
(2008) 04 GAU CK 0023
In the Gauhati High Court

Ajoy Ch. Bordoloi

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 09-04-2008

Acts Referred:

Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, 1955 — Regulation 5(5)
Assam Engineering (Public Works Department) Service Rules, 1978 — Rule 12, 12(2), 13, 13(1), 13(2)
Constitution of India, 1950 — Article 162, 166(3)

Citation : (2009) 3 GLR 380

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Amitava Roy, J.—Under challenge is the Notification No. AAP.77/07/33 dated 26.6.2007 promoting the respondent No. 4 to the post of Secretary to the Government of Assam, Public Works Department, which in the petitioner's perception is in flagrant violation of the provisions of the Assam Engineering (PWD) Service Rules, 1978 ("the Rules") more particularly Rule 13 thereof.

2. I have heard Mr. A.K. Bhattacharjee, senior advocate assisted by Mr. S.K. Medhi, advocate, Mr. K.N. Choudhury, learned Additional Advocate General for the official respondents, Mr. A.M. Mazumdar, senior advocate assisted by Mr. B. Chakraborty, advocate and Mr. K.H. Choudhury, senior advocate assisted by Mr. S. Muktar, advocate for the respondent No. 5.

3. Briefly stated the petitioner's pleaded case is that he was appointed as Assistant Engineer in the Public Works Department ("the Department") on 6.2.1979. He was thereafter promoted through the ranks as enumerated hereunder.

Post Date Executive Engineer 3.7.2000 Superintending Engineer 7.5.2003
Additional Chief Engineer 26.12.2003 Chief Engineer (NH Works) 23.6.2006

4. The petitioner while highlighting his brilliant academic record as well as his meritorious performance in the departmental selections and the details of strategic assignments administered by him during his service tenure, details whereof are not considered necessary to be scripted, has averred that the department had published a notification dated 7.5.2003 being the select list of officers for promotion to the rank of Superintending Engineer wherein he and the respondent No. 4 were placed at SI. No. 3 and 35 respectively. In the seniority list of Superintending Engineers dated 22.5.2003 their inter se position was at SI. No. 25 and 26. According to the petitioner, in the classified list of officers in the Public Works Department, the petitioner's name figured SI. No. 497 whereas the respondent No. 4's at 606. The petitioner has asserted that though the cadre strength for the post of Additional Chief Engineer in the department at the relevant time was 9, the zone of consideration for reasons unknown was extended to 48 though it ought to have been 36 (9 x 4). As a result, the respondent No. 4 who otherwise in view of his seniority position was outside the said Zone was also considered. In the select list dated 19.12.2003 for promotion to the rank of Additional Chief Engineer, the inter se order of the petitioner as well as the respondent No. 4 was shown 7 and 24 respectively. The petitioner has complained that in the seniority list of Additional Chief Engineer published by notification dated 22.1.2004 instead of he being placed at SI. No. 7 was shown to be at SI. No. 9. Though in response to a representation dated 27.1.2004 submitted by him, the Personnel Department had recommended the Necessary rectification, the same was not given effect to. While the matter rested at that, the respondent No. 4 was promoted as Chief Engineer, Public Works Department, on 19.6.2004. In the inter se seniority list of Chief Engineers published on 16.6.2006, the respondent No. 4 was placed at SI. No. 6 the petitioner's name did not figure therein as he by that time had not been promoted to the said post. He was subsequently elevated thereto on 23.6.2006.

5. The next higher post of Secretary, Public Works Department, fell vacant on and from 1.8.2006 on the retirement of the earlier incumbent Shri Maheshwar Pathak. As the petitioner scented a move to promote the respondent No. 4 to the said post in violation of the Fs, he approached this Court with WHO 4602/06 to rectify the inter se seniority position between him and the respondent No. 4. The petitioner has maintained that during the pendency of the said proceedings by notification dated 4.11.2006, the inter se seniority of the Chief Engineer was re-fixed thereby upgrading the respondent No. 4 above two officers namely Shri H. Dutta and Shri. M.R. Das who were otherwise senior to him. Thus the said respondent was virtually and for all practical purposes designated to be the senior most Chief Engineer of the Department, Shri M. Pathak and Shri B. M. Goswami placed above him therein having in the meantime retired from service. It gradually transpired that though the respondent No. 4 had been promoted to the rank of Additional Chief Engineer on 26.12.2003, he was sought to be favored with promotion as Chief Engineer with retrospective effect from 2003 by totally bypassing the procedure of promotion envisaged by the Rules. The

petitioner brought this grievance by a Misc. Case in WP(C) 4602/2006. Similarly two other officers who were sought to be relegated below the respondent No. 4 thereby also instituted WP(C) 5749/06 WP(C) 5790/06 impugning the seniority list dated 4.1.2006.

6. The petitioner has maintained that in course of the analogous hearing of the petitions, the Annual Confidential Reports ("the ACR") of the concerned candidates were examined, which established the petitioner's superiority in merit on the basis thereof over the respondent No. 4. By the common judgment dated 22.2.2007, WP(C) 4602/06 filed by the petitioner was dismissed on the ground of delay. The other writ petitions were allowed and the impugned seniority list dated 4.11.2006 was set aside. This determination, however, was interfered with by a Division Bench of this Court in WA No, 92/97. The appeal preferred by the writ petitioner (WA No. 177/07), against the dismissal of his writ petition, was again dismissed on the ground of delay.

7. However, WA 98/2007 preferred by the respondent No. 4 against the same decision was allowed by the Division Bench by its judgment and order dated 17.5.2007 as a consequence whereof the seniority list dated 4.11.2006 was restored. The petitioner has affirmed that pursuant to the said verdict, the department had issued notification dated 6.6.2007 fixing the inter se seniority of Chief Engineers wherein the petitioner and the respondent No. 4 were placed at SI. No; and 3 respectively.

8. As a move was thereafter initiated to fill up the next higher post of Secretary of the Department, the petitioner nursing an apprehension that in effecting the same, departure from the criteria of merit, cum seniority as prescribed by Rule 13(4) of the Rules was being devised submitted a representation on 8.6.2007 before the Government emphasizing on the required compliance of the statutory provisions. A selection for promotion to the post of the Secretary was thereafter held on 22.6.2007 by a Selection Committee constituted as hereunder.

Chief Engineer - Chairman

Secretary, Health Department - Member

Secretary, Public Health Department - Member

9. According to the petitioner, this composition of the Selection Committee was in marked deviation from the one uniformly followed in all previous selections for this post. The petitioner has maintained that though on the evaluation of the annual confidential reports as required under the Rules as was revealed in course of the hearing of the earlier batch of writ petitions, he was entitled to be awarded 19 points in comparison to 15 of the respondent No. 4 and was, therefore, on a comparative assessment more suitable for promotion by applying the prescribed norm of merit cum seniority, by the impugned notification dated 26.6.2007, the respondent No. 4 was selected for promotion to the post of Secretary of the Department. The petitioner has alleged favoritism on non-germane

considerations in handpicking the respondent No. 4, which was also evident from the unusual alacrity of the department at which it obtained the vigilance clearance for effecting his promotion, even prior to the selection demonstrating its pre-determined disposition to favour him. The impugned notification thus has, been impeached to be afflicted by the infraction of the mandatory provisions of the Rules, want of bona fide, fairness and transparency in State action.

10. The respondent No. 2, Commissioner and Special Secretary to the Government of Assam, Public Works Department, in his affidavit has indicted the petitioner of having withheld relevant material facts disentitling him to the equitable relief as prayed for. The answering respondent has averred that the competent authority in the Government having noticed a lacuna in the Rules, namely absence of a prescribed composition of the Selection Board for promotion to the post of Secretary, the Personal (A) Department, deliberated upon the issue and eventually the same was placed before the Chief Minister of the State who thereafter passed the following order in File No. AAP-61/88/pt., which subsequent thereto was communicated to the department, vide letter No. AAP-61/81/P1/62 dated 10.11.2000.

The post of Commissioner and Secretary, P.W.D. is the senior most administrative post of the department and is outside the cadre. In order to ensure the administrative efficiency and discipline, this post is to be filled up by the senior most person among the C.E."s. In accordance with this principle, Shri M.C. Gogoi should be appointed as Commissioner and Secretary, P.W.D.

As regards the filling up the post of Secretary, P.W.D., though the Selection Committee is not provided for in the Rules, I would like to accept the recommendations of the Committee for the time being, though strictly speaking, the post of Secretary, P.W.D. shall be filled up strictly according to the seniority of the C.E."s. Incidentally Shri Board is also the senior most man after Shri Gogoi and therefore, he needs to be appointed formally as Secretary, P.W.D.

Before any vacancy arises in the post of Commissioner/Secretary, P.W.D. the Rules should be amended to provide the criteria of seniority among the" C.E."s for the selection for these two posts viz. Commissioner and Secretary, P.W.D. This is desirable in view of the fact that once the officers have been promoted to the level of C.E."s they are more or less equally placed as far as the merit is concerned and seniority should take precedence over the merit factor.

11. The answering respondent affirmed that the post of Secretary had fallen vacant on 1.8.2006 on the retirement of the earlier incumbent Shri Maheswar Pathak. In between Shri Mridul Kumar Baruah and the petitioner had been promoted to the cadre of Chief Engineer on 23.6.2006. As the former was senior to the petitioner as on 1.8.2006, the first four officers in order of seniority in the said cadre as on 1.8.2006 were:

1. Mohan Ch. Boro respondent No. 4.

2. Shri Haresh Dutta

3. Shri Mrinal Ranjan Das

4. Shri Mridul Kumar Baruah

12. The respondent averred that Shri Haresh Dutta retired on superannuation w.e.f. 28.2.2007. As in terms of Rule 13(1), the Government is required to make an assessment of the likely number of vacancies in the next year for promotion and the zone of consideration was limited to four times the number of vacancies under Sub-rule (2) thereof, the petitioner came within the same only on the retirement of Shri Haresh Dutta i.e., 28.2.2007. According to him the petitioner, thus, in the above factual premise was not even entitled to be considered for promotion to the post of Secretary that had fallen vacant on 1.8.2006.

13. The respondent has insisted that as the order of the Chief Minister of the State as extracted hereinabove is not under challenge, considering the fact that the respondent No. 4 is the senior most in the cadre of Chief Engineer, his promotion to the post of Secretary, he being other wise fit therefor, as adjudged in terms of the Executive Policy of the Government, the challenge laid in the instant proceeding is utterly frivolous. The maintainability of the writ petition has been questioned on the ground of want of locus of the petitioner, fairness in disclosing relevant facts and omission to challenge the Executive Instructions/ Policy as evinced in the order of the Chief Minister of the State. The respondent has asserted that as the Rules suffer from a deficiency for not having provided for the make up of the Selection Board for promotion to the post of Secretary of the Department, the same were rightly supplemented by the above Executive Instructions and, therefore, the selection of the respondent No. 4 administered on the basis of seniority in service is valid. The Rules in the present form vis-a-vis the promotion to the post of Secretary of the Department being felt unworkable, the Government was within its powers to lay down the Executive Policy in this regard. As no fundamental or legal right of the petitioner has been violated thereby, the petition is devoid of merit he pleaded.

14. The respondent No. 3 in his separate counter while generally supporting the stand taken by the respondent No. 2 has maintained that the Selection Board while recommending the respondent No. 4 and Shri Mrinal Ranjan Das (newly impleaded respondent No. 5) for promotion to the post of Secretary in that order, made an adequate assessment of the merit and seniority of the four eligible Chief Engineers. The said respondent further affirmed that the executive decision to promote the senior most Chief Engineer to the post of Secretary had been acted upon since the year 2000 and, therefore, the criteria of merit cum seniority as enjoined by Rule 13(4) of the Rules has no application. Referring to the omission in the Rules in prescribing a constitution of the Selection Board for promotion to the post of Secretary of the Department, the respondent clarified that as and when occasion arose such a Board was used to be constituted with the Chief Secretary as the Chairman, a Commissioner and Secretary nominated

by the Chief Secretary as a Member and one of the Secretaries of the three Technical Departments namely Water Resources Department, Irrigation Department and Public Health Engineering Department as its Member Secretary. As such the Government of Assam in the exercise of its Executive Powers under Article 162 of the Constitution of India constituted a Selection Board comprised of the Chief Secretary as the Chairman, Commissioner and Secretary, Health and Family Welfare Department as the Member and the Secretary, Public Health Engineering Department as Member Secretary which conducted the impugned selection. While contending that there was no provision in the Rules for awarding points on the ACR gradings, the respondent repudiated the instances of Shri A.C. Borgohain and Shri M. Dutta cited by the petitioner as mere aberrations incapable of creating a legally enforceable right in him to insist on such markings.

15. The respondent No. 4 in his counter while warding off the challenge to his promotion to the post of Secretary of the Department has avowed it to be scrupulously valid in compliance of the Rules and in due recognition of his seniority in the rank of Chief Engineer. He has claimed himself to be a member of the Schedule Tribe (Plains). According to him, he was appointed as the Assistant Engineer and was from time to time in recognition of his merit been promoted to the higher ranks. His service profile till the stage of Chief Engineer of the Department as set out by him is quoted hereunder for ready reference.

Assistant Engineer 28.12.1981 Assistant Executive Engineer 27.7.1987 Executive Engineer 31.3.1999 Superintending Engineer 19.9.2002 Additional Chief Engineer 26.12.2003 Chief Engineer 19.6.2004

16. The answering respondent has averred that while serving as the Additional Chief Engineer of the Department, the Government initiated steps to fill up the three vacant posts of Chief Engineer out of which one was a backlog and carried forward vacancy meant for Schedule Tribe (Plains) category. The Selection Board constituted for the purpose drew up a select list of eligible officers in the rank of Additional Chief Engineer for such promotion and in the said list dated 30.1.2004, the respondents name figured at SI. No. 5. Shri B.M. Goswami who was selected No. 2 retired soon after. According to the respondent, in terms of Clause (V) of the Schedule to the Assam Schedule Caste and Schedule Tribe (Reservation of Vacancies in Service and Posts) Act, 1978 ("the Act") out of the said eight vacancies, the first was meant for Schedule Tribe (Plains) candidate and as he belonged to that category, by notification dated 19.6.2004, he was promoted to the post of Chief Engineer. The respondent contended that his next promotion to the post of Secretary has been in accordance with the Rules and in consideration of the fact that he is senior most Chief Engineer of the Department. He mentioned that the Select list dated 7.5.2003 for the purpose of promotion to the post of Superintending Engineer had been assailed by the writ petitioner in WP(C) 4602/06 which was dismissed by the learned Single Judge vide judgment and order dated 22.2.2007 on the ground of unexplained and inordinate delay and that WA 177/07 preferred against the same is pending

(since dismissed on 17.5.2007). He further averred that being aggrieved by the inter se seniority list dated 16.6.2006 of the Additional Chief Engineers, he submitted a representation before the concerned authorities on the consideration whereof notification dated 4.11.2006 was issued placing him above Shri Haresh Dutta and Shri Mrinal Ranjan Das. This notification was assailed by Shri Mrinal Ranjan Das in WP(C) 5749/2006. Similarly Mr. Haresh Dutta instituted WP(C) 5790/06 impeaching the said notification. The learned Single Judge by his judgment and order dated 22.2.2007 upheld the challenge and interfered with the said notification thus restoring the seniority list dated 16.2.2006.

17. Being discontented, the answering respondent preferred WA 92/2007, which was allowed on 17.5.2007 thus restoring the notification dated 14.11.2006, and the inter se seniority of the officers referred to therein. The respondent has stated that presently the issue is sub-judice before the Apex Court in Special Leave Appeal (Civil)(S) 13418/07. It was thereafter that the Government published the seniority list dated 6.6.2007 projecting the senior most Chief Engineer of the Department. The answering respondent has sought to reinforce the plea of the respondent No. 2 bearing on the Executive Instruction/Policy for filling up the post of Secretary of the Department on the basis of seniority. While referring to the aspect of markings on the basis of ACR as matter of record, the respondent has pleaded that the petitioner, having been promoted as the Chief Engineer on 23.6.2006 and positioned at SI. No. 5 in order of seniority in that rank, he was not within the zone of consideration in terms of Rule 13(1) and, therefore, this claim for the post of Secretary of the Department is misconceived. He has also questioned the bona fide of the petitioner for not impleading Shri Mrinal Ranjan Das, recommended No. 2 for the said post. He has dismissed the petitioner's misgivings pertaining to the vigilance clearance as unfounded.

18. The respondent No. 5 in his counter has impugned the notification No. AAP-77/2007/74 dated 15.11.2007 whereby in the meantime the respondent No. 4 has been permitted to officiate as Commissioner and Special Secretary of the Department as vitiated by bias and mala fide and colorable exercise of power for collateral purposes. According to this respondent, in terms of the Executive decision/policy prescribing seniority to be the criteria for promotion to the post of Secretary, the post of Commissioner and Secretary of the Department is to be filled up by the senior most person amongst the Chief Engineers and that as he on the measure of service seniority is the senior most person amongst the present Chief Engineers, he ought to have been promoted in preference to respondent No. 4. The respondent has, therefore, prayed for a writ of certiorari to quash the notification dated 15.11.2007 and for a writ of mandamus to promote him as the Commissioner and Secretary to the Government of Assam, Public Works Department.

19. As the respondent No. 4 repudiated this stand of the respondent No. 5 as unsustainable in absence of a proper challenge by filing a fresh writ petition alleging collusion with the writ petitioner, the respondent No. 5 justified this

pleading contending that it was permissible within the framework of the instant proceeding as the promotion of the respondent No. 4 as Commissioner and Special Secretary to the Government of Assam, Public Works Department vide notification dated 15.11.2007 was subject to the outcome of the Special Leave Appeal (Civil(S) 13418/07 before the Apex Court and the instant proceeding.

20. In his reply affidavit, the petitioner rejected the contentions based on Executive decisions/policy to be fallacious in the teeth of the Rules. Asserting that the views of the Chief Minister had not been applied to any selection, the petitioner has asserted that the minutes of the meeting of the Selection Board held on 22.6.2007, as well clearly manifests that seniority as the decisive criteria had not been applied. As he had been promoted to the post of Chief Engineer on 22.6.2006 and the vacancy had occurred on 1.8.2006, the plea against his eligibility to be considered, therefore, is wholly unsustainable.

21. Mr. Bhattacharjee with reference to Rules 3, 5, 12, 13 and 15 of the Rules has assertively urged that the post of Secretary of the Department being in the Class I (senior grade) cadre of the service, the provisions of the Rules pertaining to recruitment and governing the conditions of service of the incumbents thereof, would be squarely applicable and, therefore, no departure from the prescriptions therein without a prior amendment is permissible. Underlining the fact that as the transition from the post of Chief Engineer to the Secretary has to be only by promotion as enjoined by Rule 12 of the Rules for which the general procedure as laid down by Rule 13 has to be adhered to, the learned senior. Counsel argued that in terms of Rule 13(4), the criteria for adjudging the suitability for such promotion is merit cum seniority. Though Rule 15 of the Rules does not in specific terms provide the composition of the Selection Board for the post of Secretary of the Department, Mr. Bhattacharjee urged that the same per se did not signify effacement of the norm of merit cum seniority as the bench mark for evaluation of the suitability of an eligible Chief Engineer for promotion thereto. He contended that as Rule 15 was procedural in essence, deficiency, if any, therein would by no means be mutilative of the substantive prescriptions embodied in Rule 13(4). Mr. Bhattacharjee dismissed the view expressed by Chief Minister of the State, recommending seniority to be the criteria for promotion to the post of Secretary as no nest in face of the unequivocal statutory mandate of merit cum seniority as the measure for assessing the suitability therefor. Contending that in any view of the matter, the contents of the related note do not constitute either any executive decision or a government policy stipulating seniority to be the determinant for such promotion, Mr. Bhattacharjee argued that a plain reading thereof demonstrates that the Chief Minister of the State being fully aware of the precept of merit cum seniority in the Rules suggested a suitable amendment thereof while stipulating the principle of seniority to be the yardstick for assessing the suitability of an eligible Chief Engineer of the Department for promotion to the post of Secretary. As the Rules have remained unamended since 2000 till date, application of the criteria of seniority is wholly unwarranted and if resorted to would render the resultant

process ineffectual, null and void, he pleaded.

22. Mr. Bhattacharjee without prejudice to the above was particularly critical about the norm of seniority as the determining factor of suitability at the level of Secretary of the Department contending it to be a dangerous guide capable of leading to seriously adverse consequence hostile to organizational interest, Mr. Bhattacharjee urged that as the petitioner is superior in merit to the respondent No. 4 on the touch stone of the parameters engrafted in Rule 13(4), his promotion is ex-facie, illegal and is liable to be set aside and thus a writ of mandamus ought to be issued to promote the petitioner. He argued that the zone of consideration of the officers for consideration for promotion under Rule 13 being four times the number of vacancies, the case of the petitioner who came within the zone on 28.2.2007 was necessary to be considered, the vacancy having occurred on 1.8.2006. The fact that his case was considered in the impugned selection is attentive of the above proposition, he urged. Mr. Bhattacharjee to reinforce his arguments placed reliance on the decisions of the Apex Court in *Sant Ram Sharma Vs. State of Rajasthan and Another*, and *Union of India v. Mohan Lal Capoor* AIR 1974 SC 86 .

23. In reply Mr. K.N. Choudhury, learned Additional Advocate General, Assam, at the threshold questioned the maintainability of the petition contending that as on the date of occurrence of the vacancy, i.e., 1.8.2006, the petitioner was not within the zone of consideration as contemplated in Rule 13(1) of the Rules, he was not entitled there under to be considered for promotion to the post of Secretary of the Department and, therefore, his challenge to the promotion of respondent No. 4 is misconceived. According to Mr. Choudhury, the absence of a Selection Board under Rule 15 for the post of Secretary of the Department not only signifies the intention of the Rule making authority to exclude the said post from the purview of the provisions thereof pertaining to promotion thereto, it has even otherwise rendered the Rules unworkable vis-?-vis the said post. Thus the observation of the Chief Minister of the State also in administrative charge of the Department recommending seniority to be the criteria for promotion from the post of Chief Engineer to that of the Secretary visibly in exercise of its powers under Article 162 of the Constitution of India and the Rules of Executive business constitutes a binding executive instruction and/or policy, he urged. Mr. Choudhury contended that in any view of the matter as this executive instruction has the efficacy of filling up the lacunae in the Rules, the validity thereof is unassailable. As the petitioner has refrained from questioning the legality of the executive instruction/policy there is no room for him to complain on the applicability thereof to the impugned selection process.

24. Referring to the petitioner's stand in WP(C) 4602/06, the learned Additional Advocate General contended that his comprehension of seniority to be the criteria for promotion is manifest therefrom and, therefore, a belated turn around is impermissible in law. Endorsing the claimed executive instruction/policy to be valid and enforceable, Mr. Choudhury submitted that as the officers at the level

of the Chief Engineer are almost at par on merit, the decision to adopt seniority as the decisive criteria for further promotion is not inconsistent with the letter and spirit of the Rules either. As no constitutional or legal right of the petitioner has been violated by the impugned action, the challenge is liable to be rejected, he urged.

25. Mr. Choudhury argued that the decision of the Apex Court in Sant Ram Sharma, *supra*, does not clamp an absolute bar on the Government to frame administrative instructions and instead permits so to fill up and supplement the Rules if those are silent on any particular facet. The learned Counsel in addition Relied On the decision of the Apex Court in N. Suresh Nathan and another Vs. Union of India and others, , State of Sikkim Vs. Dorjee Tshering Bhutia and others, and State of Haryana and Others Vs. Ram Kumar Mann, to buttress his contentions.

26. Mr. Mazumdar, learned senior counsel for the respondent No. 4 while generally adopting the arguments made on behalf of the State has argued that all appointments in State service being at the pleasure of the crown, statutory rules in that regard are envisaged only to condition the said prerogative to the extent it provides. Rule 13(4) being not attracted to the process for promotion to the post of Secretary, the petitioner's assailment is fallacious and not cognizable in law. The learned senior counsel argued that a conjoint reading of Rule 13 and 15 makes it abundantly clear that the rule making authority consciously did not provide for a Selection Board for promotion to the post of Secretary in accordance with the Rules and, therefore, the petitioner's insistence on the adherence thereto is per se flawed and untenable. Further as in the meantime, the respondent No. 4 has been promoted to the next higher post of Commissioner and Secretary, the petition with efflux of time has been rendered infructuous.

27. Mr. K.M. Choudhury learned senior counsel for the respondent No. 5 while backing the proclaimed executive decision/policy has complained that though the same has been invoked in the matter of promotion for the post of Chief Engineer to that of the Secretary of the Department, it has been disregarded so far as it relates to promotion of the senior most amongst Chief Engineers to the post of Commissioner and Secretary. According to him, as in terms over all length of service, the respondent No. 5 is senior to the respondent No. 4, in terms of the said executive decision, he ought to have been promoted as Commissioner and Secretary and, therefore, the notification dated 15.11.2007 favoring the respondent No. 4 therewith in supercession of his (respondent No. 5) right is illegal, null and void. Mr. Choudhury therefore prayed for an appropriate writ to quash the said notification and instead promote the respondent No. 5 to the post of Commissioner and Secretary of the Department.

28. Mr. Bhattacharjee in reply has maintained that as the interpretation of Rule 13 to negate the petitioner's entitlement to be considered for promotion if accepted would nullify the underlying objective of the Rules, it ought not to be

entertained. As the petitioner admittedly was within the zone of consideration prescribed by the Rules on the date of the selection proceedings, he was rightly considered along with other eligible candidates. However, as his merit was overlooked and thereby the respondent No. 4 was preferred, his (respondent No. 4) promotion is liable to be adjudged ineffectual and non est in law. The view expressed by the Chief Minister of the State being in blatant contravention of the Rules, it is inoperative and inconsequential for all purposes, he urged.

29. The contours of the rival assertions having been delineated, it would be appropriate to deal first with the prefatory pleas bearing on the maintainability of the proceedings. The essential facts appertaining thereto are admitted. The vacancy in the post of the Secretary of the Department arose on 1.8.2006 with the retirement of its earlier incumbent Shri Maheswar Pathak. The petitioner in the meantime had been promoted to the post of Chief Engineer on 23.6.2006. Earlier thereto, the respondent No. 4, Shri Maheswar Pathak, Shri Haresh Dutta and Shri Mrinal Ranjan Das, respondent No. 5 had been promoted to the post of Chief Engineer. In the notification dated 16.2.2006 displaying the inter se seniority of the Chief Engineers of the Department, the spectrum of the officers occupying the said office was as hereunder.

1. Shri Bani Kanta Das.
2. Shri Suren Das.
3. Shri Maheswar Pathak.
4. Shri Haresh Dutta.
5. Shri Mrinal Ranjan Das (respondent No. 5.)
6. Shri Mohan Ch. Boro (respondent No. 4.)

30. On a representation submitted by the respondent No. 4, the inter se seniority of the aforeMentioned officers was re-fixed by the notification dated 4.11.2006 as hereunder.

1. Shri M. Pathak (since retired).
2. Shri B.M. Goswami (since retired).
3. Shri Mohan Ch. Boro, respondent No. 4.
4. Shri Haresh Dutta.
5. Shri Mrinal Ranjan Das, respondent No. 5.

31. Though in the meantime, the petitioner had been promoted as the Chief Engineer, his name did not figure in the said notification. the as well as Shri Haresh Dutta and Shri Mrinal Ranjan Das inter alia challenged this notification dated 4.11.2006 in WP(C) 4602/06, WP(C) 5790/2006 and WP(C) 5749/2006 respectively. A Single Bench of this Court by its judgment and order dated

22.2.2007 disposed of these petitions along with others also on related issues thereby dismissing the petitioner's WP(C) 4602/06. The learned Single Bench dismissed the petitioner's assailment principally on the ground of undue and unexplained delay in registering his challenge. This was more particularly in view of his impugment of the respondent No. 4's placement in the inter se seniority in the post of Superintending Engineer and Additional Chief Engineer fixed vide seniority list dated 22.5.2003 and 22.1.2004 respectively, in the face of his (respondent No. 4) promotion to the post of Chief Engineer in the meantime. The learned Single Judge, however, parted with the observation that if a seniority list of Chief Engineers has already been published it should reflect the names and positions of all incumbents in the cadre including that of the petitioner whose promotion may be subject to the result of any adjudication pending before the judicial forum. By the same judgment and order, however, the notification dated 4.11.2006 was interfered in WP(C) 5749/06 and WP(C) 5790/06 referred to hereinabove. Being aggrieved, the respondent No. 4 took the issue in appeal against the above determination in WP(C) 5749/06 instituted by the respondent No. 5 being WA 92/2007, which was allowed thus restoring the inter se seniority as evidenced by the notification dated 4.11.2006. The matter presently, as it is submitted at the Bar, is subjudice before the Apex Court in Special Leave Appeal (Civil)(S) 13418/07.

It is, thus, apparent that at the end of the year 2006, the petitioner though promoted to the post of Chief Engineer was not within the first four officers in the said rank in order of seniority. It was only on the retirement of Shri Haresh Dutta on 28.2.2007 that he rose to be at SI. No. 4 in seniority,

32. Rule 13(1) mandates that before the end of each year, the Government would make an assessment of the likely number of vacancies to be filled up by promotion in the next year in each cadre and the Appointing Authority would furnish to the Selection Board the documents and informations referred to in Sub-rule (2) which includes amongst others a list of officers in order of seniority eligible for promotion and the character rolls and personal files of the officers, etc., Sub-rule (4) prescribes the criteria for adjudging the suitability of the officers for promotion from the rank of Chief Engineer to that of Secretary to be merit cum seniority. As is evident from Rule 12(2) and 13(3), the recommendation of the Selection Board for such promotion has to be founded on the suitability of the candidates concerned to be placed in order of preference for the appointing authority to approve and act upon. The post of Secretary is the highest post in the department envisaged by the Rules and therefore understandably the bench mark of merit cum seniority for assessing the suitability for promotion thereto.

33. Though a dogmatic adherence to a literal construction of the prescripts of Sub-rules (1) and (2) of Rule 13 at the first blush may favour a view espoused by the respondents, a closer scrutiny thereof defeats the same. The real intendment of the rule makers being to ensure the consideration of the eligible

officers in service within the zone of consideration as four times the number of vacancies, it would be illogical and unrealistic to constitute the said zone with persons no longer in service either due to retirement or other contingencies and in the process leave out otherwise eligible candidates and entitled to be included in the zone as a consequence of such retirement, etc. If any one or more of the eligible candidates within the zone of consideration fixed at the end of each year retire before the selection is actually held for the vacancies identified and the consequent eligible officers are not inducted in the depleted zone of consideration to maintain the ratio of 1 : 4, the resultant process would be antithetical to the legislative end of prescribing the desired range of officers for "assessment and selection for promotion. The zone of consideration having been conceived of to avail a desired compass of the eligible officers with varying suitability for promotion, in my opinion the same ought not to be constricted if adequate number of eligible officers are actually available to compose it (zone). A purposeful construction has to be provided to the provisions of the Rules to advance the objective thereof and too pedantic and myopic approaches ought to be eschewed lest the very purpose thereof stands defeated. By no means the rule makers in my considered opinion contemplated against remodeling of the zone of consideration envisioned at the time of original assessment of the likely number of vacancies so much so that eligible candidates other than those in the said zone should be obdurately denied consideration of their cases for the fortuitous circumstance of being beyond the said zone at the time of the initial computation under Rule 13(1). Incidentally, the petitioner as a matter of fact had been considered by the Selection Board in its meeting held on 22.6.2007. The plea against his locus in view of the above determination does not appeal to this Court and is thus rejected.

34. The petitioner's failure to refer to the note of the Chief Minister of the State on the issue and bearing thereof on his claim as well as the initial non-impleadment of Shri Mrinal Ranjan Das, presently respondent No. 5, ipso facto is neither an unmistakable index of lack of his bona fide nor constitutes a willful suppression of material facts warranting summary dismissal of the writ petition, his assertions being dominantly structured on the Rules. As it is, with the impleadment of Shri Mrinal Ranjan Das as a party respondent in the instant proceeding the plea of non-joinder does not admit of any added significance.

35. Though some emphasis has been laid on behalf of the respondents on the discussion recorded by the learned Single Judge in the judgment and order dated 22.2.2007 passed in the WP(C) 4602/06 instituted by the petitioner, inter alia, challenging the notification dated 4.11.2006 to project his ostensible concession to seniority as the criteria for promotion to the post of Secretary, reading between the lines I do not feel persuaded to sustain the said plea. The learned Single Judge had rejected the writ petition primarily on the ground of delay. The alternative argument on the petitioner's behalf that in any event he having been in the mean time promoted to the post of Chief Engineer on 26.3.2006, he was entitled to be included in the notification/seniority list dated 4.11.2006 so that if

he comes within the zone of consideration for promotion to the post of Secretary, his case could also be considered, by no means, in the opinion of this court, constitutes the petitioner's reconciliation to seniority as the norm for adjudging the suitability of an eligible Chief Engineer to be promoted to the post of Secretary, the touch stone of merit cum seniority prescribed by Rule 13(4) notwithstanding. The assertion to this effect made on behalf of the respondents cannot thus be upheld.

36. Having regard to the outline of the adjudication drawn for the issues raised in the writ petition, this Court is disinclined to entertain the independent challenge mounted by the respondent No. 5 on the notification dated 15.11.2007, promoting the respondent No. 4 to the post of Commissioner and Secretary of the Department on the ground that he being the senior most of the Chief Engineers, he ought to have been preferred therefor. The respondent No. 5, if aggrieved thereby is at liberty to assail the same in a separate writ petition but his impugment of the above notification in the instant proceeding being collateral in character by a party respondent, is not entertainable.

37. A plain reading of the order of the Chief Minister of the State as contained in file No. AAP-61/89/Pt. and communicated to the department vide letter No. AAP-61/89/Pt./62 dated 10.11.2000 extracted hereinabove reveals his view that the post of Secretary of the Department should be filled up strictly according to the seniority of the eligible Chief Engineers. While accepting the recommendations of the Selection Committee, for the Selection referred to therein the said authority recommended amendment of the Rules to provide the criteria of seniority for Selection to the post of Commissioner/Secretary before any further vacancy arose at that level. The recommendation of seniority as a pre-eminent measure of suitability was sought to be justified observing that at the level of Chief Engineer, the officers are more or less at par on merit.

38. This order claimed to have been made in exercise of the executive power of the State under Article 162 of Constitution of India by no means can supersede the corresponding provisions of the Rules to which it is repugnant in essential particulars. Perceiving the above incompatibility the said authority logically suggested amendment of the Rules to provide the principle of seniority as the yardstick for selection to the post of Commissioner and Secretary of the Department, The post of Commissioner being beyond the purview of the Rules, the validity of the stipulation of seniority as the edict for promotion thereto need not be addressed to in the instant adjudicative exercise. The prescription of the norm of seniority per se is dissentient to the measure of merit cum seniority ordained by Rule 13(4) for promotion to the post of Secretary governed by the Rules. Admittedly the Rules have not been amended till date to accommodate the criteria of seniority as indicated by the order.

39. Rule 12(2) dealing with the promotions enjoins that subject to suitability as may be decided by the Selection Board and by the appointed authority and also subject to possessing such qualification and experience that may be prescribed

from time to time a member of the service shall be eligible for promotion to the corresponding higher cadre in the manner provided. It is apparent therefrom that the post of Secretary is promotional in nature vis-à-vis that of the Chief Engineer. Rule 13(4) provides in unequivocal terms that promotions above the rank of Superintending Engineer would be made on the basis of merit cum seniority. Obviously the Rules therefore do not acknowledge seniority alone to be the criteria for promotion to the post of Secretary from that of the Chief Engineer in the Department. Rules 12(2), 13(4) and 13(5) read cumulatively testify that for promotion as above, the suitability of the candidates has to be evaluated on the touch stone of merit cum seniority and a select list of the recommended officers is to be drawn up in order of preference and that the promotions would follow on the approval of the appointing authority thereof.

40. True it is, that Rule 15 does not in specific terms either declare a Selection Board for promotion to the post of Secretary or provides for the composition thereof. The post of Secretary having been encadred as Class I (Senior Grade) post under Rule 3(a) and requires to be filled up in terms of Rule 12 and 13, a Selection Board to administer the process in connection therewith ought to have been sanctioned by the Rules. The absence of such a Selection Board, however, in my estimate does not obliterate the enjoinder of merit cum seniority as the criteria for promotion to the post of Secretary of the Department. The omission to provide for a Selection Board for promotion to the post of Secretary does not render the Rules unworkable as well to forsake the yardstick of merit cum seniority embodied in Rule 13(4). The absence of such a Selection Board does not as well render the relevant provisions pertaining to promotion to the post of Secretary inapplicable thereby so much so that the measure of merit cum seniority can permissibly be substituted by that of seniority alone.

41. Executive instructions as contemplated to effectuate administrative governance on matters otherwise governed by statutory rules though can fill up the deficiencies thereof, if any, but cannot supplant the same in the garb of empowerment under Article 162. The said constitutional provision does not authorize the executive power to overreach the existing statutory provisions in the same field or to militate against the same and has to be essentially in conformance therewith. Supplementation of enacted laws or statutory rules though allowable by executive institutions, supplantation thereof is an anathema in the contemporaneous constitutional scheme of alignment of powers. It is permissible for the departmental authorities to provide the composition thereof and to that extent Executive Instructions and/or decisions would not be in conflict with the Rules. The records reveal that such a practice had been followed. This also demonstrates the awareness of the respondent authorities that the stipulation of merit cum seniority has to be applied and for that a Selection Board has to be constituted as no composition thereof has been provided by the Rules. In the determination of this Court though by executive instructions, a Selection Board can be constituted for conducting the promotional process to fill up the post of Secretary within the framework of the Rules, the

prescription of merit cum seniority under Rule 13(4) cannot be superseded by that of seniority without effecting an amendment thereof. While the authority of the Chief Minister of the State under the Rules of Executive Business to issue the order referred to hereinabove is not in doubt, any decision incongruent with the Rules has to be adjudged ineffectual and non est in law. The administrative order involved cannot be saved either to be one under Rule 29, which equips the Government with the power to interpret any provision of the Rules. The contents of the order exude only a view entertained by the Chief Minister of the State, which by no means can be exalted to the status of a binding Government policy. The executive sanction of seniority as the measuring norm for promotion to the post of Secretary in the teeth of the Rules, therefore, cannot be approved. The plea that though the Rules remain unamended, the yardstick of seniority has since been applied for such promotions since the year 2000 does not validate the said criteria being repugnant to Rule 13(4) of the Rules.

42. The Apex Court in *Mahadeo Bhau Khilare (Mane) and Others Vs. State of Maharashtra and Others*, had held that any scheme by way of an executive instructions in terms of Article 162 of the Constitution of India, if violative of the statutory Rules would not be legally sustainable.

43. The same view was expressed in *State of Kerala and Others Vs. K. Prasad and Another*, where their lordships of the Apex Court while emphasizing that statutory rules are meant to be and have to be applied and enforced scrupulously held that even an Executive Order is required to be made strictly in consonance therewith. It was ruled that when an Executive Order is called in question, the court if the exercise of power of judicial review is required to scrutinize as to whether the Government has departed from such Rules and if it is so, an executive action is liable to be struck down.

44. The distinction between two principles of "seniority cum merit" and "merit cum seniority" was succinctly brought about in *B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc.*, Following a survey of its decisions on these two pre-eminent criteria for promotion in service, their lordships ruled that seniority cum merit lays greater emphasis on seniority but an officer even on the basis thereof cannot claim promotion as a matter of right by virtue of seniority alone and that if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. It referred to its earlier decision in *State of Kerala and Another Vs. N.M. Thomas and Others*, to the effect that seniority cum merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though less meritorious shall have the priority. In contradistinction, their lordships enunciated that the principle of merit cum seniority lays greater emphasis on merit and ability and seniority plays a less significant role to be recognized only when merit and ability of the candidates are approximately equal.

45. In *Sankar Deb Acharya and Others Vs. Biswanath Chakraborty and Others*, the Apex Court while reiterating the above held that when the principle of merit

cum seniority is applied greater emphasis is on merit and on ability and seniority place a lays significant rule.

46. It is, thus, obvious that the two yardsticks connote varying measures of evaluation for the purpose of promotion and depending on the criteria either statutorily prescribed or administratively fixed, the appraisal of the candidates would accordingly be administered providing primacy to the merit or seniority as the case may be. In other words, these two axioms of appreciation of suitability for promotion can neither be interchanged nor substituted for each other. Application of one dictum for the other in contravention of the binding enjoinder made in that regard would ipso facto invalidate the related exercise.

47. Though merit in the broad sense may be synonymous with efficiency, competence, capability and efficacy, for objectivity in the assessment thereof, the Annual Confidential Reports of the candidate concerned for some years immediately preceding the promotion evidencing their all round performance as well as the essential personal traits bearing on the post they hold and services they cater to are considered and gradings are accorded commensurate to the level of performance. Very often as a figurative expression of such appreciation marks are allotted to the corresponding gradings so much so that the comparative evaluation of merit at times decisively depends on the scores on the basis thereof. This obviously is an acceptable and objective mode of analysis of the merit of a candidate to adjudge his suitability for promotion. The character rolls and personal files of eligible officers are forwarded to the Selection Board under Rule 13(2) indeed with that end in view. The Selection Board in turn is obliged under Rule 13(5) to examine the documents and informations so furnished and recommend to the appointing authority a list of officers about double the probable number of vacancies in order of preference, found suitable for promotion. In conducting the process of assessment, the Selection Board has to meticulously adhere to the criteria of merit cum seniority prescribed by the Rules.

48. The Apex Court in *Sant Ram Sharma* (supra), while dilating on the relevance of merit as the criteria for promotion to a selection post in service, in the contextual facts observed that the petitioner merely because he stood first in the gradation list could not claim a conferred right in him to be promoted to the selection post only on the basis thereof. Their lordships enunciated that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone, the principle being that when the claim of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available. Responding to the plea of objectivity intrinsic in the norm of seniority, the Apex Court ruled that though it is so, it fails to take any account of personal merit. It held that as a system it is fair to every official except the best ones and an official has nothing to win or lose provided he does not actually become so efficient that disciplinary action has to be taken against him. Their

lordships sounded a word of caution observing that though the system based on seniority as the criteria would be fair to the officials concerned, it would be a heavy burden on the public and a great strain on the efficient handling of public business. An extract from the Study of Public Administration, 4th edn., pp. 380, 383 was quoted, which is profitable to note:

Employees often prefer the rule of seniority, by which the eligible longest in service is automatically awarded the promotion. Within limits, seniority is entitled to consideration as one criterion of selection. It tends to eliminate favouritism or the suspicion thereof; and experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true.

Their lordships while negating the contention that in absence of any statutory rules governing promotions to selection grade posts, the Government cannot issue administrative instructions, propounded that though the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. It held that till statutory rules are framed, there is no bar for the Government to issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts.

49. The Apex Court in *M.L. Capoor & Ors. (supra)*, in the context of the duty of the selection committee under Regulation 5(5) of Indian Administrative Service/ Indian Police Service (Appointment by Promotion) Regulations, 1955 to record reasons for the proposed supersession of an officer, emphasised on the essentiality thereof to ensure a correlation between the recorded facts and the conclusions reached and observed that reasons are the links between the materials on which certain conclusions are based and the actual conclusions and divulge how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial. The reasons should reveal a rational nexus between the facts considered and the conclusions reached as a guarantee to demonstrate that the opinions or decisions recorded are manifestly just and reasonable, it held.

50. The issue involved in *N. Suresh Nathan & Ors. (supra)*, was whether past services rendered by a diploma holder Junior Engineer on acquiring a degree in engineering would be counted towards the qualifying years of service to reckon his eligibility for promotion to the next higher post of Assistant Engineer under the relevant Rules. A diploma holder in Civil Engineering was required to put in six years of service in the grade to be qualified for such promotion. In contradistinction a degree holder Junior Engineer would be eligible with three

years service in the grade. Whereas, the diploma holders contended that the services rendered by them before acquiring the degree ought to be included towards the length of qualifying service, the degree holders opposed the said plea. Their lordships of the Apex Court noticed in the attendant facts, the practice followed by the department that the three years of service in the grade for eligibility for promotion as degree-holders commenced from the date of obtaining the degree and that the earlier period of service as diploma-holders was not reckonable therefor. It was thus held that if the past practice is based on one of the possible constructions which can be made of the rules, then upsetting the same would not be appropriate. It was in that perspective that the question raised was answered. This decision is distinguishable on facts, inasmuch as the present executive instructions do not present a plausible construction in harmony with Rule 13(4) of the Rules. Any practice based on such instructions repugnant to the Rules cannot attain a status having the force of law.

51. The decision in *Dorjee Ushering Bhutia and Ors.* (supra), is also of no avail to the respondents. Thereunder the relevant rules prescribed that the recruitment to the related service was to be made exclusively by the Sikkim Service Commission ("the Commission"), through a competitive examination to be held by it. The selection committee for such recruitment was to be presided over by the Chairman of the Commission and finally the merit list was to be approved by it. The rules thus could be operated through the Commission alone, so much so, that in its absence, the same could not be made functional. Admittedly, the Commission had not been constituted for which the Rules though in force, remained unworkable for about five years. In that background the Government issued a notification constituting a selection committee, further laying down the modalities and the selection method comprising of written examination and viva voce test. The conditions of eligibility were also laid down. This notification was challenged, inter alia, on the ground that the method of selection provided thereunder was contrary to the Rules. It was inter alia pointed out on behalf of the State that the respondent had participated in the selection process and that therefore, he was estopped from assailing the same. The Apex Court referred to Article 162 of the Constitution of India recognizing the executive power of the State extending to the matters with respect to which the legislature thereof, has powers to make laws. It also Article 166(3) of the Constitution of India, where under Ministry concerned could issue orders or notifications in respect of functions which had been allocated to it. While reiterating 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 any order, instruction, direction or notification issued in exercise of the executive power thereof, contrary to any statutory provision, would be nullity being without jurisdiction, their Lordships, having regard to the facts as obtained in the proceedings upheld the State action principally on being satisfied that due to the non-existence of the Commission, the Rules had been rendered unworkable. It noticed the absence of reasons for the omission to constitute the Commission for long five years and concluded that

till the provisions of the Rules were made operational, they were construable to be non est and, therefore, the Apex Court concluded that the action taken was to remove stagnation and to afford an opportunity to the eligible persons to enter the service. It also took on record the fact that in the meantime, the Commission had been constituted and the merit list so prepared, had received its approval. Further, it observed that no infirmity or illegality had been pointed out in the process of selection or in the preparation of merit list.

52. The records in the instant case disclose that though no selection board for promotion to the post of secretary had been provided by the rules, the department from time to time had been constituting the same for conducting the selection therefor. Thus, the Rules were not viewed to be unworkable in absence of a selection board duly constituted by the Rules. The basic premise on which the action of the Government in *Dorjee Tshering Bhutia and Ors. (supra)*, had been sustained, is missing in the case in hand. The official records do not demonstrate that the State authorities had ever regarded the Rules to be unworkable in absence of a selection board provided by it. This decision as well, does not advance the case of the respondents.

53. The decision of the Apex Court in *Ram Kumar Mann (supra)*, has been pressed into service to emphasis that in order to succeed on the plea of discrimination, an enforceable right in law has to exist. The petitioner having founded his case on the Rules claiming a right to be considered for promotion to the post of Secretary on the basis thereof, the reported decision does not assist the respondents. As it is, it is a recognized fundamental right of an incumbent in service to be considered for promotion in accordance with the relevant service rules governing him.

54. The Official File No. AAP-77/2007 reveals that the contingency for filling up the vacant post of Secretary having arisen, steps were taken to constitute a Selection Board as previously done in absence of any composition thereof by the Rules. The Selection Board constituted as hereunder held its meeting for selection for promotion to the post of Secretary of the Department on 22.6.2007.

1. Shri P.C. Sharma, Chief Secretary, Assam, .. Chairman
2. Shri V.S. Bhaskar, Commissioner and Secretary, Health and F. W., I.T., Sports Y.W. Department .. Member
3. Shri N. Kakati, Secretary, P.H.E. Department .. Member Secretary

55. The minutes of the said meeting reflect that the following officers were considered.

1. Mr. M.C. Boro (respondent No. 4).
2. Mr. Mrinal Ranjan Das (respondent No. 5).
3. Mr. A.C. Bordoloi (petitioner).
4. Mr. M.U. Ahmed.

56. The selection Board as the proceeding disclose scrutinized the A.CR's of the

said officers and also recorded that there is no departmental proceeding pending or contemplated against anyone of them. Noticing that in face of the lone vacancy two names in order of priority are to be recommended, it named the following officers in order of merit.

1. Mr. M.C. Boro (respondent No 4).

2. Mr. Mrinal Ranjan Das (respondent No. 5).

57. The official records though do not contain the ACR's of the said officers it includes a table incorporating their names and particulars as well as the gradings earned by them for the years 2002-06. The recorded inputs to the above effect being of vital relevance, the same are extracted herein below.

Sl.	Name of officer	Date of birth	Date of joining	2002	2003	2004	2005	2006
1	Shr Mohan Ch.	1.6.1957	28.12.1981	Very	Very	Very	Very	Very
2	Shri Mrinal	31.7.1949	4.8.1971	Outsta-	Outsta-	Good	Very	Good
3	Shri Ajoy Ch.	13.1.1957	6.2.1979	Outsta-	Very	Outsta-	Outsta-	Very
4	Shri Mumtaz	29.4.1947	22.9.1972	Very	Very	Outsta-	Outsta-	Very
	Uddin Ahmed			good	good	nding	nding	good

58. A bare perusal of the gradings allotted to the officers under consideration demonstrates that if the same are the index of merit, the petitioner is best amongst them and, therefore, judging by the norm of merit cum seniority, he ought to have been the first recommendee. The Selection Board though having indicated their preference in order of merit as noticed hereinabove, the same stands per se belied by the above recorded statistics. The only inference possible is that the Selection Board had in fact not invoked the criteria of merit cum seniority and instead had judged the officers on the touch stone of seniority as suggested in the note of the Chief Minister of the State. In the teeth of the determination that the principle of seniority with minimum merit as suggested in the note is repugnant to the prescription of merit cum seniority stipulated by the Rules, the selection of respondents 4 and 5 in preference to the petitioner cannot be sustained. The recommendation of these officers by the Selection Board being visibly in infringement of the statutorily prescribed norms for assessing the suitability of the officers for promotion to the post involved, it has to be construed as non est in law.

59. In the above view of the matter, the impugned notification dated 26.6.2007 promoting the respondent No. 4, as the Secretary of the Department, is liable to be interfered with. It is ordered accordingly. The fact that in the meantime the said respondent has been promoted to the post of Commissioner and Secretary of the Department by the notification dated 15.11.2007 is of no consequence. The official respondents would as a corollary of the above declaration re-enact the selection process for promotion to the post of Secretary of the Department strictly in accordance with the Rules. The petition stands allowed. No costs.