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Tanya Singh
4th year, BBA LL.B. Amity
Law School, Noida (UP)

Dr. Pramod Kumar Singh
Professor, Veer kunwar Singh
University, Ara

Dr. Sanju Singh
Asst. Professor, A.B.R.
College, Sasaram.

Reservation Policy: A Socio- Legal Perspective

Tanya Singh, Pramod Kumar Singh, Sanju Singh

Abstract

The legislative intent to provide benefits of reservation in public services to the poor and socially and economically backward is much obvious. The law required to uplift the life and living of extremely backward and deprived people and not to those who are born in the families of backward and Dalits and are already uplifted in view of socio-economic Status. A powerful lobby of OBCs and SCs in bureaucracy and political parties are constantly influencing the policy matter to enhance the limit of creamy-layer so that their kin may avail the benefit of reservation. The economic criterion for exclusion of "Creamy-layer", therefore, must be reasonable and fair because children of economically backward, who study in schools run by municipalities or local bodies or state governments in rural areas, cannot compete with the children of rich OBCs. The average income of Goa is the highest having 85,000/- then comes Haryana Rs. 48,000/-. Maharashtra Rs. 47,000/-Gujarat Rs. 44,000/- and Bihar Rs. 10,500/- Only respectively. The Bihar, therefore, is the poorest amongst poor states of India having an average per capita income up to Rs. 10,750/- only. In Bihar, about 1.25 Crore people live below line of poverty and 27% population is deprived of basic health and sanitation Facilities. So, the benefit of reservation must be made available only to the 27% population of Bihar who are living below the poverty line (BPL).As an average people in Bihar earn Rs. 33,000/-per annum only. The enhancing the "creamy-layer" limit from Rs. One lakh to Rs. 4.5 lakh (Rs. 37500/- per month) therefore is highly unreasonable and arbitrary in law as it amount to robbing the poor and giving the benefits to the rich particularly in Bihar. Reservation on the basis of religion and castes is opposed to the Constitution and also in violation of the fundamental rights guaranteed to the citizens. All the posts are not amenable to reservation. There should be no reservation on the post of University teachers as the teaching profession holds a key position in social life and it is the quality of education received that determined and shapes the future. There should be no exclusive quota kept in the teaching occupation for any section at all. There should be no reservation on the posts of Principal as it holds the key position in the institutions for maintenance of academic discipline. The reservation is permissible to a limit of 50 per cent of available vacancies only. And hence then can be no reservation on a 'single post cadre' as it would amount to 100 per cent reservation. The post of principal is a single post in every educational institution and, therefore, there cannot be any reservation on the post of Principal at all. If one continues to provide reservation benefits to creamy layers', then it would amount to 'treating equals unequally. Thus, the posts of integrity and excellence, where social responsibilities are greater and where merit alone counts, should be excluded from the purview of reservation. The 'single post cadre' is also not amenable to reservation.

Keywords: Reservation, Policy, Backward Class.

1. Introduction

The Matter of reservation policy impinges upon the interest of 'millions of citizens of this country and this issue came into heated discussion with the passing of the Constitutional (93rd Amendment) Act. of 2005 and the Central Educational Institutions (Reservation in Admission) Act, 2006 (Act.5 of 2007) thereby introducing reservation of seats for the other backward classes (OBCs), socially and educationally backward classes (SEBCs) of Indian Citizens upto 27%. The claim of reservation to the extent of 27% is promised on the basis of that 52% of the population of India belongs to OBCs. But there is no supportable authentic data for this 'proposition' at all.

The Constitutional Validity of 93rd amendment as well as Act. of 2007 was challenged before the Constitution Bench of five judges of the Supreme Court in '*Ashok Kumar Thakur-Vs-Union of India & Ors*' in which both enactments were held valid, albeit with certain caveats. But certain issues are yet the leftover and lingering issues. It is occasionally alleged

Correspondence
Tanya Singh
4th year, BBA, LL.B. Amity
Law School, Noida (UP)

that “a tiny elite is grabbing up the benefits genuinely poors and the darker layer sleeping distance away from the special concessions.” as revealed in a research conducted by the A.N. Sinha Institute of Social Studies, Patna. This paper deals with three issues-whether benefits of reservation going to the real backward and deprived people? Whether reservation should extend to the posts of greater responsibilities? Whether exclusion of creamy layer’ by the present system of executive and states and Union Government is reasonable?

2. Benefit of Reservation to really backwards

The legislative intent to provide benefits of reservation in public services to the poors and socially and economically backwards is much obvious. The law required to uplift the life and living of extremely backward and deprived people and not to those who are born in the families of backwards and Dalits and are already uplifted in view of socio-economic Status. A powerful lobby of OBCs and SCs in bureaucracy and political parties are constantly influencing the policy matter to enhance the limit of creamy-layer so that their kin may avail the benefit of reservation in public services and in fact their successful efforts have deprived millions of genuinely poor and deprived OBCs and SCs/STs of the benefits of reservations.

The Apex Court through its pronouncements in ‘Indira Sawhney –V- Union of India’^[1] ruled that the government has no option but to exclude the “creamy layer” of designated OBCs for the purpose of conferring the Constitutional benefit of reservation.^[2] Justice Krishna Lyre in ‘Akhil Bhartiya Soshit Karamchari, Sangh (Railway) -Vs- Union of India and other’^[3] categorically held. “may be, some of the forward lines of the backward classes” have “their electoral Muscle..... caste” so strong as “Scares way even radical parties from talking secularism to them.” But the so called “dubious brand” and the powerful lobby of OBCs in power have successfully managed to snatch away the benefit of reservation by enhancing limit of creamy layer from genuine and real backwards who are yet deprived of public services due to poverty and backwardness.

The economic criterion for exclusion of “Creamy-layer”, therefore, must be reasonable and fair because children of economically backward, who study in schools run by municipalities or local bodies or state governments in rural areas, cannot compete with the children of rich OBCs who study in private convent schools. Nearly 38 percent population of Indians are poor, as per survey based on new health, nutrition, education, sanitation and income indicators conducted by the National Sample Survey Organization (NSSO) in the year 2004-2005.^[4] In 2007, another committee formed by the National Commission on unorganized sector has also reported that 77 per cent of the population lived below the poverty line and earned less than Rs. 20 a day.^[5] In June 2009, a rural development ministry sponsored committee has estimated that 50 percent of Indian were poor. On the basis of the number of BPL ration card issued so far which is nearly 10.86 Crores house-holds^[6]. The national average income in 2007-08 was estimated to be Rs. 34,000/- only and the state-wise income were different. The average income of Goa is the highest having 85,000/- then comes Haryana Rs. 48,000/-. Maharashtra Rs. 47,000/- Gujarat Rs. 44,000/- and Bihar Rs. 10,500/- Only respectively^[7].

The Bihar, therefore, is the poorest amongst poor states of

India having an average per capita income upto Rs. 10,750/- only. In Bihar, about 1.25 crore people live below line of poverty and 27% population is deprived of basic health and sanitation Facilities^[8]. Nearly 2.8 percent population of Bihar is on the verge of starvation. 58.4% children of the state are underweight and do not get recommended food and facilities. Thus, the extremely poor person of Bihar comprises 1.9 per cent population of India. So, the benefit of reservation must be made available only to the 27% population of Bihar who are living below the poverty line (BPL).

As an average people in Bihar earn Rs. 33,000/- per annum only^[9]. The enhancing the “creamy-layer” limit from Rs. One lakh to Rs. 4.5 lakhs (Rs. 37500/- per month) therefore is highly unreasonable and arbitrary in law as it amount to robbing the poor and giving the benefits to the rich particularly in Bihar, where per capita income per annum is much below the national average income. It amounts to giving equal treatment to two unequal’s, one who earn salary up to Rs. 35,000/- per month and other who earn up to 33,000/- per annum.

The religion and castes cannot be basis for providing reservation benefits to the OBCs as held by Hon’ble Supreme Court in ‘The State of Madras -Vs- Champakam’^[10]. The Supreme Court held that reservation on the basis of religion and castes is opposed to the Constitution and also in violation of the fundamental rights guaranteed to the citizens. The provisions of Article 46 cannot override the provisions of Article 29 (2), because the directive principles of states policy were then taken as subsidiary to fundamental rights. The 93rd constitutional amendment introduced a new clause (5) in Article 15, which provides:

“Nothing in this article or in Sub-Clause (8) of clause (1) of article 19 shall prevent the state from making special provision by law, for the advancement of any socially and educationally backward classes of citizen or for the scheduled castes or the scheduled tribes in so far as such special provision relate to their admission to the educational institutions including private education institutions, whether aided or unaided by the state, other than the minority educational institutions referred to in clause (1) of article 30.”

To give effect to the provisions of this new clause (5) of Article 15, the Parliament enacted Act 5 of 2007, which makes provision for reservation of 15% seats for the scheduled caste, 7 ½% for the scheduled tribes, and 27% for the other backward classes in Central educational institutions.^[11]

The main object to the 93rd constitutional amendment and the law enacted there under was to overcome the impediments caused by 11-judges bench decisions of Supreme Court in T.M.A. Pai Foundation, 10 in which by majority, overruled the earlier 5-judges bench decision of Supreme Court in ‘Unni Krishnan’.^[12] The Supreme Court held that all citizens have fundamental right to establish educational institutions under article 19(1) (g), and the term ‘Occupation’ in this article comprehends the establishment and running of educational institutions. The State regulation regarding admissions in such institution would not be regarded as an unreasonable restriction on fundamental right to carry on business under Article 18 (6) of the Constitution. However, the unaided educational institutions held are clearly and completely out of the intervention of the State under Article 16 (6)^[13]

3. Reservation should not be extended to the posts of greater responsibilities.

The reservation can be made in public services and also in this matter of admission to the educational institutions for the Scheduled castes, Scheduled tribes and other backward classes (OBCs). And the OBCs mean “the class or classes of citizens who are socially and educationally backward and are so determined by the central Government.”^[14]

The whole subject of providing reservation is to uplift the socio—economic situation of OBCs, SC and STs. But all the posts are not amenable to reservation. The Hon’ble Supreme Court has ruled in ‘Indira Sawhney -Vs’- Union of India’^[4] that there should be no reservation on the post of University teachers as the teaching profession holds a key position in social life and it is the quality of education received that determined and shapes the future as well as the competitive capacity of individuals and lays foundation for his career in life. Therefore, it should, held further, be necessary that there should be no exclusive quota kept in the teaching occupation for any section at all.

The Division Bench of Patna High Court in ‘Ratneshwar Prasad Singh -Vs- State of Bihar’^[15] case, relying upon Indira Sawhney case, has also ruled that there should be no reservation on the posts of Principal as it holds the key position in the institutions for maintenance of academic discipline:

“However, as regards the question of reservation in the post of principal of the constituent colleges of the Universities in Bihar, I am of the view that the principal of a college holds a key position in the institution and that the maintenance and academic discipline and imparting of proper education in the college much depend on the ability personality and efficiency of the individual holding the post of principal. Therefore, in respect of appointment of the principal of the college, there should be no compromise as regards the merit of the incumbent on any ground”. (Para—22)

The reservation is permissible to a limit of 50 per cent of available vacancies only^[16]. And hence then can be no reservation on a ‘single post cadre’ as it would amount to 100 per cent reservation^[17]. The post of principal is a single post in every educational institution and, therefore, there cannot be any reservation on the post of Principal at all.^[18]

The single post in a particular subject constitute a cadre itself for the purpose of reservation and therefore single post of lecturer in History cannot be reserved as it was a cadre in itself and for the reason that the post of lecturer in History is not interchangeable with other posts of lecturers in other subjects^[19].

“Creamy layer” must be excluded from the purview of reservation

The certain section of backwards, which have ceased to be backward because they have become economically forward or advanced’ are termed as the “Creamy-layer” of the backward classes of citizens. The Mandal Commission, set up in 1979 to identify the backwards, also admitted the existence of “creamy layer” among backward castes. It also confirmed that the benefit of reservation have really gone primarily to the relatively more advanced caste amongst the notified backward classes. It is therefore necessary that a periodical review of reservation policy and the criteria of backwardness should be made essentially and the absence of periodical review would amount to freezing the backwardness.

The Hon’ble Supreme Court held in ‘Indira Sawhney-I’ and ‘Indira Sarhney-II’ that the exclusion of creamy layers is perfectly justified and Constitutional. Non- exclusion of ‘creamy-layer’ violates the principle of equality in two ways. Firstly, if one continues to provide reservation benefits to creamy layers’, then it would amount to ‘treating equals unequally’ vis-a-vis persons belongs to ‘forward’ or ‘advanced’ class, and secondly on the other hand, to rank them with rest of backward classed would amount to treating ‘un-equals equally’. Thus, non-exclusion of creamy-layer leads to ‘perverting’ the very objective of special constitutional provisions. The Hon’ble Justice Bhandari rightly said; “creamy layers inclusion robs the poor and gives to the rich.”

According to various pronouncements of Supreme Court, particularly Indira Sawhney-II and ‘Nagaraj’ cases, the exclusion of creamy-layer is essential for upholding the paramount principle of equality^[20], and there is no possibility of inclusion of creamy layer even in future by resorting to the amendment of the Constitution as such because an amendment will be totally illegal and violate the basic structure of the constitution^[21]. Thus, the inclusion of creamy layer. Therefore, cannot be allowed to be perpetuate even by Constitutional amendment^[22].

To conclude, a special provision of reservation should be less than 50% of the limit, and therefore a special provision of should not exceed beyond the outer limit of 50% of the total available seats. The Supreme Court in ‘K.C. Vasant Kumar’ case’, emphasized the consideration of “administrative efficiency” by stating that reservation should be permitted only certain cases where ‘expertise and skill are of essence. “Merit alone must be the sole and decisive consideration.” In ‘Indira Sawhney-1’, the Supreme Court forcefully reiterated that in certain cases that call for highest level of intelligence, skill and excellence, there should not be reservation in those cases^[23]. The Supreme Court in ‘Indira Sawhney-1’ expressly excluded certain professions such as “technical posts in research”, “Super-specialties in medicine and engineering”, “Professor in Education”, “Pilots in Airlines” Scientists in nuclear science” etc. from reservation.

Thus, the posts of integrity and excellence, where social responsibilities are greater and where merit alone counts, should be excluded from the purview of reservation. The ‘single post cadre’ are also not amenable to reservation. The whole concept of ‘creamy-layer’ is confined only “to other Backward classes and has no relevance in the case of Scheduled Tribes and Scheduled Castes”^[24]. Two reasons are mainly advanced for this proposition, Firstly, scheduled castes and scheduled tribes “form a single class” and exclusion can be made only by the parliament after the President has determined the list of SCs and STs^[25]. As the Supreme Court has observed that exclusion of the ‘creamy layer’ is the truly the inclusion of the real backward ones and it is for this the government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation^[26]. Therefore, the exclusion of the creamy layer amongst the SCs and STs is now also absolutely imperative.

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