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The legality of 75% Job quota for locals in the private sector - A Critical analysis of Haryana's State Employment of Local Candidates Act 2020

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The Act provides that the employers would be required to employ 75% of the local candidates in jobs with wages not more than Rs. 30,000/- a month, as per the latest notification. It is clearly contrary to the letter and spirit of Articles 15(1), 16(2), and 19 of the Constitution and to the ideals of unity and integrity of the nation. It is quite evident that the Act is a scarcely thought-out populist move based on empty rhetoric and does not take into consideration the immense harm that the restrictions provided in it would cause to all the stakeholders including the employers, current employees, and the Haryana state itself.

Keywords: *quota, 75 percent, reservation.*

INTRODUCTION

The Haryana State Employment of Local Candidates Act, 2020¹ (Haryana Act No. 3 of 2021) (hereinafter 'Act') seeks to ensure that local candidates (that is, persons domiciled in the State of Haryana) are given preference in employment for jobs which demand a gross monthly

¹ Haryana State Employment of Local Candidates Act 2020

salary or wages of less than Rs. 50,000 (reduced to 30,000 by a later notification). Assuming the new rate of Rs. 30,000, the same translates to Rs. 3,60,000 per annum.² The Act requires that 75% of all such jobs shall be provided to local candidates by the employers. As per the Economic Survey of Haryana (2019-20), the State's per capita income was about Rs. 2,64,207 for the year 2019-20. As such, the ceiling amount of Rs. 30,000 of monthly salary would cover a vast majority of all the workers, thus in effect creating a 75% reservation in favour of persons domiciled in Haryana for 'all' private employment.³ It further requires every employer to register 'such employees' on the designated portal, within 3 months of coming into force of the Act. That, the employer would be required to apply to the Designated Officer for exemption in the event it is unable to find an adequate number of local candidates with the desired skills, qualifications, etc. Any contravention of the provisions may lead to a penalty ranging from Rs. 10,000/- to Rs. 2,00,000/-.

FALLACIES OF THE LEGISLATION

Timing of the Act

At the outset, it is surprising to note that at a time when the entire industry is reeling with the unprecedented impact of the pandemic, the Government of Haryana has decided to make matters worse by adding on further liability on ailing employers. Not only does it add to further complications in labor law compliance that a business is required to undergo, but it also severely threatens the employment status of persons who are currently employed. Furthermore, the Act is likely to have an effect on any further recruitment, especially in light of the pandemic, and is likely to only increase unemployment.

Provided by an Ordinance

It's pertinent to note that the Act has been introduced by the Haryana State Employment of Local Candidates Ordinance, 2020.⁴ It creates new kinds of onerous obligations for private employers which did not exist before. The creation of such new obligations mandate debate in

² *Ibid*

³ *Ibid*

⁴ Haryana State Employment of Local Candidates Ordinance 2020

the Legislative Assembly which was seemed to be avoided by way of the Ordinance.⁵ No reason had been provided for the necessity of promulgating the Ordinance immediately without observing the due legislative process.

Violative of Article 14

It is relevant to note that the preferential treatment to be granted on the basis of ‘domicile’ alone does not satisfy the standard of ‘intelligible differentia’ and ‘rational classification’ (reasonable classification) as required by the Supreme Court in *Deepak Sibal v Punjab University and Another*⁶. Intelligible differentia means to distinguish persons that are grouped together from others left out provided, that the move has a rational nexus to the objective of the legislation.⁷ The creation of this category of people who earn monthly salary/wages of less than Rs. 30,000/- appears arbitrary and includes unskilled as well as skilled workers. The only option available for the employer to hire persons who are not domiciled in Haryana would be by seeking exemption from a ‘Designated Officer’, as provided in Section 5 of the Act.⁸ Such a requirement would amount to serious interference in the conduct of private businesses. It is disappointing to note that at a time when the country is moving away from bureaucratic red-tapism and ensuring that the ease of doing business is relaxed, the present Act is a move in the opposite direction.⁹

Violative of Article 16

The specific mention of place of birth or residence under Article 16(2)¹⁰ of the Constitution makes it evident that the State cannot discriminate on such grounds while providing employment. The domicile criteria provided in the Act would squarely be covered under this prohibition. Given that the State cannot itself discriminate on such ground, it is clear that the State can also not pass any law providing for such discrimination. Further Article 16 provides

⁵ *Ibid*

⁶ *Deepak Sibal v Punjab University & Anr* (1989) 2 SCC 145

⁷ *Ibid*

⁸ Haryana State Employment of Local Candidates Act 2020, s 5

⁹ *Ibid*

¹⁰ Constitution of India, art 16(2)

that where any reservation is provided for economically weaker sections, a maximum of only ten percent of posts can be reserved for each category. Thus, the Act goes against the letter and spirit of the protection provided in Article 16¹¹.

Violative of Article 19

It violates the protections granted under Articles 19(1)(e)¹² and 19(1)(g)¹³. It infringes the right of the employees to reside and settle in the State of Haryana, and also to practice their profession or occupation. It further infringes the right of the employers within the State of Haryana to carry out their trade or business without undue interference by the State. It is pertinent to note that none of the reasonable restrictions provided in Articles 19(5)¹⁴ and 19(6)¹⁵ are attracted in the context of the Act.¹⁶

IMPACT ON CURRENT EMPLOYEES IN THE STATE

The term 'domicile' is not defined anywhere in the Act, and the same is likely to cause confusion regarding the status of various persons who may have migrated from other states but have been staying in Haryana for many months or even years. In spite of the fact that they may have been residing in the State and contributing to its economy by paying direct and indirect taxes, such persons would now be placed in a precarious situation where there is no certainty on their employment status. Section 4¹⁷ does not create any vested rights in favor¹⁸ of those employees who are currently employed and who may not necessarily pass the test of 'domicile'. In such cases, employers are likely to err on the side of caution and terminate the employment of such persons.

¹¹ Constitution of India, art 16

¹² Constitution of India, art 19(1)(e)

¹³ Constitution of India, art 19(1)(g)

¹⁴ Constitution of India, art 19(5)

¹⁵ Constitution of India, art 19(6)

¹⁶ *Ibid*

¹⁷ Haryana State Employment of Local Candidates Act 2020, s 4

¹⁸ *Ibid*

CONTRARY TO THE CONSTITUTIONAL NORMS OF LIBERTY, EQUALITY, AND FRATERNITY

The Act violates the very spirit of fraternity which requires the maintenance of the unity and integrity of the Nation. By creating the obligation to favour locally domiciled persons in private employment, the Act would create a rift between the State of Haryana and the rest of India. If the same kind of legislative requirements is reciprocated by the other states, the promise of “right to move freely throughout the territory of India” as guaranteed by Article 19(1)(d)¹⁹ will be reduced to a dead letter, and the country would be reduced from one composite Nation to a mere union of protectionist states.²⁰ Further, the existence of similar legislations in Andhra Pradesh and Jharkhand, and discussions of similar legislation in other states such as Maharashtra and Karnataka signals a dangerous trend that is bound to cause upheaval in the entire social fabric of the nation and gravely threaten its unity and integrity.

CONTRARY TO THE PRINCIPLE OF PROPORTIONALITY

*The Act is contrary to the principle of proportionality as followed by the Supreme Court of India in Anuradha Bhasin v Union of India*²¹ wherein the applicable law concerning the principle of proportionality is summarised. In brief, the test of proportionality provides²² that (i) any restriction on fundamental rights must have a proper and defined purpose, (ii) the measures provides for restriction on fundamental rights must be rationally connected to such purpose, (iii) there must be no alternative measures available to achieve the purpose but for such restriction on fundamental rights, and (iv) the restriction must strike a balance between the restriction of fundamental rights and achieving the proper purpose. The Act fails to meet the test of proportionality given that it is excessively vague and broad in its scope and excessively harsh in its effect.

¹⁹ Constitution of India, art 19(1)(d)

²⁰ *Ibid*

²¹ *Anuradha Bhasin v Union of India* [2020] 3 SCC 637

²² *Ibid*

IMPOSES A DISPROPORTIONATE BURDEN ON EMPLOYERS

It is evident that the intention of the Act is to provide employment to persons domiciled in the State of Haryana. However, in order to achieve this objective by taking affirmative steps the state via the Act aims to shift this burden onto employers and businesses. The same is done not through offering beneficial incentives but by imposing the threat of criminal action at every step. Such heavy-handedness simply does not work. Section 5(2)(iii)²³ permits the Designated Officer to direct the employer to train local candidates to achieve the desired result, where an employer seeks exemption on the ground of lack of local candidates of the desired skills, qualification, or proficiency. It is not provided as to who will bear the cost of such training.²⁴ Further, this provision completely fails to take into consideration the amount of time that goes into training personnel for specialised jobs (sometimes years), and that the time lag between a vacancy and its filling might cause irreparable harm to business operations. Further, it could also create an unjust situation where the employer would be bound to comply with orders of the Designated Officer to train employees out of fear of penalty under Section 13,²⁵ where it would have rather decided to not employ any such persons if the exemption was not allowed. The ultimate effect would be a lack of productivity and competitiveness.²⁶

NOT IN CONSONANCE WITH CONSTITUTIONAL PRINCIPLES CONCERNING THE RESERVATION

Further, it is relevant to note that the Supreme Court in the judgment of *Indira Sawhney v Union of India & Others*²⁷ had ruled that any scheme of reservation cannot provide for more than 50% reservation. The Act fails to take into consideration the said judgment and instead provides for 75% reservation.²⁸ What is also remarkable is that the Act specifically excludes Central Government and State Government from the purview of its application, thereby creating a

²³ Haryana State Employment of Local Candidates Act 2020, s 5(2)(iii)

²⁴ *Ibid*

²⁵ Haryana State Employment of Local Candidates Act 2020, s 13

²⁶ *Ibid*

²⁷ *Indira Sawhney v Union of India* [1992] Supp (3) SCC 217

²⁸ *Ibid*

situation wherein there is a reservation in private employment but not in public employment.²⁹

NOT IN FAVOUR OF THE STATE OF HARYANA

The Act imposes onerous restrictions with penal consequences which are disproportionately harsh. As a result, there is every likelihood of new investment getting stalled in the state, and even existing ones might look to other States where the legislative regime is more business-friendly and favours the ease of doing business. Resultantly, rather than providing further employment to the residents of Haryana, the Act would lead to a gradual shift of existing industries and businesses to other States. The interests of the State of Haryana will be damaged in the long run and as such the Act is contrary to the overall public interest of the State of Haryana.

The various provisions of the Act are vague, unsubstantiated, overly broad, and likely to breed corruption:

- *No exemption:* The Act does not exclude Micro, Small, and Medium enterprises from its ambit. In particular, Section 2(e)³⁰ defines an employer to mean any Company, regardless of its size or number of employees.
- *Abuse by corrupt officials:* Section 7(3)³¹ permits an Authorised Officer to examine the quarterly reports furnished by employers and pass any order as may be necessary for complying with the objectives of the Act. Such a broad power without any limits is patently arbitrary and ought to be curtailed. Section 8(1)³² grants unlimited discretionary power to the Authorised Officer to enter ‘any place’,³³ which would apparently include the residences of the employers for purpose of performing ‘any of the functions entrusted to him under the Act’.

²⁹ *Ibid*

³⁰ Haryana State Employment of Local Candidates Act 2020, s 2(e)

³¹ Haryana State Employment of Local Candidates Act 2020, s 7(3)

³² Haryana State Employment of Local Candidates Act 2020, s 8(1)

³³ *Ibid*

- *Combined with Section 7(3), Section 8(1)* essentially creates a regime where the Authorised Officer has unbridled power to enter any place without any search warrant on a mere whim, without the requirement of any reasonable cause, merely to determine whether any functions are required to be discharged by it.³⁴ This Act provides for the tremendous opportunity of abuse by corrupt officials and also creates an atmosphere of fear within business communities.
- *Harsh penalties:* The penalty provisions in Sections 11,³⁵ 12,³⁶ and 13³⁷ are excessively harsh, and would sound the death knell for small businesses, especially the MSME sector.³⁸ They also need to be examined particularly in view of the tremendous amount of discretion provided to officials in Sections 5,³⁹ 7,⁴⁰ and 8⁴¹.
- *Outright liability on company officials:* Section 16⁴² of the Act is arbitrary and effectively criminalises being an officer of a company because it provides that directors, managers, secretaries, agents, or other officers or persons concerning with the management of companies shall be deemed guilty of offenses committed by a company. It fails to take into consideration that companies are separate juridical persons. Such provisions are simply unprecedented.
- *Appellate Authority:* The Appellate Authority under the Act is not a court and is rather a government officer. This denies the aggrieved person access to impartial justice and fails to meet the criteria set by the Supreme Court in relation to the creation of quasi-judicial bodies.⁴³
- Section 20⁴⁴ purports to provide complete immunity to Authorised Officers and Designated Officers under the Act and assumes that all their actions are done in good faith. Constitutional provisions place restrictions on the actions of public servants and

³⁴ *Ibid*

³⁵ Haryana State Employment of Local Candidates Act 2020, s 11

³⁶ Haryana State Employment of Local Candidates Act 2020, s 12

³⁷ Haryana State Employment of Local Candidates Act 2020, s 13

³⁸ *Ibid*

³⁹ Haryana State Employment of Local Candidates Act 2020, s 5

⁴⁰ Haryana State Employment of Local Candidates Act 2020, s 7

⁴¹ Haryana State Employment of Local Candidates Act 2020, s 8

⁴² Haryana State Employment of Local Candidates Act 2020, s 16

⁴³ *Ibid*

⁴⁴ Haryana State Employment of Local Candidates Act 2020, s 20

they are always answerable for their actions, and this provision is contrary to settled jurisprudence on this issue.⁴⁵

CONCLUSION

The Act purports to effectively provide for reservation in private employment and represents an unprecedented intrusion by the government into the fundamental rights of private employers and the restrictions being placed upon them are not reasonable but are arbitrary, capricious, excessive, and uncalled for. The Act also represents a serious assault on the unity and integrity of the country and the idea of a common Indian identity. It would create a fundamental wedge between persons domiciled in different states and is contrary to the concept of common citizenship provided in the Constitution. Apart from the patent and palpable unconstitutionality of the Act, the entire aims and objectives of the Act are incorrect, misconceived, and fanciful. The Act is also unconstitutional on account of being excessively vague, arbitrary, and *inter alia* granting overly broad discretion to the Authorised Officers appointed therein. The Act applies to all diverse nature of employment, is not based upon 'intelligible differentia' and 'rational classification', and can be considered to be ultra vires.

⁴⁵ *Ibid*