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Reservation in Private Sector with Reference to Haryana State Employment of Local Candidates Act, 2020

AYUSHI RAGHUWANSHI¹

ABSTRACT

In the recent past, many states have brought up laws which provide for reservation in employment to the local residents of those states. The government policies on the reservation have been undergoing changes with the continuous development of legislation and verdicts of the apex court. The scope has been widening with the passing years and it is not an anomaly to see reservations in not just the public but also the private sector. However, the constitutionality of such provisions can be challenged on different grounds in the Court. This paper seeks to discuss the reservation in the private sector by emphasizing a recently passed legislation in the state of Haryana.

I. INTRODUCTION

India has a system of reservation in furtherance of the objective of affirmative action. Reservation provides representation to those classes of citizens who have long been deprived of representation in services and legislatures, those who are socially and economically backwards. It serves the object of affirmative action which is an action taken for the upliftment of those classes of citizens. The constitution provides the power to make reservations.

Over the past few years, many states have brought up regulations or other measures for providing reservation in employment to the local residents within the state. Recently one such act was passed by the Haryana legislature, the Haryana State Employment of Local Candidates Act, 2020 which would be effective from January 2022. The High court however had put a stay on the act² but the Supreme Court set aside the stay on the act³.

This however raises a number of questions surrounding the constitutionality of the act. Has the constitution provided the States with the power to bring up legislation for making a reservation

¹ Author is a LL.M. Student at Maharashtra National Law University, Nagpur, India.

² *Haryana moves SC against Punjab and Haryana HC order to halt 75 quota in private jobs*, TIMES OF INDIA, Feb 4, 2022, <https://timesofindia.indiatimes.com/city/chandigarh/haryana-moves-sc-against-punjab-and-haryana-hc-order-to-halt-75-quota-in-private-jobs-for-locals/articleshow/89338931.cms>

³ *SC sets aside stay on law for quota in private jobs for Haryana residents*, HINDUSTAN TIMES, June 20, 2022 <https://www.hindustantimes.com/india-news/sc-sets-aside-stay-on-law-for-quota-in-private-jobs-for-haryana-residents-101645091962623.html>

on the ground of domicile or residence alone and also exceed the ceiling limit set by the Supreme Court?

II. AFFIRMATIVE ACTION: MEANING AND SCOPE

The simple meaning of affirmative action is the practice or policy of favouring individuals belonging to groups known to have been discriminated against previously. In India, we commonly refer the same as reservation policy for the upliftment and representation of the people who have been previously discriminated.

In India, the policy was first envisaged through the very first constitutional amendment in 1951 after the case of *Champakam Dorairajan*⁴. The reservations in India are provided for seats in educational institutions, employment in public services and seats in legislatures. Article 15, Article 16, Article 334 and other articles provide for such provisions. Reservation of seats is not the only action taken but relaxation in age limit, number of attempts, qualifying marks etc is also provided to a certain class of citizens by virtue of Article 335.

The decision in *Champakam* prompted the introduction of the First Amendment to the Constitution in 1951. The Parliament inserted clause (4)⁵ in Article 15 which specifically enabled the state to make provisions for the advancement of certain classes of citizens.

Kaka Kelkar commission being the first commission and Mandal commission being the second have been imperative in determining who would constitute backward classes nationwide. The discussion on who would be considered a backward community was held in the debate and Dr B R Ambedkar said, "What is a backward community? Well, I think anyone who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government."

The 77th constitutional Amendment in 1995 added a new clause (4A) in Article 16 that technically provided reservation in promotion. The 81st Constitutional Amendment in 2000 inserted Article 16 (4 B) which protected SCs and STs in filling the backlog vacancies. After, the 85th constitutional Amendment in 2001, provided consequential seniority to SC and ST employees in case of promotion.

⁴ State of Madras V Champakam Dorairajan AIR 1951 SC 226

⁵ "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes"

Article 330 and 332 provides special provision for the reservation of seats for SCs and STs in the Parliament and in the State Legislative Assemblies. Article 243T provides reservation of seats for SCs and STs in Municipalities. Article 243D provides reservation of seats for SCs and STs in Panchayats. Article 335 of the constitution states the claims of STs and STs to services and posts and the 82nd Amendment⁶ which includes a proviso to the act. Part XVI provides for special representation of SC and ST in Central and State legislatures .

These provisions have been developed over time with amendments in the constitution and the latest being the 103rd constitutional amendment which provided reservation of 10% seats to those who belong to the economically weaker section. To understand the current reservation policy it is imperative to study the background and evolution of reservations in India.

III. THE HARYANA STATE EMPLOYMENT OF LOCAL CANDIDATES ACT, 2020

An act passed by the Haryana state legislature in November 2020 which came into effect on 15th January 2022 provided for the reservation of jobs in the private sector up to 75%.

Applicable to-

The act applies⁷ to all the companies registered under the Companies Act, 2013 or a Society registered under the Haryana Registration and Regulation of Societies Act, 2012 or a Limited Liability Partnership Firm as defined under the Limited Liability Partnership Act, 2008 or a Trust as defined under the Indian Trust Act, 1882 or a Partnership Firm as defined under Indian Partnership Act, 1932 or any person employing ten or more persons on salary, wages or other remuneration for the purpose of manufacturing or providing any service and any other entity which the government may notify .

Reservation for-

The reservation is provided to the local candidates who are domiciled in the state of Haryana⁸ for jobs with a monthly gross salary or wages up to INR30000⁹.

Who is exempted?

The act provides certain exemptions too in case an adequate number of candidates do not possess the requisite qualifications to fill the vacant job posts¹⁰. There are other exemptions

⁶ “Nothing in this article shall prevent in making of any provision in favor 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”

⁷ Section 2(e) The Haryana State Employment of Local Candidates Act, 2020

⁸ Section 2(g) The Haryana State Employment of Local Candidates Act, 2020

⁹ Section 4 The Haryana State Employment of Local Candidates Act, 2020

¹⁰ Section 5, The Haryana State Employment of Local Candidates Act, 2020

granted for new start-ups and ITs, short-term employment of fewer than 45 days, employer engaged in agricultural activities, domestic work services etc

Registration is mandatory-

The employers are required to register all the employees with a salary less than or up to INR30000 on the portal designed for the purpose within three months of the coming into force of the act¹¹. The employer is barred from employing a new employee until the registration of the employees is done.

Offences-

Failure to register the employees on the portal, failure to recruit local candidates and failure to comply with any of the other provisions of the act would constitute an offence and would attract a penalty for it¹².

The detrimental effect of the act-

The act is applicable to all companies, firms, societies or any other person employing 10 or more employees and it mandates them to employ 75% of the employees from local residents. This can have a very detrimental effect on these bodies as adequately skilled and qualified employees may not be available, it would very much restrict the options that would be at the disposal of the employers and they might not be able to procure the best talent. It would have an adverse effect on the competitiveness and efficiency of the employers. It would even serve as a detriment to future investment and establishment in the state, overall impacting the economic growth of the state. The Confederation of Indian Industry also made a remark in this respect, "At a time when it is important to attract investments at the state level, governments should not impose restrictions on the industry. Reservation affects productivity and industry competitiveness¹³."

IV. CONSTITUTIONALITY OF THE ACT

The questions surrounding the constitutionality of the act are as follows-

Does reservation in the private sector violate the right to carry on occupation or business guaranteed under Article 19(1) (g)?

Can a state law provide for reservation on the basis of domicile?

¹¹ Section 3, Haryana State Employment of Local Candidates Act, 2020

¹² Section 10- Section 14, Haryana State Employment of Local Candidates Act, 2020

¹³ *Haryana private job quota law takes effect from tomorrow*, HINDUSTAN TIMES, Jan 14, 2022 12:11 AM <https://www.hindustantimes.com/india-news/haryana-private-job-quota-law-takes-effect-from-tomorrow-101642099261802.html>

Can the reservation be made to the extent of 75% which clearly exceed the 50% limit set by the Supreme Court?

Is reservation in the private sector allowed?

The Supreme Court in 2002 held that “unaided private educational institutions must have autonomy in their administration and management¹⁴”. In 2005, the Court ruled that “the State cannot insist on private educational institutions which do not receive aid from the State to implement reservation on any criterion except merit, merely because the resources of the State in providing professional education are limited, private educational institutions cannot be forced by the State to provide for reservations¹⁵”. The court while ruling this out observed that the right to establish and administer an educational institution comes under occupation under Article 19(1) (g)¹⁶.

Subsequently, the 93rd Constitutional Amendment Act was passed in 2005 to allow the State to make provisions for the advancement of socially and educationally backward class of citizens or Scheduled Castes and Scheduled Tribes in matters relating to admission in private educational institutions¹⁷. The amendment act was challenged and held to be constitutionally valid by the Supreme Court¹⁸. The amendment nowhere provided for the reservation in employment in the private sector and thus any such provision providing for the employment in the private sector would violate Article 19(1) (g) of the Constitution of India.

Thus the judicial precedents have allowed reservation in matters of admission to private educational institutions and there has been no precedent that expressly allows reservation in employment in the private sector. However reasonable restrictions can be put on the business, occupation and trade of the citizens under Article 19(6)¹⁹ and under the scope of such restrictions the state can ask the private players to provide for reservations in employment. As it was held by the court, “the restriction cannot be said to be unreasonable merely because, in a given situation, it operates harshly. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public, not from the

¹⁴ T.M.A. Pai Foundation vs. State of Karnataka (2003), AIR 2003 SC 355

¹⁵ PA Inamdar vs. State of Maharashtra (2005), AIR 2005 SC 3226

¹⁶ Right to practice any profession or to carry on any occupation, trade or business to all citizens

¹⁷ The Constitution (Ninety-Third Amendment) Act, 2005

¹⁸ Ashoka Kumar Thakur vs Union Of India And Ors; Writ Petition (civil) 265 of 2006

¹⁹ “Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause”

standpoint of interests of persons upon whom the restrictions have been imposed or upon abstract consideration”²⁰

Further, the court held, “in examining the reasonableness, one has to consider the Directive Principles of State Policy, prevailing social values and social needs, and object sought to be achieved by it. It was held that if there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise²¹.

Can a 75% Reservation be made?

The Supreme Court had laid down guidelines which restricted the ambit of reservation provided through Article 16(4)²² for backwardness. “It held that the reservation under Article 16(4) cannot exceed 50% to maintain efficiency in administration. Further, the backwardness envisaged here is mainly social backwardness. The Court, however, held that while 50% is the rule, extraordinary situations may require the rule to be relaxed²³”.

Telangana²⁴ provided for reservations which exceeded the 50% limit and went up to 62%²⁵, and Rajasthan²⁶ and Maharashtra²⁷ have passed laws which provided for reservations in public services which exceed the 50% reservation limit which has been long back prescribed by the Supreme Court. In September 2020, the Supreme Court upon examining the Maharashtra SEBC Act stayed its implementation, “It held that the social, educational and economic backwardness of a community and existence of data regarding inadequacy in public services are not 'exceptional circumstances' for providing reservations in excess of 50%²⁸.” Thus under exceptional circumstances, the provisions can be made which exceed the ceiling limit set in Indra Sawhney’s case.

Reservation on the basis of domicile

Article 16(3)²⁹ of the constitution provides that residence can be a requirement for procuring

²⁰ *Bannari Amman Sugars Ltd. vs. Commercial Tax Officer & Ors.*, (2005) 1 SCC 625

²¹ *MRF Ltd. v. Inspector, Kerala Government* AIR 1999 SC 188

²² 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

²³ *Indra Sawhney and Ors. vs Union of India and Ors.* (1992), AIR 1993 SC 477

²⁴ Backward Classes Scheduled Castes and Scheduled Tribes Act 2017

²⁵ *Telangana assembly passes bill to increase muslim quota*, TIMES OF INDIA, April 16, 2017 <https://timesofindia.indiatimes.com/india/telangana-assembly-passes-bill-to-increase-muslim-quota/articleshow/58207491.cms>

²⁶ Backward Classes Amendment Bill, 2019

²⁷ Socially and Educationally Backward Classes (SEBC) Act, 2018

²⁸ *Laxmanrao Patil vs. The Chief Minister and Anr.* (202), The Supreme Court of India, 2020(5) ALLMR607

²⁹ “Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such

employment under the government but that shall be in accordance with the law passed by the parliament. It does not provide the states with the power to make any such law requiring residence as a requirement. The act provides reservations to local candidates in employment means those who have domicile of Haryana.

In 1957, the Public Employment act was passed with the purpose to repeal all the laws which existed then that “prescribed any requirement of residence within a state for public employment”³⁰. Article 16(2)³¹ of the Constitution also prohibits any discrimination based on place of birth or residence in matters of public employment. Despite this states have provided for reservation-based solely on domicile to which the Court has ruled out that providing reservation solely on the basis of domicile violates Article 14³² and Article 16(2) of the constitution.

The Supreme Court in 1995 struck down rules made by the government of Andhra Pradesh which provided preference for candidates with Telugu medium in public services. “It held that such provision will weed out the best candidates and would give undue advantage to less meritorious students³³.”

The Supreme Court in 2002 held, that “the appointment of government teachers in Rajasthan where the state gave preference to applicants belonging to a particular region, as unconstitutional³⁴. It held that geographical classification can be used for the categorization of socio-economic backwardness. However, residence by itself in a state cannot be a ground for reservation, except as provided in Article 16(3)”.

However it was held, that “the ambit of Article 16(2) is limited in scope as it is confined to employment or office under the government, as against Article 15(2) which applies to employment or office under private persons too³⁵”. And the court also decided, “domicile-based reservation does not violate Article 15 because there is a difference between ‘place of birth’ and ‘place of residence. It was concluded that Article 15(1) and (2) cannot be invoked for invalidating such residence requirements because these clauses prohibit discrimination on the ground of place of birth, and not on the ground of residence.³⁶”

employment or appointment”.

³⁰ Public Employment (Requirement as to Residence) Act, 1957

³¹ “No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State”

³² “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”

³³ Sunanda Reddy vs State of Andhra Pradesh (1995), AIR1995 SC 914

³⁴ Kailash Chand Sharma vs State of Rajasthan (2002), AIR2002 SC 2877

³⁵ Govt. of A.P. vs. P.B Vijay Kumar, (1995) 4 SCC 520

³⁶ D.P Joshi vs. State of Maharashtra 1955 AIR 334

In July 2019, the government of Andhra Pradesh also passed a law which provided for 75% reservation to locals in industries or factories which was challenged in the Andhra Pradesh High Court and is pending currently³⁷

V. CONCLUSION

Considering the detrimental impact that it can have on the industries of the state and the economic growth of the state, a relook at the provisions can be done by the State legislature. The Constitution of India envisages reservation as a means of uplifting those who have been long deprived of representation and not as a means of depriving the citizens of their fundamental rights. The reservation provided to the local candidates of the state does not align with the objective that was behind the entire scheme of reservation in India.

The requirement of domicile can be one such requirement by the government for public offices but to make a reservation on the basis of domicile only that too in the private sector does not find a constitutional backing. Moreover, the ceiling limit of 50% has been blatantly exceeded which again calls for a reconsideration of the provisions.

The fact that reservation has become a political issue cannot be brushed aside and it would not be completely wrong to assume that there can be political motives behind such legislation; the local candidates' votes are possibly being targeted by the state government by making such legislation.

However, the Supreme Court by lifting the stay on the implementation of the legislation has put us in a dilemma whether the said act does not violate any constitutional provisions, Article 14, Article 15(2), Article 16(2) and Article 19(1)(g).

³⁷75 percent quota for locals may be unconstitutional: Andhra Pradesh High Court, NEW INDIAN EXPRESS, May 7, 2020, <https://www.newindianexpress.com/states/andhra-pradesh/2020/may/07/75-per-cent-quota-for-locals-may-be-unconstitutional-andhra-pradesh-high-court-2140245.html>