

RIGHT TO EQUALITY AND RESERVATION

Prof. A K Vishwakarma

The traditional Indian society was characterized by the most extreme and the most pervasive form of inequality and their marks are readily visible in the contemporary India. Before the commencement of the Constitution of India, untouchability, inequality, discrimination on the ground of caste, sex, religion was deeply rooted in the society of India. Dr. B. R Ambedkar and many other social and political thinker were acutely conscious of the unjust social order prevailing in our country and the country's old customs and practices which imposed inhuman disabilities on a large number of people. With the commencement of the Constitution of India an attempt was made to redress the unjust done to the marginalized class of people. It is against this background that a number of provisions were kept in the Constitution for the affirmative action for the weaker section of the society and for bringing about social transformation in the peaceful and democratic manner. While setting the object of Constitution social justice is given the paramount importance in the preamble of the Constitution and provisions for reservation was given in Art.16(4) of the Constitution which reads as follows:

‘Nothing in this Article shall prevent the state from making any provision for reservation of appointment or post in favor of any backward class of citizens, which in the opinion of state, is not adequately represented in the service under the state.’

Reservation to Scheduled Castes and Scheduled Tribes in promotion

Reservation in promotion for Scheduled Castes and Scheduled Tribes was introduced through various office orders since 1954 and its continuance has been ensured till the decision of Indra Sawhney case.¹ Before the Judgment of Indra Sawhney case the Supreme Court in Rangachari case² held that Art.16(4) of the Constitution permits reservation of the posts not only at the initial stage of appointment but also includes promotion to selection posts. This position was reiterated in several subsequent pronouncements by the Supreme Court. The Supreme Court has thus interpreted the term ‘appointment’ in Art.16(4) liberally as including the initial appointment as well as in promotion also. Thus the reservations to the Scheduled Castes and Scheduled Tribes in promotion were continued and continued till the decision of Indra Sawhney³. In Indra Sawhney v Union of India⁴ popularly known as Mandal Commission case, eight out of nine Judges opined that Art.16(4) was confined to initial appointments only and it did not permits or warrants reservation in the matter of promotion as such, as this give rise to several untoward and iniquitous results. The Court however permitted the existing rule in that behalf to operate for a

*Associate Professor, Faculty of Law, University of Lucknow

¹ Indra Sawhney v Union of India AIR 1993 SC 477

² Gen. Manager, Southern Railway v Rangachari AIR 1962 SC362

³ AIR 1993 SC 477

⁴ AIR 1993 SC 477

period of five years from the date of judgment.⁵This period was provided to the executive to enable them to take appropriate measures to implement the Indra Sawhney judgment. Ban on reservation in promotion did not please the Government of India and the government wanted to abrogate the effect of Judgment. In order to remove this anomaly, the Parliament has passed the 77th Constitution Amendment in 1995 and added a new clause (4-A) in Art. 16 i.e Art. 16(4-A). This new provision empowers the state to make any provision for the reservation in matter of promotion in the service under the state. Thus the decision of Indra Sawhney that there can not be reservation in promotion, it is Constitutionally valid only in case of initial appointment was abrogated by the Parliament.

Reservation in Promotion and Catch-Up Rule

Reservation in promotion to Scheduled Caste and Scheduled Tribe employees had given rise to several problems, especially, related to the seniority of such persons over the employees belonging to the general category. The problem of seniority was resolved by the Supreme Court when it applied the doctrine of catch-up rule in Union of India V. Veerpal Singh Chauhan⁶. According to the catch-up rule even the reservation in promotion is to be given to Scheduled Caste and Scheduled Tribe employees they were not entitled to get the consequential seniority over the employees of general category who were promoted later on. In this case all the 33 candidates who were considered for promotion to 11 vacancies were Scheduled Caste and Scheduled Tribes. Not a single candidate belongs to the general category. On this condition the Supreme Court had said that “not only juniors are stealing a march over the seniors but the march is so rapid that not only erstwhile compatriots are left far behind but even the persons who were in the higher categories at the time of entry of Scheduled Caste and Scheduled Tribes candidates in the service have also been left behind. Such a configuration could not certainly have been intended by the framers of the rules of reservation.”⁷ The Supreme Court stated in this case that here is no uniform or prescribed method of providing reservation. The extent and nature of reservation is a matter for the state to decide having regard to the fact and circumstances of each case. It is open to a state to say that while the reservation is to be applied and the roster followed in the matter of promotion or within a particular service, class or category. The candidate promoted earlier by virtue of the rule of reservation shall not be entitled to the seniority over his senior in feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate would regain his seniority over the reserved candidate notwithstanding that he has been promoted subsequent to the reserved candidate. There is no unconstitutionality involve in this. It is permissible for the state to provide. Further in Ajeet Singh v State of Punjab⁸ Supreme Court has gone one step ahead. While reading Art. 14, 16 and 335 Supreme Court laid down that when there arises a

⁵ M P Jain “Indian Constitutional Law” Lexix Nexis Butterworths Wadhwa Publication, Nagpur ed.2012 at p.1063

⁶ AIR 1996 SC 448

⁷ Union of India v Veerpal Singh Chauhan AIR 1996 SC 448

⁸ AIR 1996 SC 1188

question to fill-up the post reserved for Scheduled Caste and Scheduled Tribes in a still higher grade, then Scheduled Caste and Scheduled Tribes candidates is to be promoted first, but when the question is in respect of the promotion to a general category post then the general category candidate who has been promoted later would be considered first for promotion applying either the principle of seniority cum merit or merit cum seniority. The court has agreed with the Veerpal⁹ ruling that the seniority between the reserved category candidates and the general candidate in the promoted category shall continued be govern by their panel position i.e with reference to their *inter-se* seniority in the lower grade. The rules of reservation give the accelerated promotion, but it does not give the accelerated ‘consequential seniority’. But the Supreme Court in Jagdish Lal v State of Haryana¹⁰ has differed from the ruling of Veerpal¹¹ and Ajeet Singh¹². In this case the Supreme Court did not agree with the catch-up rule and argued that the normal rule of seniority ought to prevail in this area as well. This means the normal rule of seniority will apply and the seniority is to be counted from the date of promotion and not from the penal position. But this view of the court could not stand and the Supreme Court reconsidered the whole matter in Ajeet Singh II¹³ case. The constitutional Bench of Supreme Court has overruled the Jagdish Lal and restored the view as expressed in Veerpal and Ajeet Singh case. While giving the judgment in Ajeet Singh II the Supreme Court Stated that the primary purpose of Art.16(4) is due representation of certain class in certain post. But along with Art.16(4), there are Art. 14, 16(1), and 335 as well. Art.14 and 16 lay down the permissible limits of the affirmative action by way of reservation which may be taken under Art.16(4) and 16(4-A) while permitting reservation. Art. 14 and 16(1) also lay down the certain limitations at the same time. Art. 335 ensures that the efficiency of administration is not jeopardized. Thus in the matter of reservation in promotion to Scheduled Caste and Scheduled Tribes candidates, conflict is appeared between the Government and Judiciary. Government wanted to continue the reservation in promotion by adding the Art.16(4-A) in the Constitution but the approach of Supreme Court, whether in the Judgment of Indra Sawhney¹⁴ or Veerpal Singh¹⁵, was against it. To remove the effect of catch-up rule as laid down by Supreme Court in Veerpal Singh¹⁶ case and reaffirmed in Ajeet Singh II case¹⁷, the parliament has brought the 85th Constitution Amendment by which Art. 16(4-A) was again amended which read as ‘ Nothing in this Article shall prevent the state from making any provision for reservation in matter of promotion, with consequential seniority, to any class or classes of posts in the service under the state in favor of Scheduled Caste and Scheduled Tribes which, in the opinion of state, are not adequately

⁹ Union of India v Veerpal Singh Chauhan AIR 1996 SC 448

¹⁰ AIR 1999 SC 3471

¹¹ Union of India v Veerpal Singh Chauhan AIR 1996 SC 448

¹² Ajeet Singh v State of Punjab AIR 1996 SC 1188

¹³ Ajeet Singh II v Union of India AIR 1999 SC 3471

¹⁴ Indra Sawhney v Union of India AIR 1993 SC 477

¹⁵ Union of India v Veerpal Singh Chauhan AIR 1996 SC 448

¹⁶ *Ibid*

¹⁷ Ajeet Singh II v Union of India AIR 1999 SC 3471

represented in the service under the state'. This is important to mention here that 85th constitution amendment in Art.16(4-A), which abrogated the catch-up rule, was given the retrospective effect from 17-06-1995.

M. NAGRAJ V UNION OF INDIA

In *M Nagraj v Union of India*¹⁸ the Constitutional validity of 77th, 81st and 85th amendment was challenged on the ground that it destroy the basic structure of the Constitution. By 77th Constitution amendment reservation in promotion for Scheduled Caste and Scheduled Tribes were allowed. 81st Constitution amendment permit the state to carry forward unfilled vacancies of one year that were reserved under Art.16(4) to any succeeding years and such carry forward vacancies will be ignored in calculating the 50% ceiling on reservation. The 85th Constitution amendment has provided the consequential seniority to such candidate who has undergone accelerated promotion. While considering the Constitutional validity in the Supreme Court has said that the 'impugned Constitutional amendments by which Art.16(4-A) and 16(4-B) have been inserted flow from Art.16(4). They do not alter the structure of Art.16(4). They retain the controlling factors or the compelling reasons, namely backwardness and inadequacy of representation which enable the state to provide for reservation keeping in mind the overall efficiency of state administration under Art. 335. These impugned amendments are confined only to Scheduled Caste and Scheduled Tribes. They do not obliterate any Constitutional requirements, namely ceiling limit of 50%, the concept of creamy layer, the sub classification between other backward classes on one hand and Scheduled Caste and Scheduled Tribes on the other hand as held in *Indra Sawhney*'. Further, the Supreme Court said that the concept of reservation in Art.16(4) is hedged by three Constitutional requirements, namely, backwardness of a class, inadequacy of representation in public employment of that class and overall efficiency of the administration. These requirements are not obliterated by the impugned Constitutional amendments. Reservation is not the issue. What is the issue is the extent of reservation. If the extent of reservation is excessive than it makes an inroad into the principle of equality in Art.16(4). Extent of reservation will depend on the fact of each case. Backwardness and inadequacy of representation are compelling reasons for the State Government to provide representation in public employment. Therefore, if in a given case the court finds excessive reservation under the state enactment then such an enactment would be liable to be struck down since it would amount to derogation of the constitutional requirements. Thus the Supreme Court has held that reservation in promotion is constitutionally valid but at the same time imposed the duty on state to collect the quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Art. 335. The Supreme Court made it clear that even if the state has compelling reasons that is backwardness, inadequacy of representation and maintenance of efficiency in administration, the state will have

¹⁸ AIR 2007 SC

to see that its reservation provision does not lead to excessiveness so as to breach the ceiling of 50% or obliterate the creamy layer or extend the reservation indefinitely.¹⁹

AFTER NAGRAJ

In *UP Power Corporation v. Rajesh Kumar*²⁰ the Supreme Court has observed that “Art.16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4- B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make 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 Art. 335. The concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. If Articles 16(4-A) and 16(4-B) flow from Art.16(4) and if Art.16(4) is an enabling provision then Articles 16(4- A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Art.16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In this case the Supreme Court has laid down the following principles:

- i) Vesting of the power by an enabling provision may be constitutionally valid and yet ‘exercise of power’ by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Art. 335
- ii) Art.16(4) which protects the interests of certain sections of the society has to be balanced against Art.16(1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality under Art.14.
- iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.
- iv) 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

¹⁹ M Nagraj v. Union of India AIR 2007 SC

²⁰ AIR 2012 SC

strength as a unit also ensures that the upper ceiling-limit of 50% is not violated. Further roster has to be post-specific and not vacancy based.

v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of Art.16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Art.16 applies only to SCs and STs. The said clause is carved out of Art.14(4-A) Therefore, Clause (4A) will be governed by the two compelling reasons – “backwardness” and “inadequacy of representation”, as mentioned in Art.16(4) . If the said two reasons do not exist, then the enabling provision cannot be enforced.

vi) If the ceiling-limit on the carry-over of unfilled vacancies is removed, the other alternative time-factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Art.335 . If the time-scale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact-situation.

vii) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Art.16(4) and Art.335, then this Court will certainly set aside and strike down such legislation.

viii) The constitutional limitation under Art. 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

x) Art.16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Art.16(1) . It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.

Conclusion

The concept of reservation is essentially connected with the concept of social justice which is of paramount importance and the constitutional goal to be achieved. Indeed reservation is an effective tool in bringing the social justice and making the deprived class of the society at par with the other class of the society. Almost sixty eight years have been passed in giving the reservation to Scheduled Caste and Scheduled Tribes in the matter of appointment as well in promotion. This has been very successful in the upliftment of their social status. Now the time has come to review the reservation system. It is very unfortunate that the people who are demanding the review are considered as anti dalit. This is not so, among the Scheduled Caste and Scheduled Tribes the caste as a whole is considered as backward but the fact is that the person to whom the benefit of reservation is given and through which they have acquired the good social and economic status are still considered as backward and the benefit of reservation is given to their sons and daughters. How can the ward of class one officer be considered at par with the ward of persons having no income or status. Perhaps this was the main reason why the Supreme Court has inculcated the concept of creamy layer in the reservation to the other backward classes. If it can be applied for the other backward classes why should it not be in the case of Scheduled Caste and Scheduled Tribes. The writer is not against the reservation to the Scheduled Caste and Scheduled Tribes in the matter of appointment as well as in promotion. The object of reservation must not be forgotten. The object of the reservation is to uplift the deprived class of the society and putting them at par with the other class of the society. Law is considering the whole Scheduled Caste and Scheduled Tribes as unequal and treating them unequally but the fact is different. Every person of Scheduled Caste and Scheduled Tribes is not on the same footing. The benefit of reservation is mostly confined to the kith and kins of those who have already been benefited. There is need of the hour to review whether the whole Scheduled Caste and Scheduled Tribes should be considered as backward class for the purpose of Art.16(4) and 16(4A) of the Indian Constitution or whether a particular class among the Scheduled Caste and Scheduled Tribes is being developed who captured the benefit of reservation and thereby depriving the deprived class of the society. Effort must have been made to ensure that the benefit of reservation to Scheduled Caste and Scheduled Tribes should be availed by those who are really deprived and marginalized class of the society. This would have been done when some criteria is adopted to filter the privilege class among Scheduled Caste and Scheduled Tribes. This would stand alive the concept of social justice and the dream of Dr. B R Ambedkar.