**SUPREME COURT OF INDIA**

B.K.Pavithra

Vs.

Union of India

WP(C)No.764 of 2018

(Uday Umesh Lalit and Dr.D.Y.Chandrachud,JJ.,)

19.03.2020

**JUDGMENT**

**Dr.D.Y.Chandrachud,J.,**

1. On 10 May 2019, this Court delivered its judgment in *B K Pavitra & Ors. v Union of India & Ors*[1]. ("B K Pavitra II"), upholding the constitutional validity of the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservations (to the Posts in the Civil Services of the State) Act 2018[2]. The conclusion which was arrived at by the Court is extracted below:

> "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."

2. 277 applicants are before this Court in three *Miscellaneous Applications*[3]. The reliefs sought in the lead MA are thus:

> "(a) Direct the State of Karnataka to implement 'post based reservation' in terms of the judgment passed by this Hon'ble Court in R.K. Sabharwal vs State of Punjab - (1995) 2 SCC 745 and to re-work all promotions on 'post' basis before any further action.
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> (b) Direct the State of Karnataka to apply 'creamy layer' and to exclude individuals belonging to the Scheduled Castes and Scheduled Tribes who no longer require reservation under Article 16(4-A) of the Constitution with a further direction to the State to apply creamy layer at entry level to disqualify those who

were creamy layer at that stage and to conduct the exercise from 17th June, 1995, i.e. the date of the Seventy Seventh Amendment.

(c) Restrain the State and its instrumentalities from taking any action where, no exercise is undertaken for that service or cadre on adequacy or where there is adequacy of representation particular when every specific application of order in relation to each cadre must be Nagaraj compliant."

Similar reliefs have been sought by the applicants in the other two MAs.

3. Dr Rajeev Dhavan, learned Senior Counsel prefaced his arguments by submitting that:

(i) The present MA is for directions and not for review of the recent judgment of this Court in B K Pavitra II; and

(ii) The directions which have been sought emanate from the judgment of this Court in B K Pavitra II.

4. The Government of Karnataka issued a *Government Order*[4] *on 15 May 2019*[5]. The preamble to the GO notes that on 27 February 2019, instructions have been issued for implementing the Reservation Act 2018 subject to the judgment that would be delivered by this Court on the validity of the Reservation Act 2018. Subsequently, in pursuance of an interim order of this Court *dated 1 March 2019*[6], instructions were issued in a GO dated 5 March 2019 to the effect that no further action should be taken for implementing the GO dated 27 February 2019 until further directions. Following the judgment of this Court in B K Pavitra II upholding the Reservation Act 2018, the Government of Karnataka, by the GO dated 15 May 2019 withdrew the earlier GO dated 5 March 2019 and directed all appointing authorities to abide by the GO dated 27 February 2019 in the implementation of the Reservation Act 2018.

5. On 24 June 2019, a circular was issued by the *Government of Karnataka*[7]. The circular notes that while preparing the seniority lists in conformity with the GO dated 27 February 2019, meetings were held under the auspices of the Chief Secretary and Additional Chief Secretary to the Government of Karnataka, following which a list of *Frequently Asked Questions*[8] has been prepared together with answers. The annexure to the circular contains a reference to the FAQs and the answers provided by the Government.

6. Dr Rajeev Dhavan, learned Senior Counsel has more specifically adverted to items 2 and 3 of the FAQs in the annexure which are extracted below:

"2. Whether to consider the scheduled caste and scheduled tribe candidate for promotions for the purpose of calculating their representation for such of the candidates who are selected in general merit rather than against the roaster points under direct recruitment.

Answer: Even though the scheduled caste and scheduled tribe candidates are selected under general merit rather than against roaster points under direct recruitment, they shall be considered against their roaster points for the purpose of

calculating their representation. This has been clearly told in the Government Order No. DPAR 29 SBC 77 dated 01.06.1978 and the same point is explained in the form of an example in the Schedule of the Act 2017.

3. Whether to consider the total no. of post in the respective cadres while revising the seniority list from 27.04.1978? or to consider the number of Government employees working in the respective cadre (Excluding the vacant post of the cadre strength)

Answer: The consequential seniority is to be given to those belonging to the reserved category employees who have been promoted against promotional roaster points at the time of revising the seniority list from 27.04.1978 to 02.02.1999.

3.1 After the date 3.2.1999, only it is to be revised by considering on the basis of total number of Government employees in the respective cadres (Cadre working strength excluding vacant posts). Thus it is not allowed to calculate the representation on the basis of total number of posts in the respective cadres. In this regard attention is drawn towards Government order number DPAR 21 SBC 97 dated 03.02.1999 and Government order even number dated 13.04.1999."

7. The grievance of the applicants is that until the backlog is cleared, the proportion of Scheduled Castes/Scheduled Tribes will exceed 15 per cent and 3 per cent. The principal points which have been urged in the present MAs are:

(i) The State government has not taken any step to correct the illegality of following a vacancy-based roaster since 27 April 1978, when the policy of reservation in promotions was introduced in the State Civil Services of Karnataka;

(ii) The State government was bound by the statement contained in its Counter Affidavit filed before this Court in B K Pavitra II that the reservation policy would be implemented on the principle of post-based reservations;

(iii) Since reservations in the state are contemplated retrospectively from 27 April 1978, the State government is obliged to apply the 'creamy layer' principle to disqualify those who fall within the creamy layer at the entry level and this exercise should be conducted at least from 17 June 1995, when the Seventy Seventh Amendment to the Constitution came into force; and

(iv) Though it was mandatory for the State of Karnataka to balance Article 16(4-A) against Article 16(1) of the Constitution and to collect cadre- wise data before implementing the Reservation Act 2018, the GO dated 15 May 2019 and the circular dated 24 June 2019 are silent on the above issues as a result of which, the State government is implementing the Reservation Act 2018 in an arbitrary manner.

8. Dr Dhavan relied on the inherent powers of this Court, as recognised by Order LV of the *Supreme Court Rules 2013*[9] to urge that the invocation of the jurisdiction of this Court in the form of the present MAs is based on the recourse to that inherent power. Reliance

in this regard was placed on the decisions of this Court in *Himachal Pradesh Scheduled Tribes Employees Federation v Himachal Pradesh Samanaya Varg Karamchari Kalayan Mahasangh*[10] *and Abu Salem Abdul Qayyum Ansari v Central Bureau of Investigation*[11] .

9. Mr Shekhar Naphade, learned Senior Counsel appearing on behalf of the applicant in *MA 1324 of 2019*[12], submitted that no data had been collected for the departments in which the applicants have been engaged as required by the judgment of this Court in *Nagaraj v Union of India*[13].

10. Mr Basava Prabhu S Patil, learned Senior Counsel and Mr Dinesh Dwivedi, learned Senior Counsel have opposed the MAs and urged that:

(i) The prayers in the MAs are not adjunct to the main decision of this Court in B K Pavitra II; and

(ii) The applicants have sought to challenge the subsequent directions and clarifications issued by the State government through the present MAs. The MAs, it was urged, are not maintainable.

11. Ms Indira Jaising, learned Senior Counsel submitted that:

(i) No provision of law has been invoked while filing the present MAs;

(ii) This Court, upon delivering its decision on 10 May 2019, has been rendered functus officio;

(iii) There is a bar contained in Order XII Rule 3 of the 2013 Rules for entertaining such an application, except for correcting arithmetical errors; and

(iv) A petition for review has been filed by the applicants and hence the MAs are not maintainable.

12. Addressing the Court on the reliefs which have been sought in the MAs, Ms Jaising submitted that:

(i) The relief which has been sought in prayer (a) is founded on a fresh cause of action for re-drafting the seniority list;

(ii)The nature of the reliefs sought require the filing of a fresh substantive Writ Petition;

(iii) The relief in prayer (b) was not an issue in the judgment of this Court in B K Pavitra II since the Court did not deal with recruitment at the entry level, but with promotions and consequential seniority thereto; and

(iv) Prayer (c) has been specifically dealt with and considered in paragraph 96 of the judgment of this Court in B K Pavitra II.

13. In rejoinder, Dr Dhavan submitted that:

> (i) The concern is that the parties should not be required to go through endless stages of litigation; and
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> (ii) The judgment delivered by this Court on 10 May 2019 requires directions and even the State government has thought it fit so as to implement the Reservation Act 2018.

14. The rival submissions fall for consideration.

15. It is necessary for this Court to address at the outset the preliminary objection raised by the learned counsel opposing the MAs that, though styled as an application for directions, they seek to lay a substantive challenge to the subsequent directions and clarifications issued by the State government in implementing the Reservation Act 2018.

16. Order XII Rule 3 of the Supreme Court Rules provides that:

> "3. Subject to the provisions contained in Order XLVII of these rules, a judgment pronounced by the Court or by a majority of the Court or by a dissenting Judge in open Court shall not afterwards be altered or added to, save for the purpose of correcting a clerical or arithmetical mistake or an error arising from any accidental slip or omission."
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> Rule 3 stipulates that, save for the purpose of correcting a clerical or arithmetical mistake or any error arising from an accidental slip or omission, no alteration or addition may be made to a judgment pronounced by the Court. This is in keeping with the principle of according finality to a judgment of the Court. The rule is made subject to Order XLVII of the 2013 Rules which contains provisions for the filing of a review before this Court. The parameters that guide the exercise of the review jurisdiction of this Court are contained in Order XLVII. Subject to the review jurisdiction of this Court, Rule 3 mandates that the Court "shall not" alter or delete any part of a judgment that has been pronounced, save for the purposes of minor corrections or accidental mistakes.

17. Order LV of the 2013 Rules titled 'Power to Dispense and Inherent Powers' contains provisions that empower this Court to adopt, notwithstanding anything contained in the Rules, such course as it considers just and expedient. Order LV, in so far as is relevant provides thus:

> "1. The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these rules, and may give such directions in matters of practice and procedure as it may consider just and expedient.
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> 6. Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

> Order LV empowers this Court to, for sufficient cause, excuse parties from compliance with any of the requirements of the 2013 Rules and issue such directions as it considers just and expedient. Rule 6 of Order LV clarifies that nothing in the rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. Rule 6 of Order LV mirrors the constitutional power conferred by Article 142 of the Constitution which empowers this Court to pass such decree or make such order as is necessary for doing complete justice.

18. Dr Rajeev Dhavan, learned Senior Counsel has urged that this Court may issue the directions sought in exercise of its inherent power. In effect, Order LV of the 2013 Rules has been pressed in aid of the submission that this Court may grant the reliefs sought in exercise of its inherent power to do complete justice.

19. This Court has, on several previous occasions, considered whether the filing of applications, though styled as applications for directions/ modification/recall/correction are, in substance, of a different nature and consequentially not maintainable. In *Delhi Administration v Gurdip Singh Uban*[14] ("Gurdip Singh"), this Court disapproved of the practice of filing applications for "clarifications", "modifications" and "recall" of final judgments and orders, noting that this was an attempt to bypass the provisions for review contained in Order XL of the Supreme Court Rules 1966. The Court observed:

> "17. We next come to applications described as applications for "clarification", "modification" or "recall" of judgments or orders finally passed. We may point out that under the relevant Rule XL of the Supreme Court Rules, 1966 a review application has first to go before the learned Judges in circulation and it will be for the Court to consider whether the application is to be rejected without giving an oral hearing or whether notice is to be issued. In case notice is issued, the review petition will be listed for hearing, after notice is served. This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of "no hearing", we find that sometimes applications are filed for "clarification", "modification" or "recall" etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve to be rejected straight away inasmuch as the attempt is obviously to bypass Order XL Rule 3 relating to circulation of the application in chambers for consideration without oral hearing... By describing an application as one for "clarification" or "modification", — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly.
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> (Emphasis supplied)

The Court observed that many applications, though styled as applications for clarification or modification are, in substance, applications for review. This practice was presumably

adopted to bypass the procedure stipulated for the consideration by this Court of review petitions. A party, it was held, would not be permitted to circumvent substantive procedures by filing such applications. With the above observations, the Court affirmed a fundamental principle of jurisprudence that "what cannot be done directly cannot be permitted to be done indirectly."

20. The view of the two judge Bench in Gurdip Singh has been reiterated by this Court in *Zahira Habibullah Sheikh v State of Gujarat*[15], *Common Cause v Union of India*[16], *Ram Chandra Singh v Savitri Devi*[17] *and APSRTC v Abdul Karim*[18].

21. Recently, in *M C Mehta v Union of India*[19], a two judge Bench of this Court rejected an application filed before it seeking a clarification that the applicant is permitted to carry out construction on the land in question in the following terms:

> "...the view expressed by this Court in Gurdip Singh Uban cannot be limited only to applications for modification, clarification or recall. There is a growing tendency to provide different nomenclatures to applications to side-step the rigours and limitations imposed on an applicant and the Court in dealing with a review petition. Applications can be and are titled as applications for directions, rehearing, reconsideration, revisiting etc. etc. One has only to open a thesaurus and find an equivalent word and give an application an appropriate nomenclature so that it could be taken up for consideration in open Court and on its merits and not as a review petition by circulation. In our opinion, the nomenclature given to an application is of absolutely no consequence-what is of importance is the substance of the application and if it is found, in substance, to be an application for review, it should be dealt with by the Court as such, and by circulation.
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> (Emphasis Supplied)

22. The Court noted the growing practice, despite the decision of this Court in Gurdip Singh, of filing applications before this Court with different nomenclatures in order to bypass or circumvent the procedure envisaged for the consideration of the reliefs sought. This Court clarified that the nomenclature of an application is of no consequence and courts must assess the contents and reliefs sought in the application to determine what is the true nature of the application.

23. Though the cases adverted to above were rendered in the context of applications before this Court which were held to be, in substance, applications for the review of a judgment, the principle of law that emerges is that courts may scrutinise applications to assess whether they, in substance, seek a relief that may not be granted in those applications. Where the court is of the opinion that the nature of the application differs from its nomenclature and there is a method prescribed in law for the grant of the reliefs sought, it may hold that the application before it is not maintainable.

24. In the present case, the basis of the MAs is founded in the steps taken by the State of Karnataka pursuant to the judgment of this Court in B K Pavitra II. The MA adverts to the GO dated 15 May 2019 and the circular dated 24 June 2019, both of which were issued subsequent to the decision of this Court.

25. By the GO dated 15 May 2019, the stay on the earlier GO dated 27 February 2019 which stipulated instructions for the implementation of the Reservation Act 2018 was lifted. Consequently, the Reservation Act 2018, as upheld by this Court, was to be operationalised in terms of the instructions contained in the GO dated 27 February 2019. By the circular dated 24 June 2019, a list of FAQs and their answers were annexed to the Schedule which concerned the preparation of the seniority list in accordance with the GO dated 27 February 2019.

26. The judgment of this Court in B K Pavitra II concerned the constitutional validity of the Reservation Act 2018 and not actions taken thereunder or in pursuance of its implementation. The present MAs, though styled as applications for directions, seek to lay challenge to the actions of the State government to carry into effect the provisions of the Reservation Act 2018. This is clear from the nature of the reliefs sought in the MAs, which impugn both the GO dated 15 May 2019 and the circular dated 24 June 2019, both of which are subsequent to the judgment of this Court in B K Pavitra II.

27. The remedy, styled as directions, sought by the applicants cannot lie in the form of MAs. Prayer (a) which seeks a direction to "re-work" all promotions on the basis of 'post based reservations' impugns item 3 of the FAQs annexed to the circular dated 24 June 2019 which states that the list is to be revised on the basis of the total number of government employees in the respective cadre. Prayer (b) seeks the issuance of a direction to the State of Karnataka to apply the creamy layer principle at the entry level. As it has been noted above, the judgment of this Court in B K Pavitra II concerned the grant of consequential seniority and not the applicability of the creamy layer at the entry level. Prayer (c) seeks the issuance of a direction to the State Government to ensure, in the implementation of the Reservation Act 2018, compliance with the decision in Nagaraj.

28. The present MAs are, in effect, a substantive challenge to the actions of the State government in implementing the Reservation Act 2018 through the GO dated 15 May 2019 and the circular dated 24 June 2019. If the applicants are aggrieved by the steps which have been taken by the State government, it is open to them to pursue a substantive remedy for challenging the steps taken by the State government in independent proceedings.

29. We are clearly of the view that MAs of this nature are not maintainable. Having come to this conclusion, no need arises for this Court to adjudicate upon the other contentions urged by Dr Rajeev Dhavan, learned Senior Counsel appearing for the applicants.

30. We consequently dismiss the Miscellaneous Applications, but leave it open to the applicants to pursue such independent remedies as may be available in the law. We clarify that no observations have been made on the merits of the matter. Pending application(s), if any, shall stand disposed of.

Judgment Referred.

[1] *(2019) 16 SCC 0129*
[2] *"Reservation Act 2018"*
[3] *"MAs"*
[4] *"GO"*
[5] *Government Order No. DPAR 186 SRS 2018, Bengaluru.*
[6] *In IA 36981 of 2019 in Writ Petition (C) No. 764 of 2019*
[7] *No : DPAR 186 SRS 2018*
[8] *"FAQs"*
[9] *"2013 Rules"*
[10] *(2013) 10 SCC 0308*
[11] *(2013) 12 SCC 0001*
[12] *KPTCL General Category Association (Regd.)*
[13] *(2006) 8 SCC 0212*
[14] *(2000) 7 SCC 0296*
[15] *(2004) 5 SCC 0353*
[16] *(2004) 5 SCC 0222*
[17] *(2004) 12 SCC 0713*
[18] *(2007) 3 SCJ 0168*
[19] *(2019) 2 SCJ 0640*