

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 13TH DAY OF NOVEMBER, 2020

PRESENT

THE HON'BLE MRS. JUSTICE B.V.NAGARATHNA

AND

THE HON'BLE MR. JUSTICE N.S.SANJAY GOWDA

WRIT APPEAL No.480/2020 (S-RES)

BETWEEN:

M/S. KARNATAKA POWER
TRANSMISSION CORPORATION LTD.,
A COMPANY INCORPORATED UNDER
THE PROVISIONS OF COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT
CAUVERY BHAVAN,
BENGALURU - 560 009
NOW REPRESENTED BY ITS
DIRECTOR (ADMN & HR).

... APPELLANT

(BY SRI SRIRANGA S., ADVOCATE)

AND:

1. B. GURUMURTHY
S/O. B. LAKKAPPA,
AGED ABOUT 58 YEARS,
WORKING AS CHIEF ENGINEER
ELECTRICITY, C, O & M ZONE,
BESCOM, CHITRADURGA - 577 001.
2. G. ASHOK KUMAR
S/O. VASUDEVA RAO,
AGED ABOUT 59 YEARS,
WORKING AS MANAGING DIRECTOR,
KAVIKA, MYSORE ROAD,
BENGALURU.
3. K.V. SHIVKUMAR
S/O. K. VEERABHADRAPPA,
AGED ABOUT 60 YEARS,
WORKING AS DIRECTOR (TRANSMISSION)

KPTCL, CAUVERY BHAVAN,
BENGALURU - 560 009.

4. M. MALLIKARJUNA REDDY
S/O. MADDI REDDY,
AGED ABOUT 59 YEARS,
WORKING AS CHIEF ENGINEER,
ELECTRICITY, TRANSMISSION ZONE,
KPTCL, ANAND RAO CIRCLE,
BENGALURU - 560 009.
5. H.K. BHARATHI
W/O. B.N. RAMESH,
AGED ABOUT 59 YEARS,
WORKING AS MANAGING DIRECTOR,
PCKL, CAUVERY BHAVAN,
BENGALURU - 560 009.
6. N. RAGHUPRAKASH
S/O. S.V. NARASIMHA MURTHY,
AGED ABOUT 60 YEARS,
WORKING AS DIRECTOR (TECHNICAL),
CORPORATE OFFICE, MESCOM,
MANGALORE.
7. SMT. H.V. MALINI
W/O. R.V. VENKATESH,
AGED ABOUT 60 YEARS,
WORKING AS CHIEF GENERAL MANAGER,
CORPORATE OFFICE,
BESCOM, K.R. CIRCLE,
BENGALURU - 560 001.
8. AFTAB AHMED
S/O. MOHAMED SADIQ,
AGED ABOUT 60 YEARS,
WORKING AS DIRECTOR (TECHNICAL),
CORPORATE OFFICE,
CESC, MYSORE.
9. K.S. PRASANNA
S/O. P. SHANKARAPPA,
AGED ABOUT 57 YEARS,
WORKING AS ADDITIONAL
DIRECTOR,
PCKL, CAUVERY BHAVAN,
BENGALURU - 560 009.
10. THE STATE OF KARNATAKA
BY ITS ADDITIONAL CHIEF SECRETARY

TO GOVERNMENT,
DEPARTMENT OF PERSONNEL
AND ADMINISTRATIVE REFORMS,
VIDHANA SOUDHA,
DR. AMBEDKAR VEEDHI,
BENGALURU - 560 001.

11. THE CHIEF SECRETARY TO GOVERNMENT,
ENERGY DEPARTMENT,
VIKASA SOUDHA,
DR. AMBEDKAR VEEDHI,
BENGALURU - 560 001.
12. SHRI D. NAGARJUNA
S/O. M. DORESWAMI,
AGED ABOUT 54 YEARS,
SUPERINTENDING ENGINEER,
(MPD) AND (TCD), BESCOM,
CORPORATE OFFICE, K.R. CIRCLE,
BANGALORE - 560 009.
13. G. SHEELA
D/O. LATE SHRI GURUMURTHY,
AGED ABOUT 54 YEARS,
SUPERINTENDING ENGINEER,
WORKING AS GENERAL MANAGER (DSM)
BESCOM, CORPORATE OFFICE,
K.R. CIRCLE, BANGALORE - 560 009.
14. GOPAL KRISHNA .V
S/O. C.S. VEERANNA,
AGED ABOUT 59 YEARS,
SUPERINTENDING ENGINEER,
R AND D CENTRE, KPTCL,
K.R. CIRCLE, BANGALORE - 560 009.
15. KRISHNA MURTHY .P
S/O. M. PUTTASWAMI,
AGED ABOUT 58 YEARS,
SUPERINTENDENT ENGINEER,
GM (POWER PURCHASE)
BESCOM, CORPORATE OFFICE,
K.R. CIRCLE, BANGALORE - 560 009.
16. GOPAL N. GAONKAR
S/O. NARAYAN GAONKAR,
AGED ABOUT 56 YEARS,
WORKING AS SUPERINTENDENT
ENGINEER (PROJECTS)

CESC CORPORATE OFFICE,
HINKAL, VIJAYANAGAR 2ND STAGE,
MYSORE - 570 007.

17. M.K. SOMASHEKHAR
S/O. M.A. KRISHNAPPA
AGED ABOUT 52 YEARS,
WORKING AS EXECUTIVE ENGINEER
(PROCUREMENT),
CESC CORPORATE OFFICE,
HINKAL, VIJAYANAGAR 2ND STAGE,
MYSORE - 570 007.
18. A.A. SUNIL KUMAR
S/O. LATE A.K. AYAPPA,
AGED ABOUT 57 YEARS,
WORKING AS EXECUTIVE ENGINEER,
CESC O & M DIVISION, HUNSUR,
MYSORE DISTRICT - 571 101. ... RESPONDENTS

(BY SMT. M.L. SUVARNA, ADVOCATE FOR SRI K. PUTTEGOWDA,
ADVOCATE FOR R-1 TO R-9; SRI A.C. BALARAJ, ADDL.
GOVERNMENT ADVOCATE FOR R-10 & R-11; SRI VIJAY KUMAR,
ADVOCATE FOR R-12 TO R-15; SMT. K. ANUSUYA DEVI,
ADVOCATE FOR R-16 TO R-18)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER DATED 28.07.2020 PASSED BY THE LEARNED SINGLE
JUDGE ON I.A.NO.2/2020 IN W.P.NOS.36133-141/2019 (S-RES)
AND PERMIT THE APPELLANT TO GIVE OFFICIATING CHARGE
TO THE ELIGIBLE EMPLOYEES ACCORDING TO THE SENIORITY
LIST.

THIS APPEAL BEING HEARD AND RESERVED ON
19/10/2020 AND COMING ON FOR PRONOUNCEMENT OF
JUDGMENT THIS DAY, **NAGARATHNA J.**, PRONOUNCED THE
FOLLOWING:

J U D G M E N T

This appeal is filed by the Karnataka Power Transmission Corporation Limited ("KPTCL", for the sake of convenience), assailing the interim order dated 28th July, 2020, passed by the learned Single Judge in W.P.No.36133/2019.

2. Briefly stated, the facts are that the respondent – petitioners have filed the writ petition assailing Circular bearing No.DPAR 186 SRS 2018 dated 24th June, 2019 (Annexure "N" to the writ petition), issued by the State (10th respondent herein), insofar as it pertains to its implementation in the appellant – KPTCL and the Notification No.KPTCL/B100/3750/2019-20 dated 22nd July, 2019 (Annexure "S"), publishing the Provisional Seniority List issued by the appellant – herein. A writ of mandamus is sought to comply with the Government Orders dated 27th February, 2019 and 15th May, 2019 for implementation of the judgment of the Hon'ble Supreme Court in ***B.K.Pavitra vs. Union of India (AIR 2019 SC 2723) [B.K.Pavitra II]***, rendered on 10th May, 2019 and to maintain the ratio of reservation at 18% for Scheduled Castes and Scheduled Tribes (SCs & STs) and 82% for

others and to grant all consequential benefits. By order dated 5th September, 2019, learned Single Judge had granted an interim order as prayed in the writ petitions, staying the operation, implementation and further proceedings, pursuant to Circular dated 24th June, 2019 and Notification dated 22nd July, 2019 by which, the Provisional Seniority List of the appellant – KPTCL was published. Thereafter, KPTCL filed an application I.A.No.4/2019, praying to vacate the interim order granted on 5th September, 2019.

3. During the course of arguments before the learned Single Judge, appellant – KPTCL stated at the Bar that 37 posts in the cadre of Chief Engineers are available, out of which, 12 posts are presently lying vacant and there are several vacancies in various cadres. Also, the writ petitioners are functioning as Chief Engineers.

4. In the said writ petition, an application filed by the appellant KPTCL seeking permission of this Court for granting “officiating charge” to the eligible employees whose names figure in the provisional Seniority List impugned in the writ petition on the ground that due to the interim order passed, it has become difficult for day-to-day

operation with the existing frugal working strength in the promotional cadres. The State supported the said application by stating that in-charge arrangements to eligible employees in respect of 1400 posts, which have remained vacant are to be made and the said exercise would not cause any prejudice to the writ petitioners, who are in any case, protected by the interim order. The writ petitioners opposed the application contending that "officiating charge" had a mischief potential of otherwise prejudicing the petitioners, some of whom are yet to retire, others having been superannuated on attaining the age of superannuation. That the interim orders had been passed after hearing both sides and there was no need for granting permission sought for by the KPTCL and the main matter itself could be considered for final disposal.

5. Learned Single Judge on hearing the respective parties, accorded permission to the appellant herein for making placement by way of in-charge arrangement of the persons enlisted in the impugned Seniority List subject to the following conditions:-

"(a) the placement of the employees figuring in the impugned Seniority List shall be only by

way of In-charge arrangement subject to outcome of the writ petitions;

(b) the employees placed on In-charge arrangement shall not have any right of lien to the posts in question and that they will not exercise any substantive functions of the said posts;

(c) this In-charge arrangement per se shall not create any equity or right in favour of the employees now being placed in the higher positions for seeking retrospective promotion in any circumstance, whatsoever;

(d) in effecting placement by way of In-charge arrangement, the extant rules of reservation shall be followed so that equity & justice are meted out to all sections of the employees;

(e) the In-charge arrangement to be effected shall not result into interfering with the protection afforded to the petitioners by virtue of the interim orders or otherwise affect their powers and positions; and,

(f) no party to the main proceedings shall use this In-charge arrangement or any benefit derived thereunder either in its favour or against the interest of the others, in any way whatsoever."

Being aggrieved, appellant - KPTCL has preferred this appeal.

6. We have heard Sri Sriranga, learned counsel for appellant - KPTCL, Smt.M.L.Suvarna, learned counsel for Sri K.Puttegowda, Advocate for Respondent Nos.1 to 9; Sri.A.C.Balaraj, learned Addl. Govt. Advocate for respondent Nos.10 and 11, Sri Vijay Kumar, learned counsel for Respondent Nos.12 to 15 and Smt.K.Anusuya Devi, learned counsel for Respondent Nos.16 to 18 and perused the material on record.

7. Learned counsel for appellant contended that the writ petitioners have filed the writ petition under a misconception that the appellant - KPTCL has failed to comply with Government Orders dated 27th February, 2019 and 15th May, 2019 (Annexures "K and L" to the writ petitions). The State Government has passed an order on 27th February, 2019 as to how the Seniority List in terms of the Reservation Act, 2018 ought to be worked out. The State Government has indicated the procedure to be followed by all the Government Departments in determining the seniority as per the Reservation Act 2018. The impugned order dated 15th May, 2019 (Annexure "L"

to the writ petition) was passed by the State Government directing the Government Departments to complete the action in accordance with the Order dated 27th February, 2019. The observations of the Hon'ble Supreme Court in *B.K.Pavitra II*, to that effect that the Officers or the Officials working in the respective cadres belonging to any category shall not be reverted is not a final observation and it is only temporary in nature. The Government Order dated 27th February, 2019 when read as a whole, makes it clear that after completing the action of preparation of the Seniority List of all cadres in accordance with the existing policy of reservation in promotion, the same shall be reviewed with effect from 19th February, 1978 by determining the seniority *inter se* of Government servants belonging to Scheduled Castes and Scheduled Tribes (SCs/STs) and those belonging to general category in accordance with Sections 3 and 4 read with Section 5 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, 2017 [hereinafter, referred to as "the 2017 Act"]. Therefore, the appellant is bound to restore the Seniority List with effect from 24th September, 1978 by determining

the Seniority List of the SCs/STs and persons belonging to the general category in accordance with Sections 3 and 4 read with Section 5 of the 2017 Act.

8. That on 5th September, 2019, learned Single Judge passed an interim order as sought for by staying the operation of the Circular dated 24th June, 2019 and Notification dated 22nd July, 2019 publishing the seniority list. The interim order dated 5th September, 2019 reads as under:-

GNJ:
05.09.2019

W.P.36133-141/2019

Heard learned Senior counsel Sri.M.Nagaprasanna for the petitioners and learned counsel for the respondents.

Despite ample opportunities respondents counsel submits that he is yet to receive instructions.

Hence, there shall be stay of the impugned proceedings and the respondents are restrained from reverting the petitioners from the post of Chief Engineer to Superintendent Engineer.

Interim order to operate till the next date of hearing.”

9. The appellant sought for vacating the interim order dated 5th September, 2019, as it was difficult to complete the exercise subsequent to judgment in *B.K.Pavitra II* during the operation of the interim order. Further, writ petitioner Nos.3, 4, 5, 7 and 8 had retired from service as Chief Engineers on attaining the age of superannuation and writ petitioner No.6 has taken voluntary retirement. Further, writ petitioner Nos.1, 2 and 9 will remain in the cadre as Chief Engineers as per the Seniority List prepared in accordance with *B.K.Pavitra II*.

10. Learned counsel for the appellant-KPTCL submitted the purpose of seeking vacating of the interim order was to publish the Seniority List and to operate the same. However, learned Single Judge while modifying the interim order has observed that the Seniority List shall be published and operated in accordance with the law laid down by the Apex Court in W.P.(C) No.791/2018. The learned Single Judge has also referred to the judgment of the Hon'ble Supreme Court in *R.K.Sabharwal*. Much water has flown subsequent to the judgment in *R.K.Sabharwal* and presently, the appellant would have to follow the 2017 Act, Government Orders, Circular and then finalize the

Seniority List. That it is not necessary for the appellant to place the Final Seniority List before this Court, as the matter is at the stage of the Provisional Seniority List being published and calling for objections. Also, the writ petitioners could have filed their objections to the same, instead they have rushed to this Court assailing the Circular dated 24th June, 2019 and the Provisional Seniority List. Further, the writ petition is premature as no promotions would be made till the Final Seniority List is published. The same has now been delayed. Hence, learned counsel for the appellant/KPTCL submitted that KPTCL has sought for setting aside of the said impugned order in W.A No. 448/2020.

11. Learned counsel for appellant further contended that after disposal of I.A.No.4/2019 seeking vacating of the interim order dated 5th September, 2019 passed by the learned Single Judge, which is assailed in W.A.No.448/2020, an application I.A.No.2/2020 was filed seeking permission to give charge to the eligible employees on officiating basis as per the Final Seniority List placed before the learned Single Judge vide Memo

dated 17th March, 2020. The writ petitioners filed their statement of objections to the said application.

12. Learned Single Judge by the impugned order dated 28th July, 2020 has disposed the application I.A.No.2/2020, permitting the appellant to make placement by way of in-charge arrangement of persons enlisted in the impugned Seniority List, subject to certain conditions. The cumulative effect of the conditions is that the persons, who are placed in a position on in-charge arrangement cannot undertake any substantive work. The object and purpose of providing in-charge arrangement is not merely to enable certain persons to occupy certain posts, but to enable them to undertake the work assigned to such posts in order to ensure that the work of the appellant – KPTCL does not suffer and is not jeopardized on account of the dispute with regard to seniority of the employees. Therefore, permission was sought by the appellant to undertake promotions on officiating basis. Further, as per the Board Employees Service Regulations [hereinafter, referred to as "the Regulations", for the sake of brevity], such in-charge arrangement is by way of an independent charge and Regulation 35 applies. As per

Regulation 35, creation of in-charge arrangement with independent charge in situations where promotion are stayed is to ensure that pendency of issue of promotion between the employees concerned would not come in the way of carrying out of the operations of the appellant-KPTCL. But the learned Single Judge has imposed restrictions, which have the effect of nullifying the effect of Regulation 35. The appellant, being a State electricity transmission utility, its operations are of paramount importance to ensure smooth functioning in the electricity sector in the State of Karnataka. But the restrictions imposed by the learned Single Judge on the in-charge arrangements to be made curtails the right of the employees to discharge their duties. Further, there are totally 1452 promotional posts, which have not been filled leading to serious difficulty in discharge of the duties and therefore, the impugned order may be set aside and permission may be granted to the appellant to fill up the vacant posts as per Regulation 35.

13. *Per contra*, learned counsel for respondent – writ petitioners supported the impugned order and contended that the reason as to why the petitioners were

constrained to file the writ petition was on account of the fact that the KPTCL was not complying with the directions of the Hon'ble Supreme Court in *R.K.Sabharwal* and other cases and hence, the learned Single Judge was initially pleased to grant an interim order, which has subsequently been modified. Also, the conditions imposed by the learned Single Judge while permitting incharge arrangements are correct and may not be interfered with. There is no merit in this appeal and the same may be dismissed.

14. Regulation 35 of the Regulations of the appellant – KPTCL reads as under:-

Regulation 35: *Instead of appointing an employee to officiate as provided in Regulation 28, it is permissible to appoint him to be in-charge of immediate higher post. In such a case, a charge allowance not exceeding 6% of the minimum pay of the higher post is admissible in addition to the pay he would have drawn in the lower post.*

Note:

- 1) *The amount of charge allowance resulting in a fraction of a rupee shall be rounded off to the next rupee.*
- 2) *When an employee not yet eligible for promotion to a higher post according to the Recruitment & Promotion Regulations has to be placed in-charge of such post, in the*

exigencies of service or when an employee though eligible for such promotion cannot be promoted to such a post for administrative reasons, e.g. owing to a injunction issued by a Court of Law, the employee should be placed in independent charge of the duties of the higher post for such period as may be considered necessary. In other case also, in-charge, instead of officiating, arrangements may be ordered at the discretion of the competent authority. If such an employee is subsequently held eligible for promotion to the higher post from the date on which he was placed in-charge of the duties of that post, or from a later date, it is permissible to change the 'In-charge' tenure to 'Officiating' or 'Permanent' tenure with retrospective effect from such earlier date."

15. We have passed a detailed judgment in W.A.No.448/2020. Promotions by way of incharge arrangement under Rule 32 of the Karnataka Civil Services Rules or Regulation 35 equivalent provision of the appellant – KPTCL is not the be-all and end-all. It is only to meet the exigencies of administration and bearing in mind number of vacancies in each cadre and for the smooth functioning of the departments or units.

16. In our view, before an exercise in the promotion is undertaken, it is necessary that the two controlling factors enunciated in the case of ***M.Nagaraj vs. Union of India [(2006) 8 SCC 212]*** (*M.Nagaraj*) have to be complied with.

17. In the circumstances, we think that any promotions to be made under Rule 32 of KCSR or any other equivalent provision such as Regulation 35 in the instant case would be only of a temporary nature, but even then the controlling factors would have to be taken into consideration.

18. Hence, what follows is, there must be a determination of (i) inadequacy of representation (ii) overall efficiency, before exercise of power under Article 16 (4A) in the matter of promotions.

19. In *M.Nagaraj*, the Constitution Bench of the Hon'ble Supreme Court held that Article 16(4-A) and 16(4-B) are enabling provisions. The State is not bound to make reservations for SCs and STs in the matter of promotions. However, if it wants to exercise its discretion to make reservations in promotions, the States have to identify and

collect quantifiable data showing backwardness of the class (later deleted) and inadequacy of representation of that class in public employment, keeping in mind maintenance of efficiency as indicated in Article 335, called "controlling factors". The concepts of efficiency, inadequacy of representation are required to be identified and measured. The exercise depends on availability of data and numerous factors. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency, then in that event the provision for reservation would be invalid. When the State fails to identify and implement the controlling factors, then excessiveness comes in and this has to be decided on the facts of each case. Thus, the extent of reservation has to be decided on the facts of each. In each case, the Court has to be satisfied that the State has exercised its discretion 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 and STs in a particular class or

classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.

20. In *M.Nagaraj*, the Constitution Bench considered at length the concepts of 'Catch-up rule' and consequential seniority and it was further observed that the Constitution (Eighty-fifth Amendment) Act, 2000 gives in substance legislative assent to the concept of consequential seniority. It was also reiterated that the judgment in *R.K. Sabharwal* stated, once roster point promotion is provided, each point in the roster indicates a post, which, on falling vacant, has to be filled by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category alone, then the question of clubbing the unfilled vacancies with current vacancies does not arise. Therefore, the replacement theory as enunciated in *R.K. Sabharwal* was reiterated in *M.Nagaraj*, both of which are Constitution Bench judgments of the Hon'ble Supreme Court.

21. It was further observed that, in *R.K.Sabharwal* the concept of post-based roster is introduced. Consequently, specific slots for OBC, SC and ST as well as GC have to be maintained in the roster. For want of a candidate in a particular category, the post may remain

unfilled vide replacement theory. That, Article 16(4B) is a direct consequence of the judgment in *R.K.Sabharwal* by which the concept of post-based reservation is introduced. Therefore, according to the Hon'ble Supreme Court, Articles 16 (4), Articles 16(4A) and 16(4B) are both inspired by observations by the Supreme Court in *Indra Sawhney* and *R.K.Sabharwal*. Therefore, the said amendments were upheld. It was further observed that, the said Articles retained 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 of the Constitution.

22. Further, these amendments to Article 16 are confined only to SCs and STs. They do not obliterate any of the other constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation); the concept of creamy layer (qualitative exclusion); the sub-classification between OBC on one hand and SCs and STs on the other, as held in *Indra Sawhney*; the concept of post-based

roster with in-built concept of replacement as held in *R.K. Sabharwal*.

23. It has reiterated 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. The State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. The State is not bound to make reservation for SCs and STs in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It was made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or

extend the reservation indefinitely. Subject to above, the validity of the Constitution (Seventy-Seventh Amendment) Act, 1995, and the Constitution (Eighty-Fifth Amendment) Act, 2001 were upheld.

24. Since, reference was made to *R.K.Sabharwal* by the Constitution Bench in *M.Nagaraj*, it would be useful to refer to the said judgment also. Therein, it was observed, when the total number of posts in a cadre are filled by the operation of the roster, then the result envisaged by the instructions impugned therein was achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the SCs/STs and the Backward Classes are filled, the percentage of reservation provided for the reserved categories is achieved. There is no justification to operate the roster thereafter. According to the Hon'ble Supreme Court, the "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy, whether permanent or temporary, in a particular post, the same has to be filled from amongst the category to which

the post belonged in the roster. However, in the event of non-availability of a reserved candidate at the roster point, it would be open to the State Government to carry forward the point in a just and fair manner. The dictum on this point was to operate prospectively and had no effect on promotions already made.

25. According to the Hon'ble Supreme Court, when a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserved points, it has to be taken that the posts shown at the reserved points are to be filled from amongst the members of reserved categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand, the reserved category candidates can compete for the non-reserved 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. For making any provision for reservation of appointments or posts in favour of any Backward Class of citizens, it is incumbent on the State Government under Article 16 (4) of the Constitution of India to reach a conclusion that the

Backward Class/ Classes for which the reservation is made is not adequately represented 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. The fact that considerable number of members of a backward class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class, but so long as the instructions/ Rules providing certain percentage of reservations for the backward classes are operative, the same have to be followed.

26. Another Constitution Bench of Hon'ble Supreme Court in ***Jarnail Singh vs. Lachhmi Narain Gupta [(2018) 10 SCC 396]*** (*Jarnail Singh*) held that, the judgment in *M.Nagaraj* does not require a reference to a larger Bench. However, the conclusion in *M.Nagaraj* that

the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in *Indra Sawhney*, was held invalid to that extent. However, as far as creamy layer is concerned, it was held that the application of the said judgment does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution of India and that only those persons who have come out of backwardness by virtue of belonging to the creamy layer, are excluded from the benefit of reservation. Therefore, it was held, the application of creamy layer test to Scheduled Castes and Scheduled Tribes did not interfere with Parliament's power under Article 341 and Article 342 of the Constitution. It was further held that, in *M.Nagaraj* it was left for determining inadequacy of representation to the state for the simple reason that as the post gets higher, it may be necessary, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, since the efficiency of administration is required to be maintained. Thus, quantifiable data has to be collected by the State on the parameters as stipulated in *M.Nagaraj* on the inadequacy of representation, which can be tested by the Courts and

the data so collected would be relatable to the cadre concerned.

27. Thus, in *M.Nagaraj*, on the question of inadequacy of representation or on the impact of efficiency, the Constitution Bench observed that it is the State, which is in the best position to define and measure merit in whatever ways it considers it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit. That whereas inadequacy has to be factually determined and judicial review would become relevant in the above context. However, whether reservation in a given case is desirable or not, as a policy, is for the State to determine as equity, justice and merit (Article 335), efficiency are variables which can only be identified and measured by the State. There is no fixed yardstick to identify and measure these factors, as it will depend on the facts and circumstances in each case.

28. Similarly, in *Jarnail*, it was observed that the element of discretion is vested in the State Government to determine inadequacy of representation in promotional posts. This is because the efficiency of administration has

also to be looked at every time promotions are made. Thus, the State has to determine inadequacy of representation depending upon the promotional posts in question and bearing in mind the efficiency of administration.

29. Even in *B.K.Pavitra-II*, it was observed that inadequacy of representation has to be assessed with reference to a benchmark on inadequacy. In this regard, reliance was placed on *R.K.Sabharwal* to reiterate that when once the prescribed percentage of posts is filled, the numerical test of inadequacy is satisfied and thereafter, the roster does not survive. That it is open to the State to make reservation in promotion for Schedule Castes & Schedule Tribes proportionate to their representation in the general population.

30. Further, in *B.K.Pavithra-II* on the aspect of filling up of the quota on the working strength on the sanctioned post, reliance was again placed on *R.K.Sabharwal* to hold that percentage of reservation has to be worked out in relation to the number of posts which form part of the cadre strength. Thus, the argument that the quota must be reckoned on the basis of the posts

which have to be filled up on the basis of the vacancies and not the sanctioned posts, was not accepted.

31. Further, in *B.K.Pavitra-II*, it was observed that Government Order dated 13th April, 1999 to the effect that reservation in promotion in favour of SCs and STs has to be provided until the representation for these categories reaches 15% and 3% respectively, also applies to KPTCL (appellant herein).

32. Also, while finalising the Seniority List, if it is found that persons promoted against reservation of backlog vacancies are in excess or contrary to the reservation provided and they cannot be adjusted and fitted against the roster points, then they shall be continued against supernumerary posts in their existing cadre till they get the date of eligibility for promotion in that cadre. Therefore, the Final Seniority List to be issued must bear in mind the aforesaid aspects.

33. If, for any reason, the exercise pertaining to the controlling factors is not undertaken prior to giving promotions under Rule 32 of the KCSRs or any equivalent provision, such as Regulation-35 in the instant case, such

promotion shall be only of an *ad hoc* or temporary nature, which would not give any vested right to the promotee and always, subject to a review to be undertaken in terms of the controlling factors enunciated in *M.Nagaraj*, which is subsequently affirmed in *Jarnail Singh*. Further, while undertaking such an exercise, it is necessary to bear in mind not the overall cadre strength/sanctioned strength, but the actual working strength. It is also necessary to bear in mind that reservation is always post based and not a vacancy based.

34. Also, prior to the making of the regular promotions, it is necessary to consider the aspect of adequacy of representation as well as overall administrative efficiency before filling up of a vacant post on the basis of the 33 point roster promotion. This is having regard to Article 335 of the Constitution which reads as under:-

“335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.-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."

35. It is also to be observed that all promotions made under Regulation 35 are on temporary basis before confirmation on a regular basis.

36. In view of the aforesaid discussion, we find that the impugned order would call for the following modification and the modified conditions shall read as under:-

(a) The placement of the employees figuring in the impugned Seniority List shall be only by way of in-charge arrangement subject to outcome of the writ petitions;

(b) The employees placed on in-charge arrangement shall not have any right of lien to

the posts in question. They can, however, exercise substantive functions of the said posts, having regard to the interest of administration;

(c) This in-charge arrangement per se shall not create any equity or right in favour of the employees now being placed in the higher positions for seeking retrospective promotion in any circumstance, whatsoever as it is being made having regard to administrative exigencies;

(d) In effecting placement by way of In-charge arrangement, the extant rules of reservation shall be followed so that equity and justice are meted out to all sections of the employees so far as practicable;

(e) The In-charge arrangements to be effected shall not result into interfering with the protection afforded to the petitioners by virtue of the interim orders or otherwise affect their powers and positions; and,

(f) No party to the main proceedings shall use this In-charge arrangement or any benefit derived thereunder either in its favour or against the interest of the others, in any way whatsoever."

37. In the result, the appeal filed by the appellant
- KPTCL is ***allowed in part*** and disposed of in the
aforesaid terms.

Parties to bear their respective costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

**mvs*