra I**, the State Government filed applications for extension of time on 9 May 2017 and 8 September 2017[64]. This Court extended time to revise the seniority lists till 30 November 2017 and for consequential actions by 15 January 2018. On 15 January 2018, the State Government moved before this Court seeking extension of time for implementing the decision in **B K Pavitra I**. On 29 January 2018, this Court finally granted time until 15 March 2018. On 17 March 2018, the State moved before this Court for extension of time and on 20 March 2018, while disposing of certain contempt petitions and other applications, one month's time was granted to take consequential action. On 25 April 2018, this Court directed the State to file a

58 (1995) 6 SCC 16
59 (2003) 5 SCC 298
60 (1996) 2 SCC 449
61 (1993) Supp (1) SCC 96
62 (2015) 4 SCC 400
63 (2018) 11 SCALE 141
64 M.A. Nos. 730-756 of 2017

further affidavit (by 1 May 2018) indicating that promotions and demotions have been duly effected. On 9 May 2018, this Court directed the State to file an affidavit to the effect that the judgment in **B K Pavitra I** had been fully complied with and the hearing was posted for 4 July 2018. On 28 June 2018, the State of Karnataka informed this Court that the "further process have been stalled because of the enactment of the new legislation and its publication in the Gazette on 23 June 2018". On 7 August 2018, the State of Karnataka filed an interim application seeking permission of this Court to implement the Reservation Act 2018. It has been urged that contrary to what was stated by the state Government, there was no compliance of the decision in **B K Pavitra I**. In this background, it has been submitted that the state has undertaken an exercise to overrule **B K Pavitra I** which constitutes a clear usurpation of judicial power.

C Lack of compliance with Nagaraj and Jarnail

44 Dr Dhavan assails the report of the Ratna Prabha Committee on the ground that is was not in compliance with **Nagaraj** and **Jarnail**. **Nagaraj** postulates that:

(i) The backlog should not extend beyond three years;

(ii) Excessive reservation would invalidate the exercise of power; and

(iii) There is a theory of guided power under which a failure to follow the above conditionalities would result in reverse discrimination.

45 According to the submission, the decision in **Nagaraj**:

(a) Deploys the methodology that the seventy-seventh, eighty-first, eighty-second and eighty-sixth amendments were only enabling and were valid. The conditionalities for a valid exercise of the enabling power are two-fold:

(i) The existence of compelling reasons namely, backwardness, inadequacy of representation and overall administrative efficiency requiring quantifiable data; and

(ii) Excessiveness, which postulates that the ceiling limit of fifty per cent is not transgressed, the creamy layer is not obliterated and reservation is not extended indefinitely.

(b) The methodology of **Nagaraj** was approved both in **I R Coelho** v **State of TN**[65] and **Jarnail**; and

(c) The decision in **Jarnail**, while upholding the methodology adopted in **Nagaraj** held that there is a constitutional presumption which obviates the need for quantifiable data on the backwardness of SCs and STs and hence that part of **Nagaraj** was held to be contrary to the decision in **Indra Sawhney.** The application of the creamy layer test was held to be a requirement for SCs and STs and other principles or applications enunciated in **Nagaraj** were held to be valid.

65 (2007) 2 SCC 1

46 In this background, the Ratna Prabha Committee report is assailed on the following grounds:

(i) The chapter on backwardness is not necessary;
(ii) Inadequacy of representation is examined over 30 pages;
(iii) The data collected is over 32 years in thirty one government departments;
(iv) No data exists in 1986;
(v) The data indicates that STs are adequately represented from 1999 to 2015 but the average of 31 years is 2.70;
(vi) No data has been collected from public sector undertakings, boards, corporations, local bodies, grant-in-aid institutions, among others, and it is assumed that the data is representative in nature;
(vii) The representation in Public Works Department ("**PWD**") and Karnataka Power Transport Corporation Limited ("**KPTCL**") is adequate;

(viii) The data collected is with respect to the availability of vacancies and not posts, contrary to the requirements laid out in **Sabharwal's** case;

(ix) The data is on sanctioned posts and not posts which have been filled;
(x) The data is not cadre based but based on grades A, B, C and D even though **Jarnail** requires the data to be on the basis of cadre;
(xi) The report erroneously assumed that grades A, B, C and D correspond to cadres;
(xii) The report candidly admits that "in some departments, corporations like PWD and KPTCL there may be over representation of the percentage mandated";
(xiii) On administrative efficiency:
    (a) The data is based on general considerations such as economic development;
    (b) The efficiencies adverted to in matters of administrative, policy and service are general; and
    (c) Reliance which has been placed is on performance reports.

(xiv) The state has followed a strange method of back door entry by filling up vacancies not by selection but through toppers from universities in various departments for gazetted grade A and B posts.

D Reservation of the Bill to the President

47 Dr Dhavan urged that from the counter affidavit filed by the State Government, it is evident that:

(i) The view of the State government was that given the legislative competence of the state legislature, the "Bill was not required to be reserved" for the assent of the President;

(ii) On 6 December 2017, the Governor of Karnataka considered it appropriate to refer the Bill to the President in view of the decision in **B K Pavitra I** and the "importance of the issue and the constitutional interpretation involved in the matter" under Article 200;

(iv) The State government on the Bill being forwarded to the President continued to maintain that the Bill neither attracted the second proviso to Article 200 nor did it deal with a matter which was repugnant to a Union law on an entry falling in List III of the Seventh Schedule. Hence, the State government opined that there did not appear to be any situation warranting the reservation of the Bill for the consideration of the President. Hence, it has been urged that it may be:

(a) The reference by the Governor on 6 December 2017 to the President simply stated that since a constitutional interpretation was

required, the Bill was reserved for the President; however no specific issues were referred; and

(b) The State government forwarded the Bill to the President, recording at the same time that there was no reason to refer.

(v) The Union Government invited reasons for the reference to which responses were made by the State Government in its clarification;

(vi) The Governor was altogether by-passed in this process; and

(vii) The Governor has the exclusive authority under Article 200 on the reference and must formulate a specific reference, which was not done. The Central Government, it was urged, cannot create a reference which has not been made by the state.

48 In order to buttress his submissions, Dr Dhavan relied upon the decisions in **Kaiser-I-Hind Pvt Ltd** v **National Textile Corporation Ltd**[66], **Gram Panchayat of Village Jamalpur** v **Malwinder Singh**[67] ("**Gram Panchayat of Village Jamalpur**"), **Hoechst Pharmaceuticals Ltd** v **State of Bihar**[68] ("**Hoechst Pharmaceuticals Ltd**") and **Nabam Rebia and Bamang Felix** v **Deputy Speaker Arunachal Pradesh Legislative Assembly**[69] ("**Nabam Rebia**").

Dr Dhavan urged that:

(i) There was no valid reference by the Governor in the absence of specificity on the matter of reference;

(ii) The State government consistently indicated that there was no reason to refer the Bill to the President;

66 (2002) 8 SCC 182
67 (1985) 3 SCC 661
68 (1983) 4 SCC 45
69 (2016) 8 SSC 1

(iii) The Union Government could not have created a reference where none existed; and

(iv) The reference was unconstitutional and the assent of the Governor was not obtained.

E Seniority including consequential seniority

49 The submissions of Dr Dhavan are:

(i) Seniority is determined by the Seniority Rules 1957;

(ii) The decision in **Badappanavar** held that there was no specific rule providing for consequential seniority in the Seniority Rules 1957;

(iii) The amendments in the Seniority Rules 1957 on 18 August 2006 did not effect any change to unsettle the decision in **Badappanavar**;

(iv) The Reservation Act 2002 attempted to overrule **Badappanavar** and was eventually invalidated in **B K Pavitra I**;

(v) The Reservation Act 2018 mentions consequential seniority in its title yet Section 5 makes no reference of it and in fact reinforces the Seniority Rules 1957 by implication. The reference to the Rules in Section 5 can only be in the context of the Seniority Rules 1957 as amended. The Seniority Rules 1957 will override the administrative orders of 27 April 1978;

(vi) The Government Order dated 27 April 1978 specifically adverts to Rules 4 or 4-A (as the case may be) of the Seniority Rules 1957;

(vii) No seniority can be conveyed by filling up of backlog and creating excess or supernumerary posts; and

(viii) The proviso to Section 5 would be liable to be struck down for its excessiveness.

50 In substance, Dr Dhavan's are as follows:

(i) Every administrative action or legislation has to be **Nagaraj** compliant as explained in **Jarnail**;

(ii) After the decision in **B K Pavitra I**, the State of Karnataka hurriedly enacted the Reservation Act 2018 without demonstrating any compelling necessity;

(iii) The Governor of Karnataka reserved the Bill for the President without delineating the exact reasons for doing so. Even while forwarding the Bill, the State government maintained that there was no reason to make a reference to the President. The queries exchanged subsequently would not constitute a valid reference;

(iv) The Ratna Prabha Committee report is flawed and does not establish inadequacy of representation and impact on administrative efficiency;

(v) The Reservation Act 2018 is similar to the Reservation Act 2002 except for (i) Section 5 while mandates reservations; and (ii) Section 9 which overrules all decisions of the past and pre-empts challenges in the future;

(vi) The Seniority Rules 1957 continue not to cover consequential seniority and by the repeal of the Reservation Act 2002, the decision in **Badappanavar** continues to be good law;

(vii) The uncontrolled backlog is not valid;

(viii) A proper exercise must be post and not vacancy based, it must be based on cadres and not on groups A to D;

(ix) The counter affidavit of the State admits the flaws of the process denying curative effect to the exercise; and

(x) The Reservation Act 2018 has failed to pass muster and its non-compliant with the decisions in **Nagaraj** and **Jarnail**.

51 Mr Shekhar Naphade, learned Senior Counsel submitted that:

(i) The decision in **B K Pavitra I** has attained finality and a subsequent change in law cannot abrogate the principle of *res judicata*;

(ii) As held in the decision of this Court in **Pandit M S M Sharma** v **Dr Krishna Sinha**[70], whether an earlier judgment is right or wrong is not material to the applicability of the doctrine of *res judicata*;

(iii) The subsequent decision in **Jarnail** is not a ground for review and, in any event, a review of **B K Pavitra I** by the state will not lie;

(iv) In view of the explanation to Order XLVII of the CPC, a reversal on a question of law in a subsequent decision of a superior court is not a ground for review;

(v) An error of law is no ground for review (**State of West Bengal** v **Kamal Sengupta**[71]);

(vi) The Reservation Act 2018 is based on a report which furnishes factual data: this could have been furnished in the earlier round. The legislature has taken recourse to exercise of judicial power;

70 AIR 1960 SC 1186
71 (2008) 8 SCC 612

(vii) The provisions of the Reservation Act 2018 are virtually the same as those of the Reservation Act 2002;

(viii) The basis of legislative intervention was the collection of data: the attempt is to place fresh material before the Court to review its decision in **B K Pavitra I**. There is no change in law;

(ix) Retrospectivity of the Reservation Act 2018 from 1978 is arbitrary;

(x) There is no change in the basis of the law. The basis is a change in the factual matrix which is not available as a ground for review;

(xi) The Ratna Prabha Committee report has collected no substantive material on the impact of reservation in promotion on the efficiency of administration;

(xii) The second proviso to Article 200 and Article 254 (2) of the Constitution are exhaustive of the constitutional power of the Governor to reserve a Bill for the assent of the President;

(xiii) The Ratna Prabha Committee report does not deal with the aspect of creamy layer which had been duly considered in **Jarnail**;

(xiv) The Ratna Prabha Committee dwelt on groups and not on cadres. The data includes direct recruits as well as promotees, whereas the present case is only about promotion; and

(xv) Data was collected only from thirty one government departments and not from public sector undertakings.

52 Supplementing the submissions of Dr Dhavan, Mr Puneet Jain, learned Counsel appearing on the behalf of the petitioners has adverted to the following issues which arise for the consideration of this Court:

(i) Section 3 of the Reservation Act 2018 only seeks to extend consequential seniority retrospectively to vacancy based roster point promotees and is not concerned with the state exercising its enabling power to provide for reservation in promotions. The Government Order[72] dated 27 April 1978 by which reservation for persons belonging to SCs and STs in specified categories of promotional posts was introduced cannot be "justified" by a satisfaction on the basis of the Ratna Prabha Committee report;

(ii) Article 16 (4A) confers a discretion upon the state to provide for reservations in promotion with or without consequential seniority. **Nagaraj** mandates that there have to exist compelling reasons and the satisfaction of the state before exercise of its powers under Article 16 (4A). In view of the decision in **Panneer Selvam**, automatic conferment of consequential seniority can no longer be sustained; and

(iii) The fact that the eighty-fifth amendment has been made retrospective from 17 June 1995 cannot enable the state to make a provision for the first time by exercising powers retrospectively and consequently taking away vested rights which legitimately accrued upon the general category employees.

C.2 Submissions for the respondents and intervenors

72 G.O. No. DPAR 29 SBC 77

53 Appearing for the State of Karnataka, Mr Basava Prabhu S Patil, learned Senior Counsel submitted thus:

A The basis of B K Pavitra I has been altered

(i) The Reservation Act 2018 has taken away the basis of the judgment in **B K Pavitra I** and the protection of seniority with retrospective effect which is permissible in law:

(a) The Reservation Act 2018 does not seek to overrule or nullify simpliciter the decision in **B K Pavitra I**. The law was enacted to provide consequential seniority for roster point promotees after collecting data showing the existence of the compelling reasons of : (i) backwardness; (ii) inadequacy of representation; and (iii) overall efficiency. Hence, the Reservation Act 2018 removes the basis of the decision in **B K Pavitra I**;

(b) The state legislature is competent to enact a law with retrospective or retroactive operation. The legislative competence of the State Legislature to enact law is traceable to Article 16 (4A). Merely because the legislation confers seniority with effect from 1978, will not lead to its invalidation (**Cheviti Venkanna Yadav** v **State of Telangana**[73] ("**Cheviti Venkanna Yadav**"), **Utkal Contractors & Joinery (P) Ltd** v **State of Orissa**[74] ("**Utkal Contractors and**

73 (2017) 1 SCC 283
74 (1987) Supp. SCC 751

Joinery (P) Ltd") and **State of Himachal Pradesh** v **Narain Singh**[75] ("**Narain Singh**");

(c) Sections 3 and 4 of the Reservation Act 2018 came into operation on 17 June 1995, on which date the seventy-seventh and eighty-fifth amendments to the Constitution came into effect, thereby enabling reservations to be made in promotion together with consequential seniority. The Reservation Act 2018 protects consequential seniority accorded from 27 April 1978 (the date of the reservation order) in light of the data collected which shows the inadequacy of representation;

(d) In terms of the decision in **Virpal Singh**, the catch-up rule was to be applied with effect from 10 February 1995 (i.e. the date of the judgment in **Sabharwal**). According to the decision in **Ajit Singh II**, promotions granted prior to 1 March 1996 without following the catch-up rule are protected. **Badappanavar** protects the promotions of reserved candidates based on consequential seniority which took place before 1 March 1996;

(e) While judicial review allows courts to declare a statute as unconstitutional if it transgresses constitutional limits, courts are precluded from inquiring into the propriety or wisdom underlying the exercise of the legislative power. The motives of the legislature in enacting a law are incapable of being judicially evaluated; and

75 (2009) 13 SCC 165

(f) Seniority is not a vested or an accrued right and hence it is open for the legislature to enact a law for dealing with it.

(ii) The Reservation Act 2018 is not of the same genre of legislation dealt with in the decision of **Madan Mohan Pathak**:

(a) **Madan Mohan Pathak** involved a challenge by the employees of the Life Insurance Corporation to the constitutional validity of a Parliamentary law which attempted to render ineffective a settlement with employees for the payment of bonus. The judgment does not deal with a case where the basis of the invalidity of a legislation noticed in a judicial decision is taken away by a subsequent law; and

(b) **Madan Mohan Pathak** in fact, notices that in the case of a declaratory judgment holding an action to be invalid, validating legislation to remove the defect is permissible.

(iii) The collection of data by the State must demonstrate the presence of compelling reasons namely, (a) inadequacy of representation; (b) backwardness; and (c) overall administrative efficiency as enunciated in **Nagaraj** and **B K Pavitra I**;

(iv) The decision in **Indra Sawhney** holds that the question as to whether a backward class of citizens is not adequately represented in the services under the state is a matter of subjective satisfaction;

(v) **Nagaraj** also notices the position that there is a presumption that the state is in the best position to define and measure merit and that there is no fixed yardstick to identify and measure the three factors on which quantifiable data has to be collected;

(vi) The decision in **Jarnail** also holds that the test of determining the adequacy of representation in promotional posts is left wisely to the states; and

(vii) The Reservation Act 2018 was enacted after the State was satisfied about the existence of the three compelling reasons.

B The Ratna Prabha Committee has dealt with all the three facets constituting the 'compelling reasons':

1 **Backwardness**

(i) The decision in **Jarnail** has clarified that there is no requirement of collecting quantifiable data on the backwardness of SCs and STs. The observation in **Nagaraj** is contrary to the larger Bench decision in **Indra Sawhney.**

(ii) Yet, in any event, the Ratna Prabha Committee considered the backwardness of SCs and STs in view of the dictum in **Nagaraj** which then held the field. The Committee after carrying out the exercise came to the conclusion that the requirement of backwardness is satisfied.

2 **Inadequacy of representation**

(i) Chapter II of the Ratna Prabha Committee report considered the inadequacy of representation and records a summary of its conclusions in paragraphs 2.5 and 2.6;

(ii) It is misleading to assert that the State did not collect cadre wise data. Para 2.4.1 indicates that the government took into account the data for groups A, B, C and D to draw a conclusion about the inadequacy of representation;

(iii) The decisions in **Indra Sawhney** and **Sabharwal** are clear in postulating that persons belonging to the SCs and STs who are appointed against general category posts/vacancies are not to be reckoned for ascertaining over representation; and

(iv) It is a matter of common experience that for most of the group D posts such as municipal sweepers, only persons belonging to SCs and STs apply. Over representation in group D posts which results from general category candidates keeping away from them is no ground to deny promotion to group D employees recruited against the reserved category.

3 **Administrative efficiency**

(i) Para 3.12 of Chapter III of the Ratna Prabha Committee report has considered all relevant aspects before coming to the conclusion that reservations in promotion do not affect administrative efficiency;

(ii) Promotions are made on the basis of seniority-cum-merit. [Rule 19(3)(a) of the Rules 1977] Only those candidates who fulfil the criteria of merit/suitability are promoted based on seniority. Since this criterion is applicable even in respect of roster promotions, the efficiency of administration is not adversely impacted; and

(iii) On promotion, a candidate is required to serve a statutory period of officiation before being confirmed in service. This applies to all candidates including roster point promotees and ensures that the efficiency of administration is not adversely affected.

C The challenge on the ground that the Reservation Act 2018 does not exclude the benefit of consequential seniority in respect of the creamy layer in terms of the decision in Jarnail is baseless:

(i) Creamy layer as a concept can be applied only at the entry level or at appointment and has no application while granting reservations in promotion and allowing for consequential seniority. The Reservation Act 2018 provides only for consequential seniority and the extent of reservation granted to SCs and STs at the entry level/ in appointment is not under challenge;

(ii) Even assuming that the concept of creamy layer can be applied at the stage of promotion, it is inapplicable to the conferment of consequential seniority. Consequential seniority is not an additional benefit but a consequence of promotion;

(iii) Appointment to a post or progression in career based on promotion cannot be treated as acquisition of creamy layer status. In fact, the decision in **Jarnail** makes it clear that the concept of creamy layer applies only to the entry stage;

(iv) **Nagaraj** does not hold that the exclusion of the creamy layer is a pre-condition for the exercise of the enabling power under Article 16 (4A) for providing promotion or consequential seniority;

(v) In the decision in **B K Pavitra I**, the challenge to the Reservation Act 2002 was accepted on the ground that the State had not carried out an exercise for determining inadequacy of representation, backwardness and overall efficiency of administration. **B K Pavitra I** did not accept the plea of the applicability of creamy lawyer principle to consequential seniority; and

(vi) Under the Reservation Order 1978, reservations in promotion are restricted up to the lowest category of class I post.

D There is no basis in the challenge that the Reservation Act 2018 does not meet the proportionality test and results in over representation.

(i) In view of the Reservation Order 1999 providing that reservation in promotion in favour of SCs and STs shall continue only till their representation reaches 15 per cent and 3 per cent respectively, it is ensured that there is no over representation; and

(ii) Since the Reservation Act 2018 provides only for consequential seniority and not for reservation in appointment or promotion, it cannot be asserted that reservation for the purpose of seniority is vacancy-based and not post-

based, contrary to the decision in **Sabharwal.** Reservations in promotion are provided by the Government Order 1978 which provides for roster point promotion and not roster point seniority. The Government Order dated 13 April 1999 provides for making promotions (after the existing backlog is filled) in favour of SCs and STs by maintaining their representation to the extent of 15 per cent and 3 per cent of the total working strength (and not vacancies).

E There was no constitutional infirmity in the Governor of Karnataka having reserved the Reservation Act 2018 for the consideration of the President.

The Governor in reserving the Bill for consideration of the President acted in pursuance of the provisions of Article 200 of the Constitution. The Governor may under Article 200 (i) declare assent to a Bill; or (ii) declare the withholding of assent; or (iii) reserve a Bill for consideration of the President. The power of the Governor to reserve a Bill for consideration of the President is not subject to the existence of a repugnancy under Article 254 (2). The action of the Governor is non-justiciable. (**Hoechst Pharmaceuticals Ltd**)

F The assent of the Governor is not contemplated once the President has given assent to a Bill.

Neither Article 200 nor Article 201 contemplates that the Bill should be presented again before the Governor after it has been assented to by the President. Section 5(1)(iv) of the Karnataka General Clauses Act 1899 postulates that an Act passed

by the Karnataka legislature shall come into operation on the day on which the assent of the Governor or, as the case may be, of the President is granted and is first published in the Official Gazette. Hence, once the assent of the President is granted, the necessity of a further assent by the Governor is obviated.

G The submission that in Karnataka Power Transport Corporation Limited, as a consequence of the reservation in seniority in the cadre of Superintending Engineer and Engineer-in-Chief, there was over representation for SCs and ST between 2005 and 2016 is erroneous.

(i) There is no reservation for promotion to the posts of Superintending Engineer and Engineer-in-Chief in KPTCL. Reservation in promotion and consequential seniority is available only up to the post of Assistant Executive Engineer. In fact, if consequential seniority were not to be granted on promotion up to the post of Assistant Executive Engineer, there would be excessive under-representation of reserved category candidates. The Ratna Prabha Committee report, in paragraph 2.4, took note of the total number of officials/employees working in thirty one government departments of the State Government. It noted that 80.35 per cent of the sanctioned posts are concentrated in six major Government departments namely; Education, Home, Health, Revenue, Judicial and Finance. The data pertaining to thirty one government departments was taken in the totality to analyse and assess the adequacy of representation. The data of smaller departments may not be representative of the State Civil Services as a whole.

On the above grounds, it was urged that the challenge to the Reservation Act 2018 must fail.

54 Ms Indira Jaising[76], learned Senior Counsel appearing on behalf of the intervenors (Karnataka SC/ST Engineer's Welfare Association) contended that the Reservation Act 2018 is constitutionally valid. Ms Jaising urged the following submissions:

(i) The decisions of this Court in **State of Kerala** v **N M Thomas**[77] ("**N M Thomas**") and **Nagaraj** affirmed that Article 16 (4) is an emphatic declaration of Article 16 (1). The principle of 'proportional equality' entails substantive equality which is reflected in affirmative action to remedy injustice to SCs, STs and Other Backward Classes[78]. Social justice is concerned with the distribution of benefits and burdens. The Reservation Act 2018, in providing for consequential seniority, furthers the vision of substantive equality and is valid;

(ii) Affirmative action under Article 15 (4) and reservation under Article 16 (4) of the Constitution are intended to ensure that all sections of the society are represented equally in services under the state. The Reservation Act 2018 underlies this salient objective and furthers the promotion of the interests of the SCs, STs and other weaker sections as stipulated in Article 46 of the Constitution;

(iii) Article 16 (4A) is an enabling provision which empowers the State to frame rules or enact a legislation granting reservations in promotions with

76 In I.A. No. 90623 of 2018 in W.P. (C) No. 764 of 2018
77 (1976) 2 SCC 310
78 OBCs

consequential seniority subject to the fulfilment of the conditions laid down in **Nagaraj** and modified by **Jarnail**. Following the decision in **Jarnail**, the state is required to show data only on the inadequacy of representation and efficiency of administration. The State of Karnataka, in exercise of the enabling power under Article 16 (4A) enacted the Reservation Act 2018 in compliance with the conditions precedent to the exercise of the power stipulated in that Article;

(iv) The decision in **Sabharwal** lays down that in determining the inadequacy of representation of SCs and STs in promotional posts, the state may take the total population of a particular class and its representation in the service. The State has studied the extent of reservation in posts for SCs and STs in a 'group' which is a collection of cadres. Hence, it cannot be said that the state failed to collect quantifiable data on the representation of SCs and STs in promotional posts. Without the grant of consequential seniority, the percentage of reservation will not reach the prescribed percentage;

(v) No statistical studies have been provided to show that the grant of consequential seniority has led to the lowering of efficiency in administration. It cannot be presumed that the appointment of SCs and STs will lead to a lowering of efficiency as at the individual level, all individuals belonging to SCs and STs must also achieve the minimum benchmark of 'good';

(vi) The Reservation Act 2002 was struck down on the basis of the failure of the state to collect quantifiable data. The Reservation Act 2018 has been

enacted on the basis of data collected and studied in the Ratna Prabha Committee report. Hence, the basis of the decision in **B K Pavitra I** has been removed. Additionally, no mandamus was issued in **B K Pavitra I**;

(vii) The collection of data required to be carried out by the State is a matter of social science and is carried out by experts. Data collection is both qualitative and quantitative. As long as the methodology adopted by the state is scientifically sound, the assessment of the data collected is the prerogative of the state. The court may intervene in judicial review only when there is a complete absence of data or if the data relied on is irrelevant; and

(viii) The principles laid down by this Court in **Indra Sawhney** on the exclusion of the creamy layer apply only to OBCs and cannot extend to SCs and STs. No question arose in **Nagaraj** on the exclusion of the creamy layer in respect of SCs and STs. Hence, the decision is not an authority for the principle that the states are bound to exclude the creamy layer in respect of SCs and STs. The decision of this Court in **Jarnail** dealt with the competence of Parliament to enact a law in relation to the creamy layer and did not lay down a general proposition on its exclusion. The concept of creamy layer, if applicable, can only be applied at the entry level and not in promotions.

55 Mr Dinesh Dwivedi[79], learned Senior Counsel appearing on behalf of the intervenor (Karnataka SC/ST Engineers' Welfare Association), urged the following submissions:

79 In I.A. No. 102966 of 2018 in W. P. (C) No. 791 of 2018

(i) The decision in **Nagaraj** was concerned with whether reservation in promotion as inserted in Article 16 (4A) by the Constitution (Seventy-seventh Amendment) Act 1995 and the enabling provision for the grant of consequential seniority under Article 16 (4A) inserted by the Constitution (Eighty-fifth Amendment) Act 2001 violated the basic structure of the Constitution. The decision in **Nagaraj** was concerned with reservations in promotion and did not equate reservation in promotion with the grant of consequential seniority. In this view, the four controlling factors, namely (i) backwardness; (ii) adequacy of representation; (iii) elimination of the creamy layer; and (iv) efficiency of administration have relevance only to the exercise of the enabling power under Article 16 (4A) for making reservation in promotion and not the exercise of the enabling power to grant consequential seniority;

(ii) Reservation in promotion was introduced in the State of Karnataka by the Government Order dated 27 April 1978 and continues to be in operation. The Reservation Act 2018 stipulates the grant of consequential seniority which is premised on the prior existence and operation of reservation in promotion. Absent a challenge to the Government Order dated 27 April 1978 in the present proceedings, the petitioner is precluded from challenging the grant of consequential seniority in the Reservation Act 2018;

(iii) Consequential seniority is nothing but the normal rule of seniority which accords seniority to roster point promotees from the date of their substantive promotion. The catch-up rule is an exception to the normal rule

of seniority. Prior to the decision in **Indra Sawhney**, accelerated seniority to roster point promotees existed in the State of Karnataka with the application of the continuous officiation rule. This is supported by Rule 2(b) of the 1957 Rules. Para III (d) of the Government Order dated 27 April 1978 provided for the application of the catch-up rule only in a limited manner. Rule 4 is restricted in its application to appointments made on the same day which implies that in the absence of its application to a given case, consequential seniority must be granted;

(iv) The decision in **Virpal Singh** concerned a rule that specifically provided for the application of the catch-up rule in a departure from the normal rule of seniority. This Court held that a state may prescribe either consequential seniority based on continuous officiation or the catch-up rule of seniority in case of roster point promotions. A harmonious reading of Articles 14 and 16(1) of the Constitution does not stipulate that the catch-up rule must apply in the case of roster point promotions. Thus, a balancing of Articles 14, 16(1) and 16(4) of the Constitution denotes that the catch-up rule is not mandatory. The decisions of this Court in **Ajit Singh I**, **Ajit Singh II** and **Badappanavar**, in holding to the contrary, have been expressly overruled by the seventy-seventh and the eighty-fifth amendments to the Constitution, following which the principles enunciated in **Virpal Singh** continue to govern the field. The eighty-fifth amendment was intended to make consequential seniority a constitutional principle and revive consequential seniority as the normal rule of seniority;

(v) The principles enunciated in **Virpal Singh** are fortified by the decision in **Nagaraj** which held that the catch-up rule and consequential seniority are principles of service jurisprudence and cannot be elevated to a constitutional status. The discretion to choose between consequential seniority and catch-up vests with the state. The Reservation Act 2018, in stipulating for consequential seniority, is a valid exercise of discretion by the State; and

(vi) In the alternative, the tests laid down by the four controlling factors in **Nagaraj** and **Jarnail** have been satisfied prior to the enactment of the Reservation Act 2018. The satisfaction of the state in this regard cannot be subjected to review by this Court.

56 Mr Lakshminarayana, learned Senior Counsel has submitted thus:

(i) The issue as to whether reservation under Article 16 (4A) can be provided by an executive order was answered in the affirmative in the judgment of Justice BP Jeevan Ready speaking for a plurality of judges in **Indra Sawhney.** The word 'provision' in Article 16 (4) was interpreted in contrast with the word 'law' in clauses (3) and (5) of Article 16. The word 'any' and the word 'provision' in Article 16 (4) must be given their due meaning. Article 16 (4) is exhaustive as a special provision in favour of the backward class of citizens. Backward classes having been classified by the Constitution as a class deserving special treatment and the Constitution itself having specified the nature of the special treatment, it should be presumed that no further classification or special treatment is permissible

in their favour outside Article 16 (4). In light of the decision in **Indra Sawhney**, it is now a settled principle that a provision for reservation can be made by the legislature, by statutory rules and by executive orders;

(ii) Provisions for reservation in promotions were introduced in Karnataka by the Government Order dated 27 April 1978 on the basis of the inadequacy of representation of SCs and STs in public services under Article 16 (4). After the report on the inadequacy of representation dated 30 August 1979, first and second roster points were reserved for SCs and STs. The principle of consequential seniority is adopted by clause (vii) of the Government Order dated 27 April 1978 and clause (d) of the Government Order dated 1 June 1978;

(iii) Clause (vii) of the Government Order dated 27 April 1978 as it originally stood provided that *inter se* seniority amongst persons promoted "on any occasion" shall be determined under Rules 4 and 4 (A) of the Seniority Rules 1957;

(iv) The words "on any occasion" in clause (vii) were amended by clause (d) of the Government Order dated 1 June 1978 so that the determination of seniority among reserved promotees and general candidates on the basis of seniority-cum-merit shall "on each occasion" be fixed under Rule 4 of the Seniority Rules 1957;

(v) The substitution of the expression "on any occasion" with the expression "on each occasion" denotes the intention of the government to provide

consequential seniority to reserved category candidates promoted on the basis of roster;

(vi) The legislature enacted provisions pertaining to the policy of reservation in promotion in the State Civil Services and Public Sector Undertakings as follows :

(a) The Rules 1977 including the proviso to Rule 8, upheld by this Court in **Bhakta Ramegowda**;
(b) The Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Appointment etc.,) Act 1990;
(c) The Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Appointment etc.,) Rules 1992; and
(d) The Karnataka State Civil Services (Unfilled Vacancies Reserved for the persons belonging to the Scheduled Castes and the Scheduled Tribes) (Special Recruitment) Rules 2001.

The above provisions were followed by the Reservation Acts of 2002 and 2017.

(vii) With effect from 1 April 1992, the State of Karnataka inserted the proviso to Rule 8 in the Rules 1977 which reads as follows:

> "**8. Provision for reservation of appointments or posts.-**
>
> Appointments or posts shall be reserved for the members of the Scheduled Castes, Scheduled Tribes, and Other Backward Classes to such extent and in such manner as may be specified by the government under clause (4) of Article 16 of the Constitution of India.
>
> **Proviso to Rule 8**
>
> [80][Provided that, notwithstanding anything in the rules of Recruitment specially made in respect of any Service or Post,

80 Proviso inserted by GSR 64, dated 01.04.1992 w.e.f. 01.04.1992

the backlog vacancies in the promotional quota shall be determined and implemented with effect from 27th April,1978.

Note.– The backlog vacancy means the extent of the number of vacancies available under the roster system up to the level of lowest category in Group-A post calculated from 27th April, 1978.]."

The above Rule was upheld in **Bhakta Ramegowda**;

(viii) The Government Order dated 24 June 1997 provided additional roster points to cover up backlog promotional roster points, both in promotion and direct recruitment. Clauses (iv) and (v) of para 8 of the Government Order dated 24 June 1997 reads as follows :

"**Clause (IV).**

After effecting review of promotion and adjustment and fitment as indicated in item (iii) above, if some more persons belonging to scheduled castes and scheduled tribes who have already been promoted against backlog cannot get adjusted due to want of adequate number of vacancies as per the aforesaid roster points, such persons shall be adjusted and fitted in accordance with the procedure specified in item (iii) while effecting promotion in respect of future vacancies. Until such time, shall be continued against supernumerary posts to be created by the concerned Administrative Department. For this purpose, the Secretaries to Government are hereby delegated the power to create supernumerary posts presuming the concurrence of Finance Department and to that extent the Government Order No. FD 1 TFP 96, dated 10.07.1996, shall be deemed to have been modified accordingly.

Clause (V)

While adjusting and fitting promote[e]s as indicated in item (iii) and (iv) above, the inter-se seniority among the General category, the scheduled caste category and the scheduled tribe category shall be determined in accordance with rule 4 or rule 4 A as the case may be, of the Karnataka Government Servants Seniority Rules 1957. The roster points are meant only for calculating the number of vacancies that become available for the different categories on each occasion and they do not determine the seniority."

The above clauses reiterated the purpose of assessing *inter se* seniority after promotion of roster promotees in reckoning consequential seniority among two groups.

(ix) The State Government is entitled to prescribe the percentage of reservation based on the total population of a particular backward class and its representation in the services of the State under Article 16 (4). Once the prescribed percentage of reservations is determined, the numerical test of adequacy is satisfied. The percentage of reservation is the desired representation of the backward classes in the state services and is consistent with the demographic estimate, based on the proportion worked out in relation to their population;

(x) The operation of the roster points and filling of the cadre strength ensures that the reservation remains within the limit of 50 per cent;

(xi) Reserved candidates who have been appointed or promoted on merit as general candidates cannot be included in calculating adequacy of representation of backward classes in operating the roster points. Only reserved candidates promoted against roster points are to be taken into account in considering the adequacy of representation;

(xii) A cadre includes different grades and reservation can be provided in different grades within the cadre. The reservation policy contained in the Government Order dated 27 April 1978 has been re-issued on 17 April 1993 and 11 May 1993 after the decision in **Indra Sawhney**;

(xiii) Both clauses (1) and (4) of Article 16 operate in the same field. Both are directed towards achieving equality of opportunity in services under the State. The formation of opinion by the State on the adequacy of representation is a matter of subjective satisfaction and the test is whether there was some material before the State to justify its opinion. In the exercise of judicial review, the court would extend due deference to the judgment and discretion of the executive. Even if there are some errors on the part of the State Government, that would not in any way result in the invalidation of the entire exercise;

(xiv) Efficiency of administration means governance which provides responsive service to the people. Merit alone is not a component of efficiency. Once an employee is promoted, efficiency is judged on the basis of the annual confidential reports;

(xv) A curative legislation does not constitute an encroachment on judicial power by the State Legislature. Similarly, it is open to the legislature to enact a legislation both with retrospective and prospective effect;

(xvi) Judicial review cannot extend to examine the adequacy of the material available before the President and unless, there is a situation involving a fraud on power or conduct actuated by oblique motive, the court would not intervene;

(xvii) The principle of creamy layer has no application to in-service candidates; and

(xviii) The State having rectified the lacuna which was pointed out in **B K Pavitra I**, by carrying out the exercise of data collection, the opinion formed by the State after analysing the data lies in its subjective satisfaction. The reservation policy dated 27 April 1978 which introduced provisions for reservations in promotions for SCs and STs in public services has continued until date without interruption.

57 Mr Nidhesh Gupta, learned Senior Counsel urged the following submissions:

(i) The phrase 'in the opinion of the state' in Article 16(4) of the Constitution indicates that the issue with regard to adequacy of representation is within the subjective satisfaction of the state. The role of the court is limited to examining whether the opinion formed by the government was on the basis of data available with it. While the existence of circumstances requiring state action may be reviewed, the opinion formed is outside the purview of judicial review. These propositions have been accepted in the decisions of this Court in **Indra Sawhney**, **Barium Chemicals Ltd.** v **Company Law Board**[81] ("**Barium Chemicals Ltd.**"), **Rohtas Industries** v **S D Agarwal**[82] and **Rustom Cavasjee Cooper** v **Union of India**[83];

(ii) The expression 'to any class or classes of posts' in Article 16(4) makes it abundantly clear that the phrase refers to a 'class' or 'group' and not a cadre. The use of the word 'services' in the phrase 'services under the state' in Article 16 (4A) supports this contention. The decisions in

81 AIR 1967 SC 295
82 (1969) 1 SCC 325
83 (1970) 1 SCC 248

Sabharwal and **Nagaraj** clarify that cadre strength is to be applied in the operation of the roster. The reference to 'entire cadre strength' in **Sabharwal** adverted to the fact that the entire cadre strength should be taken into account in determining whether reservation up to the quota limit has been reached. In this view, 'entire cadre strength' is the reference point to (i) ascertain the position of representation in the entire service; (ii) determine whether reservation up to the quota limit has been reached in the application of the roster; and (iii) the cadre strength has been applied in the operation of the roster. It was urged that if the percentages were calculated on the basis of vacancies, the actual appointments made may exceed the prescribed quota. Reliance has been placed on the decisions of this Court in **Indra Sawhney**, **Nagaraj**, and **Jarnail**;

(iii) The decision in **Indra Sawhney** does not deal with SCs and STs in regard to the creamy layer principle. In any case, even if the principle applies to SCs and STs, it would only be applicable at the stage of appointments and not for promotional posts; and

(iv) The percentages in the PWD which are marginally above the stipulated quota are by way of including those reserved category candidates who were selected on general merit. This is contrary to the law laid down by this Court in **Sabharwal**, **Indra Sawhney** and **Ritesh Sah** v **Y L Yamul**[84].

58 The rival submissions now fall for consideration.

84 (1996) 3 SCC 253

59 Other Counsel, who argued and submitted their written submissions, have with certain nuances, reiterated similar arguments.

D Assent to the Bill

60 Besides the Governor, the legislatures of the States consist of a bicameral legislature for some States and a unicameral legislature for others.[85]

61 Article 200 is the provision which enunciates the power of the Governor to assent to a Bill, withhold assent or reserve a Bill for considering of the President:

> "200. When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:
>
> Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom:
>
> Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to

85 Article 168. (1) For every State there shall be a Legislature which shall consist of the Governor, and—
(a) in the States of [Andhra Pradesh], Bihar, [Madhya Pradesh], [Maharashtra], [Karnataka], [[Tamil Nadu, Telangana]] [and Uttar Pradesh], two Houses;
(b) in other States, one House.
(2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly.

> endanger the position which that Court is by this Constitution designed to fill."

Article 201 deals with what is to happen when the Governor reserves a Bill for the consideration of the President.

> "201. When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom:
>
> Provided that, where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to the House or, as the case may be, the Houses of the Legislature of the State together with such a message as is mentioned in the first proviso to article 200 and, when a Bill is so returned, the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and, if it is again passed by the House or Houses with or without amendment, it shall be presented again to the President for his consideration."

Upon a Bill being passed by the Houses of the legislature (or by the sole House where there is only a legislative assembly), it has to be presented to the Governor. The Governor can (i) assent to the Bill; (ii) withhold assent; or (iii) reserve the Bill for the consideration of the President.

62 Where a Bill is not a Money Bill, the Governor may return the Bill for reconsideration upon which the House or Houses, as the case may be, will reconsider the desirability of introducing the amendments which the Governor has recommended. If the Bill is passed again by the House (or Houses as the case may be), the Governor cannot thereafter withhold assent. The second proviso to Article 200 stipulates that the Governor must not assent to a Bill but

necessarily reserve it for the consideration of the President if the Bill upon being enacted would derogate from the powers of the High Court in a manner that endangers its position under the Constitution. Save and except for Bills falling within the description contained in the second proviso (where the Governor must reserve the Bill for consideration of the President), a discretion is conferred upon the Governor to follow one of the courses of action enunciated in the substantive part of Article 200. Aside from Bills which are covered by the second proviso, where the Governor is obliged to reserve the Bill for the consideration of the President, the substantive part of Article 200 does not indicate specifically, the circumstances in which the Governor may reserve a Bill for the consideration of the President. The Constitution has entrusted this discretion to the Governor. The nature and scope of the discretionary power of the Governor to act independent of, or, contrary to aid and advice of Council of Ministers under Article 163 was discussed in **Nabam Rebia**, Justice J S Khehar (as the learned Chief Justice then was) held thus:

> "154. We are, therefore, of the considered view that insofar as the exercise of discretionary powers vested with the Governor is concerned, the same is limited to situations, wherein a constitutional provision expressly so provides that the Governor should act in his own discretion. Additionally, a Governor can exercise his functions in his own discretion, in situations where an interpretation of the constitutional provision concerned, could not be construed otherwise…"[86]

Justice Dipak Misra (as the learned judge then was), observed thus:

> "375. …The Governor is expected to function in accordance with the provisions of the Constitution (and the history behind the enactment of its provisions), the law and the rules

86 Supra 69 at page 159

> regulating his functions. It is easy to forget that the Governor is a constitutional or formal head—nevertheless like everybody else, he has to play the game in accordance with the rules of the game—whether it is in relation to the Executive (aid and advice of the Council of Ministers) or the Legislature (Rules of Procedure and Conduct of Business of the Arunachal Pradesh Legislative Assembly). This is not to say that the Governor has no powers—he does, but these too are delineated by the Constitution either specifically or by necessary implication…"[87]

63 The framers carefully eschewed defining the circumstances in which the Governor may reserve a Bill for the consideration of the President. By its very nature the conferment of the power cannot be confined to specific categories. Exigencies may arise in the working of the Constitution which justify a recourse to the power of reserving a Bill for the consideration of the President. They cannot be foreseen with the vision of a soothsayer. The power having been conferred upon a constitutional functionary, it is conditioned by the expectation that it would be exercised upon careful reflection and for resolving legitimate concerns in regard to the validity of the legislation. The entrustment of a constitutional discretion to the Governor is premised on the trust that the exercise of authority would be governed by constitutional statesmanship. In a federal structure, the conferment of this constitutional discretion is not intended to thwart democratic federalism. The state legislatures represent the popular will of those who elect their representatives. They are the collective embodiments of that will. The act of reserving a Bill for the assent of the President must be undertaken upon careful reflection, upon a doubt being entertained by the Governor about the constitutional legitimacy of the Bill which has been passed.

87 Ibid at page 244

64 Dr Dhavan in the course of his submissions, has dwelt at length on the power which is entrusted to the Governor to reserve a Bill for the consideration of the President under Article 254 (2). Article 254 (2) deals with a situation where a law which has been enacted by the legislature of a state on a matter which is enumerated in the Concurrent List of the Seventh Schedule contains any provision which is repugnant either to an earlier law made by Parliament or an existing law with respect to that matter. In such an eventuality, the law made by the legislature of the state can prevail in that state only if it has received the assent of the President on being reserved for consideration.

65 When the reservation of a Bill for the assent of the President has been occasioned on the ground of a repugnancy with an existing law or a law enacted by the Parliament, there are decisions of this Court which hold that the President has to be apprised of the reason why the assent was sought. In **Gram Panchayat of Village Jamalpur**, a law enacted by the Punjab legislature in 1953, extinguished all private interests in Shamlat-deh lands and vested them in the village Panchayats as a matter of agrarian reform. This Court held that the Punjab enactment had not been reserved for the assent of the President on the ground that it was repugnant to an earlier Act enacted by Parliament in 1950 but the assent was sought for a different and a specific purpose. In this background, the Constitution Bench held that the assent of the President would not avail the state government to accord precedence to the law enacted by the state legislature over the law made by Parliament. The Constitution Bench held:

> "12…The assent of the President under Article 254(2) of the Constitution is not a matter of idle formality. The President has, at least, to be apprised of the reason why his assent is sought if, there is any special reason for doing so. If the assent is sought and given in general terms so as to be effective for all purposes, different considerations may legitimately arise. But if, as in the instant case, the assent of the President is sought to the Law for a specific purpose, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it."[88]

66 A similar principle was adopted in **Kaiser-I-Hind Pvt Ltd**. The case concerned rent legislation in Maharashtra and the Public Premises (Eviction of Unauthorized Occupants) Act 1971 enacted by Parliament. This Court held that where the assent was given after considering the repugnancy between the Bombay Rent Act, the Transfer of Property Act and the Presidency Small Cause Courts Act, it was not correct to hold that the state law would prevail over another parliamentary enactment for which no assent had been sought. In that context, the Court held:

> "65… 2. (a) Article 254(2) contemplates "reservation for consideration of the President" and also "assent". Reservation for consideration is not an empty formality. Pointed attention of the President is required to be drawn to the repugnancy between the earlier law made by Parliament and the contemplated State legislation and the reasons for having such law despite the enactment by Parliament.
>
> (b) The word "assent" used in clause (2) of Article 254 would in context mean express agreement of mind to what is proposed by the State."[89]

67 These decisions are specifically in the context of Article 254. Article 254(1) postulates *inter alia*, that in a matter which is governed by the Concurrent List, a law which has been enacted by the legislature of a state shall be void to the

88 Supra 67 at pages 668-669
89 Supra 66 at pages 215-216

extent of its repugnancy with a law enacted by the Parliament. Clause (2) of Article 254 obviates that consequence where the law has been reserved for the consideration of the President and has received assent. Article 254(1) is made subject to Clause (2), thereby emphasizing that the assent of the President will cure a repugnancy of the state law with a law enacted by the Parliament in a matter falling in the Concurrent List. It is in this context, that the decisions of this Court hold that the assent of the President should be sought in relation to a repugnancy with a specific provision contained in a Parliamentary legislation so as to enable due consideration by the President of the ground on which assent has been sought. Article 200 contains the source of the constitutional power which is conferred upon the Governor to reserve a Bill for the consideration of the President. Article 254 (2) is an illustration of the constitutional authority of the Governor to reserve a law enacted by the state legislature for consideration of the President in a specified situation - where it is repugnant to an existing law or to a Parliamentary legislation on a matter falling in the Concurrent List. The eventuality which is specified in Article 254 (2) does not exhaust the ambit of the power entrusted to the Governor under Article 200 to reserve a Bill for the consideration of the President. Apart from a repugnancy in matters falling in the Concurrent List between state and Parliamentary legislation, a Governor may have sound constitutional reasons to reserve a Bill for the consideration of the President. Article 200, in its second proviso mandates that a Bill which derogates from the powers of the High Court must be reserved for the consideration of the President. Apart from Bills which fall within the description set out in the second proviso, the Governor may legitimately refer a Bill for consideration of the

President upon entertaining a legitimate doubt about the validity of the law. By its very nature, it would not be possible for this Court to reflect upon the situations in which the power under Article 200 can be exercised. This was noticed in the judgment of this Court in **Hoechst**. Excluding it from judicial scrutiny, the Court held:

> "86…There may also be a Bill passed by the State Legislature where there may be a genuine doubt about the applicability of any of the provisions of the Constitution which require the assent of the President to be given to it in order that it may be effective as an Act. In such a case, it is for the Governor to exercise his discretion and to decide whether he should assent to the Bill or should reserve it for consideration of the President to avoid any future complication. Even if it ultimately turns out that there was no necessity for the Governor to have reserved a Bill for the consideration of the President, still he having done so and obtained the assent of the President, the Act so passed cannot be held to be unconstitutional on the ground of want of proper assent. This aspect of the matter, as the law now stands, is not open to scrutiny by the courts. In the instant case, the Finance Bill which ultimately became the Act in question was a consolidating Act relating to different subjects and perhaps the Governor felt that it was necessary to reserve it for the assent of the President. We have no hesitation in holding that the assent of the President is not justiciable, and we cannot spell out any infirmity arising out of his decision to give such assent."[90]

68 **Hoechst** is an authority for the proposition that the assent of the President is non - justiciable. **Hoechst** also lays down that even if, as it turns out, it was not necessary for the Governor to reserve a Bill for the consideration of the President, yet if it was reserved for and received the assent of the President, the law as enacted cannot be regarded as unconstitutional for want of 'proper' assent.

90 Supra 68 at pages 100-101

69 The above decisions essentially answer the submissions which were urged by Dr Dhavan. The law as propounded in the line of precedents adverted to above must negate the submissions which were urged on behalf of the petitioners. Once the Bill (which led to the Reservation Act 2018) was reserved by the Governor for the consideration of the President, it was for the President to either grant or withhold assent to the Bill. The President having assented to the Bill, the requirements of Article 201 were fulfilled. The validity of the assent by the President is non-justiciable. The Governor, while reserving the Bill in the present case for the consideration of the President on 6 December 2017 observed thus:

> "The Supreme Court in the case of BK Pavitra Case, while considering the issue of grant of promotion to persons belonging to SC and STs has observed the necessity of applying the test of inadequacy of representation, backwardness and overall efficiency, for exercise of power under Article 16 (4A) of the Constitution and has directed the State Government to revise the seniority list within the time frame.
>
> The State Government to overcome the situation which was found fault with by the Supreme Court in the aforesaid judgment has come out with a Bill, which is now sent for my assent.
>
> Having regard to the judgment of the Supreme Court in the aforesaid case and importance of the issue and the Constitutional interpretation involved in the matter, I deem it appropriate to reserve the matter for the consideration of the President. Accordingly, the Bill is reserved for the consideration of the President under Article 200 of the Constitution of India."

70 The state government, in the course of its clarifications, was of the view that there was no necessity of reserving the Bill for the consideration of the

President, since in its view, the Governor had not recorded a finding that it was unconstitutional, or fell afoul of existing central legislation on the subject or that it was beyond legislative competence or derogated from the fundamental rights. All procedural requirements under the Constitution were according to the government duly complied with. This objection of the state government cannot cast doubt upon the grant of assent by the President. The law having received the assent of the President, the submissions which were urged on behalf of the petitioners cannot be countenanced.

E Does the Reservation Act 2018 overrule or nullify B K Pavitra I

71 The foundation of the decision in **B K Pavitra I** is the principle enunciated in **Nagaraj** that in order to sustain the exercise of the enabling power contained in Article 16 (4A), the state is required to demonstrate a "compelling necessity" by collecting quantifiable data on: (i) inadequacy of representation; (ii) backwardness; and (iii) overall efficiency. The judgment in **B K Pavitra I** held that no such exercise was undertaken by the State of Karnataka before providing for reservation in promotion and providing for consequential seniority. On the ground that the state had not collected quantifiable data on the three parameters enunciated in **Nagaraj**, the Reservation Act 2002 was held to be unconstitutional. The Constitution Bench in **Nagaraj** upheld the validity of Article 16 (4A) on the basis that before taking recourse to the enabling power the state has to carry out the exercise of collecting quantifiable data and fulfilling the three parameters noted above. **B K Pavitra I** essentially held that there was a failure on the part of

the state to undertake this exercise, which was a pre-condition for the exercise of the enabling power to make reservations in promotions and to provide for consequential seniority.

72 The decision in **B K Pavitra I** did not restrain the state from carrying out the exercise of collecting quantifiable data so as to fulfil the conditionalities for the exercise of the enabling power under Article 16 (4A). The legislature has the plenary power to enact a law. That power extends to enacting a legislation both with prospective and retrospective effect. Where a law has been invalidated by the decision of a constitutional court, the legislature can amend the law retrospectively or enact a law which removes the cause for invalidation. A legislature cannot overrule a decision of the court on the ground that it is erroneous or is nullity. But, it is certainly open to the legislature either to amend an existing law or to enact a law which removes the basis on which a declaration of invalidity was issued in the exercise of judicial review. Curative legislation is constitutionally permissible. It is not an encroachment on judicial power. In the present case, state legislature of Karnataka, by enacting the Reservation Act 2018, has not nullified the judicial decision in **B K Pavitra I**, but taken care to remedy the underlying cause which led to a declaration of invalidity in the first place. Such a law is valid because it removes the basis of the decision.

73 These principles have consistently been reiterated in a line of precedents emerging from this Court. In **Utkal Contractors and Joinery (P) Ltd**, this Court held:

> "15. …The legislature may, at any time, in exercise of the plenary power conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law. There is no prohibition against retrospective legislation. The power of the legislature to pass a law postulates the power to pass it prospectively as well as retrospectively. That of course, is subject to the legislative competence and subject to other constitutional limitations. The rendering ineffective of judgments or orders of competent courts by changing their basis by legislative enactment is a well-known pattern of all validating acts. Such validating legislation which removes the causes of ineffectiveness or invalidity of action or proceedings cannot be considered as encroachment on judicial power. The legislature, however, cannot by a bare declaration, without more, directly overrule, reverse or set aside any judicial decision…"[91]

(See also in this context : **Bhubaneshwar Singh** v **Union of India**[92], **Indian Aluminium Co** v **State of Kerala**[93] ("**Indian Aluminium Co**"), **Narain Singh**[94] and **Cheviti Venkanna Yadav**).

74 The legislature has the power to validate a law which is found to be invalid by curing the infirmity. As an incident of the exercise of this power, the legislature may enact a validating law to make the provisions of the earlier law effective from the date on which it was enacted (**The United Provinces** v **Mst Atiqa Begum**[95] and **Rai Ramkrishna** v **State of Bihar**[96]). These principles were elucidated in the decision of this Court in **Prithvi Cotton Mills Ltd**. The judgment makes a distinction between a law which simply declares that a decision of the court will not bind (which is impermissible for the legislature) and a law which

91 Supra 74 at page 759
92 (1994) 6 SCC 77
93 (1996) 7 SCC 637
94 (2009) 13 SCC 165
95 AIR 1941 FC 16
96 (1964) 1 SCR 897

fundamentally alters the basis of an earlier legislation so that the decision would not have been given in the altered circumstances. This distinction is elaborated in the following extract:

> "4. … Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal."[97]

75 In **State of T N** v **Arooran Sugars Ltd**[98], a Constitution Bench of this Court recognized the power of the legislature to enact a law retrospectively to cure a defect found by the Court. It was held that in doing so, the legislature did not nullify a writ or encroach upon judicial power. The legislature in remedying a deficiency in the law acted within the scope of its authority. This Court held:

> "16…It is open to the legislature to remove the defect pointed out by the court or to amend the definition or any other provision of the Act in question retrospectively. In this process it cannot be said that there has been an encroachment by the legislature over the power of the judiciary. A court's directive must always bind unless the conditions on which it is based are so fundamentally altered that under altered circumstances such decisions could not have been given. This will include removal of the defect in a statute pointed out in the judgment in question, as well as alteration or substitution of provisions of the enactment on which such judgment is based, with retrospective effect."[99]

97 Supra 55 at pages 286-287
98 (1997) 1 SCC 326
99 Ibid at page 340

The same principle was formulated in the decision of this Court in **Virender Singh Hooda** v **State of Haryana**[100]:

> "59. …vested rights can be taken away by retrospective legislation by removing the basis of a judgment so long as the amendment does not violate the fundamental rights. We are unable to accept the broad proposition… that the effect of the writs issued by the courts cannot be nullified by the legislature by enacting a law with retrospective effect. The question, in fact, is not of nullifying the effect of writs which may be issued by the High Court or this Court. The question is of removing the basis which resulted in issue of such a writ. If the basis is nullified by enactment of a valid legislation which has the effect of depriving a person of the benefit accrued under a writ, the denial of such benefit is incidental to the power to enact a legislation with retrospective effect. Such an exercise of power cannot be held to be usurpation of judicial power…"[101]

76 A declaration by a court that a law is constitutionally invalid does not fetter the authority of the legislature to remedy the basis on which the declaration was issued by curing the grounds for invalidity. While curing the defect, it is essential to understand the reasons underlying the declaration of invalidity. The reasons constitute the basis of the declaration. The legislature cannot simply override the declaration of invalidity without remedying the basis on which the law was held to be *ultra vires*. A law may have been held to be invalid on the ground that the legislature which enacted the law had no legislative competence on the subject matter of the legislation. Obviously, in such a case, a legislature which has been held to lack legislative competence cannot arrogate to itself competence over a subject matter over which it has been held to lack legislative competence. However, a legislature which has the legislative competence to enact a law on

100 (2004) 12 SCC 588
101 Ibid at page 616

the subject can certainly step in and enact a legislation on a field over which it possesses legislative competence. For instance, where a law has been invalidated on the ground that the state legislature lacks legislative competence to enact a law on a particular subject – Parliament being conferred with legislative competence over the same subject – it is open for the Parliament, following a declaration of the invalidity of the state law, to enact a new law and to regulate the area. As an incident of its validating exercise, Parliament may validate the collection of a levy under the earlier law. The collection of a levy under a law which has been held to be invalid is validated by the enactment of legislation by a legislative body – Parliament in the above example – which has competence over the subject matter. Apart from legislative competence, a law may have been declared invalid on the ground that there was a breach of the fundamental rights contained in Part III of the Constitution. In that situation, if the legislature proceeds to enact a new law on the subject, the issue in essence is whether the re-enacted law has taken care to remove the infractions of the fundamental rights on the basis of which the earlier law was held to be invalid. The true test therefore is whether the legislature has acted within the bounds of its authority to remedy the basis on which the earlier law was held to suffer from a constitutional infirmity.

77 The petitioners have placed a considerable degree of reliance on the decision in **Madan Mohan Pathak**, where a law – The Life Insurance Corporation (Modification of Settlements) Act 1976 was enacted by Parliament to render ineffective a settlement which was arrived at between LIC and its employees for the payment of bonus. The law was challenged by the employees. In that case,

there was a judgment of the Calcutta High Court which had given effect to the right of the employees to an annual cash bonus under an industrial settlement, by the issuance of a writ of mandamus. The mandamus bound the parties to the dispute. It was in this backdrop that the Constitution Bench observed that the effect of the mandamus issued by the High Court could not simply be nullified by enacting a law overriding the industrial settlement. This Court held:

> "9...Here the judgment given by the Calcutta High Court, which is relied upon by the petitioners, is not a mere declaratory judgment holding an impost or tax to be invalid, so that a validation statute can remove the defect pointed out by the judgment amending the law with retrospective effect and validate such impost or tax. But it is a judgment giving effect to the right of the petitioners to annual cash bonus under the Settlement by issuing a writ of mandamus directing the Life Insurance Corporation to pay the amount of such bonus. If by reason of retrospective alteration of the factual or legal situation, the judgment is rendered erroneous, the remedy may be by way of appeal or review, but so long as the judgment stands, it cannot be disregarded or ignored and it must be obeyed by the Life Insurance Corporation. We are, therefore, of the view that, in any event, irrespective of whether the impugned Act is constitutionally valid or not, the Life Insurance Corporation is bound to obey the writ of mandamus issued by the Calcutta High Court and to pay annual cash bonus for the year April 1, 1975 to March 31, 1976 to Class III and Class IV employees."[102]

78 The decision in **Madan Mohan Pathak** is hence distinguishable from the facts of the present case. The above observations recognized the constitutional position that in the case of a declaratory judgment holding an action to be invalid, a validating legislation to remove the defect is permissible. Applying this principle, it is evident that the decision in **B K Pavitra I** declared the Reservation Act 2002 to be invalid and consequent upon the declaration of invalidity, certain directions were issued. If the basis on which Reservation Act 2002 was held to be invalid is

102 Supra 56 at page 67

cured by a validating legislation, in this case the Reservation Act 2018, this would constitute a permissible legislative exercise. The grounds which weighed in **Madan Mohan Pathak** would hence not be available in the present case.

79 The decision in **Madan Mohan Pathak** has been adverted to and clarified in several decisions of this Court rendered subsequently. These include:

(i) **Sri Ranga Match Industries** v **Union of India**[103], where it was held that:

> "14. While appreciating the ratio of the said opinions, it is necessary to bear in mind the basic fact that the settlement between the Corporation and its employees was not based upon any statute or statutory provision. Sub-sections (1) and (3) of Section 18 of the Industrial Disputes Act provide merely the binding nature of such settlements; they do not constitute the basis of the settlements. **The settlement between the parties was directed to be implemented by the High Court. In other words, it was not a case where the High Court either struck down a statutory provision nor was it a case where a statutory provision was interpreted in a particular manner or directed to be implemented. It was also not a case where the statutory provision, on which the judgment was based, was amended or altered to remove/rectify the defect**."[104] (Emphasis supplied)

(ii) **Indian Aluminium Co**, where it was held that:

> "49. In Madan Mohan Pathak v. Union of India (1978) 2 SCC 50 : 1978 SCC (L&S) 103 : (1978) 3 SCR 334]…
>
> From the observations made by Bhagwati, J. per majority, it is clear that **this Court did not intend to lay down that Parliament, under no circumstance, has power to amend the law removing the vice pointed out by the court.** Equally, the observation of Chief Justice Beg is to be understood in the context that **as long as the effect of mandamus issued by the court is not legally and constitutionally made ineffective, the State is bound to obey the directions.** Thus understood, it is unexceptionable. But it does not mean that the learned Chief Justice intended

103 1994 Supp. (2) SCC 726
104 Ibid at pages 736-737

> to lay down the law that mandamus issued by court cannot at all be made ineffective by a valid law made by the legislature, removing the defect pointed out by the court."[105] (Emphasis supplied)

(iii) **Agricultural Income Tax Officer** v **Goodricke Group Ltd**[106], where it was held:

> "14. We are of the view that Madan Mohan Pathak case [(1978) 2 SCC 50 : 1978 SCC (L&S) 103 : (1978) 3 SCR 334] would not apply to the facts in the present case for the simple reason that **what has been undone by Section 4-B and Section 78-C is not a mandamus issued by a superior court. What is undone is the very basis of the judgment** in Buxa Dooars Tea Co. Ltd. case[(1989) 3 SCC 211 : 1989 SCC (Tax) 394] by retrospectively changing the levy of rural employment cess and education cess."[107] (Emphasis supplied)

80 **Madan Mohan Pathak** involved a situation where a parliamentary law was enacted to override a mandamus which was issued by the High Court for the payment of bonus under an industrial settlement. The case did not involve a situation where a law was held to be *ultra vires* and the basis of the declaration of invalidity of the law was sought to be cured.

81 Dr Dhavan adverted to the legal basis of **B K Pavitra I** as set out in the following extract from the conclusion:

> "30. In view of the above, we allow these appeals, set aside the impugned judgment and declare the provisions of the

105 Supra 93 at page 660
106 (2015) 8 SCC 399
107 Ibid at page 407

> 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."[108]

Dr Dhavan is entirely correct, if we may say so with respect, in submitting "that what has to be shown is whether the Reservation Act 2018 is, in law Articles 14 and 16 compliant". This necessitates an examination of the constitutionality of the Reservation Act 2018. That would require this Court to examine the challenge on the ground that there has been a violation of the equality code contained in Articles 14 and 16.

E.I Is the basis of B K Pavitra I cured in enacting the Reservation Act 2018

82 The Statement of Objects and Reasons of the Reservation Act 2018 refers to the legislative history preceding its enactment. The Ratna Prabha Committee was constituted after the Reservation Act 2002 was held to be invalid in **B K Pavitra I** on the ground that no compelling necessity had been shown by the state to provide for reservation in matters of promotion for SCs and STs by collecting and analysing relevant data to satisfy the requirements laid out in **Nagaraj**. The constitution of the Ratna Prabha Committee was consequent upon the Reservation Act 2002 having been held to be invalid in **B K Pavitra I**.

108 Supra 5 at page 641

83 The Statement of Objects and Reasons is extracted below, insofar as it is material:

> "The Hon'ble Supreme Court of India in its judgment dated: 09.02.2017 in the case of BK Pavitra and others Vs Union of India and others in Civil Appeal No. 2368 of 2011 and connected matters while dealing with the issue of consequential seniority provided to the Scheduled Castes and Scheduled Tribes, having regard to the ratio of the decision of the Constitution Bench in M.Nagaraj in Writ Petition No. 61 of 2002 has observed that a proper exercise for determining 'inadequacy of representation' 'backwardness' and 'overall efficiency' is a must for exercise of power under Article 16 (4A). The court held that in the absence of this exercise under Article 16 (4A) it is the "catch-up" rule that shall be applicable. Having observed this the Court declared the provisions of Sections 3 and 4 of the Karnataka Act 10 of 2002 to be ultra vires of Articles 14 and 16 of the Constitution. The Hon'ble Supreme Court directed that revision of the Seniority lists be undertaken and completed within three months and further consequential action be taken within the next three months;
>
> In order to comply with the directions of the Hon'ble Supreme Court in BK Pavitra and others vs Union of India and others in Civil Appeal No. 2368 of 2011 the Government has issued order vide Government order No. DPAR 182 SRR 2011 dated 06.05.2017 to all appointing authorities to revise the seniority lists;
>
> While in compliance of the Supreme Court order, the Government considering the need and taking note of the decision of the Constitution Bench in M Nagaraj, in Writ Petition No. 61 of 2002, has entrusted the task of conducting study and submitting a report on the backwardness of the Scheduled Castes and Scheduled Tribes in the state, inadequacy of their representation in the State Civil Services and the effect of reservation in promotion on the State administration, to the Additional Chief Secretary to Government in Government order No. DPAR 182 SRR 2011 dated 22.03.2017;
>
> The Additional Chief Secretary to Government with the assistance of officers from various departments has collated the scientific, quantifiable and relevant data collected and having made a detailed study of quantifiable data has submitted a report on backwardness of Scheduled Castes and Scheduled Tribes in the state, inadequacy of their representation in the State Civil Services and the effect of

> reservation in promotion on the State administration to the State Government;
>
> The report confirms the backwardness of the Scheduled Castes and Scheduled Tribes in the state, inadequacy of their representation in the State Civil Services and that the overall efficiency of administration has not been affected or hampered by extending reservation in promotion to the Scheduled Castes and Scheduled Tribes in the state and continuance of reservation in promotion within the limits will not affect or hamper overall efficiency of administration;"

84 The first principle of statutory interpretation guides us towards the view that undoubtedly, the Statement of Objects and Reasons:

(i) Cannot be used for restricting the plain meaning of a legislation[109];

(ii) Cannot determine whether a provision is valid[110]; and

(iii) May not be definitive of the circumstances in which it was passed[111].

[See in this context **Welfare Association** v **Ranjit**[112]].

85 The preamble to a law may be a statutory aid to consider the mischief which the law seeks to address. While it cannot prevail over the provisions of the statute, it can be an aid to resolve an ambiguity[113].

86 In the course of his submissions, Dr Dhavan has emphasized the "new provisions" contained in the Reservation Act 2018. These according to him, are:

(i) Section 2 (d) which defines 'backlog';

109 Bhaiji v Sub-Divisional Officer, Thandla : (2003) 1 SCC 692 at page 700, A Manjula Bhashini v A P Monen's Coor. Finance Corp. Ltd. : (2009) 8 SCC 431 at paras 34, 40
110 Kerala State (Electricity) Board v Indian Aluminum : (1976) 1 SCC 466
111 K S Paripoornan v State of Kerala : (1994) 5 SCC 593
112 (2003) 9 SCC 358
113 Burrakur Coal Co. Ltd. v Union of India : AIR 1961 SC 954 at pages 956-957

(ii) Section 5 under which the appointing authority is to revise and redraw the existing seniority lists;

(iii) Section 7 which deals with the power to remove difficulties;

(iv) Section 8 which provides for the repeal of the Reservation Act 2002; and

(v) Section 9 which is a validating provision.

87 The essential issue which now needs to be addressed by this Court is whether the basis of the decision in **B K Pavitra I** has been cured. The decision of the Constitution Bench in **Nagaraj** mandates that before the State can take recourse to the enabling power contained in Clauses (4A) and (4B) of Article 16, it must demonstrate the existence of "compelling reasons" on three facets: (i) backwardness; (ii) inadequacy of representation; and (iii) overall administrative efficiency. In **Jarnail**, the Constitution Bench clarified that the first of the above factors – "backwardness" has no application in the case of reservations for the SCs and STs. **Nagaraj** to that extent was held to be contrary to the decision of the larger Bench in **Indra Sawhney.**

E.2 The Ratna Prabha Committee report

88 The decision in **B K Pavitra I** was rendered on 9 February 2017. The Ratna Prabha Committee was established on 22 March 2017. Its report was examined by a Cabinet Sub-Committee on 4 August 2017 and was eventually approved by the Cabinet on 7 August 2017. The Ratna Prabha Committee report was commissioned to : (i) collect information on cadre wise representation of SC and ST employees in all government departments; (ii) collect information on

backwardness of SCs and STs; and (iii) study the effect on the administration due to the promotion of SCs and STs.

89 Dr Dhavan's challenge to the report is basically founded on the following features:

(i) Only thirty one out of sixty two government departments were examined;

(ii) No data was collected for public sector undertakings, boards, corporations, local bodies, grant-in-aid institutions and autonomous bodies;

(iii) In PWD and KPTCL, the representation is excessive;

(iv) The data is vacancy based and not post based as required by **Sabharwal**;

(v) The data is on sanctioned posts and not of filled posts;

(vi) The data is based on grades A, B, C and D and not cadre based; and

(vii) On efficiency, there is only a general reference to the economic development of the State of Karnataka.

90 Based on the above features, the petitioners have invoked the power of judicial review. Dr Dhavan emphasized that the decision in **Nagaraj** upheld the constitutional validity of successive constitutional amendments to Article 16 conditional upon the existence of compelling reasons which must be demonstrated by the State by collecting and analysing relevant data. It is submitted that the flaws in the report of the Ratna Prabha Committee would indicate that the compelling reasons which constitute the foundation for the exercise of the enabling power contained in Article 16 are absent, which must result in the invalidation of the Reservation Act 2018.

91 Before we deal with the merits of the attack on the Ratna Prabha Committee report, it is necessary to set down the parameters on which judicial review can be exercised. Essentially, the exercise which the petitioners require this Court to undertake is to scrutinize the underlying collection of data by the State on two facets laid out in **Nagaraj**, as now clarified by **Jarnail**: (i) the adequacy of representation; and (ii) impact on efficiency in administration.

Clause (4) of Article 16 contains an enabling provision to empower the State to make reservations in appointments or posts in favour of any backward class of citizens "which, in the opinion of the State, is not adequately represented in the services under the State". Clause (4A) contains an enabling provision that allows the state to provide for reservations in promotion with consequential seniority in posts or classes of posts in services under the State in favour of SCs and STs. Clause (4A) also uses the expression "which, in the opinion of the State, are not adequately represented in the services under the State". In **Indra Sawhney**, while construing the nature of the satisfaction which has to be arrived at by the State, this Court held:

> "798….The language of clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words "in the opinion of the State". This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the

> people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. **The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in *Barium Chemicals* v. *Company Law Board*** [1966 Supp SCR 311 : AIR 1967 SC 295] which need not be repeated here. **Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16 (4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive**."[114] (Emphasis supplied)

The above extract from the decision in **Indra Sawhney** presents two mutually complementary and reinforcing principles. The first principle is that the executive arm of the state is aware of prevailing conditions. The legislature represents the collective will of the people through their elected representatives. The presumption of constitutionality of a law enacted by a competent legislature traces itself to the fundamental doctrine of constitutional jurisprudence that the legislature is accountable to those who elect their representatives. Collectively, the executive and the legislature are entrusted with the constitutional duty to protect social welfare. This Court explained in **Amalgamated Tea Estates Co Ltd** v **State of Kerala**[115], the rationale for the principles of constitutionality:

> "11.The reason why a statute is presumed to be constitutional is that the Legislature is the best judge of the local conditions and circumstances and special needs of various classes of persons. "(T)he Legislature is the best judge of the needs of particular classes and to estimate the degree of evil so as to adjust its legislation according to the exigency found to exist."[116]

This principle was reiterated in **V C Shukla** v **State (Delhi Administration)**[117]:

114 Supra 13 at page 728
115 (1974) 4 SCC 415
116 Ibid at page 420
117 (1980) Supp SCC 249

> "11…Furthermore, the legislature which is in the best position to understand the needs and requirements of the people must be given sufficient latitude for making selection or differentiation and so long as such a selection is not arbitrary and has a rational basis having regard to the object of the Act, Article 14 would not be attracted. That is why this Court has laid down that presumption is always in favour of the constitutionality of an enactment and the onus lies upon the person who attacks the statute to show that there has been an infraction of the constitutional concept of equality."[118]

92 More recently, this was emphasized in **State of Himachal Pradesh** v **Satpal Saini**[119]:

> "12…The duty to formulate policies is entrusted to the executive whose accountability is to the legislature and, through it, to the people. The peril of adopting an incorrect policy lies in democratic accountability to the people…"[120]

93 The second of the reinforcing principles which emerges from **Indra Sawhney** is that the opinion of the government on the adequacy of representation of the SCs and STs in the public services of the state is a matter which forms a part of the subjective satisfaction of the state. Significantly, the extract from **Indra Sawhney** reproduced earlier adverts to the decision in **Barium Chemicals Ltd**, which emphasises that when an authority is vested with the power to form an opinion, it is not open for the court to substitute its own opinion for that of the authority, nor can the opinion of the authority be challenged on grounds of propriety or sufficiency. In **Nagaraj**, while dealing with the parameters

118 Ibid at page 259
119 (2017) 11 SCC 42
120 Ibid at page 47

governing the assessment of the adequacy of representation or of the impact on efficiency, the Constitution Bench held:

> "45… **The basic presumption, however, remains that it is the State who is in the best position to define and measure merit in whatever ways it consider it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit**. Similarly, the concept of "extent of reservation" is not an absolute concept and like merit it is context-specific.
>
> …
>
> 49**.** Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16 (4) and Article 16(4A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas **inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide** as long as the parameters mentioned in Articles 16 (4) and 16 (4A) are maintained. As stated above, **equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State.**
>
> …
>
> 102…equity, justice and efficiency are variable factors. These factors are context-specific. **There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case**."[121] (Emphasis supplied)

94 The element of discretion vested in the state governments to determine adequacy of representation in promotional posts is once again emphasized in the following extract from the decision in **Jarnail**:

121 Supra 6 at pages 249-250

> "35…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 Scheduled Castes and Scheduled Tribes in promotional pots, as one goes upwards. This is for the simple reason that efficiency of administration has to be looked at every time promotions are made. As has been pointed out by B P Jeevan Reddy, J.'s judgment in Indra Sawhney, there may be certain posts right at the top, where reservation is impermissible altogether. For this reason, we make it clear that **Article 16 (4A) 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**."[122] (Emphasis supplied)

95 In dealing with the submissions of the petitioners on this aspect, it is relevant for this Court to recognize the circumspection with which judicial power must be exercised on matters which pertain to propriety and sufficiency, in the context of scrutinizing the underlying collection of data by the State on the adequacy of representation and impact on efficiency. The Court, is above all, considering the validity of a law which was enacted by the State legislature for enforcing the substantive right to equality for the SCs and STs. Judicial review must hence traverse conventional categories by determining as to whether the Ratna Prabha Committee report considered material which was irrelevant or extraneous or had drawn a conclusion which no reasonable body of persons could have adopted. In this area, the fact that an alternate line of approach was possible or may even appear to be desirable cannot furnish a foundation for the assumption by the court of a decision making authority which in the legislative sphere is entrusted to the legislating body and in the administrative sphere to the executive arm of the government.

122 Supra 49 at page 430

96 On the inadequacy of representation, the summary which emerges from the Ratna Prabha Committee report is as follows:

> "2.5: Summary:
> 1) The analysis of time series data collected for the last 32 years (1984-2016 except for 1986) across 31 Departments of the State Government provides the rich information on the inadequacy of representation of SCs and STs employees in various cadres of Karnataka Civil Services.
> 2) The total number of sanctioned posts as per the data of 2016 is 7,45,593 of which 70.22 percent or 5,23,574 are filled up across 31 Departments.
> 3) The vacancies or posts are filled up through Direct Recruitment (DR) and Promotions including consequential promotion.
> 4) The overall representation of the SC and ST employees of all 31 Departments in comparison with total sanctioned posts comprises of 10.65 per cent and 2.92 per cent respectively. This proves inadequacy of representation of SCs and STs.
> 5) On an average the representation in Cadre A for SCs is at 12.07 per cent and STs 2.70 per cent which sufficiently proves the inadequacy of representation.
> 6) The extent of representation in Cadre B is on an average of 9.79 per cent and 2.34 per cent for ST for all the years of the study period.
> 7) It is observed that on an average 3.05 per cent of SC representation is inadequate in the Cadre 'C' whereas, 0.05 per cent excess representation is seen for ST.
> 8) On an average of 2 per cent and 1 per cent over representation of employees of SCs and STs is found in Cadre D respectively. However, in the last 5 years, inadequacy of representation of SCs by 3 per cent is found in this cadre.
> 9) The representation of Scheduled Caste in Cadre A, B and C is on an average 12, 9.79 and 12.04 per cent respectively whereas in Cadre D it is 16.91.
> 10) In case of STs in the cadres A and B the representation is 2.70 and 2.34 per cent. However, excess representation of 0.04 and 0.93 per cent is found in case of Group C and Group D respectively.
> 11) Over representation in some years and departments is attributed to either Direct Recruitment or retirement of employees or filling up of backlog vacancies as the later does not fall under 50 per cent limitation of reservation.
>
> 2.6: Conclusion:

> The data clearly shows the inadequacy of representation of SCs and STs in the civil services in Groups A, B and C and adequate representation in Group D."

97 Collection of data and its analysis are governed by varying and often divergent approaches in the social sciences. An informative treatise on the subject titled **Empirical Political Analysis – Quantitative and Qualitative Research Methods**[123] distinguishes between obtaining knowledge and using knowledge. The text seeks to explain empirical analysis on the one hand and normative analysis on the other hand:

> "Social Scientists distinguish between obtaining knowledge and using knowledge. Dealing with factual realities is termed empirical analysis. Dealing with how we should use our knowledge of the world is termed normative analysis.
>
> **Empirical** analysis is concerned with developing and using a common, objective language to describe and explain reality. It can be quantitative or qualitative. **Quantitative** analyses are based on math-based comparisons of the characteristics of the various objects or events that we study. **Qualitative** analyses are based on the researcher's informed and contextual understanding of objects or events.
>
> **Normative** analysis is concerned with developing and examining subjective values and ethical rules to guide us in judging and applying what we have learned about reality. Although the emphasis in this book is on empirical analysis, it seeks to develop an appreciation of the larger, normative perspective within which knowledge is acquired, interpreted, and applied through a discussion of the ethics of research.
>
> **Normative** analysis without an empirical foundation can lead to value judgments that are out of touch with reality. Empirical analysis in the absence of sensitivity to normative concerns, on the other hand, can lead to the collection of observations whose significance we are not prepared to understand fully. The objective in undertaking political inquiry is to draw upon both types of analysis – empirical and normative – so as to maximize not only our factual

123 Ninth edition, Richard C Rich, Craig Leonard Brians, Jarol B Manheim and Lars B Willnat, Longman Publishers

> knowledge, but also our ability to use the facts we discover wisely."

98 In supporting the methodology which has been adopted by the Ratna Prabha Committee, Ms Indira Jaising, learned Senior Counsel emphasized that:

(i) Save and except where a national census is proposed to be conducted, data collection is based on valid sampling methods on which conclusions are drawn;

(ii) Research methodology can be qualitative as well as quantitative – the present case deals with the collection of quantitative data;

(iii) Quantitative data is also collected on the basis of sample surveys. In this case, the purpose of the study was to collect data on the adequacy of representation in promotional posts and the sample which was chosen was a representative sample from which conclusions were drawn; and

(iv) In the study conducted by the State of Karnataka, statistics of a number of persons belonging to the SCs and STs in promotional posts were collected group wise. The groups include cadres. Hence, it stands to reason that if the data is collected in relation to a group, it will include data pertaining to cadres as well since, every cadre within the group has been statistically enquired.

99 We find merit in the above submissions. The methodology which was adopted by the Ratna Prabha Committee has not been demonstrated to be alien to conventional social science methodologies. We are unable to find that the Committee has based its conclusions on any extraneous or irrelevant material. In

adopting recourse to sampling methodologies, the Committee cannot be held to have acted arbitrarily. If, as we have held above, sampling is a valid methodology for collection of data, the necessary consequence is that the exercise cannot be invalidated only on the ground that data pertaining to a particular department or of some entities was not analysed. The data which was collected pertained to thirty one departments which are representative in character. The State has analysed the data which is both relevant and representative, before drawing its conclusions. As we have noted earlier, there are limitations on the power of judicial review in entering upon a factual arena involving the gathering, collation and analysis of data.

100 Dr Dhavan has painstakingly compiled charts for the purpose of his argument. We may also note at this stage that Ms Jaising in response to the charts relied upon by Dr Dhavan, also placed on records charts indicating:

(i) Current representation after demotion of SC and ST employees in the PWD of Karnataka;

(ii) Percentage of SCs and STs in the post of Executive Engineer without consequential seniority in the PWD; and

(iii) Corresponding figures in the post of Executive Engineer without consequential seniority in the PWD.

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. After the decision in **B K Pavitra I**, the Ratna Prabha Committee was correctly appointed to carry out the required exercise. Once that exercise has been carried out, the Court must be circumspect in exercising the power of judicial review to re-evaluate the factual material on record.

102 The adequacy of representation has to be assessed with reference to a benchmark on adequacy. Conventionally, the State and the Central governments have linked the percentage of reservation for the SCs and STs to their percentage of population, as a measure of adequacy. The Constitution Bench noticed this in **Sabharwal**, where it observed:

> "4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16 (4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its

> representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class…"[124]

Explaining this further, the Constitution Bench held:

> "5...Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward Classes in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster…"[125]

Consequently, it is open to the State to make reservation in promotion for SCs and STs proportionate to their representation in the general population.

103 One of the submissions which has been urged on behalf of the petitioners is that the quota has to be reckoned with reference to posts which are actually filled up or the working strength and not with reference to sanctioned posts. This submission is answered by the decision in **Sabharwal**, which holds that the

124 Supra 24 at page 750
125 Ibid at page 751

percentage of reservation has to be worked out in relation to the number of posts which form part of the cadre strength. The Constitution Bench held:

> "6. The expressions 'posts' and 'vacancies', often used in the executive instructions providing for reservations, are rather problematical. The word 'post' means an appointment, job, office or employment. A position to which a person is appointed. 'Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. **The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation**."[126] (Emphasis supplied)

Similarly, in **Nagaraj**, the Constitution Bench held:

> "83. In our view, the appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based."[127]

Hence, the submission that the quota must be reckoned on the basis of the posts which are actually filled up and not the sanctioned posts cannot be accepted.

104 We find no merit in the challenge to the Ratna Prabha Committee report on the ground that the collection of data was on the basis of groups A, B, C and D as

126 Ibid at pages 751-752
127 Supra 6 at page 261

opposed to cadres. For one thing, the expression ‘cadre’ has no fixed meaning ascribed to it in service jurisprudence. But that apart, **Nagaraj** requires the collection of quantifiable data *inter alia*, on the inadequacy of representation in services under the state. Clause 4A of Article 16 specifically refers to the inadequacy of representation in the **services** under the state. The collection of data on the basis of groups A to D does not by its very nature exclude data pertaining to cadres. The state has studied in the present case the extent of reservation for SCs and STs in groups A to D, consisting of several cadres. Since, the group includes posts in all the cadres in that group, it can logically be presumed that the state has collected quantifiable data on the representation of SCs and STs in promotional posts in the cadres as well.

105 Another facet of the matter is that in the judgment of Justice Jeevan Reddy in **Indra Sawhney,** it was observed that reservation under Article 16 (4) does not operate on communal grounds. Hence, if a member belonging to a reserved category is selected in the general category, the selection would not count against the quota prescribed for the reserved category. The decision in **Sabharwal** also noted that while candidates belonging to the general category are not entitled to fill reserved posts, reserved category candidates are entitled to compete for posts in the general category. In several group D posts, such as municipal sweepers, the sobering experience of administration is that the overwhelmingly large segment of applicants consists of persons belonging to the SCs and STs. Over representation in group D posts as a result of candidates belonging to the general category staying away from those posts cannot be a

valid or logical basis to deny promotion to group D employees recruited from the reserved category.

F Substantive versus formal equality

106 The core of the present case is based on the constitutional content of equality.

107 For equality to be truly *effective* or *substantive*, the principle must **recognise existing inequalities in society** to overcome them. Reservations are thus not an exception to the rule of equality of opportunity. They are rather the true fulfilment of *effective and substantive* equality by accounting for the structural conditions into which people are born. If Article 16(1) merely postulates the principle of formal equality of opportunity, then Article 16(4) (by enabling reservations due to existing inequalities) becomes an exception to the strict rule of formal equality in Article 16 (1). However, if Article 16 (1) itself sets out the principle of substantive equality (including the recognition of existing inequalities) then Article 16 (4) becomes **the enunciation of one particular facet of the rule of substantive equality set out in Article 16 (1)**.

F.I The Constituent Assembly's understanding of Article 16 (4)

(I) Reservations to overcome existing inequalities in society

(a) There is substantial evidence that the members of the Constituent Assembly recognised that (i) Indian society suffered from deep structural inequalities; and (ii) the Constitution would serve as a transformative document to overcome them. One method of overcoming these inequalities is reservations for the SCs and STs in the legislatures and state services. Therefore, for the members of the Constituent Assembly who supported reservations, **a key rationale for incorporating reservations for SCs and STs in the Constitution was the existence of inequalities in society** based on discrimination and prejudice within the caste structure. This is evidenced by the statements in support of reservations for minorities by members. For example, in the context of legislative reservations for minorities Monomohan Das noted:

> "… Therefore, it is evident from the Report of the Minorities Committee that it is on account of the extremely low educational and economic conditions of the scheduled castes and the grievous social disabilities from which they suffer that the political safeguard of reservation of seats had been granted to them..."[128]

(b) Prof. Yashwant Rai used similar statements to support reservations for backward communities in employment:

> "… Therefore, **if you want to give equal status to those communities which are backward and depressed and on whom injustice has been perpetrated for thousands of years** and if you want to establish Indian unity, so that the country may progress and so that many parties in the country may not mislead the poor, **I would say that there should be a provision in the constitution under which the educated**

128 (Volume XI) Debate on 25 August 1949.

> **Harijans may be provided with employment**…."[129]
> (Emphasis supplied)

(II) Recognition of the insufficiency of formal equality by the Constituent Assembly

108 During the debates on the principles of equality underlying Article 16 (then draft Article 10), certain members of the Assembly recognised that in order to give true effect to the principle of equality of opportunity, the Constitution had to expressly recognise the existing inequalities. For example, Shri Phool Singh noted:

> "… Much has been made of merit in this case; **but equal merit pre-supposes equal opportunity**, and I think it goes without saying that the toiling masses are denied all those opportunities which a few literate people living in big cities enjoy**. To ask the people from the villages to compete with those city people is asking a man on bicycle to compete with another on a motorcycle,** which in itself is absurd. Then again, merit should also have some reference to the task to be discharged…"[130] (Emphasis supplied)

Similarly, P Kakkam stated,

> "… **If you take merit alone into account, the Harijans cannot come forward.** I say in this house, that the Government must take special steps for the reservation of appointment for the Harijans for same years. I expect the government will take the necessary steps to give more appointments in police and military services also..."[131]
> (Emphasis supplied)

129 (Volume XI) Debate on 23 August 1949.
130 (Volume XI) Debate on 23 August 1949.
131 (Volume VII) Debate on 30 May 1948.

109 By recognising that formal equality of opportunity will be insufficient in fulfilling the transformative goal of the Constitution, these members recognised that the conception of equality of opportunity must recognise and account for existing societal inequalities. The most revealing debates as to how the Constituent Assembly understood equality of opportunity under the Constitution took place on 30 November 1948. Members debated draft article 10 (which would go on to become Article 16 of the Constitution). In these debates, some members understood sub-clause (4) (providing for reservations) as *an exception* to the general rule of *formal equality* enunciated in sub-clause (1). Illustratively, an articulation of this position was made by Mohammad Ismail Khan, who stated,

> "… **There can be only one of these two things--either there can be clear equal opportunity or special consideration**. Article 10 says there shall be equality of opportunity, then it emphasises the fact by a negative clause that no citizen shall be discriminated on account of religion or race. It is quite good, but when no indication is given whether this would override article 296 or article 296 is independent of it, we are certainly left in the lurch. What would be the fate of the minorities? [**Article 296 stated that special considerations shall be shown to minorities to ensure representation in the services**]…"[132] (Emphasis supplied)

110 Dr B R Ambedkar's response summarises the different conceptions of equality of opportunity that the members of the assembly put forward. Dr Ambedkar argued that the inclusion of sub-clause (4) was a method of recognising the demand that mere formal equality in sub-clause (1) would be insufficient, and a balance between formal equality of opportunity and the needs of the disadvantaged classes of society was needed. Dr Ambedkar presciently observed:

132 (Volume VII) Debate on 30 May 1948.

"… If members were to try and exchange their views on this subject, they will find that there are three points of view which it is necessary for us to reconcile if we are to produce a workable proposition which will be accepted by all…

The first is that there shall be equality of opportunity for all citizens. It is the desire of many Members of this House that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not and that there ought to be no limitations…

Another view mostly shared by a section of the House is that, if this principle is to be operative--and it ought to be operative in their judgment to its fullest extent--there ought to be no reservations of any sort for any class or community at all…

Then we have quite a massive opinion which insists that, **although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration.** As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a `proper look-in' so to say into the administration…

The view of those who believe and hold that there shall be **equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now--for historical reasons--been controlled by one community or a few communities, that situation should disappear** and that the others also must have an opportunity of getting into the public services…"[133] (Emphasis supplied)

F.2 The Constitution as a transformative instrument

111 The Constitution is a transformative document. The realization of its transformative potential rests ultimately in its ability to breathe life and meaning into its abstract concepts. For, above all, the Constitution was intended by its

133 (Volume VII) Debate on 30 May 1948.

draftspersons to be a significant instrument of bringing about social change in a caste based feudal society witnessed by centuries of oppression of and discrimination against the marginalised. As our constitutional jurisprudence has evolved, the realisation of the transformative potential of the Constitution has been founded on the evolution of equality away from its formal underpinnings to its substantive potential.

112 In the context of reservations, the decision in **T Devadasan** v **The Union of India**[134] construed Article 16 (4) to be a proviso or an exception to Article 16 (1). In a dissent which embodied a vision statement of the Constitution, Justice Subba Rao held:

> "26**.** Article 14 lays down the general rule of equality. Article 16 is an instance of the application of the general rule with special reference to opportunity of appointments under the State. It says that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State… Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced clause (4) in Article 16. The expression "nothing in this article" is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article."

134AIR 1964 SC 179

113 Subsequently, in **N M Thomas**, the Constitution Bench adopted an interpretation of Articles 15 and 16 which recognized these provisions as but a facet of the doctrine of equality under Article 14. Justice K K Mathew observed:

> "78…Article 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualized in Article 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of Scheduled Castes and Scheduled Tribes. If equality of opportunity guaranteed under Article 16 (1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up to the point of making reservation."[135]

In his own distinctive style, Justice Krishna Iyer observed:

> "139. It is platitudinous constitutional law that Articles 14 to 16 are a common code of guaranteed equality, the first laying down the broad doctrine, the other two applying it to sensitive areas historically important and politically polemical in a climate of communalism and jobbery."[136]

This court has set out this latter understanding in several cases including **ABS Sangh (Railways)** v **Union of India**[137].

114 Ultimately, a Bench of nine judges of this Court in **Indra Sawhney** recognized that Article 16 (4) is not an exception to but a facet of equality in Article 16 (1). Justice Jeevan Reddy delivering the judgment of a plurality of four judges observed:

135 Supra 77 at page 347
136 Ibid at page 369
137 (1981) 1 SCC 246

> "741…Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principle inherent in the main provision itself...
>
> In our respectful opinion, the view taken by the majority in Thomas [(1976) 2 SCC 310, 380 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906] is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it."[138]

115 Justice Mathew in **N M Thomas** spoke of the need for proportional equality as a means of achieving justice. Highlighting the notion that equality under the Constitution is based on the substantive idea of providing equal access to resources and opportunities, learned judge observed:

> "73. There is no reason why this Court should not also require the State to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and
>
> circumstances stand in the way of their equal access to the enjoyment of basic rights or claims."[139]

Carrying these precepts further Justice S H Kapadia (as the learned judge then was) speaking for the Constitution Bench in **Nagaraj** observed:

> "51…Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality— "formal equality" and "proportional equality". "Formal equality" means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy."[140]

138 Supra 13 at page 691
139 Supra 77 at page 346
140 Supra 6 at page 250

Social justice, in other words, is a matter involving the distribution of benefits and burdens.

G Efficiency in administration

116 Critics of affirmative action programs in government services argue that such programs adversely impact the overall competence or "*efficiency*" of government administration. Critics contend that the only method to ensure "efficiency" in the administration of government is to use a "merit" based approach – whereby candidates that fulfil more, seemingly "neutral", criteria than others are given opportunities in government services. The constitutional justification for this "efficiency" argument is centred around Article 335.

> "335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:
>
> [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.]."

The proviso was inserted by the Constitution (Eighty-second Amendment) Act 2000.

117 The substantive part of Article 335 contains a mandate : a requirement to take into consideration the claims of SCs and STs in making appointments to

services and posts in connection with the affairs of the Union or of a State. Consideration is much broader in its ambit than reservation. The consideration of their claims to appointment is to be in a manner consistent with maintaining the efficiency of administration. The proviso specifically protects provisions in favour of the SCs and STs for: (i) relaxing qualifying marks in an examination; (ii) lowering the standards of evaluation; or (iii) reservation in matters of promotion. Reservation is encompassed within the special provision but the universe of the latter is wider.

118 The proviso recognises that special measures need to be adopted for considering the claims of SCs and STs in order to bring them to a level playing field. Centuries of discrimination and prejudice suffered by the SCs and STs in a feudal, caste oriented societal structure poses real barriers of access to opportunity. The proviso contains a realistic recognition that unless special measures are adopted for the SCs and STs, the mandate of the Constitution for the consideration of their claim to appointment will remain illusory. The proviso, in other words, is an aid of fostering the real and substantive right to equality to the SCs and STs. It protects the authority of the Union and the States to adopt any of these special measures, to effectuate a realistic (as opposed to a formal) consideration of their claims to appointment in services and posts under the Union and the states. The proviso is not a qualification to the substantive part of Article 335 but it embodies a substantive effort to realise substantive equality. The proviso also emphasises that the need to maintain the efficiency of

administration cannot be construed as a fetter on adopting these special measures designed to uplift and protect the welfare of the SCs and STs.

119 The Constitution does not define what the framers meant by the phrase "efficiency of administration". Article 335 cannot be construed on the basis of a stereotypical assumption that roster point promotees drawn from the SCs and STs are not efficient or that efficiency is reduced by appointing them. This is stereotypical because it masks deep rooted social prejudice. The benchmark for the efficiency of administration is not some disembodied, abstract ideal measured by the performance of a qualified open category candidate. Efficiency of administration in the affairs of the Union or of a State must be defined in an inclusive sense, where diverse segments of society find representation as a true aspiration of governance by and for the people. If, as we hold, the Constitution mandates realisation of substantive equality in the engagement of the fundamental rights with the directive principles, inclusion together with the recognition of the plurality and diversity of the nation constitutes a valid constitutional basis for defining efficiency. Our benchmarks will define our outcomes. If this benchmark of efficiency is grounded in exclusion, it will produce a pattern of governance which is skewed against the marginalised. If this benchmark of efficiency is grounded in equal access, our outcomes will reflect the commitment of the Constitution to produce a just social order. Otherwise, our past will haunt the inability of our society to move away from being deeply unequal to one which is founded on liberty and fraternity. Hence, while interpreting Article 335, it is necessary to liberate the concept of efficiency from a

one sided approach which ignores the need for and the positive effects of the inclusion of diverse segments of society on the efficiency of administration of the Union or of a State. Establishing the position of the SCs and STs as worthy participants in affairs of governance is intrinsic to an equal citizenship. Equal citizenship recognizes governance which is inclusive but also ensures that those segments of our society which have suffered a history of prejudice, discrimination and oppression have a real voice in governance. Since inclusion is inseparable from a well governed society, there is, in our view, no antithesis between maintaining the efficiency of administration and considering the claims of the SCs and STs to appointments to services and posts in connection with the affairs of the Union or of a State.

120 This part of the philosophy of the Constitution was emphasized in a powerful exposition contained in the judgment of Justice O Chinnappa Reddy in **K C Vasanth Kumar** v **State of Karnataka**[141] ("**K C Vasanth Kumar**"). The learned Judge held:

> "35. One of the results of the superior, elitist approach is that the question of reservation is invariably viewed as the conflict between the *meritarian* principle and the compensatory principle. No, it is not so. The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis. There is not enough fruit in the garden and so those who are in, want to keep out those who are out. The disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too

141 (1985) Supp. SCC 714

> obvious to be stated. And, what is merit? There is no merit in a system which brings about such consequences…"[142]

Speaking of efficiency, the learned Judge held:

> "36. Efficiency is very much on the lips of the privileged whenever reservation is mentioned…
>
> One would think that the civil service is a Heavenly Paradise into which only the archangels, the chosen of the elite, the very best may enter and may be allowed to go higher up the ladder. But the truth is otherwise. The truth is that the civil service is no paradise and the upper echelons belonging to the chosen classes are not necessarily models of efficiency. The underlying assumption that those belonging to the upper castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, "naturally" perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes…"[143]

121 The substantive right to equality is for all segments of society. Articles 15 (4) and 16 (4) represent the constitutional aspiration to ameliorate the conditions of the SCs and STs. While, we are conscious of the fact that the decision in **Indra Sawhney** did not accept **K C Vasanth Kumar**[144] on certain aspects, the observations have been cited by us to explain the substantive relationship between equal opportunity and merit. It embodies the fundamental philosophy of the Constitution towards advancing substantive equality.

122 An assumption implicit in the critique of reservations is that **awarding opportunities in government services based on "merit" results in an increase in administrative efficiency**. Firstly, it must be noted that

142 Ibid at pages 737-738
143 Ibid at page 738
144 Supra 139 at paragraph 613

administrative efficiency is an *outcome* of the actions taken by officials *after* they have been appointed or promoted and is not tied to the selection method itself. The argument that one selection method produces officials capable of taking better actions than a second method must be empirically proven based on an evaluation of the outcomes produced by officials selected through both methods.

Secondly, arguments that attack reservations on the grounds of efficiency equate "merit" with candidates who perform better than other candidates on seemingly "neutral" criteria, e.g. standardised examinations. Thus, candidates who score beyond a particular "cut-off point" are considered "meritorious" and others are "non-meritorious". However, this is a distorted understanding of the function "merit" plays in society.

123 As Amartya Sen notes in his chapter on "Merit and Justice",[145] the idea of merit is fundamentally derivative of our views of a good society. Sen notes,

> "**Actions may be rewarded for the good they do**, and a system of remunerating the activities that generate good consequences would, it is presumed, tend to produce a better society. The rationale of incentive structures may be more complex than this simple statement suggests, but the idea of merit in this instrumental perspective relates to the motivation of producing better results. In this view, **actions are meritorious in a derivative and contingent way, depending on the good they do, and more particularly, the good that can be brought about by rewarding them**….
>
> …The concept of merit is deeply contingent on our views of a good society. Indeed, the notion of merit is fundamentally derivative, and thus cannot be qualified and contingent. There is some elementary **tension between (1) the inclination to see merit in fixed and absolute terms, and (2) the**

145 Sen A, Merit and Justice, in Arrow, KJ, MERITOCRACY AND ECONOMIC INEQUALITY (Princeton University Press 2000) (Amartya Sen, Merit and Justice).

> **ultimately instrumental character of merit – its dependence on the concept of "the good" in the relevant society**.
>
> This basic contrast is made more intense by the tendency, in practice, to characterise "merit" in inflexible forms reflecting values and priorities of the past, often in sharp conflict with conceptions that would be needed for seeing merit in the context of contemporary objectives and concerns…
>
> **Even though the typical "objective functions" that are implicitly invoked in most countries to define and assess what is to count as merit tend to be indifferent to (or negligent of) distributive aspects of outcomes, there is no necessity to accept that ad hoc characterisation**. **This is not a matter of a "natural order" of "merit" that is independent of our value system**…." (Emphasis supplied)

124 Once we understand "merit" as instrumental in achieving goods that we as a society value, we see that the equation of "merit" with performance at a few narrowly defined criteria is incomplete. A meritocratic system is one that rewards actions that result in the outcomes that we as a society value.

125 For example, performance in standardised examinations (distinguished from administrative efficiency) now becomes *one among many* of the actions that the process of appointments in government services seeks to achieve. Based on the text of Articles 335, Articles 16 (4), and 46, it is evident that the uplifting of the SCs and STs through employment in government services, and having an inclusive government are other outcomes that the process of appointments in government services seeks to achieve. Sen gives exactly such an example.

> "If, for example, the conceptualisation of a good society includes the absence of serious economic inequalities, then **in the characterisation of instrumental goodness, including the assessment of what counts as merit, note would have to be taken of the propensity of putative merit to lessen – or to generate – economic inequality**. In

> this case, the rewarding of merit cannot be done independent of its distributive consequences.
>
> …
>
> A system of rewarding of merit may well generate inequalities of well-being and of other advantages. But, as was argued earlier, much would depend on the nature of the consequences that are sought, on the basis of which merits are to be characterised. **If the results desired have a strong distributive component, with a preference for equality, then in assessing merits (through judging the generating results, including its distributive aspects), concerns about distribution and inequality would enter the evaluation**."[146] (Emphasis supplied)

Thus, the providing of reservations for SCs and the STs is not at odds with the principle of meritocracy. "Merit" must not be limited to narrow and inflexible criteria such as one's rank in a standardised exam, but rather must flow from the actions a society seeks to reward, including the promotion of equality in society and diversity in public administration. In fact, Sen argues that there is a risk to excluding equality from the outcomes.

> "In most versions of modern meritocracy, however, **the selected objectives tend to be almost exclusively oriented towards aggregate achievements (without any preference against inequality**), and sometimes the objectives chosen are even biased (often implicitly) towards the interests of more fortunate groups (favouring the outcomes that are more preferred by "talented" and "successful" sections of the population. **This can reinforce and augment the tendency towards inequality that might be present even with an objective function that inter alia, attaches some weight to lower inequality levels**."[147] (Emphasis supplied)

126 The Proviso to Article 335 of the Constitution seeks to mitigate this risk by allowing for provisions to be made for relaxing the marks in qualifying exams in

146 Ibid
147 Ibid

the case of candidates from the SCs and the STs. If the government's sole consideration in appointments was to appoint individuals who were considered "talented" or "successful" in standardised examinations, by virtue of the inequality in access to resources and previous educational training (existing inequalities in society), the stated constitutional goal of uplifting these sections of society and having a diverse administration would be undermined. Thus, a "meritorious" candidate is not merely one who is "talented" or "successful" but also one whose appointment fulfils the constitutional goals of uplifting members of the SCs and STs and ensuring a diverse and representative administration.

127 It is well settled that existing inequalities in society can lead to a seemingly "neutral" system discriminating in favour of privileged candidates. As Marc Galanter notes, three broad kinds of resources are necessary to produce the results in competitive exams that qualify as indicators of "merit". These are:

> "… (a) economic resources (for prior education, training, materials, freedom from work etc.); (b) social and cultural resources (networks of contacts, confidence, guidance and advice, information, etc.); and (c) intrinsic ability and hard work..." [148]

128 The first two criteria are evidently not the products of a candidate's own efforts but rather the structural conditions into which they are born. By the addition of upliftment of SCs and STs in the moral compass of merit in government appointments and promotions, the Constitution mitigates the risk that

148 Galanter M, Competing Equalities: Law and the Backward Classes in India, (Oxford University Press, New Delhi 1984), cited by Deshpande S, Inclusion versus excellence: Caste and the framing of fair access in Indian higher education, 40:1 South African Review of Sociology 127-147.

the lack of the first two criteria will perpetuate the structural inequalities existing in society.

129 The Ratna Prabha Committee report considers in Chapter III, the relationship between reservation in promotion and maintenance of efficiency in administration. Finally, it concludes:

> "3.12: Conclusion:
>
> Karnataka has been showing high performance in all the sectors of development viz., finance, health, education, industry, services, etc., to support sustainable economic growth. The analysis on performance of the state in economic development clearly indicates that reservation in promotions has not affected the overall efficiency of administration.

130 Moreover, even in a formal legal sense, promotions, including those in respect of roster points, are made on the basis of seniority-cum-merit and a candidate to be promoted has to meet this criteria [See in this context Rule 19(3) A and D of the Karnataka Civil Services General Recruitment Rules 1977 which states that subject to other provisions all appointments by promotion shall be on an officiating basis for a period of one year and at the end of the period of officiation, if appointing authority considers the person not suitable for promotion, she/he may be reverted back to the post held prior to the promotion]. A candidate on promotion has to serve a statutory period of officiation before being confirmed. This rule applies across the board including to roster point promotees. This ensures that the efficiency of administration is, in any event, not adversely affected.

H The issue of creamy layer

131 At the outset, we analyse the submission of Ms Indira Jaising, learned Senior Counsel that the concept of creamy layer is inapplicable to the SCs and STs. This submission which has been urged by the learned Counsel is founded on two hypotheses which we have extracted below from the written submissions:

> "(i) This Court in **Indra Sawhney** seems to suggest that the creamy layer should be excluded, however there was no unanimity for determining what is creamy layer. Some judges took the view that the criteria for creamy layer exclusion is social advancement (i.e. based on social basis, educational, and economical basis) and others took the view that it will be economic basis alone. It is submitted that it must be kept in mind that the said judgment related only to OBCs; and
>
> (ii) **Jarnail** is not an authority for the proposition that the creamy layer principle applies to SCs and STs. It dealt only with the competence of the Parliament to enact a law in relation to creamy layer without affecting Articles 341 and 342."

132 Dr Dhavan, learned Senior Counsel in his response has urged that the above submissions are incorrect because:

(i) **Indra Sawhney** decided the issue of creamy layer as a principle of equality; and

(ii) **Jarnail** affirmed that if **Nagaraj** is rightly applied, creamy layer is a principle of equality and of the basic structure.

133 Ms Jaising's argument is based on the decision in **Chinnaiah** that the SCs and STs cannot be split or bifurcated and the adoption of the creamy layer principle would amount to a spilt in the homogenous groups of the SCs and STs.

This argument according to Dr Dhavan, was rejected in **Jarnail** by the Constitution Bench.

134 As a Bench of two judges we are bound by the decision in **Indra Sawhney** as indeed, we are by the construction placed on that decision by the Constitution Benches in **Nagaraj** and **Jarnail**. Construing the decision in **Indra Sawhney**. **Nagaraj** held:

> "120…Concept of egalitarian equality is the concept of proportional equality and it expects the States to take affirmative action in favour of disadvantaged sections of society within the framework of democratic polity. In Indra Sawhney [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] all the Judges except Pandian, J. held that the "means test" should be adopted to exclude the creamy layer from the protected group earmarked for reservation. In Indra Sawhney [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] this Court has, therefore, accepted caste as a determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] . The question as to the "determinant" of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] has evolved numerical benchmarks like ceiling limit of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination."[149]

Then again, in paragraphs 121, 122 and 123, the Constitution Bench held:

149 Supra 6 at pages 277-278

“121. 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 OBCs on one hand and SCs and STs on the other hand as held in Indra Sawhney [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] , the concept of post-based roster with inbuilt concept of replacement as held in R.K. Sabharwa [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] .

122. 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.

123. However, in this case, as stated above, the main issue concerns the “extent of reservation”. In this regard the State concerned 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 SCs/STs in matters 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 with 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.”[150]

150 Ibid at pages 278 -280

135 The reference before the Constitution Bench in **Jarnail** arose out of an initial reference by a two judge Bench in **State of Tripura** v **Jayanta Chakraborty** ("**State of Tripura**")[151] and then by a three judge Bench in **State of Maharashtra** v **Vijay Ghogre**[152]. The order in **State of Tripura** states:

> "2…However, apart from the clamour for revisit, further questions were also raised about application of the principle of creamy layer in situations of competing claims within the same races, communities, groups or parts thereof of SC/STs notified by the President under Articles 341 and 342 of the Constitution of India."[153]

136 Before the Constitution Bench in **Jarnail**, the learned Attorney General specifically raised the following arguments:

> "3…according to the learned Attorney General, the creamy layer concept has not been applied in *Indra Sawhney (1)* [*Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] to the Scheduled Castes and the Scheduled Tribes and *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] has misread the aforesaid judgment to apply this concept to the Scheduled Castes and the Scheduled Tribes. According to the learned Attorney General, once the Scheduled Castes and the Scheduled Tribes have been set out in the Presidential List, they shall be deemed to be Scheduled Castes and Scheduled Tribes, and the said List cannot be altered by anybody except Parliament under Articles 341 and 342. The learned Attorney General also argued that *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] does not indicate any test for determining adequacy of representation in service. According to him, it is important that we lay down that the test be the test of proportion of Scheduled Castes and Scheduled Tribes to the population in India at all stages of promotion, and for this purpose, the roster that has been referred to in *R.K. Sabharwal* v. *State of Punjab* [*R.K. Sabharwal* v. *State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548] can be utilised. Other counsel who argued, apart from the learned

151 (2018) 1 SCC 146
152 (2018) 15 SCC 64
153 Supra 149 at pages 147-148

> Attorney General, have, with certain nuances, reiterated the same arguments."[154]

The decision in **Jarnail** specifically addressed the issue of creamy layer:

> "28. Therefore, when *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16 (4A) and 16 (4B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342. We are, therefore, clearly of the opinion that this part of the judgment does not need to be revisited, and consequently, there is no need to refer *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] to a seven-Judge Bench. We may also add at this juncture that *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] is a unanimous judgment of five learned Judges of this Court which has held sway since the year 2006. This judgment has been repeatedly followed and applied…"[155]

Justice Rohinton Nariman speaking for the Constitution Bench in **Jarnail** explained the reason for applying the creamy layer principle:

> "25. However, when it comes to the creamy layer principle, it is important to note that this principle sounds in Articles 14 and 16 (1), as unequals within the same class are being treated equally with other members of that class."

137 We are thus unable to subscribe to the submission that **Jarnail** is not *per curium* on the issue of creamy layer. For one thing, **Jarnail** specifically examined the decision in **Indra Sawhney**, noticing that eight of the nine learned Judges applied the creamy layer principle as a facet of the larger equality principle. In fact, the decision in **Indra Sawhney II** v **Union of India**[156] ("**Indra Sawhney II**") summarised the judgments in **Indra Sawhney I** on the aspect of creamy layer.

154 Supra 49 at pages 407-408
155 Ibid at page 426
156 (2000)1 SCC 168

The judgment in **Jarnail** approved **Indra Sawhney II** when it held that the creamy layer principle sounds in Articles 14 and 16 (1):

> "12. In para 27 of the said judgment, the three-Judge Bench of this Court clearly **held that the creamy layer principle sounds in Articles 14 and 16(1)** as follows: [Indra Sawhney (2) case [Indra Sawhney (2) v. Union of India, (2000) 1 SCC 168 : 2000 SCC (L&S) 1] , SCC p. 190, para 27]
>
> "(i) Equals and unequals, twin aspects
>
> 27. As the "creamy layer" in the backward class is to be treated "on a par" with the forward classes and is not entitled to benefits of reservation, it is obvious that if the "creamy layer" is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as equals (forwards and creamy layer of Backward Classes) cannot be treated unequally. **Again, non-exclusion of creamy layer will also be violative of Articles 14, 16(1) and 16(4) of the Constitution of India since unequals (the creamy layer) cannot be treated as equals, that is to say, equal to the rest of the backward class**…
>
> Thus, any executive or legislative action refusing to **exclude the creamy layer from the benefits** of reservation will be violative of Articles 14 and 16(1) and also of Article 16(4). We shall examine the validity of Sections 3, 4 and 6 in the light of the above principle. (emphasis in original)"[157]

Jarnail discussed the decision in **Chinnaiah** and held that it dealt with the lack of legislative competence on the part of the State legislatures to create sub-categories among the Presidential lists under Articles 341 and 342. The decision in **Jarnail** therefore held that **Chinnaiah** did not deal with any of the aspects on which the constitutional amendments were upheld in **Nagaraj** and hence it was not necessary for **Nagaraj** to refer to **Chinnaiah** at all. In this view of the matter, we are clearly of the view that **Jarnail**, on a construction of **Indra Sawhney** holds that the creamy layer principle is a principle of equality.

157 Supra 49 at page 415

138 Though, we have not accepted the above submission which was urged by Ms Jaising on behalf of the intervenors, we will have to decide as to whether the Reservation Act 2018 is unconstitutional. The challenge in the present case is to the validity of the Reservation Act 2018 which provides for consequential seniority. In other words, the nature or extent of reservation granted to the SCs and STs at the entry level in appointment is not under challenge. The Reservation Act 2018 adopts the principle that consequential seniority is not an additional benefit but a consequence of the promotion which is granted to the SCs and STs. In protecting consequential seniority as an incident of promotion, the Reservation Act 2018 constitutes an exercise of the enabling power conferred by Article 16 (4A). The concept of creamy layer has no relevance to the grant of consequential seniority. There is merit in the submission of the State of Karnataka that progression in a cadre based on promotion cannot be treated as the acquisition of creamy layer status. The decision in **Jarnail** rejected the submission that a member of an SC or ST who reaches a higher post no longer has a taint of untouchability or backwardness. The Constitution Bench declined to accept the submission on the ground that it related to the validity of Article 16 (4A) and held thus:

> "34…We may hasten to add that Shri Dwivedi's argument cannot be confused with the concept of "creamy layer" which, as has been pointed out by us hereinabove, applies to persons within the Scheduled Castes or the Scheduled Tribes who no longer require reservation, **as opposed to posts beyond the entry stage, which may be occupied by members of the Scheduled Castes or the Scheduled Tribes**."[158] (Emphasis supplied)

158 Supra 49 at page 430

139 In sustaining the validity of Articles 16 (4A) and 16 (4B) against a challenge of violating the basic structure, **Nagaraj** applied the test of width and the test of identity. The Constitution Bench ruled that the catch-up rule and consequential seniority are not constitutional requirements. They were held not to be implicit in clauses (1) to (4) of Article 16. **Nagaraj** held that they are not constitutional limitations or principles but are concepts derived from service jurisprudence. Hence, neither the obliteration of those concepts nor their insertion would violate the equality code contained in Articles 14, 15 and 16. The principle postulated in **Nagaraj** is that consequential seniority is a concept purely based in service jurisprudence. The incorporation of consequential seniority would hence not violate the constitutional mandate of equality. This being the true

constitutional position, the protection of consequential seniority as an incident of promotion does not require the application of the creamy layer test. Articles 16 (4A) and 16 (4B) were held to not obliterate any of the constitutional limitations and to fulfil the width test. In the above view of the matter, it is evident that the concept of creamy layer has no application in assessing the validity of the Reservation Act 2018 which is designed to protect consequential seniority upon promotion of persons belonging to the SCs and STs.

I Retrospectivity

140 Sections 3 and 4 of the Reservation Act 2018 came into force on 17 June 1995. The other provisions came into force “at once” as provided in Section 1(2).

Section 4 stipulates that the consequential seniority already granted to government servants belonging to the SCs and STs in accordance with the reservation order with effect from 27 April 1978 shall be valid and shall be protected. In this context, we must note from the earlier decisions of this Court that:

(i) The decision in **Virpal Singh** held that the catch-up rule would be applied only from 10 February 1995 which was the date of the judgment in **Sabharwal**;

(ii) The decision in **Ajit Singh II** specifically protected the promotions which were granted before 1 March 1996 without following the catch-up rule; and

(iii) In **Badappanavar**, promotions of reserved candidates based on consequential seniority which took place before 1 March 1996 were specifically protected.

141 Since promotions granted prior to 1 March 1996 were protected, it was logical for the legislature to protect consequential seniority. The object of the Reservation Act 2018 is to accord consequential seniority to promotees against roster points. In this view of the matter, we find no reason to hold that the provisions in regard to retrospectivity in the Reservation Act 2018 report are either arbitrary or unconstitutional.

142 The benefit of consequential seniority has been extended from the date of the Reservation Order 1978 under which promotions based on reservation were accorded.

J Over representation in KPTCL and PWD

143 The Ratna Prabha Committee collected data from thirty one departments of the State Government of Karnataka. It has been pointed out on behalf of the State that corporations such as KPTCL and other public sector undertakings fall within the administrative control of one of the departments of the State government. The position in thirty one departments was taken as representative of the position in public employment under the State. The over representation in KPTCL and PWD has been projected by the petitioners with reference to the total number of posts which have been filled. On the other hand, the quota is fixed and the roster applies as regards the total sanctioned posts as held in **Sabharwal** and **Nagaraj**. On the contrary, the data submitted by the State of Karnataka indicates that if consequential seniority is not allowed, there would be under representation of the reserved categories. Finally, it may also be noted that under the Government Order dated 13 April 1999, reservation in promotion in favour of SC's and ST's has been provided until the representation for these categories reaches 15 per cent and 3 per cent, respectively. The State has informed the Court that the above Government Order is applicable to KPTCL and PWD, as well.

K Conclusion

144 For the above reasons, 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.

145 We therefore find no merit in the batch of writ petitions as the constitutional validity of the Reservation Act 2018 has been upheld. They shall stand dismissed. Accordingly, the review petitions and miscellaneous applications shall also stand dismissed in view of the judgment in the present case. There shall be no order as to costs. All pending applications are disposed of.

146 Before concluding, the Court records its appreciation of the erudite submissions of the learned Counsel who have ably assisted the Court. We deeply value the assistance rendered by Dr Rajeev Dhavan and Mr Shekhar Naphade, learned Senior Counsel and Mr Puneet Jain, learned Counsel who led the arguments on behalf of the Petitioners. We acknowledge the valuable

assistance rendered to the Court by Ms Indira Jaising, Mr Basava Prabhu S Patil, Mr Dinesh Dwivedi, Mr Nidhesh Gupta and Mr V Lakshminarayana, learned Senior Counsel.

…….J.
[Uday Umesh Lalit]

…….J.
[Dr Dhananjaya Y Chandrachud]

New Delhi;
May 10, 2019.