
(2008) 09 GAU CK 0094
In the Gauhati High Court

Hemanta Bhattacharjee and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 09-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2010) 5 GLR 428 : (2008) 4 GLT 7

Hon'ble Judges : Amitava Roy, J;Aftab H. Saikia, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amitava Roy, J.—These appeals script a third bout of relentless, obdurate and animated legal tussle for seniority in the Assam Police Service (hereinafter to as the "Service") between two classes of recruits. Their induction had been on the basis of two independent processes claimed to be drawn up under the Assam Police Service Rules, 1966 (hereafter referred to as the "Rules") in the Junior Grade of the service. At this point of time, most of them as is submitted at the Bar, have been promoted to the Senior Grade.

2. The appellants in Writ Appeal No. 448/2004 and 465/2004 assert to be special recruits contemplated u/s 5(1)(c) of the Rules. Leading the challenge in the rival faction is the appellant in Writ Appeal No. 459/2004, a recruit under Rule 5(1)(a) of the Rules. For the sake and convenience, two classes of recruits as above are hereafter referred to as special recruits and direct recruits respectively. The challenge in principal is against the judgment and order dated 12.11.2004 passed in the corresponding writ petitions WP(C) No. 7843/02, WP(C) Nos. 69/2003, 298/2003, 1031/2003 and 4129/ 2003.

3. We have heard Mr. A.K. Bhattacharyya, Senior Advocate assisted by Mr. M. Chanda, Mr. Section Dutta and Mr. BK Singh, Advocates for the appellant in Writ Appeal No. 448/ 2004, Mr. PK Goswami and Mr. N. Dutta, Senior Advocates assisted by Mr. D. Saikia, Advocate for the appellant in Writ Appeal No. 459/2004

and Mr. DK Mishra, Senior Advocate assisted by Mr. I. Choudhury, Advocate for the appellant in Writ Appeal No. 465/2004. Mr. AK Phookan, learned Advocate General, Assam assisted by Mr. BJ Talukdar and Ms B. Goyel, Advocates represented the state authorities. Mr. TC Chutia, learned Standing counsel, Assam Public Service Commission (hereafter referred to as the "Commission") appeared on its behalf.

4. The build up of the facts leading to the lingering Us has its roots in a proposal broached by the Department of Home, Government of Assam in the later part of 1987 suggesting special recruitment to the Junior Grade of the service in face of the delay in the process for direct recruitment through the Assam Public Service Commission though the existing vacancies were urgently required to be filled up in view of the escalating law and order situation, proliferation of extremists, pressing need for detection and deportation of foreigners etc. The proposal though processed from the highest level of the said department, was not acceded to by the Personnel (A) Department on the ground that in the meantime, an advertisement had been issued for filling up the vacancies through combined competitive examination by the Commission. The scope of special recruitment as stated was thereby dismissed. This was on 18.7.1989. The above notwithstanding, the Director General of Police, Assam, by his letter dated 17.8.1991 reiterated the suggestion for special recruitment to 20 posts of Deputy Superintendent of Police in terms of Rule 5(1)(c) of the Rules. Though the highest authorities of the department were conscious of the pendency of the parallel exercise for filling up of 30 posts of Deputy Superintendent of Police initiated by the Commission u/s 5(1)(a) of the Rules, initiatives were taken to launch the venture for the special recruitment. The vacancies proposed to be filled up in this manner were identified to be 20. Eventually, a meeting was held on 25.5.1992 between the authorities of Department of Home, Govt. of Assam and the Chairman of the Commission wherein it was inter alia resolved that the recruitment to 20 posts in the Junior Grade of the service in terms of Rule 5(1) (c) of the Rules be made ingratiation of the provisions of the Assam Public Service Combined Competitive Examination Rules, 1989 (hereafter referred to as the "APSC Rules"). The age limit prescribed for the candidates ranged from 21 years to 45 years. The sources of induction were identified to be serving graduate personnel of Po-lice/PMP/NCC/APRO/Home Guard/ Civil Defence/Excise/Jail/Fire Service. The Personnel (A) Department on this count on 18.7.1992 as a special case agreed to the proposal.

5. Accordingly, on 29.8.1992 the Commission issued an advertisement being No. 12/1992 for 20 posts of APS (Junior Grade) by special recruitment from the aforementioned categories in relaxation of the A.P.S.C. Rules. The conditions of eligibility as well as the extent of reservation were also spelt out therein. In the meantime, however, the commission had notified an advertisement No. 9/1992 issued on 23.6.1992, notifying the date of the preliminary examination of the Combined Competitive Examination, 1992-93 to be held on 30.8.1992 for recruitment amongst others to the Junior Grade of the service in terms of Rule

5(1)(a) of the Rules. Though the advertisement contained the detailed guidelines as to the procedure for submission of the candidature indicating the conditions of eligibility and the syllabi of the examination to be conducted, the number of posts to be filled up in the service was not disclosed. Pursuant to the said advertisement, preliminary and main examination were held and the commission on 26.4.1993 forwarded the results thereof to the government along with the list of the recommended candidates. The government however, inspite of taking that process to its logical end by making appointments from the recommended candidates, pursued with the commission to expedite the exercise initiated by the advertisement dated 29.8.1992 special recruitment and persistently made requests through letters dated 28.5.1993 and 7.6.1993 to that effect. On 14.6.1993 the Commission forwarded the results of the special recruitment.

6. It was thereafter that by notification No. HMA 478/86/Pt-I/17 dated 3.7.1993, 20 posts in the Junior Grade of the service were filled up as special recruitment. The notification, however, mentioned that their inter se seniority would be determined later on. By the subsequent notification No. HMA. 284/93/148 dated 31.8.1994, one Sri Majibur Rahman was also appointed as a special recruit from the same batch. The notification disclosed that this was in compliance of the order dated 15.3.1994 passed by this Court in Civil Rule No. 1851/1993.

7. The appointment of the direct recruits followed by notification No. MHA. 110/93/45 dated 13.8.1993 whereby 27 persons named therein were recruited to the Junior Grade of the service. By notification No. HMA.232/90/ Pt/39 dated 19.9.96, 27 incumbents in the post of Deputy Superintendent of Police including some of both the categories of the aforementioned recruits were confirmed in the Junior Grade of the service with effect from the dates as shown against their names. Not only, the direct recruits enlisted therein were placed below some of the special recruits, their dates of confirmation were also recorded to be later than those of the former.

8. A representation was submitted in April, 1997 by some of the direct recruits before the Director General of Police, Assam ventilating their grievances for the visible loss of their seniority in service, qua, the special recruits and therefore, they sought for the intervention of the said authority for redress. It was inter alia highlighted therein that though the process for the direct recruits had been initiated and completed earlier than that of the special recruits, the latter had been favoured with the appointments prior to the former. They also pointed out that the appointment of special recruits had been in excess of number of posts advertised and that there has been a disparity in the matter of length of training for the two groups, the special recruits being required to undergo the same for a term shorter than the basic minimum prescribed. Another representation in the month of March, 1998 was submitted in the same lines by one direct recruit Bidyut Burgohain before the Commissioner and Secretary, Govt. of Assam, Department of Home.

9. While the above representations were so pending, the Government of Assam

(Home)(A) Department, on 12.3.1999 published the provisional gradation list of the Junior Grade officers of the service as on 31.12.1997. Therein, the special recruits were placed above the direct recruits. A copy of the aforesaid provisional gradation list was forwarded to the Director General of Police, Assam on 1.4.1999 for necessary circulation and elicitation of objections if any, within a period of 30 days thereof. It was mentioned that in absence of any representation or objection, the provisional gradation list would be treated as final.

10. By an official communication No. HMA 410/98/85 of the even date, the Deputy Secretary to the Govt. of Assam, Home (A) Department apprised the Director General of Police with reference to his letter dated 13.5.1998 that in terms of Rule 18(1) of the Rules his proposal for according higher seniority to direct recruit over the special recruits was not entertainable as it was computable on the basis of the dates of appointment in service.

11. The records reveal that an appeal/representation was thereafter submitted on 29.4.1999 by the direct recruits before the Director General of Police, Assam objecting to the placement of the special recruits over them in the provisional gradation list and praying for upgradation of their seniority over them. As their objection lay unattended and the appeal/representation disposed and instead by order dated 21.5.1999, several officers of both the grades were promoted to the senior grade of service in the rank of Additional Superintendent of Police, four direct recruits namely, Sri Parthasarathi Mahanta, Sri Shyamal Prasad Saikia, Devajyoti Mukherjee and Sri Luis Aind preferred an appeal before the Assam Administrative Tribunal, Guwahati (hereafter referred to as "Tribunal") registered as Appeal No. 79 ATA of 1999 contending inter alia that the appointment of the special recruits arrayed as respondent Nos. 6 to 25 having been in violation of the Rules, conferment of higher seniority to them was patently illegal and unjust and prayed for fixation of their seniority over them with all consequential benefits.

12. In the appeal, the state respondents, the Commission and the private respondents (special recruits) duly entered appearance and submitted their counter. The learned Tribunal finally by its judgment and order dated 11.10.2002 while allowing the appeal directed the state respondents to refix the inter se seniority by placing the direct recruits above the special recruits, publish a gradation list to the said effect and also extend all consequential benefits to the direct recruits on or from the date on which the senior most special recruit had availed the same even by creating supernumerary duty posts in the cadre.

13. Being aggrieved by the above verdict, some of the special recruits approached this Court with several writ petitions being WP(C) Nos. 7482/2002, 7843/02, 7564/02, 8081/ 02 and 298/03. While these petitions were pending, Sri Bibekanana Das, a direct recruit who was not a party in the aforementioned appeal before the Tribunal, joined the fray with WP(C) No. 69/03. The learned Single Judge after hearing the parties and on a consideration of the pleadings and the official records, negated the challenge to the determination of the Tribunal. Though the appointments of the special recruits in the contextual facts

were held to be in contravention of the Rules, the same were not annulled. Whereas, the contesting special recruits are aggrieved by the confirmation of the finding of the learned Tribunal, the direct recruit in his appeal insists that the appointment of the special recruits in view of the demonstrable and uncondonable incursion of the Rules ought to be quashed.

14. Mr. Bhattacharjee, leading the arguments for the special recruits has urged that the challenge to the validity of their appointments is barred by the principle of *res judicata*. The direct recruits not having questioned the finding of the learned Tribunal that the appeal by them was not an assailment on the legality of the appointment of the special recruits under the Rules, this issue ought not have been taken note of by the learned Single Judge. The learned Senior counsel to reinforce his arguments traversed the memorandum of appeal before the learned Tribunal and more particularly drew our attention to the prayer made therein. According to Mr. Bhattacharjee, Ground IV of the memorandum of appeal by no means can be construed to be one challenging the appointment of the special recruits to be in violation of the prescriptions of the Rules. In the above backdrop, the learned Single Judge erred in entertaining such a challenge made in W.P(C) No. 69/2003, as the petitioner therein, a direct recruit, was estopped in law from doing so, the grievances of the members of his batch before the Tribunal being in a representative capacity, he urged. He further submitted that in any view of the matter, impugment of the appointment of the special recruits in W.P(C) No. 69/2003, ought not to have been entertained in view of the enormous delay, the petitioner therein, being fully aware from the fact thereof, as well as the institution of the appeal by his direct recruit colleagues. Going by the progression of the events from the point of time of induction of the special recruits in service, it is impossible that the petitioner in W.P(C) No. 69/2003, was unaware of the process leading to their appointments, he urged. The learned Senior counsel, contended that the judgment of the learned Tribunal could not have spawned a cause of action for the aforementioned writ petition to be filed and that therefor, the learned Single Judge erred in law in entertaining the same.

15. Mr. Bhattacharjee, while emphatically contending that the appointments of the special recruits had been in compliance of the Rules pleaded that even if the same had witnessed some departure therefrom, the appellants cannot be penalized, they not in any manner having contributed thereto. The learned Senior counsel, maintained that in absence of any evidence of incurable illegalities in the said process, no interference with their appointment is warranted, either in law or in equity. Mr. Bhattacharjee insisted that not only a presumption of validity of the official acts pertaining to the process of appointment of the special recruits is available, deviation, if any, from the Rules must be construed to be in deemed relaxation of the prescriptions thereof, under Rule 23.

16. Without prejudice to the above, Mr. Bhattacharjee, has implored that the

special recruits having continued in service for over one and half decades and presently promoted to a higher grade, annulment of their appointments at this distant point of time would result in their ouster from service with disastrous consequences. Mr. Bhattacharjee, contended that the seniority list dated 06.12.2004 in purported compliance of the directions contained in the judgment of the learned Tribunal as affirmed by the learned Single Judge, is per se, in violation of Rule 18(6) of the Rules and is thus liable to be adjudged non est in law. In support of his contentions, the learned Senior Counsel has placed reliance on the following decisions:

Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others, , Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat), , The Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another, , Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others, , AIR 1933 183 (Privy Council) Narayana Prabhu Venkateswara Prabhu Vs. Narayana Prabhu Krishna Prabhu (Dead) by L. Rs., , Shiromani Gurdwara Parbandhak Committee Vs. Mahant Harnam Singh C. (Dead), M.N. Singh and Others, , State of U.P. Vs. Nawab Hussain, , State of Punjab Vs. Bua Das Kaushal, , State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, , Ashok Kumar Sharma and Another Vs. Chander Shekher and Another,

17. Carrying the cudgel further, Mr. Mishra, argued that as the learned Tribunal lacked jurisdiction to entertain the appeal before it, the conditions precedent contained in Section 4(2) of the Assam Administrative Tribunal Act, 1977 (hereafter for short referred to as the "Act"), not having been complied with, the judgment rendered by it, is non est in law. Referring to the representations said to have been submitted on behalf of the direct recruits, the learned Senior counsel, maintained that the same by no means were in observance of the prescription of the above statutory provision. The Tribunal being a sub-ordinate Court in the institutional hierarchy, its determination to be valid, its jurisdiction ought to be borne out by the records. He referred to certain excerpts from the Halsbury laws of England to endorse his assertion. Mr. Misra, also underlined the omission on the part of the direct recruits to challenge in specific terms the appointment of the special recruits and pleaded that Ground IV in the memorandum of appeal had been recited only for the collateral purpose of reinforcing their claim of superior seniority. He also endorsed the contention of Mr. Bhattacharjee against entertaining the challenge to the appointment of special recruits in W.P(C) No. 69/2003 to be unduly delayed and thus non est. The learned Senior counsel relied on the decisions of the Apex Court in Roshan Lal and Ors. v. International Airport Authority of India and Ors. (1980) Suppl. SCC 449 , K.A. Abdul Majeed Vs. The State of Kerala and Others, to reinforce his arguments.

18. Mr. Dutta, in refutation of the above, assiduously insisted that the process through which the special recruits had been appointed being afflicted by gross

violations of the Rules, those are dehors the same Slid thus being ab initio void any delay in the challenge thereto, is wholly inconsequential. Contending with reference to the Rules and the advertisement for special recruits that the process undertaken on the basis thereof is vividly illegal, the learned Senior counsel argued that the plea of res judicata cannot be a bar for a Writ Court to entertain a challenge to a public process for appointment in government service on the ground of infraction of statutory rules. Mr. Dutta, urged that the contention of res judicata is, even otherwise not available to the appellants in the face of the Ground IV in the memorandum of appeal before the learned Tribunal. He contended that the decision of this Court in CR No. 1857/1993, Muzibur Rahman, v. State of Assam and Ors. apart from being on a different issue would not efface the illegalities in the process of appointment of the special recruits. Mr. Dutta, referring to the decision of the Apex Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, avowed that the appointments of the special recruits are ineffectual null and void and, therefore, the findings of the learned Single Judge to the above effect, are unassailable in law.

19. The learned Counsel dismissed the challenge to the maintainability of the appeal before the learned Tribunal, as misconceived, the same having been filed within a period of 6 months from the date of the submission of the undisposed representation/appeal dated 29.04.1999 against the impugned gradation list. While pointing out that the petitioner in W.P(C) No. 69/2003, was not a party in the appeal before the learned Tribunal, Mr. Dutta, urged that it was only from the revelations bearing on the illegalities in the process of appointments of the special recruits as recorded in the learned Tribunal that he was acquainted therewith for the first time and, therefore, his challenge by no means can be repudiated as unduly delayed. The following decisions were relied upon: State of U.P. Vs. Rafiquddin and Others, , Secretary, State of Karnataka and Others Vs. Umadevi and Others, , Ananda Ram Borah v. State of Assam and Ors. 2003 (2) GLT 75, Dr. M. Laitphalang and Ors. v. State of Meghalaya and Ors. 2004(1) GLT 308 : 2004 (2) GLR 546 , Mira Roy and Others Vs. State of Tripura and Others, Kushal Sarmah Vs. State of Assam and Others, Chaitanya Kumar and Others Vs. State of Karnataka and Others,

20. Mr. Goswami, while reiterating the challenge to the appointment of the special recruits as violative of the expressed provisions of the Rules, has argued that the orientation of the interse seniority batch wise as made in the gradation list dated 15.03.1999, is impermissible under Rule 18 as well. Pointing out that no decision to make the special recruitment being demonstrable by the records, the same is ineffectual, null and void and thus no interference with the determination to the above effect made by the learned Single Judge is warranted in the facts and circumstances of the case. The learned Senior counsel to buttress his arguments relied on the decisions of the Apex Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, and State of U.P. Vs. Rafiquddin and Others,

21. Mr. Bhattacharjee as well as Mr. Misra, in reply, emphatically urged that the legal principle formulated in *Uma Devi* (supra), is inapplicable to the facts of present case, the special recruits being neither appointees inducted on ad-hoc basis or sans any procedure known in law.

22. The learned Advocate General of Assam, on the basis of the official records submitted that a decision, on principle, had been taken to resort to special recruitment in the exigencies of the situation. He argued that marginal departures from the procedure prescribed by the Rules would not invalidate the process and therefore no interference therewith at this point of time ought to be made, more particularly, in absence of any adverse input against the competence of the special recruits or the quality of the services rendered by them.

23. Mr. Chutia, learned Standing counsel, Assam Public Service Commission, while affirming that the special recruitment process had been conducted on the request made by the State Government, pleaded that in view of the Assam Public Services Combined Competitive Examination Rules, 1989, the infirmities in the said process as highlighted on behalf of the direct recruits, are of no consequence and, therefore, to that effect the determination of the learned Single Judge to the contrary is unsustainable in law.

24. The rival pleadings and the submissions made have received our anxious consideration. The preliminary issues of moment apart from the central question of validity of the appointment of the special recruits bearing on the seniority in service demand scrutiny at the outset. Lack of jurisdiction of the learned Tribunal has been urged understandably to efface its determination forming the subject matter of challenge in the writ petitions by the special recruits. The appellants have maintained that the decision of the learned Tribunal is nonest in law as it was debarred u/s 4 of the Act to entertain the appeal before it, the mandatory prerequisites embodied in Sub-section (2) thereof not having been observed.

25. The Act as its preamble suggests, is an enactment to provide for an alternative forum for the adjudication of disputes in respect of conditions of service of certain classes of Civil servants of the State. The Tribunal constituted u/s 3 thereof has been conferred with the jurisdiction to entertain and dispose of appeals preferred by civil servants against any order passed by a competent authority in respect of any condition of service. Section 4(2) prohibits the exercise of such jurisdiction in respect of any order passed, if the civil servant concerned has not availed of all the remedies obtainable by him under the relevant services rules, executive instructions or order. The proviso thereto, however, permits entertainment of an appeal from such a civil servant, if any appeal, revision petition or representation filed by him under the relevant service rules before the competent authority has not been finally disposed of within a period of six months from the date of filing thereof. Though Section 5 of the Act prescribes 60 days to be the period to file an appeal against an order before the Tribunal, it has been bestowed with a discretion to entertain the appeal even after expiry of the said period on its satisfaction that the civil servant was

prevented by any sufficient cause from doing so in time. Proviso to Section 4(2), therefore, curves out an eventuality when a civil servant's appeal before it can be entertained by the Tribunal though no order by the competent authority has been passed on his appeal, revision petition or representations, on his pica or grievance. An appeal, revision petition or a representation under the relevant services Rules, is however a sine qua non for the invocation of the jurisdiction by the Tribunal to entertain an appeal filed by the civil servant before it in that contingency as well.

26. The memo of appeal before the Tribunal discloses that the same had been filed by four direct recruits. Shri Bibekananda Das, writ petitioner in WP(C) 69/2003, being not a party thereto. The appellants therein claimed to have submitted an appeal in April 1997 before the Director General and Inspector General of Police, Assam, for restoration of their seniority over the special recruits, having noticed that on the confirmation of the direct recruits and the special recruits of the batch concerned, the latter had been accorded seniority over the former. According to the direct recruits they as well as others similarly situated, in March 1998 submitted another appeal to the Commissioner and Secretary to the Government of Assam, Home Department, reiterating their claim of seniority over the special recruits. Their plea was rejected on 1.4.1999 and the provisional gradation list dated 12.3.1999 was circulated on the very same date inviting objections thereto. The special recruits having been awarded higher positions of seniority in the said list, the direct recruits submitted their objections on 29.4.1999 before the Director General and Inspector General of Police for redressed of their grievance in the matter of seniority. According to them, whereas these objections remained pending, on 21.5.1999, thirty officers comprising of all the direct and special recruits of 1993 batch were promoted to the senior scale of the Assam Police Service (Grade II) and in the order to the said effect, the special recruits were placed above the direct recruits. As their objections remained undisposed for nearly six months, they approached the Tribunal with the appeal being under the impression that any further wait would not yield any meaningful result.

27. The progression of events as narrated in the memo of appeal noticed hereinabove, are matters of records. The objections/appeals dated 29.4.1999 annexed to the memo of appeal though unsigned are apparently on individual basis. Whereas the averment by the appellant before the learned Tribunal about lodging of objections by them on 29.4.1999 against the provisional gradation list dated 12.3.1999 has not been responded to by the official respondents, the special recruits also did not categorically deny the same. The appeal was filed before the Tribunal on 14.10.1999 and was entertained by it on 4.10.1999.

28. In the above state of the recorded facts, we are disinclined to proceed on the basis that the appeal by the direct recruits had been filed before the learned Tribunal without lodging their objections before the competent authority against the provisional gradation list dated 12.3.1999. There is no denial, of the fact that

these objections were solicited from the persons aggrieved with the inter se seniority projected by the aforementioned gradation list. It is not disputed either that the objections of the direct recruits had remained undisposed on the date of filing of the appeal by them before the learned Tribunal. The objection dated 29.4.1999 inter alia refers to departures from the stipulations contained in the advertisement meant for special recruits, disparity between the two batches in the matter of training and denial of due seniority to the direct recruits. In the backdrop of the chronology of the facts leading to the filing of the appeal before the learned Tribunal we are of the opinion that the objection dated 29.4.1999 can permissibly be construed to be a representation against a decision of the competent authority for the non-disposal whereof within a period of six months therefrom, they invoked the jurisdiction of the learned Tribunal for amelioration of their distress. Having regard to the dates of the objections/representation and the filing of the appeal, in our estimate the plea of non-compliance of Section 4(2) of the Act is unsustainable. The learned Tribunal had the jurisdiction to entertain the appeal and, therefore, its decision is not liable to be denounced as nonest on this count.

29. The assertion based on *res judicata* next needs attention. The avowal presupposes absence of challenge to the appointment of special recruits as violative of the Rules. The direct recruits on the above foundational facts had asserted in the appeal before the Tribunal that though their selection process was otherwise complete, the State respondents without any cogent reason delayed their appointment on one hand and resorted to enthusiastic measures to expedite the ongoing pursuit for induction of the special recruits. Not only, eventually, the special recruits were provided with appointments on 03.07.1993, ahead of the direct recruits on 13.08.1993, one Sri Muzibur Rahman, a special recruit was, thereafter, appointed on 31.08.1994. The direct recruits averred that they being aggrieved by the denial of seniority in service as revealed by the order of their confirmation, submitted a representation on 01.04.1997 before the Director General of Police and Inspector General of Police, Assam. Finding no response thereto, they submitted another appeal/representation before the Commissioner & Secretary, Government of Assam, Home Department in March, 1998. Though, the Director General, Assam by his letter dated 13.05.1998 recommended in their favour for higher seniority over the special recruits, the Commissioner & Secretary, government of Assam, Home Department by his official communication dated 01.04.1999 declined to accede thereto and on the same date, the provisional gradational list dated 12.03.1999 was circulated. Their objection/representation on 29.04.1999 before the Director General and Inspector General of Police, Assam, against the provisional gradation list remained unresponded. In the meantime, by notification dated 21.05.1999 several Officers of both the groups were promoted to the Senior Scale of APS (Grade-II). In view of the indifferent and predetermined approach of the official respondents, vis-a-vis their representation(s) against the provisional gradation list, the appeal before the Tribunal was lodged. The direct recruits in the

memorandum of appeal while asserting unfairness and unequal treatment in permitting the special recruits to score a march over them in the matter of appointment and seniority in service, questioned the validity of their (special recruits) appointments to be in violation of the Rules, in ground IV in the following terms:

IV) For that the selection of the candidates through Special Recruitment drive was not in strict compliance of the provisions contained in the Prescribed Rules and as such the seniority given to them above the appellants deserves to be set aside as not sustainable in law.

The prayer made in the appeal is also extracted herein below for ready reference:

It is, therefore, prayed that this Hon''ble Tribunal would be pleased to admit this appeal, call for the entire records of the case, ask the respondents to show cause as to why the appellants'' seniority should not be fixed over the private respondents in terms of the Provisional Gradation List dated 12/ 3/1999 (Annexure-XI) after duly disposing of the appeal/objections dated 29/4/1999

(Annexure-XII) and after perusing the causes shown, if any, and hearing the Parties, direct that the final gradation list be published and circulated refixing the seniority of the appellants over the Private respondents in the rank as A.P.S. (Jr. Grade) after proper consideration of the objections/appeals filed by the appellants with all consequential benefits and/or pass any other order/orders as Your Honour would deem fit and proper so as to grant proper relief to the appellants.

30. All the special recruits involved and impleaded as respondents filed their counter. So did the official respondents as well as the Commission. The special recruits, however, did not contend in specific terms that no revision/appeal had been filed by the appellants/ direct recruits before the competent authority as contemplated under the service rules, executive instructions or guidelines seeking departmental remedies to their grievances.

31. The State respondents, in their affidavit before the Tribunal disclosed that the Government at the relevant time had decided to fill up 30 vacancies by direct recruitment out of the available SO in the APS Junior Grade. However, due to administrative exigency, it also proposed to fill up the remaining 20 posts on emergent basis through a competitive examination on 17.12.1991 and consequently in terms thereof a decision was taken in a meeting held on 25.05.1992, that these vacancies be filled up through the Commission as a special case. The respondents averred that the Home Department received the select list of special recruits from the Commission on 14.06.1993, and that for the direct recruits on 11.08.1993 from the Personnel Department, and accordingly, the appointments were made. The respondents asserted that the inter se seniority had been fixed based on the dates of the appointments of the recruits in terms of Rule 18(1) of the Rules.

32. The special recruits, in their counter, in the appeal, dismissed the challenge as utterly untenable, contending that mere inclusion of the names of the direct recruits in the select list did not vest them with any indefeasible right of prior appointment. They endorsed the appointment of Md. Muzibur Rahman to be valid being in compliance of the order dated 15.03.1994 passed by this Court in CR No. 1851/1993. They also maintained that the fixation of inter se seniority having been made in terms of the rules, the same was valid.

33. The Commission, in its affidavit, affirmed to have conducted the APS (Special Recruitment Examination), 1992 on 22.11.1992 and interviews on several dates thereafter and on 14.06.1993 recommended 20 names for appointment as special recruits. It, however, confirmed to have declared the result of the direct recruits on 26.04.1993.

34. The learned Tribunal did not construe the appeal to be a challenge by the direct recruits to the validity or propriety of the appointments of the special recruits but viewed it to be one directed against the wrong fixation of interse seniority between the two batches. The learned Tribunal also negated the plea of the bar of limitation recording that the appeal had been filed as permissible u/s 4(2) of the Assam Administrative Tribunal Act, 1997 as the appeal/representation of the appellants against the provisional gradation list had remained undisposed for nearly 6 months. The learned Tribunal also observed that there was no administrative decision of the Government at the appropriate level for making appointments to the service by resorting to the process of special recruitment in preference to general recruitment and concluded that the direct recruits ought to have been appointed earlier than the special recruits, the Commission having forwarded its recommendation for the former. The learned Tribunal returned a finding that the process of selection of the special batch was not in conformity with the Rules and, therefore, they could not be treated as regular recruits thereunder. The Tribunal, therefore, held that the direct recruits were entitled to higher seniority in service, but on a consideration of the factors recorded in its judgment refrained from interfering with the appointments of the special recruits. The following operative directions were issued:

In consideration of the entirety of the facts on record and arguments advanced from both sides, we hold that the appellants are entitled to get their seniority over and above the respondents No. 6 to 25 by virtue of the earlier advertisement, written test, selection and recommendation of the APSC. Thus the appeal is hereby allowed and the official respondents are directed to re-fix inter-se-seniority of the appellants and other recruits belonging to the Regular Batch over and the official respondents are directed to re-fix inter-se-seniority of the appellants and other recruits belonging to the Regular Batch over and above the candidates belonging to the Special Batch (i.e. respondents No. 6 to 25). The official respondents are further directed to finalize the provisional gradation list showing inter-se-seniority position on consistent with this order. We further direct, in compliance with the above order, that the members of the Regular

Batch shall be allowed consequential benefits with effect from the date on which the senior most member of the Special Batch availed any benefit even creating supernumerary duty post in the cadre.

35. The learned Tribunal thus rejected the prayer for annulment of appointments of the special recruits even if inferred to have been made.

36. Ground IV incorporated in the memo of appeal though on a close reading demonstrates an explicit assailment of the selection of the special recruits to be in non-compliance of the Rules, no relief for terminating their appointments had been sought for as a consequence thereof. The appellant direct recruits before the learned Tribunal chose to remain contended with the relief of re-fixation of their seniority above the special recruits respondents in the Junior Grade of the service. In their counter, the special recruits respondents however perceived a challenge to their appointments and sought to dismiss the same on the ground of unexplained delay. According to them, the special recruitment having been conducted in the year 1993, appeal against the same was not maintainable and that the claim of the direct recruits for seniority over them was untenable, the claim having been once rejected on 1.4.1999 by the Government. The learned Tribunal's disinclination to cancel the appointment of the special recruits, though being satisfied on merits that the same had been in transgression of the Rules, because of absence of any specific prayer to the said effect therefore could not have posed a bar to challenge or re-agitate the issue relating thereto before this Court. Having regard to the frame and text of Ground IV alluded hereinabove, the plea of absence

of challenge to the appointments of the special recruits cannot be sustained. On a scrutiny of the memo of appeal, we are, therefore, of the opinion that the learned Single Judge had rightly proceeded on the basis that the direct recruits in their appeal before the learned Tribunal in terms of Ground IV of the memo of appeal had impeached the appointments of the special recruit to be repugnant to the Rules. The effect of the omission of the direct recruits appellants in seeking annulment of the appointments of the special recruits however is an aspect to be analyzed on its own merit.

37. Their Lordships of the Privy Council in AIR 1933 183 (Privy Council) with reference to Explanation VI to Section 11 of the CPC (hereafter referred to as the Code) and Order I Rule 8 thereof ruled that the Explanation is not confined to cases covered by the said Rule but extends to include any litigation in which parties are entitled to represent interested persons other than themselves.

38. The decision in *Devilal Modi*, supra, has been offered to underline that the doctrine of *res judicata* is applicable in writ proceeding as well.

39. The decision in *State of Punjab v. Bua Das Kaushal* (supra); was pressed into service to emphasise that a plea based on *res judicata* can be raised though the same had not been taken up in specific terms in the written statement when necessary facts are otherwise available on record.

40. The Apex Court in *Narayana Prabhu Venkateswara Prabhu v. Narayana Prabhu Krishna Prabhu* (supra), reiterated on principle the dictum of the Privy Council in *Kumaravelu Chettiar*, supra. Their Lordships of the Apex Court in *State of U.P. v. Nawab Hussain* (supra), while re-enunciating the theory formulating the doctrine of *res judicata* quoted with approval the observation of Somervell, L.J., in *Greenhalgh v. Mallard* (1947) ALLER 255 has hereunder.

I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

41. Thereby their Lordships underlined that the doctrine is not confined to the issues which the Court is actually asked to decide but extend to issues or facts which are so integral to the subject matter of the litigation that the same could have been agitated and that it would amount to an abuse of the process of the Court to permit a fresh proceeding to be initiated in respect thereof. Their Lordships recognized this Rule to be one of constructive *res judicata* as an amplification of the basal principle. The extension of this doctrine with its judicially recognized expanse to writ proceedings was also reiterated.

42. In *Workmen of Cochin Port Trust versus Board of Trustees of the Cochin Port Trust and Another*, supra, while elucidating the rule of constructive *res judicata* as engrafted in Explanation IV to Section 11 of the Code, their Lordships of the Apex Court held that the said principle is applicable when by the judgment and order of a Court, a decision of a particular issue is implicit in it. It was held that when any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided. This view found reiteration in *Forward Construction Co. and others versus Prabhat Mandal (Regd.)*(supra).

43. The decision in *Shiromani Gurdwara Parbandhak Committee v. Mahant Hamam Singh C. (Dead), M.N. Singh and Ors.* (supra), though deals with Explanation VI to Section 11 of the Code, it is with reference to a suit u/s 92 thereof for protection of public rights in public trust and charities which by its nature is representative in character.

44. While we respectfully subscribe to the judicially evolved principles on the doctrine of *res judicata* in all its manifestations noticed hereinabove, the same in the facts and circumstances of the case are of no assistance to the appellants before us to repulse the assailment of the validity of their appointments. The memo of appeal of the direct recruits before the learned Tribunal having carried a graphic challenge thereto, absence of any prayer for cancellation of the

appointments of the special recruits per se in our view would not debar them from pursuing the same in this Court in a related proceeding. The plea founded on res judicata, therefore, fails.

45. The challenge to the appointment of special recruits as independently projected by Shri Bibekananda Das, a direct recruit in WP(C) 69/2003 is sought to be repudiated on the ground of delay and laches. The assailment is also sought to be denounced as misconceived, as a judgment of a Court, according to the appellants, cannot generate a cause of action. It is sought to be contended that as the aforementioned direct recruits expectedly was abreast of all relevant facts from the very beginning, unexplained delay is fatal and, therefore, the impeachment made by him ought not to have been entertained.

46. Admittedly Shri Bibekananda Das was not a party in the appeal before the learned Tribunal. As determined hereinabove, impugment of the appointments of the special recruits had been taken to the learned Tribunal by his other direct recruit colleagues. This insistent contention of delay is founded on the premise of absence of such prayer before the learned Tribunal, which in the noted factual background is unsound. The appeal by the four appellant direct recruits before the learned Tribunal having questioned the validity of the appointment of the special recruits, the assertions in WP(C) 69/2003 do not forge any additional dimension in this regard. The prayer for quashing the appointments, however, would have to be tested independent of the above. The argument advanced on behalf of the special recruits that the appeal before the learned Tribunal had been in a representative capacity on behalf of the direct recruits though made in the context of the plea of res judicata also offsets, the objection of delay vis-a-vis Shri Bibekananda Das. The above aside, the contentious issue relatable to a public process leading to appointments in State service being one of considerable moment, we feel inclined to examine the same on merits.

47. The hub of the debate bearing on the validity of the appointment of the special recruits next deserves attention. The criteria regulating the recruitment and the conditions of service of persons in the Assam Police Service are admittedly governed by the Rules. A member of the service after the commencement of the Rules is a person recruited in terms thereof. The entry grade is the Junior Grade as is contemplated in Rule 4, which delineates the cadre of the service. The next higher grade is the senior grade. Whereas the post of the Deputy Superintendent of Police is included in the Junior Grade that of the Additional Superintendent of Police is lodged in the Senior Grade. Rule 5 provides the methods of recruitment to service. There are three modes namely (1) by competitive examination to be conducted by the Commission as is envisaged by Rule 5(1)(a), (2) by promotion of the confirmed Inspector of Police as envisaged by Rule 5(1)(b) and by (3) selection in special cases as sanctioned by Rule 5(1)(c).

48. The selection under Rule 5(1)(c) has to be from amongst persons other than Inspector of Police serving in connection with the affairs of the Government

having qualifications and experience eminently suitable for service in the Police Department in the rank of Deputy Superintendent of Police. The proviso to Rule 5(1) requires that 50% of the total number of posts in the cadre would be filled up by recruitment under Clause (1)(a) and (c) and the remaining 50% by promotion as contemplated in Clause (b). The proviso imposes a ceiling of 5% of the total number of posts in the cadre on the recruitment under Clause 5(1)(c) so much so that the induction in the said manner does not exceed one in any particular year. Rule 5 clarifies that the recruitment to the service would be to the Junior Grade of the cadre.

49. The procedure of recruitment by competitive examination is enumerated in Rule 6 and is essentially to be conducted by the Commission. Rule 7 provides for composition of a selection committee. The procedure to be followed is also detailed in the said provision. The conditions of eligibility for recruitment under Rule 5(1)(c) is outlined in Rule 8. For ready reference, the same is extracted hereinbelow.

Rule 8. ...Recruitment by selection: (1) The Governor may from time to time, for the purpose of recruitment to the service under Clause (c) of Sub-rule (1) of Rule 5, call upon the recommending authorities to submit recommendation in respect of persons who,

(a) are of the outstanding merit and ability;

(b) have to their credit not less than 2 years of experience in duties comparable in status and responsibility to that of the Deputy Superintendent of Police or 8 years of experience in duties comparable in status and responsibility to that of Inspectors of Police;

(c) possess the academic qualification prescribed under Rule 10;

(d) are not above the age of 35 years on the 1st day of the year in which the recommendations are called for, and

(e) are otherwise eligible, in the opinion of the recommending authorities to be appointed to service.

(2) On receipt of the recommendations, the Governor shall refer then and also simultaneously send the character rolls/testimonials of character and service records/other relevant records of the persons recommended to the committee which will, after examination of the records forwarded to it and interviewing, such of the persons recommended as it considers necessary, draw up a list of persons in order of preference who are considered suitable for appointment to the service. The procedure detailed in Sub-rules (4) to (7) of Rule 7, shall mutatis mutandis be followed in regard to the list of persons prepared under this sub-rule.

(3) For every recruitment a separate list shall be drawn up and the list once approved by the Commission shall lapse immediately on the year's quota of

posts for persons under Clause (c) of Sub-rule (1) of Rule 5 having been filled up from the list.

50. As would be evident from hereinabove a requisition by the Governor from the recommending authorities in respect of persons who satisfy the norms listed in Clauses (a) to (e) is the inaugural step to initiate the process of special recruitment contemplated by the Rules. On the receipt of the recommendations as sought for, the Governor would forward the same along with the character rolls/ testimonials of character and service record/ other relevant records of the recommendees to the committee which would on an examination of the records interview such persons as considered necessary and prepare a list of persons in order of preference who are assessed to be suitable for appointment to the service. Thereafter the procedure laid down in Sub-rule (4) to (7) of Rule 7 for recruitment by promotion has to be undertaken.

51. Rule 2(b) defines "Recommending Authority" to mean the Head of the Department under whose administrative control a person is serving for the time being and the Inspector General of Police for the purposes of Rule 5(1)(c)(ii). Sub-rule (4) of Rule 7 deals with the segment of the process pertaining to recruitment by promotion under Rule 5(1)(b) from the stage at which the committee prepares a list of candidates in order of preference. The said list is thereafter forwarded to the Governor who in turn transmits the same to the Commission together with the character rolls and other papers. The Commission is then required to consider the list prepared by the Committee together with the documents received as well as other records, if sought for by it and approve the list unless it considers otherwise. The list finally approved by the Commission would then be forwarded to the Governor along with the documents and records. In terms of Rule 14, appointments to the service under Rule 5(1)(c) would be made in the order in which the names of the candidates appear in the list approved by the Commission. The seniority of a member of the service has to be determined as per Rule 18 on the basis of his date of appointment to the service. In the matter of computation of seniority of a person recruited under Rule 5(1)(c), the Governor may in consideration of his previous service and/or experience, fix a deemed date of appointment after taking into consideration half the period of continuous service in completed years subject to a maximum of four years rendered in previous service. Rule 18(1) stipulates that inter se seniority of persons recruited on the same date in Rule 5(1)(a), (b) and 5(2) would be in the following order.

- (i) Persons recruited under Rule 5(2).
- (ii) Persons recruited under Rule (1)(b).
- (iii) Persons recruited under Rule 5(1)(a).

52. This provision further enjoins that the inter se seniority position of the persons appointed under any of the three clauses of Rule 5(1) shall be in the order in which their names appear in the list from which the appointment is

made. Inter se seniority of persons promoted to the Senior Grade of the service as Rule 18(6) mandates shall be in the order in which their names appear in the list from which the promotion is made. Under Rule 19, a confirmed member of the service in the Junior Grade of the cadre shall be eligible for promotion to the Senior Grade, if he is serving in the feeder grade for a period of 8 years and further if the Governor is satisfied about his ability, integrity and character. The promotions are to be effected from a list of suitable members of the service as prepared from time to time and reviewed as and when necessary by the selection board composition whereof is provided by the Rules. The Governor of the State is, by Rule 23, empowered to dispense with or relax the requirement of any provision of the Rules, which he is satisfied would cause undue hardship in any particular case determining the extent and the conditions subject to which the same is accordable.

53. The scheme of the Rules, therefore, manifestly comprehend a mode of recruitment different from one through competitive examination to be conducted by the Commission and by promotion of the in service confirmed Inspectors of Police. Rule 5(1)(c) envisages a selection in special cases from amongst the limited categories of persons referred to therein. The number of vacancies to be filled up by that procedure has also been restricted. Rule 8 is unequivocal on the conditions of eligibility, commencement of the process contemplated and the culmination thereof. An assessment of eligibility by the Recommending Authority of the person is a sine qua non for consideration of his candidature to be recruited by this singular process. The candidate, as per the mandate of Rule 8 has to be of outstanding merit and ability, possessing the academic qualification as prescribed by Rule 10 should not be above 35 years of age on the first day of the year in which the recommendations are called for and should have not less than two years of experience in duties comparable in status and responsibility to that of the Deputy Superintendent of Police or 8 years of experience in duties comparable in status and responsibility to that of Inspector of Police.

54. Following an exhaustive consideration of the provisions of the Rules and the materials available on record the learned Single Judge held that the appointments of the special recruits to be in contravention of the Rules. It was, amongst others, held that the fact that three members of the special recruits had failed to qualify in the process initiated for the direct recruits belied the test of outstanding merit and ability-an essential prerequisite for special recruitment under the Rules. The learned Single Judge, however, accepted the Ground IV in the memorandum of appeal before the learned Tribunal to be a challenge by the direct recruits to the validity of the appointment of the special recruits and noticing that there had been no approval to the Cabinet memorandum proposing the special recruitment, held the view that the action of the State Government in prioritizing the appointments of the special recruits over that of the direct recruits, was wanting in bonafide. In coming to the above conclusion, the learned Single Judge observed that neither any decision to relax the prescriptions of the Rules, had been taken under Rule 23 nor it was permissible for the participating

authorities in the meeting dated 25.05.1992 to effect the same. It was held that in any case Rule 23 could not be applied to leave the other provisions of the Rules totally denuded of their efficacy. The learned Single Judge entertained the assailment of the appointments of the special recruits as violative of the Rules, rejecting the objection to the tenability thereof on the ground of delay. The findings of the learned Tribunal were up-held observing that as the appointments of the special recruits were illegal, they were not entitled to the benefit of Rule 18 of the Rules for the purpose of computation of their seniority.

55. The impugned judgment discloses that in course of the debate before the learned Single Judge, it was sought to be urged that the process for the special recruits had been undertaken pursuant to a Cabinet decision in terms of the Assam Rule of Executive Business, 1968. Reliance was placed on a Cabinet Memorandum circulated under Rule 17 of the said Rules for recruitment of 20 Officers in the rank of Deputy Superintendent of Police to meet the immediate requirement of the Department for the reasons recorded therein. It having transpired that the said Cabinet Memorandum had not been formally adopted by the government, eventually, no further reliance thereon, was made by the special recruits or the official respondents.

56. The State respondents in their affidavits in the present appeal WA 448/2004, have reiterated their assertions as made before the learned Tribunal. They have contended that in the year 1992, the Assam Police being faced with the crisis of non-availability of young officers, had to resort to direct recruitments in the rank of APS Junior Grade of the service. For this, in addition to the process initiated for direct recruits to various posts including that of the Deputy Superintendent of Police for the Home Department through competitive examination initiated by the Commission on 20.06.1992, it was also decided to fill up 20 posts in the cadre of APS Junior Grade as Deputy Superintendent of Police by special recruitment under Rule 5 of the Rules. The Commission having been requested in this regard, an advertisement was issued on 29.8.1992 and on the conclusion of the process, it recommended 20 candidates, whereafter, they were appointed as special recruits on 03.07.1993. Similarly 28 candidates were appointed on 13.08.1993 in the regular batch from the list of candidates recommended by the Commission on the conclusion of the process initiated on 23.06.1992. The respondents reaffirmed that the interse seniority of these two batches of Officers as on 31.12.1997, was reckoned on the basis of Rule 18(1) of the Rules i.e. from the dates of appointment and the provisional gradational list was published on 12.03.1999. They averred that in terms of the judgment and order dated 19.11.2004 of the learned Single Judge, the seniority of the Officers has been re-fixed as contained in the notification No. HMA.154/2002/Pt-I/176, dated 06.12.2004.

57. Elaborating the above stands, the State respondent in their affidavit filed on 08.06.2007, stated that in view of the prevailing exigencies, namely, creation of new districts and sub-divisions, rising complexity in the law and order situation

out of frequent frictions between the various communities, increase in extremists activities and dearth of young officers in service with required leadership qualities, a proposal was mooted to recruit persons under Rule 5(1)(c) of the Rules. The respondents pleaded that though the said proposal was placed before the Cabinet vide a draft memorandum for obtaining the approval for recruitment of 20 such Officers by a Special Selection Board, pending regularisation by the Commission in due course it did not crystallize into a Cabinet decision. While affirming that a parallel process had been earlier commenced by the Commission for direct recruitment to the posts amongst others of that of the Deputy Superintendent of Police in the Home Department, the Government decided to pursue the special recruitment process, as the ongoing exercise was likely to take some time. The answering respondents stated that the approval of the Personnel (A) for the special recruit examination for filling up the aforementioned posts from amongst the personnel of Police/Paramilitary Forces/NCC/Ex-Army/Home Guards/Civil Defence/Excise/Jail/Fire Service was obtained on 18.07.1992. The Personnel (A) Department also relaxed the applicability of A.P.S.C. Rules and approved a modified age range of 21-45 years for the purpose. The respondents have disclosed that the Commission, thereafter, submitted a list of 29 candidates for direct recruitment on 24.04.1993 to Personnel (A) Department, which was received back by the Home Department on 11.08.1993, whereafter appointment of 28 direct recruits were made on 13.08.1993. However, prior thereto, the list forwarded by the Commission for the Special Recruits was received by the Home Department on 14.06.1993. The respondents admitted that in the meantime, the Officers of both the batches have been promoted to the next higher rank of APS Senior Grade-II, as Additional Superintendent of Police etc.

58. In their additional affidavit, filed on 17.07.2007, the State respondents, in essence, have endeavoured to explain the steps taken to locate all relevant records for production before this Court. According to them, the correspondence sheets of File No. HMA.478/86 bearing Serial No. 1 to 156, are not available and could not be traced out inspite of best efforts. They have referred to HMA.478/86/PM, HMA.478/98 and HMA. 110/93, which have been produced. They have confirmed that no other file or record is traceable. The affidavit discloses that the records pertaining to the office of the DGP, Assam have been assured by the concerned authorities to be produced before this Court. To complete the pleadings, it has to be mentioned that the appellants have, before this forum, impugned the re-fixation of inter se seniority in the promotional posts in terms of the judgment and order, impugned.

59. The official record bearing No. HMA 478/86 reveals that the proposal for a special recruitment to the service along with the ongoing process for induction under Rule 5(1)(a) was broached in the last part of the year 1987 by the Home Department of the State on administrative exigency. Initially the Personnel (A) Department was not favourably inclined in view of the process initiated by the Commission for direct recruitment under Rule 5(1)(a) of the Rules. Finally a meeting was held on 25.5.1992 attended by the Chairman and Secretary of the

Commission, Director General of Police, Secretary and Joint Secretary to the Government of Assam, Home Department, in which it was resolved, having regard to the urgency expressed on behalf of the Government, highlighting the prevailing disturbed situation in the State, that a special recruitment drive be made. The meeting was of the view that in face of the urgency, the usual procedure prescribed by the Assam Public Services Combined Competitive Examination Rules, 1989 should be dispensed with. The minutes of the meeting reveals that it was conscious of the fact that the recruitment as proposed is as comprehended in Rule 5(1)(c) of the Rules. A proposal for filling up 20 vacancies in the entry grade of the service was thus resolved to be forwarded to the Personnel Department for ruling up the same in relaxation of the A.P.S.C. Rules. The Personnel (A) Department on 18.7.1992 concurred on the said proposal. The age limit of the candidates was prescribed to be 21 to 45 years. As observed hereinabove, though a Cabinet memorandum was prepared prior thereto broaching the same proposal there was no occasion to adopt the same and that admittedly there was no Cabinet decision countenancing the same.

60. A draft advertisement was accordingly forwarded by the Home Department to the Commission for the purpose of the special recruitment, which in addition to prescribing the academic qualification and other conditions of eligibility mentioned the age limit of the intending applicants to be between 21 to 45 years. The advertisement in the above terms was eventually published on 26/8/1992 specifically discloses that the recruitment would be in relaxation of the A.P.S.C. Rules. It would thus be apparent from the sequence of facts leading to the publication of the advertisement as above that no decision either had been taken for relaxation of the requirement of Rule 8 of the Rules in conducting the special recruitment comprehended under Rule 5(1)(c). Though the file No. E-8/92-93 of the Commission discloses that the applications of the aspiring candidates were forwarded to it by the various Heads of Department, no recommendation as such with regard to their eligibility is available. The Commission thereafter conducted a written competitive examination on 22.11.1992 and after subjecting the successful candidates to the physical/medical test and interview recommended a list of 20 persons in order of merit for appointment. Eventually by the notification dated 3.7.1993, 20 selectees were appointed. In doing so, it so happened that one Shri Mazibur Rahman whose name appeared at SI. No. 7 of the recommended candidates was omitted. He, therefore, approached this Court with C.R. 1851/93. It was alleged that in his place one Shri Nityananda Goswami whose name did not figure in the said list had been appointed. The State respondents omitted to controvert the averments made in the writ petition and this Court by order dated 15.3.1994 allowed the same with a direction to appoint the petitioner and fix his seniority accordingly. The appeal filed by the State being WA 347/94 was also rejected on 5.8.1994. The plea taken on behalf of the State appellants that the respondent Mazibur Rahman did not at the relevant time, fulfill the eligibility criteria was negated. The issue adjudicated upon in the proceedings initiated by Shri Mazibur Rahman,

therefore, apparently has no conclusive bearing on the question of validity or otherwise of the appointment of the special recruits alleged to be in contravention of the Rules.

61. The process undertaken by the State respondents for the special recruitment as above, therefore, marks an evident departure from the prescriptions of Rule 5(1)(c) and 8 of the Rules on more than one count. Rule 8 envisages a recommendation of the Recommending Authority as defined in Rule 2(h) recording the eligibility of the candidates concerned. It does not contemplate assessment of comparative suitability by the Commission, a role attributed to the Committee constituted under Rule 7. The age limit has been fixed to be 35 years on the first day of the year in which the recommendations are called for. No advertisement by the Commission is conceived of by Rule 8. No explanation is forthcoming as to why and how 20 candidates were earmarked to be recruited under Rule 5(1)(c) in face of the ceiling prescribed by the said provision of the Rules. No decision to relax the provisions of the Rules as such is discernible, the only authority empowered to do so being the Governor of the State. Even the minutes of the meeting held on 25.5.1992, which set the stage for the special recruitment, did not resolve for whatever worth to relax the otherwise obligatory enjoinders of the Rules pertaining to the process to be pursued.

62. On the other hand relaxation of the A.R.S.C. Rules connotes the necessity of compliance of the provisions of the Assam Police Service Rules, 1966. In terms of Rule 3 of the 1989 Rules, the Commission has the unqualified authority to hold combined competitive examination every year for selection of candidates for recruitment to services as enumerated in Schedule II, which includes Assam Police Service (Junior Grade). Rule 4 provides that the corresponding Rules in the respective Service Rules relating to the services and posts mentioned in the said schedule to the extent of inconsistency with the Assam Public Service Combined Competitive Rules, 1989 would stand repealed. The power to remove defects or to amend any provision in the said Rules or to interpret any provision thereof is conferred only on the Governor.

63. Shri Bibekananda Das, petitioner in WP(C) 69/2003 has also brought on record, the names and service designation of 10 special recruits who did not have the necessary experience prescribed by Rule 8(1)(b) to be eligible to be considered for appointment u/s 5(1)(c). The pleadings of the State respondents are silent in this regard.

64. On a cumulative reading of the two Rules and having regard to the revelations from the records, it is explicit that the special recruitment process conducted by the respondents through which the special recruits had been inducted in service was in departure from the mandatory provisions of the Rules. The presumption of validity of official acts thus stands rebutted in view of the overwhelming materials on record in the instant case. Rule 5 in unambiguous terms comprehend a situation where recruitment to the services as a special cases is permissible. Not only the said statutory provision identifies the

categories of persons from which the selection is to be made, it provides a ceiling on the extent of appointments as well. The norms of eligibility enumerated in Rule 8 are clear and unequivocal so much so that the exigency of urgent recruitment does not admit of supercession of the prescriptions contained therein. As it is, the conditions of recruitment are not relaxable unless provided for expressly in the Rules ordaining the principles relating thereto. The Rules in the case in hand do not proclaim any such relaxation which even otherwise is not inferable as observed herein-above. No decision to relax the essentialities of Rule 5(1)(c) or 8 is decipherable from the records. We, therefore, are of the unhesitant opinion that the induction of the special recruits has not been in full compliance of Rule 5(1)(c) and 8 of the Rules.

65. The Apex Court in *S.K. Ghosh and Another Vs. Union of India (UOI) and Others*, (supra), was seized with a situation where the petitioners therein, had been promoted to the grade of Directors of Postal Services by selection and not in terms of the seniority in the feeder post. Their seniority in the promotional post was, accordingly, fixed on the basis of their promotion. The relevant Rules prescribed that the promotion as above, has to be by selection and not in accordance with seniority in the feeder post. Their seniority was sought to be altered in the promotional post on the ground that it was wrongly determined in the feeder post. The Apex Court in the above factual backdrop, noticing the mandate of the Rules and the procedure followed for promotion, held that as the same was on the basis of merit to be taken into account after due selection and not on seniority in the feeder post, their seniority determined as a result of the selection, could not be made dependent on their seniority in the feeder post. It was held that even if in the attending circumstances, there was any justification for revising their seniority in the feeder post, the same could not in any way affect their seniority in the promotional post. It was ruled that the seniority in the post of Director of Postal Services was not dependent on the inter se seniority in the feeder post and any alteration in seniority in the feeder post could not form the basis for revising the seniority in the promotional post.

66. The appellant in *K.A. Abdul Majeed* (supra), having fulfilled the qualifications specified in the advertisement issued by the Greater Cochin Development Authority for the post of Lower Division Typist, was appointed following a test and on the completion of his period of probation in the said post, was promoted to that of Upper Division Typist. In the provisional list he was placed above the contesting respondent. The appellant's seniority was sought to be depressed by the Authority on the ground that his initial appointment was irregular. The Apex Court noticing that the appellant was possessed of all qualifications referred to in the advertisement and had been appointed on selection and that he had completed successfully his period of probation, subsequent where to he had been promoted to the next higher post ruled that the question of validity of his initial appointment after a long lapse of time ought not to be reopened. It was observed that having regard to the process whereby, the appellant was appointed, he could not be said to have been inducted through the back door.

67. In *Ashok Kumar Sharma and Anr. (supra)*, in terms of the advertisement issued by the State of Jammu and Kashmir for appointment to the post of Junior Engineer (Civil), the academic qualification prescribed was BE (Civil) and only those, who fulfilled the prescribed qualifications, were to be called for the interview. The appellants though, at the relevant time had appeared in the BE (Civil) Examination, their results had not been declared. They, however, also applied for the posts. Their results were declared on 21.08.1982 and the interview commenced from 24.08.1982. The appellants were allowed to participate therein and thereafter, were declared selected. It transpired that the decision to invite them for the interview was based on Rule 37 of the Public Service Commission Business Rules, according to which, the Commission could entertain applications of the candidates, who were awaiting their results in the qualifying examinations. The private respondents, who were placed lower in merit compared to the appellants, challenge their selection contending that they (appellants), in terms of the advertisement ought not to have been called for the interview, they being ineligible till the closing date for submission of the applications.

68. The challenge was negated by a Single Judge of the Jammu & Kashmir High Court, but was sustained by the Division Bench, inferring mala fide on the part of the appointing authority. The Apex Court while noticing the absence of mala fide from the materials available, observed that the appellants on the dates of the interview, were admittedly qualified and that though Rule 37 applied only to the Public Service Commission candidates, the decision to adopt the principle contained therein, being in greater public interest, and harness best talents available, restored the determination of the learned Single Judge. Hon'ble R.M. Sahai, J, in his partly dissenting judgment, held the view that once the eligibility bar was lifted, it would be unjust to deprive the appellants, who on being subjected to the same interview as the same respondents were found better qualified on merits to be placed junior to those of lesser merit.

69. The decision of this Court in *Dr. M. Laitphalang and Ors. v. State of Meghalaya and Ors. (supra)*, has been pressed into service on behalf of the direct recruits to underline the judicial view against relaxation of basic and fundamental rules of recruitment. Their Lordships held that an exception would be, if Rules in particular contain such a provision, the rider being that such a relaxation, should render the conditions of recruitment negatory.

70. A Division Bench of this Court in *Ananda Ram Borah (supra)*, propounded that the appellants therein, not having been appointed in accordance with Assam Secretariat Sub-ordinate Service Rules, 1963, as applicable, they were not entitled to seniority over the persons regularly recruited. While marking a distinction between conditions of recruitment and conditions of service, it was held that though the latter could be relaxed, the Rules permitting, the former were non-relaxable.

71. The issue in *Kushal Sarmah (supra)*, pertains to regularization of ad-hoc

service of the petitioners. In that context, it was ruled that a Cabinet decision cannot be contrary to the recruitment rules and any executive action taken on the basis thereof by construing it in a manner not sanctioned by the Rules, would be illegal and unsustainable in law.

72. The Apex Court in *Roshan Lai and Ors. (supra)*, negated the challenge to the validity of the appointment of the private respondents therein, as Air Port Officers (Operations) for want of sanction of such posts on the ground of delay of 3 years. While expressing its opinion as such, it further noticed that the relief prayed for in the writ petition, was confined primarily to the issue of seniority and the consequences emanating therefrom.

73. The question posed before the Orissa High Court in *State of Orissa and Ors. v. Sukanta Mohapatra and Ors. (supra)*, was whether appointees made dehors the Orissa Ministerial Service (Method of Recruitment to Posts of Lower Division Assistants in offices of Heads of Department), Rules 1975, be regularized in exercise of power of regularization conferred on the Government by the Rule 14 thereof and if it is so, whether the irregular appointees could be placed above the regularly appointed incumbents in seniority on the basis of their length of service, hi the context of Rule 14 which permitted relaxation of the provisions of the rules in public interest, their Lordships held that even assuming that long years of service was an acceptable reason for regularization of the services of the irregular appointees, the same, per se, did not meet the requirement for invocation of the power of relaxation, so much so to dislodge of the seniority of those regularly appointed. It was held that Rule 14 cannot be construed to be permissive of total suspension of the Rules and recruitments dehors the same. The regularization of the irregular appointees, however, was not interfered with, but the seniority of the regular appointees was directed to rank higher than that of the irregular appointees.

74. The Apex Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, was seized with the right of the employees appointed by the State or by its instrumentalities on a temporary basis or of daily wages or casually, to seek a writ of mandamus for their regularization in appropriate posts in consideration of their continued employment or engagement in the works relatable thereto for a significant length of time. Their Lordships while recognizing the prerogative of the sovereign State or its instrumentalities to engage persons on temporary basis or on daily wages, as additional hands without following the required procedure emphasized that such recruitments ought not be made to defeat the very scheme of public employment envisaged in the constitution. An elaborate dilation on the constitutionally enjoined essentialities informing public employment was recorded in the context of regularization of appointments of adhoc, temporary or casual nature made against statutory provisions. The trend of effecting appointments dehors the constitutional scheme and regularizing the resultant appointments, temporary or casual on the sole consideration of the length of service rendered was emphatically disapproved. Their Lordships,

however, made an one time exception in case of irregular appointments of duly qualified persons to sanctioned posts, the incumbents where of had been continuing therein for a decade or more. The Government concerned and its instrumentalities were permitted to take steps to regularize their services as a one time measure.

75. In this regard reference was made amongst others to the decision rendered by it in *R.N. Nanjundappa Vs. T. Thimmiah and Another*, wherein while clarifying that regularization was not a form of appointment, it was held that ratification or regularization is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment.

76. In *State of U.P. Vs. Rafiquddin and Others*, the U.P. Public Service Commission on the basis of a competitive examination had recommended 46 candidates for appointment to the post of Munsiffs. On the request of the State Government to propose some more candidates for appointment to the said post by reducing the qualifying marks, the Commission forwarded another list of 33 candidates. These two batches of candidates were appointed thereafter. Their inter se seniority was also fixed. Meanwhile the Commission held another competitive examination for appointment to other posts of Munsiff and on the completion of the process forwarded a list of 150 candidates who were duly appointed thereafter. Some of the unsuccessful candidates in the first process having represented before the Government, the Commission was requested to further relax the qualifying marks to accommodate these candidates. This was in view of shortage of Munsiff in the State. After some persuasion, the Commission forwarded a list of 37 candidates who were also appointed. These candidates thereafter claimed to have their seniority fixed along with those appointed through the earlier process and above those who had been recruited to the services through the latter pursuit. Their claim having been rejected by the jurisdictional High Court and the State Government, the matter was taken to the Apex Court.

77. Their Lordships, on a scrutiny of Rule 19, 21 and 22 of the U.P. Civil Service (Junior) Service Rules 1951 held that securing of minimum aggregate marks in the written test and also the minimum in the viva voce was a sine qua non for the recommendation by the Commission for appointment to the service and that having regard to the said Rules at the time of holding of the first competitive examination, the appointments of the candidates seeking superior seniority were illegal and, therefore could not be equated with those who were validly appointed. Their Lordships ruled noticing that these candidates had been inducted by relaxing the minimum marks fixed by the Commission that though it (Commission) had forwarded a list containing their names, it had infact not recommended them for appointment as required under the Rules. Their Lordships propounded that as the Rules vest the Commission with the power to hold the competitive examination and to select suitable candidates on the criteria

fixed by it, the State Government or the high level committee cannot issue any direction to the it for making recommendation in the favour of those candidates who failed to achieve the minimum prescribed standards. The lower seniority of these candidates as fixed by the High Court on its administrative side as well as the State Government was approved. Their appointments, however, were left uninterfered. In the factual panorama as obtains in the instant case, we see no cogent reason to chart a different course.

78. The wide range of propositions enunciated in the authorities cited have received our respectfiil attention. Apparently though the appointment of the special recruits have been in deviation from the Rules, those cannot by any means be branded as dehors any procedure whatsoever known to public employment. As it is, even under Rule 8, the Commission after the Committee draws up a list of persons recommending for appointment has to examine and approve the same with changes as it may deem necessary so much so that it is only thereafter that the same is open to be acted upon for appointments therefrom. The association of the Commission to the process impugned is, therefore, not an anathema to the exercise undertaken. The induction of the special recruits cannot be equated with adhoc, casual or temporary recruitments or an entry through the backdoor to be proscribed as a gift of the spoils system. The special recruits, however, in view of the anomalies noticed hereinabove, in the teeth of the prescripts of Rule 5(1)(c) and 8 of the Rules cannot be favoured with seniority above the direct recruits. Their appointments not being in observance of the statutory provision *stricto sensu*, they are not entitled thereto. The fixation of their batch wise seniority over the direct recruits of the same year is also impermissible in view of the proviso to Rule 18(1). The records do not disclose any endeavour as contemplated therein for fixing the seniority of the special recruits.

79. As it is, the special recruits had been appointed in the year 1993 the validity where of was for the first time challenged before the Tribunal in the year 1999, The two special recruits namely Shri Niharendu Seal and Shri Niharkanti Sinha, respondents before the learned Tribunal have in the meantime expired in the year 2002 and 2001 respectively and their family are in receipt of necessary retiral benefits. Shri Hrilsangvung Buhril, another special recruit of the same batch has also passed away in the year 1999. The materials on record do not suggest any overt role on the part of the special recruits in contributing to the violation of the Rules in the matter of their appointments. As referred to hereinabove, the annulment of the appointment of the special recruits was not prayed for before the learned Tribunal. In view of their appointments to the service, the special recruits over the years must have lost their lien in the parent department. No fault, deficiency or blemish in their service has been alleged. As referred to hereinabove, their appointment in service has been on observance of a semblance of a public participatory process and following an assessment by the Commission. In the above view of the matter as well as on equitable considerations, we consider it to be a fit case where justice has to be tempered

with mercy. In the atypical facts and circumstances of the case, the appointments of the special recruits at this distant point of time are left uninterfered. However, for reasons recorded hereinabove, we are not inclined to interfere with the conclusion of the learned Single Judge on the issue of their seniority visa-vis the direct recruits in the atypical facts and circumstances after one and a half decades of their induction in service.

80. A bare perusal of the Notification No. HMA. 154/2002/Pt.1/176, dated 06.12.2004 makes it obvious that thereby in compliance of the judgment and order of the learned Single Judge, the direct recruits of the 1993 batch were placed above the special recruits of the same year in the APS Senior Grade -II. It is manifest from the said notification that the inter se seniority, as reflected therein followed the dates of confirmation of the incumbents in the APS Junior Grade. In terms of Rule 19 of the Rules, which prescribes the conditions of eligibility for promotion from the Junior Grade of the cadre to the Senior Grade, the elevation has to be on the basis of an assessment made by a Selection Board adjudging the suitability therefor. The above provision and the Rules therefore, convey that an eligible member of the service in the Junior Grade of the cadre would be promoted to the Senior Grade not in terms of his seniority but on the evaluation of his suitability. As a corollary, inter se seniority of the members of the service in the Junior Grade therefore, cannot automatically be the determining factor for their seniority in the Senior Grade.

81. The file No. H.M.A. 10/99 of the Home Department discloses that the promotions of the two batches of recruits to the Senior Grade were made on the basis of the recommendations of the Selection Committee made on 22.3.1999 and 15.9.2000. It transpires from the minutes thereof that the candidates were recommended in order of preference following the same seriality in which their names appear in the provisional gradation list dated 12.3.1999 as the selection committee did not find any reason justifying supersession of a senior by his junior on the measure of merit. Though the recommendations were made on the assessment of the suitability of the candidates as stipulated by Rule 19, the inter se order of the candidates in the provisional gradation list dated 12.3.1999 was maintained in recommending them for promotion. The inter se seniority of the promotees, therefore, was a replication of that in the provisional gradation list dated 12.3.1999/In view of the determination sustaining the superior seniority of the direct recruits over the special recruits in the Junior Grade, the challenge to the notification dated 6.12.2004 considering the above disclosure fails.

83. On a totality of the considerations enumerated hereinabove, we do not find any merit in the appeals, which are accordingly dismissed.

84. No costs.