

(2010) 05 GAU CK 0070
In the Gauhati High Court
Case No : Writ Petition (C) No. 1532 of 2009

Bhogeswar Saikia and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 12-05-2010

Acts Referred:

Assam Engineering (Flood Control Department) Service Rules, 1981 — Rule 22, 32
Constitution (Eighty-Fifth Amendment) Act, 2001 — Article 16A(4)
Constitution of India, 1950 — Article 118, 12, 13, 14, 145(1)

Citation : (2011) 2 GLR 704 : (2010) 3 GLT 377

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : M.K. Choudhury and D.K. Das, for the Appellant; A.K. Phukan, N. Dutta, D.R. Gogoi, D.K. Mishra and R. Chakraborty, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The Petitioners, who are presently working as Asstt. Executive Engineers under the Respondents, are aggrieved by fixation of their seniority below the private Respondents i.e. Respondents No. 4 to 10 in the provisional Gradation List circulated under Annexure-E notification dated 17.8.2002. The Petitioners are also aggrieved by the Annexure-F Office Memorandum dated 12.3.2002, issued by the Government of Assam in the Department of Personnel on the subject of fixation of Seniority of Reserved candidates vis-r-vis general candidates in promotional posts. The basic challenge in the writ petition is the said memorandum dated 12.3.2002 following which the seniority of the Petitioners vis-r-vis the private Respondents have been assigned in the impugned provisional gradation list circulated vide the impugned Annexure-E notification dated 17.8.2002.

2. Before the impugned gradation list was issued, there was another gradation listed dated 19.5.2001 (Annexure-D) in which the Petitioners were shown senior to the private Respondents, they having occupied positions at SI. No. 91, 95, 92,

94, 96 and 93 respectively as against the seniority positions assigned to the private Respondents at SI. No. 102, 104, 105, 108, 109, 111 and 112 respectively. However, pursuant to the aforesaid impugned Annexure-F OM dated 12.3.2002, in the subsequent gradation list, published vide Annexure-E notification dated 17.8.2002, the aforesaid positions were altered and the Petitioners were placed at SI. No. 91, 95, 92, 94, 96 and 93 respectively as against placing the private Respondents at SI. No. 79, 81, 82, 85, 86, 88 and 89 respectively.

3. The impugned Annexure-F OM dated 12.3.2002 was issued consequent upon the amendment of Article 16(4)(A) of the constitution of India by the Constitution (85th) Amendment Act, 2001, by which it was provided that the State shall not be prevented from making any provision for reservation in matters of promotion with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and Scheduled Tribes, which in the opinion of the State are not adequately represented in the services under the State.

4. Following the aforesaid amendment in the Constitution, the Annexure-F OM dated 12.3.2002 was issued by the Government of Assam in the Department of Personnel laying down the criteria for fixation of seniority of reserved candidates vis-r-vis the general candidates in promotional posts. The relevant provisions of the said OM are quoted below:

Scheduled Castes/Scheduled Tribes Government servants shall on their promotion by virtue of rule of reservation/roster be entitled to consequential seniority also and the above decision shall be effective from 17th June, 1995.

On the basis of the revised seniority, consequential benefits like promotion, pay, pension etc. shall be allowed to the concerned Scheduled Castes/Scheduled Tribes Government servants (without arrears by applying principle of no work no pay). For this purpose, senior Scheduled Castes/Scheduled Tribes Government servants may be granted promotion with effect from the date of promotion of their immediate junior General/Other Backward Classes Government servants. Such promotion of Scheduled Castes/Scheduled Tribes Government servant may be given with the approval of the appointing authority of the post to which the Government servant is to be promoted at each level after following normal procedure of Departmental Selection Committee and with the approval of Assam Public Service Commission.

5. It was in the aforesaid basis, the impugned gradation list was drawn and circulated vide the impugned Annexure-E notification dated 17.8.2002, making a grievance against which the Petitioners have approached this Court by filling the instant writ petition.

6. According to the Petitioners, the policy of reservation should not be allowed to become a vested interest and that it ought to be balanced with the other provision of the fundamental rights contained in Article 14 and 16 of the

Constitution of India. According to them, the impugned OM dated 12.3.2002 (Annexure-F) has flouted the settled principles of services jurisprudence. Referring to the decisions of the Apex Court in *Union of India and others etc. Vs. Virpal Singh Chauhan etc.*, R.K. Sabharwal reported in (1985) 2 SCC 745 and *Ajit Singh and Others Vs. The State of Punjab and Others*, the Petitioners have contended that the said OM providing seniority to the reserved category candidates even on accelerated promotion on the basis of reservation is violative of Article 14 and 16(1) of the Constitution of India.

7. The Petitioners have also contended that the Article 16(4)(A) of the Constitution only enables the State to make provision for reservation in the matter of promotion with consequential seniority but it does not lay down, even by implication that the reserved category employees shall be entitled to the benefit of accelerated seniority as a matter of right, in the absence of any specific statutory provision in this regard. Referring to the provisions of the Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1978 as well as the Rules of 1983 framed there under, the Petitioners have contended that the said provisions having not provided for any accelerated seniority on promotion to the reserved category candidates, they are not entitled to get seniority on their accelerated promotion.

8. The Petitioners have also referred to the Recruitment Rules, namely, Assam Engineering (Flood Control Department) Service Rules, 1981. Rule 32 of the said rules provides for fixation of seniority of the direct recruitment and/or promotion, according to the order of merit in the respective select list. Thus, the contention of the Petitioners is that the particular fixation of seniority as envisages in the impugned OM dated 12.3.2002 and consequential fixation of seniority in the impugned gradation list in absence of any law conferring the benefit of consequential seniority on promotion to the reserved category candidates is illegal and not sustainable in law. The Petitioners have also placed reliance on the Judgments of this Court dated 25.5.2007 passed in W.P.(C) No. 4739/ 2002: *Shankar Prasad Nandi v. State of Assam and Ors.*, in which it was held that in tune with the provision of Article 16(4)(A), the State having not made any law granting consequential seniority on promotion to the reserved category candidates, such assignment of seniority in the impugned gradation list is not sustainable.

9. Controverting the aforesaid stand of the Petitioners, the Respondents in their counter affidavit have denied the contentions raised in the writ petition. The simple stand of the Respondents is that the impugned OM dated 12.3.2002 has been issued as per the enabling provisions of Article 16(4)(A) of the Constitution of India. In paragraph 13 and 14 of the counter affidavit, it has been stated thus:

13. That, as regards the statements made in Paragraph 11 of the Writ petition, your humble deponent begs to state that though the Assam Schedule Caste and Schedule Tribes (Reservation Vacancies in Service and Posts) Act, 1978 as well as the Rules 1983 is silent about consequential seniority the benefit of

consequential seniority has been extended to the reserved category candidates in pursuance of Personal (B) Department O.M. No. ABP. 59/96/163 dated 12.03.2002.

14. That, as regards the statements made in Paragraph 12 of the Writ petition, your humble deponent begs to state that Rule 22 of Assam Engineering (F.C.) Department Service Rule 1981 deals with seniority amongst the cadre in common. But the promotion etc. are governed by the Assam Schedule Caste and Schedule Tribes (Reservation of Vacancies in Service and Posts) Act 1978 and Office Memorandum issued in this regard from time to time. As such contempt of the Petitioners that the "Consequential seniority" as highly illegal, arbitrary, malafide and whimsical is contrary to Article 16(4) of Constitution of India.

10. I have heard Mr. M.K. Choudhury, learned senior Counsel assisted by Mr. D.K. Das, learned Counsel for the Petitioners as well as Mr. N. Dutta, learned senior Counsel assisted by Mr. D.R. Gogoi, learned Counsel representing the private Respondents. I have also heard Mr. A.K. Phukan, learned Advocate General, Assam assisted by the Standing Counsel, Water Resource Department. Ms. R. Chakraborty, learned Addl. Sr. Govt. advocate represented the Respondent No. 3. I have also gone through the entire materials on record.

11. During the course of hearing, learned Counsel appearing for the parties, referred to the provisions of the Constitution of India and so also various decisions of this Court and the Apex Court.

12. The basic question which falls for consideration of this Court is as to whether the clause in Article 16(4)(A) "Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the Services under the State" can be prescribed by the impugned OM dated 12.3.2002 (Annexure-F).

13. The decisions on which Mr. M.K. Choudhury, learned Counsel for the Petitioner has placed reliance are as follows:

1. Union of India (UOI) Vs. Naveen Jindal and Another,
2. Punit Rai Vs. Dinesh Chaudhary,
3. Mannalal Jain Vs. The State of Assam and Others,
4. Anil Chandra and Others Vs. Radha Krishna Gaur and Others,
5. Sukanta Saha Vs. State of Tripura and Others,
6. Banikanta Das and Others Vs. State of Assam and Others,
7. Dr. Ambesh Kumar Vs. Principal, L.L.R.M. Medical College, Meerut and Others,
8. AIR 1967 SC 1170 : State of Madhya Pradesh and Anr. v. Thakur Bharat Singh

9. Chandrika Jha Vs. State of Bihar and Others,
10. Gulabrao Keshavrao Patil and Others Vs. State of Gujarat and Others,
11. (1971) I SCC 607 : State of Andhra Pradesh and Anr. v. Lavu Narendranath and Ors. etc.
12. Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others,
13. Shiv Nath Prasad Vs. Saran Pal Jeet Singh Tulsi and Others,
14. On the other hand, Mr. N. Dutta, learned senior Counsel representing the private Respondents referring to the various provisions of the Constitution has also placed reliance on the decisions of the Apex Court reported in M.R. Balaji and Others Vs. State of Mysore, : State of Punjab Vs. Hira Lal and Others,
15. Mr. A.K. Phukan, learned Advocate General, Assam, supporting the impugned OM dated 12.3.2002, has placed reliance on the decision of the Apex Court reported in R. Chitralekha and Another Vs. State of Mysore and Others,
16. Since the basic issue is as to whether the OM dated 12.3.2002 (Annexure-F) conforms to the enabling provision made in Article 16(4)(A) of the Constitution and the learned Counsel for the parties have argued against and in favour of the said question on the basis of the aforesaid case laws, it will be appropriate to refer to the same to answer the issue.
17. In Naveen Jindal (supra) the Apex Court dealing with the question whether Flag Code and for that matter executive instructions is "Law" within the meaning of Article 13 of the Constitution of India, held that the executive instructions would not fall in the category of law although such instructions may have the force of law, for purposes like a supplement to the legislative power.
18. In Punit Rai (Supra) referring to the particular circular letter, it was held that the same had not been issued by the State in exercise of its power under Article 162 of the Constitution of India. It was held that the circular letter being an administrative instruction is not a law within the meaning of Article 13 of the Constitution of India.
19. In Dr. Ambesh Kumar (supra), dealing with the scope of State Government's executive power under Article 162 of the Constitution of India, it was held that the State Govt. can in exercise of its executive power under Article 162 of the Constitution of India, can make an order relating to matters referred to in Entry 25 of the concurrent list in absence of law made by the State Legislature. This case has been referred to by the learned Counsel for the Petitioners so as to contend that the Service Rules being in existence specifying the determination of seniority in a particular manner, the OM dated 12.3.2002 could not have laid down a criterion contrary to the said seniority provision.
20. In Thakur Bharat Singh (supra) it was held that the State in exercise of

executive authority cannot infringe rights of citizens merely because legislature of State has power to legislate in regard to the subject on which the executive order is passed. Thus, this decision is also on the same ground that the OM dated 12.3.2002 cannot override the provision of statutory Rules.

21. In Chandrika Jha (supra) also the view expressed was that the executive cannot go against the provisions of the Constitution or of any law.

22. In Mannalal Jain (supra), it was observed that executive instructions cannot be issued to override the provisions of law.

23. In Anil Chandra (supra) following the decision in M. Nagaraj and Others Vs. Union of India (UOI) and Others, it has been held that ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency, are all constitutional requirement, within which the structure of equality of opportunity in Article 16 would collapse. This case has been pressed into service so as to contend that the State without first forming an opinion about inadequate representation in the services under the State by the reserved category candidate, could not have issued the OM dated 12.3.2002 conferring consequential seniority to the reserved category candidate.

24. In Sukanta Saha (supra), this Court has held that granting of accelerated seniority to the reserved category candidate would be un-constitutional. In Banikanta Das (supra), this Court after having held that the OM dated 12.3.2002 will have to be understood in the context of the enabling provision under Article 16(4)(A), held that in the absence of any law laying down that in the event of a reserved category candidate appointed against a backlog vacancy alongwith other candidates by the same Govt. order, such reserved category candidate will be entitled seniority over the other candidates appointed alongwith him. The issue was answered in the context of claim of seniority on promotion against a backlog vacancy and when promoted alongwith others by the same Govt. order. In the instant proceeding, we are concerned with consequential seniority on accumulated promotion doing away with the catch up formula.

25. Apart from the above, in the aforesaid decision, as well as in the decision indicated by the Petitioner in the writ petition i.e. the Judgment and order dated 25.5.2007 passed in W.P.(C) No. 4739/2002: Shri Shankar Prasad Nandi v. State of Assam and Ors., there was no challenge to the OM dated 12.3.2002 (Annexure-F). Further, in Shankar Prasad (supra), the Court rather recognizes the said OM, but only held that in the fact situation involved in the said case, the OM dated 12.3.2002 cannot be made applicable.

26. In M. Nagaraj (supra) referring to the provisions of Article 16(4)(A) it has been held that the State can make provision for reservation only if "Backwardness" and "Inadequacy of representation" as mentioned in Article 16(4) are fulfilled. It has been observed that the State should also keep in mind "Over all efficiency" (Article-335). This case has also been pressed into service so

as to contend that after first ascertaining and or dealing with these 3 key factors, the State even if empowered, could not have done so by the impugned OM dated 12.3.2002.

27. Gulabrao Keshabrao Patil and Ors. (supra) has been pressed into service so as to contend that the OM dated 12.3.2002 having not been issued in the name of the Governor, same is not enforceable in law.

28. In Ratan Kumar Tandon (supra) as in the other cases referred to above, it was observed that administrative instructions do not have any overriding effect on operation of statutory provisions or the law of the land.

29. In Lavu Narendranath (supra), dealing with the extent of executive power of the State, it was observed that the executive have a power to make any regulation which having the effect of a law so long as it does not contravene any legislation already covering the field. The decision in Bishambhar Dayal Chandra Mohan (supra) is also in respect of the same proposition of law.

30. The decision in Shiv Nath Prasad (supra) has been referred to, to highlight the facts involved in the said case. It was observed that the 85th amendment was necessitated which came by the amendment Act of 2001 with retrospective effect from 17.6.1995. After the said amendment, the State Government involved in the case framed the Madhya Pradesh Public Services (Promotion) Rules, 2002. Prior to that the State Government had already framed the Act known as The Madhya Pradesh Lok Seva (Anusuchit Jatiyon Anusuchit Janjatiyon Aur Anya Pichhade Vargon Ke Liya Arakshan) Adhiniyam, 1994. By the said Act, the Govt. only provided that the State Govt. can by notification, provide roster point promotion to the SC and ST in the services but there was no consequential provision for providing the seniority. Therefore, the aforesaid Adhiniyam, 2002 was framed providing the same. According to the learned Counsel for the Petitioner, such a course of action having not been adopted by the State of Assam, simply by issuing the impugned OM dated 12.3.2002, the consequential seniority could not have been provided to the reserved category candidates on their promotion.

31. The aforesaid decisions have been pressed into service primarily to bring home the point of argument that the State having not framed any law, the OM dated 12.3.2002 (Annexure-F) cannot override the expressed provision of the statutory rules determining seniority amongst the officers. Further argument is that such executive instructions cannot override the statutory provisions and that the OM having not been issued in the name of the Governor, its validity falls through.

32. As against the aforesaid decisions, Mr. N. Dutta, learned senior Counsel representing the private Respondents has placed reliance on the decision of the Apex Court reported in M.R. Balaji (supra), The Apex Court held that State Government can make provision, by an executive order and for the purpose legislation is not necessary. In paragraph 19 of the Judgment, it has been

observed thus:

Then it is urged that even if special provision can be made by the State under Article 15(4), the said provision must be made not by an executive order but, by legislation. This argument, is equally misconceived. Under Article 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 Article 16(3) and (5) are illustrations in point. Both the said subclauses of Article 16. in terms, refer to the making of the law by the Parliament in respect of the matters covered by them. Similarly, Articles 341(2) and 342(2) expressly refer to a law being made by Parliament as therein contemplated. Therefore, when Article 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. In *Hiralal* (supra), the apex Court observing that reservation of appointment cannot be struck down on hypothetical grounds or on imaginary possibilities, held that the burden proving that a particular reservation offends Article 16(1) is on the persons who assails the reservations. According to Mr. Dutta, the particular benefit having been extended to the reserved category candidate under the impugned OM dated 12.3.2002, same is required to be upheld as the Petitioner has failed to prove that the particular provision offends Articles 16(4)(A) of the constitution.

34. The decision on which Mr. A.K. Phukan, learned Advocate General has placed reliance is *R. Chitrlekha* (supra). Drawing the particular attention of this Court, as to the nature of the power exercised under Article 166 of the Constitution of India, it was argued that the provisions of Article 166 are only directory and not mandatory in character and if they were not complied with, it could still be established as a question of fact that the impugned order was issued, in fact, by the State Government or Governor. He submitted that although the OM dated 12.3.2002 is not in the name of the Governor but that, by itself will not render the same invalid as the intention of the Government is clearly conveyed by the said OM.

35. The impugned OM dated 12.3.2002 finds mention of the earlier OM dated 12.6.96, the relevant provision of the OM dated 12.3.2002 has been quoted above. After the said relevant provisions, the OM further provides as follows:

Except seniority, other consequential benefits like promotion, pay etc. (including retrieval benefits in respect of those who have already retired), allowed to General/ Other Backward Classes Government servant by virtue of implementation of Office Memorandum No. ABP. 59/96/17 dated 12.6.96 and/or in pursuance of the direction of Assam Administrative Tribunal/ Court, should be protected as personal to them. The instructions contained in this Department's Office

Memorandum No. ABP. 59/96/17 and 12.6.96 stand withdrawn with effect from 12.6.96 itself and seniority of Government servant determined in the light of Office Memorandum dated 12.6.96 shall be revised as if that Office Memorandum was never issued.

36. As per the above quoted provision, except seniority, other consequential benefits like promotion, pay etc. including retrial benefits in respect of those who have already retired, allowed to general/other backward classes of Government servants by virtue of implementation of the said OM dated 12.6.96 should be protected as personal to them. So far as determination of seniority is concerned in the light of the OM dated 12.6.96, the same shall stand revised as if the said OM was never issued.

37. The aforesaid OM dated 12.6.96 was also issued by the Government of Assam in the Department of Personnel pursuant to the decision of the Apex Court in Union of India and others etc. Vs. Virpal Singh Chauhan etc., , laying down the principle relating to fixation of seniority of reserved candidates vis-r-vis general candidates in promoted posts. Following the said decision, it was laid down that while the rule of reservation shall be applied and the roster followed in the matter of promotions, the candidates promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over his seniors in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate will regain his seniority over the reserved candidate, notwithstanding that he is promoted subsequent to the reserved candidate. The principle of such seniority was made effective from 10.2.1995.

38. The aforesaid OM dated 12.6.96 held the field till issuance of the impugned OM dated 12.3.2002 (Annexure-F). The Petitioners being general category candidates and the particular determination of seniority being advantageous to them, never made any grievance against the said OM dated 12.6.96 either on the principle of determination of seniority or on the technical grounds, on which the present writ petition is structured towards assailing the said OM dated 12.3.2002. Since the OM dated 12.3.2002 has done away with the catch-up formula relating to regaining the seniority on promotion, they have made a challenge to the same primarily on two grounds, namely, the said OM cannot take the position of law and secondly, the OM having not been issued in the manner and method in which such OM is required to be issued, the same is not sustainable in law.

39. The provision of reservation is already there in the aforesaid Act of 1978 and the rules framed thereunder in 1983. Thus, the State Government is aware about the backwardness and inadequate representation of the reserved category communities in the services under the State. Thus, it cannot be said that even for the purpose of issuance of the OM like the one dated 12.3.2002, the State is required to reassess the backwardness and adequacy of representation of the backward communities. The question is one of determination of seniority in the

particular methodology as envisaged under Article 16(4)(A) of the Constitution of India. The OM dated 12.3.2002 has been issued in that context.

40. In *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, the present controversy has been set to rest with the following observations:

A question is raised whether an executive order made in terms of Article 16(4) is effective and enforceable by itself or whether it is necessary that the said "provision" is enacted into a law made by the appropriate legislature under Article 309 or is incorporated into and issued as a Rule by the President/Governor under the proviso to Article 309 for it to become enforceable? Mr. Ram Jethmalani submits that Article 16(4) is merely declaratory in nature, that it is an enabling provision and that it is not a source of power by itself. He submits that unless made into a law by the appropriate legislature or issued as a rule in terms of the proviso to Article 309, the "provision" so made by the Executive does not become enforceable. At the same time, he submits that the impugned Memorandums must be deemed to be and must be treated as Rules made and issued under the proviso to Article 309 of the Constitution. We find it difficult to agree with Sri Jethmalani. Once we hold that a provision under Article 16(4) can be made by the executive, it must necessarily follow that such a provision is effective the moment it is made. A Constitution Bench of this Court in *B.S. Yadav and Others Vs. State of Haryana and Others*, (Y.C. Chandrachud, C.J., speaking for the Bench) has observed:

Article 235 does not confer upon the High Court the power to make rules relating to conditions of service of judicial officers attached to district Courts and the Courts subordinate thereto. Whenever it was intended to confer on any authority the power to make any special provisions or rules, including rules relating to conditions of service, the Constitution has stated to in express terms. See, for example Articles 15(4), 16(4), 77(3), 87(2), 118, 145(1), 146(1) and (2), 148(5), 166(3), 176(2), 187(3), 208, 225, 227(2) and (3), 229(1) and (2), 234, 237 and 283(1) and (2)

Be that as it may, there is yet another reason, why we cannot agree that the impugned Memorandums are not effective and enforceable the moment they are issued. 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. (See *Sant Ram Sharma Vs. State of Rajasthan and Another*, . This view has been reiterated in a recent decision of this Court in *M. Ahamedkutty Vs. Union of India (UOI) and Another*, wherein it is held:

The High Court is not right in stating that there cannot be an administrative order directing reservation for Scheduled Castes and Scheduled Tribes as it would

alter the statutory rules in force. The rules do not provide for any reservation. In fact it is silent on the subject of reservation. The Government could direct the reservation by executive orders. The administrative orders cannot be issued in contravention of any statutory Rules but it could be issued to supplement the statutory Rules (See the observations in *Sant Ram Sharma Vs. State of Rajasthan* and *Another*, In fact similar circulars were issued by the Railway Board introducing reservations for scheduled castes and scheduled tribes in the Railway Services both for selection and non-selection categories of posts. They were issued to implement the policy of the Central Government and they have been upheld by this Court in *Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India (UOI) and Others*,

It would, therefore, follow that until a law is made or rules are issued under Article 309 with respect of reservation in favour of backward classes, it would always be open to the Executive (Government) to provide for reservation of appointments/posts in favour of Backward Classes by an executive order. We cannot also agree with Sri Jethmalani that he impugned Memorandums should be treated as Rules made under the proviso to Article 309. There is nothing in them suggesting even distantly that they were issued under proviso to Article 309. they were never intended to be so. nor is that the stand of the Union Government before us. They are executive orders issued under Article 73 of the Constitution read with Clause (4) of Article 16. The mere omission of a recital "in the name and by order of the President of India" does not affect the validity or enforceability of the orders, as held by this Court repeatedly.

41. The aforesaid position has been reiterated in *Dr. Gulshan Prakash and Others Vs. State of Haryana and Others*, in the following words:

On the other hand, the consistent view of this Court is that Article 15(4) is only an enabling provision and it is for the respective States either to enact a legislation or issue an executive instruction providing reservation in postgraduate courses.

42. The real controversy is as to what is the intention of the State Government. Its intention was clear when the aforesaid OM dated 12.6.96 was issued by the same very Department i.e. the Personnel laying down the principle of determination of seniority pursuant to the decision of the Apex Court in *Virpal Singh Chauhan*(supra). Its intention is also clear from the impugned OM dated 12.3.2002 (Annexure-F) that it wants to give consequential seniority to the promoted reserved category candidates following the amendment of Article 16(4) (A) can only be translated into action only by framing Rules. The provision of reservation being already in existence by virtue of the aforesaid act of 1978 and the Rules of 1983 and thereby recognising backwardness and inadequacy of representation of the backward communities in the services under the State, the particular determination of seniority pursuant to the aforesaid constitutional amendment, cannot be said to be opposed to the constitutional mandate and/or

the recruitment Rules.

43. It is true that the recruitment Rules make provision for determination of seniority, which is on the basis of merit position obtained in the select list. However, it does not take care of the situation in which a reserved category candidate gets accelerated promotion. The earlier position was that de hors the provision in the recruitment Rules, a reserved category candidate along with his accelerated promotion would also earn seniority. However, pursuant to the decision of the Apex Court in Virpal Singh Chauhan (supra), it was provided that by the aforesaid OM dated 12.6.96 that the erstwhile senior in the feeder cadre being promoted to the higher post would regain his seniority over the reserved category candidate, although they were promoted at earlier point of time by virtue of reservation. This position has now been altered pursuant to the aforesaid amendment of Article 16(4)(A) of the Constitution of India. As per the enabling provision, the State has issued the OM dated 12.3.2002, in terms of which the reserved category candidate on accelerated promotion would also get consequential seniority and consequently catch-up formula as envisaged in Virpal Singh Chauhan has been done away with.

44. The whole controversy has arisen in view of the particular interpretation given by the Petitioners that unless a law is framed, merely on the strength of an OM like the one dated 12.3.2002 and/or without amending the recruitment rules or making any provision to supplement the said rules, the reserved category candidate cannot be given consequential seniority. Thus, the issue raised is on technicalities.

45. Article 16(4)(A) enables the State to make provision for reservation with consequential seniority. Such provision can be laid down by Office Memorandum as has been done in the instant case. The whole emphasis of the Petitioners is on "Law and Rules" and not on "Provisions". Once it is held that the State is empowered to make a provision and the source of its power is traceable and discernible, irrespective of the technicalities raised by the Petitioners, I am of the considered opinion that the implementation of the decision of the State Government to grant consequential seniority to the reserved category candidates in the form of the impugned OM dated 12.3.2002, is sustainable in law.

46. For all the aforesaid reasons, the writ petition fails and consequently, it is dismissed. There shall be no order as to costs.