

(1995) 04 AP CK 0008

In the Andhra Pradesh High Court

Case No : Writ Petns. No's. 15487, 12253, 15423, 15496, 15973, 15662, 12142, 13572 and 16089 of 1994

A.P. State Backward Class Welfare Association (Registered) **APPELLANT**
and

Vs

The State of A.P. Backward Classes Welfare (P.2) Department **RESPONDENT**
and

Date of Decision : 07-04-1995

Acts Referred:

Andhra Pradesh Commission for Backward Classes Act, 1993 — Section 10, 11, 11(2), 3, 3(2)

Constitution of India, 1950 — Article 12, 13(3), 14, 15, 15(4)

Citation : AIR 1995 AP 248 : (1995) 2 ALT 1 : (1995) 2 APLJ 1

Hon'ble Judges : Y. Bhasker Rao, J;Ramesh Madhav Bapat, J;B. Subhashan Reddy, J

Bench : Full Bench

Advocate : S. Ramachandra Rao, K. Ashok Reddy, K. Ramakrishna Reddy, A. Satya Prasad, G.V. Shivaji C.P. Sarathy, K. Govind and Ashok Kumar, for the Appellant; The Advocate-General G.P., for S.W. and Labour V. Venkataramaianaiah, T. Anantha Babu, Y. Rama Rao, I. Sreerama Murthy, Duba Nagarjuna Reddy, P. Gangaiah Naidu, C.V. Rajeeva Reddy, G. Venkateswararao, P.K. Gopala Rao, H. Prahalada Reddy, K. Subrahmanya Reddy, A.V. Krishna Koundinya, G.P., for G.A.D., V. Venkataramana and Duba V.N. Babu, for the Respondent

Judgement

Y. Bhaskar Rao, J.—In this batch of writ petitions, the validity of G.O.Ms, No. 30, Backward Classes Welfare (P-2) Department, dated 25-8-1994 is the subject-matter of challenge. The G.O. declared for "14" communities the status of "other Backward Classes" for the purpose of reservation under Articles 15(4) and 16(4) of the Constitution,

2. Before entering into the controversies and respective contentions, we may usefully trace the background in the matter of reservations: As per the scheme of our Constitution, there shall not be any discrimination on grounds of religion,

race, caste, sex and place of birth in the fields of education and employment. However, Articles 15(4) and 16(4) are two facets envisaging reservation to the classes of citizens socially and educationally backward. In so far as the State of Andhra Pradesh is concerned, it was originally formed part of the Composite Madras State, besides that of the State of Hyderabad. With the formation of the Andhra Pradesh on 1-10-1953, a list of Backward Classes as was existing in the Composite Madras State was adopted with slight modifications. Again on 1-11-1956 in the wake of formation of the State of Andhra Pradesh, including Telangana Area, the list that was existing with the State of Hyderabad was continued, thereby maintaining two lists -- One for Andhra area and the other for Telangana area.

3. The President of India appointed a Backward Classes Commission in January, 1953 viz., Kaka Khelkar Commission, to determine the criteria to be adopted for treating any section of the people, other than Scheduled Castes and Scheduled Tribes, as socially and educationally Backward Classes. The said Commission was also to draw up a list of such classes on the basis of the criteria laid down by it. On submission of the report of the Commission, the Central Government found certain tests applied by the Commission to be vague, and therefore directed different State Governments to choose their own criteria for defining backwardness.

4. The State of Andhra Pradesh issued G.O.Ms. No. 1886 dated 21-6-1963 specifying a list of certain persons as belonging to Backward Classes for the purpose of selecting candidates to the seats reserved for Backward Communities in the medical colleges in Andhra Pradesh and provided 25% of the seats to be reserved for Backward Classes in accordance with the list contained therein. The said list was challenged in the High Court on the ground that the order of the Government offends Articles 15 and 29(2) of the Constitution. Justice P. Jaganmohan Reddy, as he then was, considered the validity of the G.O., and struck down the said G.O., holding that the State has placed no material before the Court as to economic conditions of various castes, their occupation, habitation, social status and their educational backwardness and that the enumeration of persons as Backward has been made almost exclusively on the basis of the caste -- vide *Sukh Dev v. The Government of Andhra Pradesh*, (1966) 1 Andh WR 294. After the above G.O.Ms. No. 1886 was struck down, the State Government issued G.O.Ms. No. 301, Education, dated 3-2-1964 scrapping the then existing list of Backward Classes with effect from 1-4-1964 and directed financial assistance to be given to the economically poorer sections of the population, whose family income was below Rs. 1500/- per annum.

5. The State Government again took up the question of drawing up a list of Backward Classes and for that it appointed a Cabinet Sub-Committee. The Subcommittee adopted the criteria for determining the backwardness of the people and it included poverty, low standard of education, low standard of living, place of habitation, inferiority of occupation and caste. The Cabinet Sub-

Committee after considering the recommendations of the Director of Social Welfare drew up a list of 112 communities which were considered as backward. Accordingly, G.O.Ms. No. 1880, Education, dated 29-7-1966 was issued showing 112 communities as backward being eligible for scholarships and reservation of seats to Professional Colleges and Government Services. The validity of the said G.O. was again challenged in the High Court. A Division Bench of this High Court in P. Sagar and Others Vs. State of Andhra Pradesh and Others, quashed G.O.Ms. No. 1880 also. It was held by the High Court that the list was drawn up by the Director of Social Welfare and the Law Secretary, who cannot be considered to be experts and that they had made no investigation nor collected any material data for classifying the persons mentioned in the G.O. as backward. The State carried the matter to the Supreme Court. The Supreme Court in State of Andhra Pradesh and Another Vs. P. Sagar, upheld the decision of the High Court.

6. G.O.Ms. No. 870 dated 12-4-1968 is yet another one whereunder the State Government appointed Anantha Raman Commission to prepare a list of Backward Classes in the State as socially and educationally Backward Classes. The Commission drew up a list consisting of 93 classes to be included in the Backward Classes. The Government accepted the criteria adopted by the Commission and issued G.O.Ms. No. 1793 of 1970 declaring that the castes and communities specified by the Commission to be socially and educationally backward for the purpose of Art. 15(4) of the Constitution and making 25% reservation for them. The said G.O. was also challenged in the High Court. The High Court struck down the said G.O. as unconstitutional. On appeal, the Supreme Court reversed the view of the High Court and held that G.O. is valid being within the postulates of Art. 15(4) of the Constitution -- vide The State of Andhra Pradesh and Others Vs. U.S.V. Balram, etc., .

7. Again in the year 1982, N. K. Murali-dhar Rao was appointed as one Man Commission of Inquiry through G.O.Ms. No. 12, Social Welfare, dated 22-1-1982 to determine the nature of social and educational backwardness of different sections of citizens and submit its report. The Commission did send a report, but did not recommend for inclusion of Kapus, Ontaris, Balijas and Telegas in the list of Backward Classes.

8. While the matter stood thus, the Supreme Court delivered its judgment in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., , wherein it considered two memorandums issued by the Central Government providing 27% reservation to other Backward Classes in Central Services on the basis of the Mandal Commission report. The Supreme Court directed the State Governments to constitute a permanent body in the nature of commission or tribunal to decide the complaints of wrong inclusion and non-inclusion of groups, classes in the list of other Backward Classes and such body must be empowered to examine the complaints of such nature and pass appropriate orders and advice given by such body should ordinarily be binding upon the Government. Where, however, the Government does not agree with the recommendations, it must record the

reasons therefor. It was further observed that it is equally desirable that each State constitutes such body which step would go a long way in redressing the genuine grievances. Such body must be constituted under Article 16(4) read with Article 340 of the Constitution. The Supreme Court directed to constitute such body at State and Central levels within four months from the date of its judgment. It was observed that body or bodies so created can also be consulted in the matter of periodic revision of list of other Backward Classes.

9. In pursuance of this direction of the Supreme Court, the State of Andhra Pradesh passed the Andhra Pradesh Commission for Backward Classes Act, 1993, hereinafter re-ferred to as the A. P. Act 20/93, which, came into force on 3-12-1993. By virtue of the powers vested under the Act, the Backward Classes Commission headed by Justice Puttu-swamy was appointed. When the agitation in the districts mostly covered by population of Kapus growing wild, the Government issued G.O.Ms. No. 18 dated 6-7-1994 providing certain non-statutory educational benefits and economic schemes to poor persons and also issued G.O.Ms. No. 19 dated 10-7-1994 providing non-statutory educational and economic support schemes to poor among Kapus, Telegas whose annual income is less than Rs. 12,000/-. Even then as the agitation was not stopped, G.O.Ms. No. 30 dated 25-8-1994, which is impugned in these writ petitions, was issued declaring 14 classes/communities as other Backward Classes.

10. Now, turning to the challenge of the G.O., mainly it is impugned on five grounds, namely, (1) the G.O., is ultra vires of the provisions of the Andhra Pradesh Commission for the Backward Classes Act, 1993 (hereinafter referred to as "the A. P. Act 20/93"), (2) the G.O., is issued by the State Government without considering any material to support its issuance, (3) the G.O., is the outcome of pressure in the wake of ensuing elections to the State Assembly, (4) the G.O., will culminate in the breach of 50% reservation, the ceiling put-in by the Supreme Court and (5) the G.O. issued is ultra vires of the provisions of the Constitution, since it is only ,by means of a legislative action that the communities can be included in the list of Backward Classes and not by an executive order.

11. We shall first address ourselves to the first contention, whether the State Government has the power to issue the impugned G.O. under Article 162 of the Constitution.

12. Articles 15(4) and 16(4) of the Constitution are the source of power enabling the State Government to provide reservations for socially and educationally backward class citizens in the fields of education and employment. This power of the State, as contended by the learned Advocate General and also by the Senior Counsel appearing for the respondents, cannot be abridged or taken away through any Acts since Acts are the creatures of the Constitution and subservient to the mandatory constitutional provisions. Identical was the question that arose before the Supreme Court in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., . There, senior counsel, Sri Venugopal, argued that the

"provision" contemplated by Article 16(4) can be made only by the Legislative wing of the State and not by the Executive wing and this contention squarely ran against the decision in *M.R. Balaji and Others Vs. State of Mysore*, . Considering the said argument, Justice Jeevan Reddy, speaking for the majority of the Constitution Bench of nine Judges held :

"Reading the definition of State in Art. 12 and of "law" in Art. 13(3)(a), it becomes clear that a measure of the nature contemplated by Art. 16(4) can be provided not only by Parliament/ Legislature but also by the executive in respect of Central/State services and by the local bodies and "other authorities" contemplated by Art. 12, in respect of their respective services.....

Even textually speaking, the contention cannot be accepted. The very use of the word "provision" in Art. 16(4) is significant. Whereas clauses (3) and (5) of Art. 16 -- and clauses of (2) to (6) of Art. 19 -- use the word "Law", Art. 16(4) uses the word "Provision". Regulation of service conditions by orders and Rules made by the Executive was a well known feature at the time of framing of the Constitution. Probably for this reason, a deliberate departure has been made in the case of clause (4). Accordingly, we hold, agreeing with Balaji, that the "provision" contemplated by Art. 16(4) can also be made by the executive wing of the Union or the State, as the case may be, as has been done in the present case."

Thus, the question is settled by this decision of the Supreme Court itself that the State can through executive order make "provision" contemplated by Article 16(4) and equally for the same reasons under Article 15(4) of the Constitution.

13. Touching the power of the executive, incidentally another contention is advanced by submitting that the benefit available under Article 16(4) can be extended if only the statutory rules made under Article 309 are amended by including the present communities envisaged by the impugned G.O. This question was also settled by the same decision of the Constitution Bench holding as under:

"It is well settled by the decisions of this Court that the appropriate Government is empowered to prescribe the conditions of service of its employees by an executive order in the absence of the rules made under the proviso to Article 309. It is further held by this Court that even where Rules under the proviso to Article 309 are made, the Government can issue orders/instructions with respect to matters upon which the Rules are silent."

14. Therefore, it is clear that generally reservations must be provided through the rules framed under Article 309, but where such rules are silent executive order will validly govern the field. Therefore, the prime contention in the light of competency of the State Executive in issuing the impugned G.O. merits rejection.

15. The second point that arises for our consideration is, whether the impugned G.O. is supported by sufficient material so as to, fulfil the subjective satisfaction

of the State in issuing the same.

16. This contention turns upon the facts-situation and therefore a reference to the counter-affidavit can be usefully made. We find specific averments that the Government has carefully considered the report submitted by Prof. Tata Rao of Andhra University as regards the social and educational backwardness of the Kapu community as also the report submitted by the Research Wing of the Osmania University in respect of Muslims and also the report of the Mandal Commission in respect of Telegas, besides having effective consultation with the Cabinet Ministers that come into close rapport with the people in day to day life in so many aspects. The Government has also laid down the criteria for ascertainment of the communities for inclusion in the list of Backward Classes and only after a deep investigation brought out the G.O. The counter-affidavit gave, of course, much more details as regards the percentage of literacy in the different communities, etc. Thus, there is sufficient factual foundation laid in the counter-affidavit to save the G.O. from the present challenge. *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, is again an authority in the present context, since the Supreme Court had made the following pertinent observations in para. 89 therein:

""All that is required is, there must be some material upon which the opinion is formed. Indeed in this matter the Court must show due deference to the opinion of the State, which in the present context means executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, , which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact within the subjective judgment of the State/ Executive."

It is further observed in paragraph 113 as under:

"At the same time, we must say that Court would normally extend due deference to the judgment and discretion of the Executive -- a co-equal wing -- in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight."

17. In view of these observations, we need to show due deference to the opinion of the State Executive in enlisting the communities as backward classes through the impugned G.O. Further in *The State of Andhra Pradesh and Others Vs. U.S.V. Balram, etc.*, , we find a ruling that identifying communities for being enlisted as backward classes from out of the personal knowledge of the members of the

Commission is free from any vice and this principle embraces even the members of the Cabinet being the elected representatives of the people, whom the State Government has consulted before issuing the G.O. Incidentally touching this question, the learned counsel for the petitioners sought to submit that the G.O., as such, does not embody the material upon which the State Government had based its investigation in arriving at the classification for inclusion in the backward classes. We, therefore, have gone through the impugned G.O. and find that there are reasons given for urgency to declare the status of the communities as backward classes. No doubt, what material was considered does not find a place in the G.O. However, requirement of giving reasons is one traceable to the statute or to the principles of natural justice. Nothing is brought to our notice that any statute or G.O. mandates giving of reasons by the G.O. itself in an exercise of the present nature. Further, principles of natural justice are not attracted in the present matter since no one as such is affected by virtue of the impugned G.O., inasmuch as the G.O. has simply declared the status of the communities as backward classes and no reservation as such is indeed provided therein. It is well settled principle of law that where an order passed does not affect any party, non-giving of reasons will not vitiate that order. There is catena of decisions laying down this principle, namely, *The Swadeshi Cotton Mills Co. Limited Vs. The State of U.P. and Others*, *Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others*, *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, *Asif Hameed and others Vs. State of Jammu and Kashmir and Others*, and *Mahabir Jute Mills Ltd., Gorakhpore Vs. Shibban Lal Saxena and Others*. Accordingly, we have to conclude that there is material considered by the State Executive as noted in the counter before issuing the G.O., and as observed by the Supreme Court we should show due deference for the exercise involved therein.

18. The next point that needs to be dealt with is, whether the impugned G.O. is violative of the A.P. Act 20/93. Before advertng to this issue, it needs to be stated that the A. P. Act 20/93 was itself legislated in the wake of the decision of the Supreme Court in *Indra Sawhney's* case directing setting up of permanent Backward Classes Commission for examining questions like under inclusion and over inclusion of the communities in the list of Backward Classes besides incidental questions thereto. Pursuant to the enactment, it needs to be stated that one man Commission headed by Justice Puttuswamy was appointed under G.O.Mis. No. 9 dated 26-1-1994. It is Section 9 of the Act that provides for the functions of the Commission, while Section 11 envisages periodic revision of the lists by the Government, of course, after consultation with the commission. In the light of this legislation, the point framed reflects two aspects to be considered, namely, (i) whether it is open to the State Government to identify certain communities for inclusion in the list of Backward Classes pending report of the Commission appointed under the Act and, (ii) whether consultation of the Commission is pre-mandate before identification of such communities.

19. Advertng first to the first aspect, as" stated in the counter-affidavit, there

was much unrest among the people of Kapu community resulting in a Member of the Legislative Assembly, namely, Mudragada Padmanabham threatening and in fact launching hunger strike culminating in worsened agitation, creating law and order problem in the State. Pursuant to it, though the Government was obliged to issue two G.Os. providing non-statutory economic support schemes to the poor members among the Kapu and Telega communities, the situation could not come under control and therefore the impugned G.O. was the resultant to combat the threatened law and order problem. It is in this background, that the G.O. happened to emanate. Here the question is, whether the identification made amounts to usurping the functions entrusted to the Commission. The Act itself, under which the Commission is appointed, is a creature of the constitutional powers vested under Articles 15(4) and 16(4) in the State Government and therefore the Commission is subservient to the constitutional functions of the Government. Basically, the report of the Commission is recommendatory in nature and normally receives acceptance of the Government: Therefore, it is ultimately the State Government that takes a decision on the recommendations made through; a report by the Commission. It is, thus, manifest that the Commission being a recommendatory body cannot control the powers of the Government in taking decision thereon. The Commission only helps the Government in arriving at a correct conclusion in the matter of identifying the communities for being included in the list of Backward Classes. The power as such vested in the Government by the Constitution for identifying the communities does not get even shaken since the Commission is constituted, and it remains intact. It is stated by the learned Advocate General that petitions are filed by private parties before the Commission challenging the inclusion of the disputed communities in other Backward Classes and the said petitions are pending. Therefore, declaration of the disputed communities by the Government as other Backward Classes is proper or not has to be decided by the Commission along with the requisition sent by the Government to consider the matters referred to the Commission. Thus, entire matter is now before the Commission. It is open to the Commission to arrive at its own decision after conducting enquiry and send a report to the Government either upholding the inclusion or disavowing the inclusion. Thereafter, the Government has to exercise its power as provided under the A.P. Act 20/93 and then the decision of the Government will be final for, providing reservation as per Articles 15 and 16 of the Constitution. Until the exercise is completed, there cannot be and there is no immediate action giving reservation to the enlisted Backward Classes. As the matter is pending before the Commission, we do not want to express anything regarding the declaration of the status of the included communities. The Government instead of taking decision after calling for the report, now declared the status and referred the matter to the Commission to give its recommendation. After the report of the Commission, the Government has to consider afresh for taking a decision according to the provisions of the A. P. 20/93 taking the report of the Commission into consideration. A reading of the impugned G.O. also makes it clear that the no final decision is taken for

providing reservation to the communities enlisted in the impugned G.O. The G.O. can at best be treated as a requisition to the Commission to send a report as regards the reservation to the communities enlisted in the G.O. In this view of the matter, the question of the G.O. being contrary to the provisions of the A.P. Act 20/93 does not arise. There is no dispute where the legislation has envisaged a particular procedure, matters will be dealt with certainly in accordance therewith. Therefore, we cannot accede to the contention that the Government has no jurisdiction to identify the communities as was done since a report from the Commission is pending.

20. Turning to the second aspect of the issue, whether consultation with the Commission is pre-mandate before such an identification of the communities, it is to be noticed that it is for the Commission under Sec. 9 to examine the request for under-inclusion and over-inclusion of the communities, while Sec. 11 empowers the Government to revise the list from time to time to suit the changing needs of the communities in the State. This exercise of revision by the Government is certainly only after consultation of the Commission. However, it is to be borne in mind that revision of a list presupposes existence of a list and further the impugned G.O. has not brought-in a situation where a revision as such is effected to the existing list, but simply an identification of different communities is made for being enlisted by the Commission. It is for the Commission to enlist such communities in its report in a recommendatory form to the Government for its acceptance. The Commission may or may not accept the identification made by the Government through the impugned G.O., more so when there are petitions filed before the Commission -- as was submitted -- seeking non-inclusion of the said communities in the list. In this view of the matter, it cannot be said that a revision only was effected u/s 11 through the impugned G.O., muchless an occasion has arisen to render the impugned G.O., vitiated for non-consultation with the Commission, a mandate declared by S. 11. Accordingly, we hold that the impugned G.O. is not amenable for challenge on the ground of violation of the provisions of the A.P. Act 20/93.

20A. Now, turning to the contention that it is pursuant to the pressure and yielding to the demands of the people in a particular district, the State Government issued the G.O., in the wake of the ensuing elections to the State Assembly, it is to be noticed that in a democratic country it is the will of the people that stands supreme and that the Governments have to lay down their policies in tune with the public demand in the form of manifesto. It is not uncommon that, at times, to set at rest the upsurge, the Government has to yield to the public demand and even if it is a case where a demand from a particular community happened to be accepted that cannot form a ground to vitiate an order of the present nature.

21. The last point touches the question of percentage of reservation that is likely to result in by virtue of the present identification through the impugned G.O. The contention, of the learned counsel for the petitioners is that the inclusion of the

communities envisaged by the impugned G.O. is sure to bring in a situation where the total percentage of reservation envisaged by Arts. 15 and 16 exceeds the ceiling of 50% ordained by the Supreme Court. It is categorically indicated in the G.O. itself that if the situation so warrants the Government will take suitable action to meet the legal impediments in the light of the ceiling laid down. It is relevant here to note the observations of Justice Jeevan Reddy in *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, :

"While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people."

Justice Sawant agreeing with Justice Jeevan Reddy endorsed that it is only for extraordinary reasons that the percentage of 50 may exceed, subject of course, on justified and valid grounds. Justice Sahai on this aspect observed thus:

"Reservation being extreme form of protective measure or affirmative action it should be confined to minority of seats. Even though the Constitution does not lay down any specific bar but the Constitutional philosophy being against proportional equality the principle of balancing equality ordains reservation, of any manner, not to exceed 50%".

Justice Pandian held that there will be no maximum ceiling in the matter of reservation as envisaged by Art. 16(4). Thus, though 50% is the ceiling as a rule, it is not without an exception. Pausing for a moment here, it needs to be borne in mind that except on account of an apprehended situation, the present challenge of the impugned G.O. on the ground of crossing 50% ceiling has no factual basis as on date. The apprehension may not also come true because the ruling in *Indra Sawhney's* case envisaged eschewing of creamy layer from the existing communities of the Backward Classes. When so eschewed, it is equally possible that the resultant situation may get itself balanced and even otherwise also the ruling of maximum ceiling is not without an exception. The Commission - appointed under the Act will make its own exercise and at this stage it is not predictable how it ultimately turns upon. On mere apprehension it is not open to the petitioners to challenge the validity of the G.O. Further, as submitted by the learned Advocate General and other counsel on behalf of the respondents, the writ petitions themselves are premature since a list of Backward Classes has yet got to be submitted to the State Government by the Commission and on date no one can be said to have been affected by virtue of the impugned G.O. In this view of the matter, we find no merits in these writ petitions and they are accordingly disposed of.

22. Before parting with this, we may make it clear that nothing in this judgment will have any influence on the recommendation to be made by the Commission in the light of the impugned G.O. and that the Commission is at absolute liberty to discharge its functions as envisaged by the Act and the law.

Ramesh Madhav Bapat, J.

23. I agree with my learned brother Justice Y. Bhaskar Rao.

W. P. No. 15487 of 1994 and batch

B. Subhashan Reddy, J.

24. I had the privilege of perusing the judgment prepared by my learned brother Y. Bhaskar Rao, J. While respectfully disagreeing with some of the findings arrived at by my learned brother, I Sustain the impugned G.O. on a different reasoning.

25. This batch of Writ Petitions have been filed impugning G.O. Ms. No. 30, dated 25-8-1994 issued by the State of Andhra Pradesh, by which 14 new castes/categories have been added to the existing list of Backward Classes. It is not a litigation of new kind. It is an ongoing battle of some castes for inclusion as Backward Classes for the purpose of a availment of benefits of reservation, be it education or employment. There was a Kalelkar Commission firstly constituted in the year 1953 by the President in exercise of powers under Art. 340 of the Constitution of India. Kalelkar Commission was not approved and that is the reason why the Mandal Commission was constituted in the year 1978. Meanwhile, the State of Andhra Pradesh has issued G.O. Ms. No. 1886, dated 21-6-1963 specifying 139 castes as socially and educationally backward. The said list was prepared for the purpose of selecting candidates in Medical Colleges and 25% of the seats were reserved for them. The validity of this list was challenged in a writ petition and the same was quashed by a learned single Judge of this Court in Sukdev v. Government of Andhra Pradesh, (1966) 1 Andh WR 294. Again in 1966, Government of Andhra Pradesh has prepared another list specifying 112 communities as Backward Classes by G.O. Ms. No. 1880, dated 29-7-1966. This was for both the reservations in education and Government employment. The same was assailed and a Division Bench of this Court in R. Sagar v. State of A.P., AIR 1968 Andh Pra 105 struck down the same. The same was upheld by the Supreme Court in State of Andhra Pradesh and Another Vs. P. Sagar, . On 12-4-1968, Government of Andhra Pradesh appointed another Commission by G.O. Ms. No. 870 to identify the Backward Classes and to prepare a list having regard to the social and economic backwardness. The same is referred to as Anantharaman's Commission. The said Commission prepared a list specifying 93 classes as socially and educationally backward and recommended the reservation of 30% of the seats in professional colleges and Government employment. The said list was submitted to the Government on 20-6-1970. In the report, 93 classes mentioned above were sub-divided into four groups, namely, A, B, C and D and inter se division of seats among them. The said report was accepted by the Government and the result was G.O. Ms. No. 1793, dated 23-9-1970. The quota of reservation accepted was 25% as against recommendation of 30%. This was again subjected to challenge before this Court and this Court struck down the same as being contrary to the Judgment of the Supreme Court rendered in M.R. Balaji and Others Vs. State of Mysore, . The matter was carried in appeal to the Supreme Court and the Supreme Court in

The State of Andhra Pradesh and Others Vs. U.S.V. Balram, etc., reversed the decision of this Court. While, the earlier G.O.Ms. No. 1886, dated 21-6-1963 and G.O.Ms. No. 1880, dated 29-7-1966 were struck down on the ground of lack of material data classifying persons as Backward Classes, Anantaraman Commission's report was upheld by the Supreme Court stating that there was enough data collected by the Commission.

26. To review the situation further and to examine the inclusion in the list of Backward Classes of any other communities or castes including minorities, the Government of Andhra Pradesh appointed One Man Commission, namely, Sri N.K. Muralidhar Rao, I.A.S., which is referred to as "Muralidhar Rao's Commission". This was by G.O.Ms. No. 12, dated 22-1-1982. Muralidhar Rao Commission submitted its report on 25-9-1982. The list has identified 9 more communities as Backward Classes and suggested some other measures including enhancement of quota of reservation to B.Cs. from 25% to 45%. With minor variations, the said report was accepted by the Government and was placed on the floor of Assembly. Result was issuance of three Governmental Orders, namely, G.O.Ms. Nos. 166, 167 and 168, dated 15-7-1986. They were challenged in a batch of Writ Petitions in V. Narayana Rao and Another Vs. State of Andhra Pradesh and Another, and were struck down partially pointing out several deficiencies and infirmities. Clause (1) of G.O.Ms. No. 167, dated 15-7-1986 was upheld while clauses 13, 14, 15 and 18 of G.O.Ms. No. 166 were struck down. Clause 17 of G.O.Ms. No. 166 was upheld subject to modifications and in other respects G.O.Ms. No. 166 was affirmed. G.O.Ms. No. 168 was made operative subject to modifications as it was consequential to G.O.Ms. No. 166. While things stood thus, the Mandal Commission, which was constituted in the year 1978 submitted its report on 31st Dec. 1980. During the year 1990 when action was taken culminating in issuance of Memo to that effect, it has resulted in large-scale resentment, protests and agitations. There was a change in Government at the Centre ultimately leading to dissolution of Parliament and conduct of elections to Lok Sabha and installation of new Government formed by Congress (I) Party. The new Government had accepted Mandal Commission report with some modifications by issuing an Office Memorandum dated 25-9-1991 and the same was the subject matter of challenge in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., decided by the Constitution Bench of the Supreme Court comprising 9 learned Judges. The Judgment, on behalf of majority, was rendered by Justice B. P. Jeevan Reddy. Authoritative pronouncement has been made on broad propositions of law concerning the aspect of reservations. We extract such of those propositions, which concern the instant cases.

(a) Reservations are permissible under the Constitution, be it in Education or Public employment;

(b) The said reservations can be made not only by the legislative bodies, but also by the Government and also local authorities;

(c) Reservations can be made either by enacting a law or by appointing a

Commission under Art. 340 of the Constitution of India, or u/s 3 of the Commissions of Enquiry Act, 1952 or in exercise of the executive powers of the Union or States under Arts. 73 and 162, respectively, of the Indian Constitution; and

(d) Any reservation/s, over all, should not - exceed 50% of the seats/vacancies and in exceptional cases, the said percentage of reservation may exceed.

The Supreme Court also felt that it is desirable to have a specific Commission for this purpose. Of course, to enact a law or not, is within the domain of the Government and the Government has thought fit to enact a law on the specific subject of identifying and providing reservations to Backward Classes.

27. The Andhra Pradesh Commission for Backward Classes Act, 1993 (A.P. Act"20/,93) (hereinafter referred to as "the Act1) is, the outcome of the Judgment of the Supreme Court in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., . A glance at Statement of Objects and Reasons makes it explicit. It is apt to extract the same.

"Supreme Court in its judgment delivered on 16-11-1992 on the question of reservation in appointments in Central Services/ Posts for Backward Classes directed the Central and State Governments to set up permanent Backward Classes Commission for examining, considering and recommending the requests for inclusion and complaints of "under-inclusion" and "over inclusion" in the list of Backward Classes and to determine the economic criteria to exclude from the list of Backward Classes where such lists are already under operation.

It has been decided to undertake a suitable legislation for constituting a Commission as per direction of Supreme Court to examine, consider and recommend the requests for inclusion and complaints of "under inclusion" and "over inclusion" in the list of Backward Classes and to examine any other matter relating to the B.Cs. that may be referred to it by the State Govt. from time to time.

This Bill seeks to give effect to the above decision."

The Act came into force with effect from December 3, 1993. In exercise of the powers conferred on the Government u/s 3 of the Act, Backward Classes Commission, namely, the Andhra Pradesh Commission for Backward Classes (for short B.C. Commission") was constituted with retired Judge of the High Court of Karnataka as its Chair .person, the other members being a Social Scientist and two persons having special knowledge in matters relating to Backward Classes and a Member Secretary as an Officer of the Commission in the rank of Secretary to Government. The said B.C. Commission was constituted under G.O.Ms. No. 9, dated 26-1- 1994. The functions of the B.C. Commission are envisaged under Chapter III of the Act. Chaptdr. III comprises 3 sections, viz., 9, 10 and 11. u/s 9, it is incumbent upon the B.G.-Commission to examine the request for inclusion of any class of citizens as Backward Class in the lists and hear complaints of over-

inclusion and under-inclusion of "any Backward Class in such list and tender such advice to the Government as it deems appropriate and to examine and make recommendations on any other matter relating to Backward Classes that may be referred to it by the Government from time to time. Section 11 enjoins on the Government to make a revision of the list of Backward Classes per force every 10 years after coming into force of the Act, with a view to exclude from such list those classes, who have ceased to be Backward Classes or for including in the list as new Backward Classes. The said provision also enables the Government to exercise the said power of revision even at any time within 10 years. While the exercise for every 10 years is an absolute duty, exercise within the said time is an optional one at the discretion of the Government, if it feels that a revision is necessary. Sub-section (2) of the said provision makes it obligatory on the part of the Government to consult the Commission while undertaking any revision. Lot of legal argument is advanced with regard to the impact of the said word "shall" employed u/s 11(2) as to whether it is mandatory or directory and that will be dealt with appropriately later. A glance at Section 10 of the Act, will make it clear that the B.C. Commission while performing its functions u/s 9 of the Act has all the powers of a Civil Court trying the suit and, in particular, in respect of the following matters, viz.,

- (a) Summoning and enforcing attendance of any person from any part of the State and examining him on oath;
- (b) requiring the discovery and production of any document;
- (c) receiving evidence on affidavits;
- (d) requisitioning any public record or copy thereof from any Court or Office;
- (e) issuing commissions of the examination of witnesses and documents; and
- (f) any other matter which may be prescribed.

As such, it is clear that the B.C. Commission can make an enquiry akin to that of Civil Court and there is chance for adducing both oral and documentary evidence by the proponents and opponents, cross-examination of witnesses, filing of documents and also to summon them, if it is necessary from the custody of others and to record a finding. The scheme mentioned above makes it amply clear that the B.C. Commission has to objectively deal with the matter and then submit the same to the Government and as per the dicta of the Supreme Court laid down in *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, , the said report ordinarily binds the Government, but the Government may take a different decision for the reasons to be recorded. It cannot be doubted that because of this obligation, the Government has to act in objective manner and should have material sufficient to displace the opinion of the B.C. Commission so as to substitute its own opinion to form a decision, as to who is a B.C., and who is not a B.C.

28. After the constitution of the B.C. Commission, there was an agitation caused

by Kapus led by Mr. Mudragada Padma-nabham, an Ex. M.L.A., and Minister, propagating the cause of Kapus, Telegas, Ontaris Balijas to be included in the list of Backward Classes for availment of benefits, be it education or public employment. Mr. Mudragda Padmanabham started fast-unto-death on 1-7-1994. The then Government took note of the same and responded by issuing G.O.Ms. No. 18, dated 6-7-1994 and G.O.Ms. No. 19, dated 19-9-1994 granting some concessions in the nature of educational benefits, economic support scheme and enforcement of the same by specially constituted Andhra Pradesh Backward Classes Finance Corporation. Even then, the Kapu leaders were unrelenting and there was mass upsurge and large scale violence and the then Government reacted by issuing the impugned G.O. Ms. No. 30, dated 25-8-1994, which is assailed in this batch of Writ Petitions. Under the said G.O., the then Government had included the people falling under 14 castes/categories as Backward Classes in addition to the list of Backward Classes already existing. The same was stayed by a learned single Judge of this Court on 28-9-1994. The learned Judge prima facie opined that without a report from the Backward Classes Commission under the Act, Government ought not to have issued the impugned G.O. May be anticipating the said objection, the Government has promulgated the Ordinance 15 of 1994 inserting subsection (3) into Section 11 of the Act empowering the Government to call for the interim report from the Commission. But, as on the date of passing of the interim orders by the learned single Judge, no interim report was submitted by the B.C. Commission. Validity of this Ordinance was not assailed. The Government and the affected parties filed Writ Appeal against the Order of the learned single Judge and the order of the learned single Judge was suspended and a modified order was passed by the Division Bench on the statement made on behalf of the State that the impugned Governmental Order will not be put into action immediately and that the same will be done only after the Commission submits its report.

Mr. S. Ramachandra Rao, the learned counsel for the petitioner in W.P. No. 15487 of 1994 (filed by A.P. State Backward Classes Welfare Association) submits that the impugned G.O.

- (1) violates the provisions of the Act;
- (2) is contra to the dicta laid down by the Supreme Court in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., ;
- (3) borne of mala fides;
- (4) results in usurpation of the functions of the B.C. Commission;
- (5) is arbitrary violating equality clause; and
- (6) is devoid of material or basis.

Mr. K. Ashok Reddy, the learned counsel appearing for the petitioners in W. P. Nos. 15423,15496 and J 2253 of 1994, filed by A. P. Toddy Tappers Workers! Union, Hyderabad, Pla. v. Balaprasad, Advocate and Kudupudi Suryanarayana

Rao, Advocate and Convener, of State B.C. Kulasang-hala Mahanadu and Rashtra Settibahija Mahanadu, lays stress on Anantaramar's report and also Central list where Telagas are included and assails Tataji's report as being baseless. Mr. K. Ramakrishna Reddy, the learned counsel for the petitioner (A. Thiru-pathi) in W.P. No. 15973 of 1994, has taken us to Mandal Commission's Report and also the First B.C. Commission report, i.e., Ananta-raman's report and the second B.C. Commission report, i.e., Muralidhar Rao's report and reiterates that the impugned G.O. is very vague, of any guidelines and material and as such, it is bad under law. Mr. A. Satya Prasad, the learned counsel for the petitioner in W.P. No. 15662 of 1994, Mr. C.P. Sarathy, the learned counsel for the petitioner in W.P. No. 12142 of 1994 and Mr. K. Govind, the learned counsel for the petitioners in W.P. Nos. 13572 and 16089 of 1994, adopted the above arguments advanced by the aforesaid counsel.

29. Mr. S. Venkat Reddy, the learned Advocate General, has contended that the Government has jurisdiction to issue the impugned G.O. and that the power of reservation is vested in the Government by virtue of constitutional provisions contained in Arts. 15(4) and 16(4), that there was valid material like Reforming the Constitution by Giani Zail Singh, Tataji's report, Mandal Commission Report and other relevant material and, that the impugned orders was the result of valid exercise of power by the Government and is not arbitrary. He also contended that the impugned G.O. was issued under legislative power under Art. 162 of the Indian Constitution. The argument of the learned Advocate General is supported by Mr. K. Subrahmanya Reddy, the learned senior counsel appearing for the interveners led by Mr. Mudragada Padmanabham. He further submits that the Government can straightway identify Backward Classes without B. C. Commission and that the Government still has got power to issue the impugned G.O., for inclusion of Backward Classes on the basis of the material without reference to the B.C. Commission and without waiting for the report and he asserts and reiterates that the source for the Government to identify the Backward Classes flows not from the Act, but from Arts. 15(4) and 16(4) of the Constitution of India. His further argument is that de hors the Act, the Government can act independently and in spite of the enactment of A.P. Act 20/93. Art. 162 of Constitution power still exists and subsists. In any event, he contends that the word "shall" employed u/s 11(2) of the Act, in the circumstances, has to be construed as "may", i.e., as directory and not mandatory. In the alternative, he contends that the impugned G.O. can be construed as a consultation u/s 11(2) of the Act. He also submits that identification of Backward Classes is by subjective satisfaction and not an objective one. Mr. V. Venkatara-manaiiah, the learned senior counsel appearing for some of the beneficiaries, submitted that the impugned G.O. is based on relevant material, proper reasons and considerations. He also reiterates that the impugned G.O. is legislative in character and it cannot be impeached for reasons other than legislative incompetence and infraction of fundamental rights and that neither Section 9 nor Section 11 of the Act strip the power of the Government to

include or exclude Backward Classes.

30. Mr. T. Anantha Babu, the learned senior counsel appearing for Kapus Sangham, not only reiterates the contentions of M/s. Venkat Reddy, K. Subrahmanya Reddy and V. Venkataramanaiah, but goes a step further and submits that the source of reservation for Backward Classes flows directly from Arts. 15(4) and 16(4) of the Constitution and that Art. 162 of the Constitution is irrelevant for that purpose and that there is unfettered discretion and power vested in the Government analogous to the issuance of blank cheques for making a provision for Backward Classes under Articles 15(4) and 16(4) of the Indian Constitution. He submits that the impugned G.O. is a law itself and no consultation is necessary in spite of the subsisting enactment mentioned above. He also submits that the B.C. Commission is just an advisory body and that this Court is enjoined only to see that constitutional parameters are observed and not as to whether the parameters of A.P. Act 20/93 are observed, that A.P. Act 20/93 is in no way concerned with the impugned G.O., and that the impugned G.O. has to be tested in the light of Articles 15(4) and 16(4) of the Indian Constitution. He also submits that revision u/s 11 of the Act, means a comprehensive revision of list of Backward Classes and for piecemeal consideration, S. 11(2) of the Act is inapplicable. He says that the Commission is an instrument of the Government. He asks us to read the word "shall" u/s 11(2) of the Act as "may" and that if so construed, Section 11 (2) of the Act does not sound mandatory and is only directory and if the word "shall" is construed as mandatory, then it becomes ultra vires Arts. 15(4) and 16(4) of the Constitution. He contends that the Commission need not be consulted in exercise of power under Arts. 15(4) and 16(4) and that there can be a Condition for recognising Backwards Classes and the said condition is whether a particular caste is socially and educationally backward. He further contends that in any event, Section 11 (2) of the Act has to be read down to be in tune with Arts. 15(4) and 16(4) of the Constitution. He argues that the constitutional powers under Arts. 15(4) and 16(4) vested the Government empowering it to make provision for reservation in favour of Backward Classes and that they cannot be taken away by a statute. M/s. S. Satyanarayana Prasad, and P.M. Gopal Rao appearing for some of the impleaded respondents have made similar submissions supporting the impugned G.O.

31. The main points which emerge for consideration are:

1. Whether the impugned Governmental Order is legislative in nature and if it is so --can it sustain in view of A.P. Act 20/93?
2. Whether the impugned Governmental Order is liable to be struck down as unconstitutional, illegal, arbitrary, baseless and borne of mala fides?

32. The word "State" employed under Arts. 15(4) and 16(4) of the Indian Constitution, is not confined only to the legislature, but it also takes in the Government. That is settled law. Repelling the argument that State under Arts.

15(4) and 16(4) of the Constitution is referable to legislature, the Supreme Court in *M.R. Balaji and Others Vs. State of Mysore*, held "Then it is urged that even if special provision can be made by the State under Art. 15(4), the said provision must be made not by an executive order, but by legislation. This argument is equally misconceived. Under Art. 12, the State includes the Government and the Legislature of each of the States, and so, it would be unreasonable to suggest that the State must necessarily mean the Legislature and not the Government. Besides, where the Constitution intended that a certain action should be taken by legislation and not by executive action, it has adopted suitable phraseology in that behalf. Articles 16(3) and (5) is illustrations in point. Both the said sub-clauses of Art. 16, in terms refer to the making of the law by the Parliament in respect of the matters covered by them. Similarly, Arts. 341(2) and 342(2) expressly refer to a law being made by Parliament as therein contemplated. Therefore, when Art. 15(4) contemplates that the State can make the special provision in question, it is clear that the said provision can be made by an executive order."

33. The above view was accepted by the Supreme Court in *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, . But, those are the enabling provisions empowering the Government to make a special provision for reservation to Backward Classes. There is no -compulsion or obligation for the State to make such provision. When the Government wants to exercise its powers under Arts. 15(4) and 16(4) of the Constitution, by virtue of its executive power, the same is traceable to Art. 162 of the Constitution if it is a State and to Art. 73 of the Constitution if it is Central Government. Again, the executive power of the State, be it under Art. 73 or Art. 162 of the Constitution, comprises not only of issuing administrative orders (executive instructions), but also issuing or passing the orders, which are legislative and even judicial in nature. H.W.R. Wade in his *Administrative Law* (6th Edition) at page 46 said "Administrative Law needs consistent working definitions of the 3 primary constitutional functions, legislative, administrative -and judicial, and also of the hybrid "quasi-judicial" functions which has a part of its own to play. Some analysis of the distinctions between them is a help to clarity of thought" . The judicial and quasi judicial aspects are not relevant here. The impugned G.O., therefore, can either be legislative or administrative. Whether legislative or administrative, the same is open to judicial scrutiny by the Constitutional courts. But, first of all, we have to consider as to whether it is legislative in nature and if so what is the effect and as to whether it is enforceable and if not whether it can be construed as administrative and if so the real effect thereof.

34. To exercise the power under Arts. 15(4) and 16(4) of the Constitution, the Government is not obligated to enact a law for that purpose or to appoint a Commission under Art. 340 of the Constitution or under the provisions of the Commissions of Enquiry Act, 1952. The Government can independently, by having fact finding, arrive at a decision as to who is a Backward Class and who is not, in exercise of its power under Art. 162 of the Constitution. When Union

Government appointed Kalelkar Commission and Mandal Commission, the President had exercised his powers under Art. 340 of the Constitution. G.O.Ms. No. 1886, dated 21-6-1963 and G.O.Ms. No. 1880, dated 29-7-1966 have been issued in exercise of the powers of the State, Government under Art. 162 of the Constitution. Anantaraman Commission and Muralidhara Rao Commission were appointed by the Government of Andhra Pradesh in exercise of powers u/s 3(2) of Commissions of Enquiry Act, 1952. Nothing precluded the State Government to issue another G.O. in exercise of its powers under Art. 162 of the Constitution to identify new Backward Classes and order their inclusion in the list of Backward Classes, provided the Government had applied its mind and gathered material to support its action. But situation is altogether different as the Government chose to exercise the power of identifying Backward Classes after a fact finding by a statutory Commission specially constituted for that purpose. A. P. Act No. 20/93 is a law enacted for that purpose with all provisions and powers inbuilt. Not that the State Government is denuded of its powers under Articles 15(4) and 16(4) of the Constitution by enacting the above law. It cannot also be called a delegation of functions of the State Government to the B.C. Commission as contended by some learned counsel. The power of the Government as also its supremacy vis-a-vis B.C. Commission constituted under the Act cannot be doubted. It is the State Government, which is empowered to recognise backward Classes either for exclusion or inclusion, in exercise of its powers under Articles 15(4) and 16(4) of the Constitution and the B.C. Commission constituted under A.P. Act 20/93 cannot be vested with such power and, in fact, it is not so vested. By enacting A.P. Act 20/93 and constituting B.C. Commission, procedure for identifying of Backward Classes was sought to be regulated in the manner indicated by the said legal provisions. In fact, enacting of A.P. Act 20/93 is only to enable the State Government to correctly and accurately identify the real and genuine Backward Classes, who need constitutional protection by way of reservations to attain the goal of egalitarian society. It is only to make provision for the benefit of real Backward Classes, the State Government has enacted law and constituted B.C. Commission and it does not amount either denuding or delegating its power to the B.C. Commission as ultimately even after the report of the B.C. Commission, it is the State Government which has to consider the same and take appropriate action. There should be material to base the conclusion of the Government identifying the genuine Backward Classes and the same can be had by any fact finding body appointed by the Government for that purpose; but, Government is precluded from appointing such an unofficial body when a law is enacted for constitution of B.C. Commission specially for that purpose and prescribing procedure therefor. The procedure, which has been prescribed under the Act (A.P. Act 20/93) cannot be called directory and it is mandatory. The Act obligates the Government to make a revision of the list of Backward classes every 10 years, but makes it optional to revise the list within the said period. The Government has now opted to make a revision. Exclusion of some castes from the list of Backward Classes or inclusion of new Backward Classes may be made after the B.C. Commission submits its report. But, now the

Government vide impugned G.O. intends to include 14 castes/communities as new Backward Classes. It can do so, but only after following the procedure prescribed under the Act and it will become filial subject to judicial scrutiny, should they be challenged. As said above, in the absence of any law, the Government can adopt any method of identification of Backward Classes, but if a law is specially made for that purpose, such identification of Backward Classes shall be only made in accordance with law so made, i.e., A.P. Act 20/93, and not otherwise. The powers of the State under Article 162 are co-extensive with that of legislature. But, how far they traverse is the question. Is it permissible under our constitutional scheme to enact a law and also exercise powers under Article 162 of the Constitution, that too in derogation of the said law ?

35. In *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, it was held by the Supreme Court that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are not limited merely to the carrying out of these laws, and that Article 309 of the Constitution do not abridge the power of the executive to act under Article 162 of the Constitution without a law. But, the Supreme Court held that if there is a statutory rule or an Act on the matter, the executive must abide by that Act or Rule and it cannot in exercise of the executive power under Article 162 of the Constitution, ignore or act contrary to that Rule or Act.

36. The said view was approved by the Supreme Court by its later decision in *R. Chitrallekha and Another Vs. State of Mysore and Others*, . Similar view was taken by the Supreme Court in *B.N. Nagarajan and Others Vs. State of Mysore and Others*, holding that if there is statutory Rule or an Act on the matter, the Executive must abide by that Act or Rule and it cannot, in exercise of the executive powers under Article 162 of the Constitution, ignore or act contrary to that Rule or Act.

37. The said principle was accepted by the Supreme Court in a later Judgment in *R.N. Nanjundappa Vs. T. Thimmiah and Another*, . In the above case, the Supreme Court held that the Government cannot act simultaneously under Articles 162 and 309 of the Constitution regarding the same matter and in the same breach and that these two Articles operate in different areas, that as already a statutory rule framed under Article 309 of the Constitution was operating the field, with regard to the same and that too in contradiction of the same, no executive power under Article 162 of the Constitution could be exercised.

38. In *State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others*, , dealing with the executive power of the State under Article 162 of the Constitution, it was held by the Supreme Court "Under Article 162 of the Constitution, the executive power of the State, extends to the matter with regard to which the legislature of a State has power to make laws. As there is no legislation covering the field of selection of candidates for admission to Medical Colleges, the State Government would, undoubtedly, be competent to pass

executive orders in this regard".

39. In *Ramendra Singh and Others Vs. Jagdish Prasad and Others*, , the said view was reaffirmed by the Supreme Court.

40. In *Union of India (UOI) and Others Vs. R. Narasimhan*, the Supreme Court while dealing with Manual of Railway Pension Rules, 1950, which were framed in exercise of executive powers of the Union Government under Art. 73 of the Constitution and construing the same vis-a-vis Article 309 of the Constitution held as follows :

"Thus the area of operation of Para 620 of Railway Pension Manual is different from that of clauses (h) and (k) of Rule 2046 of the Rules. Para 620 of the Railway Pension Manual should be treated as supplementary to Rule 2046 of the Rules. The said para, which has been framed by the Union Government in exercise of its executive power under Article 73 of the Constitution, should be given due effect since there is no statutory provision or a rule framed under the said proviso to Article 309 of the Constitution, which is inconsistent with it."

40A. The same principle has been re-affirmed and reiterated by the Supreme Court in the latest Judgment rendered in *State of Sikkim Vs. Dorjee Tshering Bhutia and others*, holding that the executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature and that it is settled that any order, instruction, direction or notification issued in exercise of the executive power of the State, which is contrary to any statutory provisions, is without jurisdiction and is a nullity.

41. In view of what is stated above, the irresistible conclusion is that the impugned G.O. cannot purport to be legislative in nature as the procedure for identification of the Backward Classes for conferment of the benefit of reservation flowing from Articles. 15(4) and 16(4) of the Constitution is already prescribed by A.P. Act 20/93 and such an identification can only be made in accordance with the said mandatory procedure prescribed under the said Act and not otherwise. B.C. Commission is yet to submit its report and before submission of report, it will make a comprehensive enquiry by permitting the parties including the Government to adduce both oral and documentary evidence, opportunity of cross-examination, summoning of the witnesses and summoning of documents, if they are in custody of any other authority and it is only after such report is submitted, the State Government is empowered to take a decision in an objective manner and till then no new backward Class can be added. In fact, Mr. S. Venkat Reddy, the learned Advocate. General made a statement before us that the impugned G.O. will not be given effect to, until such a report is submitted by the B. C. Commission. Here, I also clarify that the report may be final and also interim as contemplated u/s 11(3) of the Act.

42. Lastly, I may have to deal with the argument that even assuming the A.P. Act 20/93, holds the field for recognising any caste/category as Backward Class, the word "shall" employed u/s 11(2) of the Act is only directory and not mandatory.

Sub-sections (1) and (2) of Section 11 of the Act read as follows :

"(1) The Government may at any time, and shall, at the expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.

(2) The Government shall while undertaking any revision referred to in sub-section (1) consult the Commission."

Firstly, the language is so plain and unambiguous that it will not admit of any interpretation. When the language of the provision is plain, clear and unambiguous, only the plain meaning rule is to be adopted so as to avoid absurdity resulting therefrom. While in *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, (supra) the Supreme Court ruled that it is not obligatory on the part of a State to enact a law for identifying backward Classes and that can be done after receiving fact finding, be it a Commission under Article 340 of the Constitution or Statutory Commission under Commissions of Inquiry Act, 1952 or a committee constituted by the Government in its executive power, but felt it desirable to have a permanent body in the nature of a Commission or Tribunal. It is apt to extract the relevant portion in paragraph 117 of the Judgment in *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, .

"We are of the considered view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-in clusion of groups, classes and sections in the lists of Other Backward Classes can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Govern ment does not agree with its recommenda- tion, it must record its reasons therefor. Even if any new class/ group is proposed to be included among the other backward classes. such matler must also be referred to the said body in the first instance and action taken on the basis of its recommendation." (emphasis supplied by me)

The State Government has responded to the same and making it so explicit in the Objects and Reasons for enacting A.P. Act 20/93, whose only object is to constitute a Commission for identifying Backward Classes and then to consider having regard to the said report. The construction has to be settled while looking at the scope and purpose of the said enactment and examining the relation of that provision to the object sought to be acquired by such requirement. The object is to have a comprehensive and accurate fact finding with regard to. identification of true Backward Classes and particular regard may be had to its significance as it is intended to ascertain the views of individuals/Associations/ Unions for the said purpose of identifying true Backward Classes. Professor H. W.R. Wade in his *Commentary on Administrative Law* (sixth Edition), as page 247, said "Procedural Safeguards, which are so often imposed for the benefit of

persons affected by the exercise of administrative powers, are normally regarded as mandatory, so that it is a fatal to disregard them". As there is a statutory duty to consult persons affected, this must genuinely be done, and reasonable opportunity for enquiry and comment must be given. If the legislature did not think it mandatory for consulting B.C. Commission before identifying the Backward Classes either for exclusion or inclusion in a comprehensive revision or piecemeal revision and to call for a report in that regard, it would not have made such provision and that too having regard to the historical background mentioned above where number of times the constitutional courts had to strike down the process of identification as being baseless. There is always a presumption that legislature does not indulge in pointless legislation. Courts have to adopt a purposeful construction and the construction which carries on the objects of the Act have got to be preferred. Sound rule of construction is to confine the provisions of the statute to itself and harmonious construction should be resorted to, making the provision meaningful in the context. The construction to be put up should sub-serve the purpose of legislative intent and not to defeat it. If the language of the statute is clear and susceptible to only one meaning, it must be given to, irrespective of the consequence. While interpreting a statute, the consideration of inconvenience and hardships should be avoided and when the language is clear and explicit and the words used are clear and unambiguous, court is bound to construe them to their ordinary sense and there is no room for applying any of the principles of interpretation, which are merely presumption in cases of ambiguity in the statute. That apart, the statutory provision contained u/s 11(2) of the Act requiring prior consultation of the Commission before the Government takes a decision either to exclude the existing Backward Classes or to include the new Backward Classes is in tune and conformity with the Judgment rendered by the Supreme Court in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., , the relevant portion of which is already extracted above, Further, revision does not mean only wholesome inclusion or exclusion of all Backward Classes at a time. Exclusion of any existing Backward Class from the list and inclusion of any new Backward Class in the list even piecemeal is a revision warranting prior consultation of the Commission u/s 11(2) of the Act."

43. In view of what is stated above, the word "shall" employed u/s 11(2) of the Act, is mandatory and not directory. Merely because the Government feels hurry due to some agitation, it cannot by pass a mandatory provision treating the same as directory which will make the entire A.P. Act 20/93 nugatory and otiose and the very purpose of constituting a Commission is defeated. The responsible Government may have to respond to the agitation for taking up the cause for redressal of the grievances, but the same has to be done as per the procedure established by law and in the instant case, A.P. Act 20/93. The endeavour of the Government to redress those grievances expeditiously is a matter of appreciation. As the prior consultation of the Commission was mandatory and as the comprehensive and final report would take considerable time, the Government felt urgency in the matter and even promulgated Ordinance No. 15

of 1994 incorporating sub-section (3) into Section 11 of the Act, which reads that "it shall be competent for the Commission at the request of the Government to make an interim report in regard to any Castes or Classes in whose cases urgent action under the Act is, in the opinion of the Government, necessary. Any action taken by the Government on the basis of such report shall be subject to review with prospective effect as and when the final report of the Commission is received", enabling the Government to call for the interim report from the Commission and to take action thereon. The impugned G.O. can be construed as such a request by the Government to the Commission to make an interim report, but it is for the Government to take steps to expedite the matter in that regard before the Commission.

44. As the process of identification of Backward Classes is covered by the legislative field, i.e., A.P. Act 20/93, the Government is bound to follow the provisions contained therein scrupulously.

45. The next question, as a necessary corollary, which arises for consideration is as to whether the impugned G.O. is liable to be set aside. Merely because an argument is advanced that the impugned G.O. is legislative in character and this court repels the said argument that it is not legislative, the impugned G.O. cannot be set at naught. As stated above, as the power under Article 162 of the Constitution of India extends not only for issuing legislative orders, but also for administrative orders and actions, the Courts have to place proper interpretation and harmonise the situation and interpret correctly in tune with the constitutional legal provisions and declare the correct nature of such an order passed by the Government in exercise of executive powers under Article 162 of the Constitution of India.

46. In view of what is stated above that the impugned G.O. cannot be legislative order in view of the fact that the field is already by A.P. Act 20/93, and the statement of the learned Advocate General that the impugned G.O. will be subject to the report of the B.O. Commission and that it will not be given effect to, until such a report is filed by the B.C. Commission; the impugned G.O. has to be read down and it is held that the same is administrative in nature and has to be treated as a reference made by the State Government to the B.C. Commission indicating the mind of the Government that from the material it gathered or submitted before it, it prima facie opines that 14 castes/categories in the impugned G.O. can be treated as Backward Classes subject to such report which may be submitted by the B.C. Commission and such final action which may be taken by the State Government and the enforceability or otherwise of the impugned G.O. will depend upon the final outcome of the decision to be taken by the Government after considering the said report, be it final or interim, to be submitted by the B.C. Commission, I hold that for making such a reference, the Government did not act mala fide as there was material to form basis for making such a reference at least, if not for final identification of Backward Classes. Ours is a representative Democracy with general freedom of expression and the

people or section thereof are entitled to project their grievances in whatever shape possible or permissible and it is not wrong on the part of the responsible State to respond to such protests or grievances or agitations subject to of course following the Rule of Law and as I do not see any error on the part of the Government in making the reference for inclusion of new Backward Classes, what happens after reference, what report would be submitted by the B. C. Commission, what decision would be taken by the Government finally and whether by such decision the percentage of reservation would exceed 50% and if it exceeds 50% what is the effect of the same vis-a-vis the dicta laid down by the Supreme Court in Indra Sawhney's case (supra), are all hypothetical and as such I restrain from adjudicating on the said aspect as it is not desirable for the Courts to give hypothetical answers on hypothetical questions, as, such an adjudication cannot constitute ratio decidendi.

47. Accordingly, all the Writ Petitions are disposed of. No order as to costs.

48. Order accordingly.