

(2006) 06 GAU CK 0020
In the Gauhati High Court
Case No : Writ Petition (C) No. 3430 of 2004

Jotin Sharma and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 16-06-2006

Acts Referred:

Assam Engineering (Public Works Department) Service Rules, 1978 — Rule 11(3), 17, 2(J), 6, 6(2)
Constitution of India, 1950 — Article 14, 16, 16(1)

Citation : (2006) 4 GLT 834

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : B. Ahmed, N. Hoque and J. Begum, for the Appellant; S. Saikia, S. Sarma, H.M. Das, G.N. Sahewalla, P. Bora, Md. Aslam, D. Senapati, G.K. Bhattacharyya, P. Sharma, B.M. Chetri, B. Das, C. Chowdhury, R. Mazumder, K.N. Chowdhury, I. Chowdhury, P. Upadhaya and N. Barman, for the Respondent

Final Decision : Allowed

Judgement

B.P. Katakey, J.—This writ petition is directed against the decision of the Government to fill up 51 more posts of Assistant Engineer (Civil) in Public Works Department from out of the candidate selected by the Assam Public Service Commission (in short "APSC") vide select list dated 19.7.2002, selection process for which was initiated in respect of the 187 vacancies by issuing advertisement dated 11.9.2001 and also for directing the State Respondents not to make any appointment to the post of Assistant Engineer (civil), PWD beyond the posts advertised.

2. Facts in brief is that on the basis of the requisition given by the Public Works Department, Government of Assam, the APSC issued an advertisement on 11.9.2001 calling application from the intending candidates for selection against 187 posts of Assistant Engineer (Civil) in Public Works Department. Pursuant to the said advertisement the Petitioners along with the present private Respondents and others appeared for selection and the APSC after conducting

interview recommended the names of 392 candidates for recruitment to 187 posts of Assistant Engineer (Civil) vide its recommendation dated 19.7.2002, which was accepted by the Government. The Petitioners were not selected by the APSC for appointment against those 187 posts. The present Petitioners along with another filed WPC No. 4985 of 2002 challenging the recommendation of the APSC in not selecting them for appointment which was however, dismissed. Another writ petition being WPC No. 7112 of 2002 was also filed by an association of unemployed engineers challenging selection process conducted by the APSC which was also dismissed on withdrawal. Two persons thereafter filed WPC No. 5170 of 2003 with a prayer for directing the Respondents therein not to fill up any post of Assistant Engineer (Civil) beyond 87 posts advertised, from out of the select list prepared by the APSC which was disposed of vide order dated 9.7.2003 on the basis of the submission made by the learned standing counsel, Public Works Department, to the effect that select list dated 19.7.2002 shall be operative for 187 posts of Assistant Engineer (Civil) only, which were advertised. Since the Government after filling up 187 posts of Assistant Engineer (Civil) advertised, has taken a decision to fill up 51 more posts of Assistant Engineer (Civil) beyond the post advertised, for which the selection was made, the present writ petition has been filed by the Petitioner, who were not the successful candidates, challenging such action on the part of the State Government, on the ground that authority can not make any appointment to the post beyond the posts advertised, for which the selection was made, as that will effect their future right to offer their candidature against such additional posts and thereby violates their fundamental right under Article 14 and 16 of the Constitution of India. Hence the present writ petition.

3. I have heard Dr. B. Ahmed, learned Counsel for the Petitioners, Mr. S. Saikia, learned standing counsel Public Works Department appearing on behalf of the Respondent Nos. 1 and 2, Mr. G.K. Bhattacharjee, learned Sr. counsel appearing on behalf of the Respondent Nos. 3 and 4, Mr. G.N. Sahewalla, learned Senior counsel appearing on behalf of the Respondent No. 5 and Mr. C. Choudhury, learned Counsel appearing on behalf of the Respondent Nos. 9 to 14. None appears for the Respondent Nos. 6 to 8 and 15 to 18.

4. Dr. Ahmed, learned Counsel for the Petitioners challenging the purported decision of the State Government to fill up the additional 51 posts of Assistant Engineer (Civil) from out of the candidates selected by the APSC vide recommendation dated 19.7.2002 has submitted that the concerned department namely Public Works Department having requested the APSC to advertise and make selection against the 187 posts only and the APSC having issued the advertisement dated 11.9.2001 for selection of candidate against said 187 posts and also having recommended the names of the successful candidates against the said posts no post beyond 187 posts can be filled up by the Government, even if those posts existed at the time of sending requisition by the department to the APSC for selection, that too without taking any policy decision in that regard and if the same is allowed it will effect the fundamental rights of the

Petitioners guaranteed under Article 14 and 16 of the Constitution of India as it will amount to depriving the Petitioners from seeking selection against those additional 51 posts of Assistant Engineer (Civil). The learned Counsel referring to the statements made in paragraph 9 of the affidavit in opposition filed on behalf of the Respondent No. 1 and 2 namely the State Respondents, has submitted that the State Respondents in their affidavit has categorically stated that the Government took a decision to fill up 187 posts only due to financial crisis out of 235 available vacancies and the Government having taken such conscious decision and the selection having been made accordingly against the 187 post only, cannot subsequently decided to fill up the remaining posts without there being a fresh advertisement and selection for the post beyond 187 advertised posts for which the selection was made, more so when the Government in WPC No. 5170 of 2003 has informed this Court that the appointment shall be restricted to 187 posts only and not beyond that. It has further been submitted that the Government has not taken any policy decision to fill up those additional 51 posts from out of the select list prepared by the APSC on 19.7.2002. The department cannot take a decision to fill up any post beyond the posts advertised and any decision taken in that regard, even if the same was approved by the State Level Empowered Committee headed by Chief Secretary, can not be legal and valid in the absence of any policy decision by the Government. The learned Counsel has further submits that it is an admitted position of fact that no policy decision has been taken by the State cabinet in the present case and therefore, no post beyond the posts advertised, for which selection was made, cannot be filled up by the department. The learned Counsel in support of his contention has placed reliance on Prem Singh and Others Vs. Haryana State Electricity Board and Others, Surinder Singh and Others Vs. State of Punjab and Another, , Pradip Gogoi and Others Vs. State of Assam and Others, and a division bench decision of this Court in Debabrata Borgohain and 19 Ors. v. Dilip Hazarika and Ors. reported in 1996 (3) GLT 310.

5. Mr. Saikia, learned standing counsel, Public Works Department appearig on behalf of the Respondent Nos. 1 and 2 and relying on the affidavit filed on their behalf as well as the records produced before this Court, has submitted that it is a fact that the Government initially decided to fill up 187 posts out of 235 existing vacancies of Assistant Engineer (Civil) because of the financial constrain, for which requisition was given to the APSC for making selection and consequently advertisement as well as the selection was made by the APSC in respect of the 187 post only, but the Government subsequently keeping in view the requirement of appointing more Assistant Engineers (Civil) in the department took a decision to fill up 51 more existing posts from out of the said select list prepared by the APSC on 19.7.2002, which was approved by State Level Empowered Committee heading by the Chief Secretary. According to the learned Counsel since the Public Works Department initially decided to fill up 187 posts, it can subsequently decide to fill more posts, for which no policy decision is required to be taken. Mr. Saikia, however, has fairly submitted that as such no

policy decision was taken by the Government to fill up 51 more posts of Assistant Engineer (Civil), in the instant case, and it is the department who has decided to fill up such 51 additional post. The learned standing counsel has further submitted that with a view to make appointment against 51 existing vacancies more than the posts advertised, the Government in fact from time to time extended the validity of the select list, life of which is normally one year, by issuing various orders and the last order was passed on 27.1.2004 extending the validity of the select list by six months with effect from 19.1.2004, but because of the interim order passed by this Court in the present writ petition on 4.6.2004 directing not to go for any appointment without the leave of this Court, no further appointment could be made against those 51 post beyond the post advertised. The learned Counsel therefore, submits that the government having taken a decision keeping in view the exigencies of services, can fill up more post than the posts advertised. It has further been submitted by the learned standing counsel that the writ petition at the instance of the un-successful candidates like the writ Petitioners cannot be maintained as they do not have any right to get appointment. Mr. Saikia, referring to paragraph 7 of the writ petition has also contended that Petitioner Nos. 2 and 3 are admittedly over aged for seeking any selection for Government service as well as Assistant Engineer (Civil) in future and therefore, this Court may not interfere with the decision of the Government at the instance of such person, to whom no benefit can be given, meaning thereby that the Petitioners are not the "persons aggrieved."

6. Mr. Bhattacharjee, learned senior counsel appearing on behalf of the Respondent Nos. 3 and 4 has also submitted that it is open to the Government to take a decision and fill up more post than the post advertised and in the instant case Government having taken a decision to fill up more post, it is open to the Government to appoint persons from out of the select list prepared by the APSC on 19.7.2002, in order of the preference given by the APSC in the select list. It has further been submitted by the learned senior counsel that the Government has not decided to fill up the 51 future vacancies but they have decided to fill up those post existed on the date when the advertisement was issued by the APSC on 11.9.2001 and therefore no illegality has been committed by the Government in deciding to fill up those existing vacancies.

7. Mr. Sahewalla, learned senior counsel appearing on behalf of the Respondent No. 5 has also submitted that the writ petition having been filed by the unsuccessful candidates is not maintainable and it is inconsequential whether the Government decides to fill up 187 posts or 235 posts as the Petitioners having not been selected by the APSC pursuant to the advertisement dated 11.9.2001 they are not entitled to get appointment. Mr. Sahewalla, has further submitted that the Petitioners are not the "persons aggrieved" as by the time they may be over aged for getting any appointment in Government service. Mr. Sahewalla, has also submitted that it is open for the Government to take a decision to fill up all the existing vacancies though the number of post advertised was less than the existing vacancies and in the instant case such decision having been taken by the

Government, no fault can be found on such decision of the Government. Mr. Sahewalla, in support of his contention has placed reliance on 1996 VII AD 622 (SC)

8. Mr. Choudhury, learned Counsel appearing on behalf of the Respondent Nos. 9 to 14, relying on the statement made in the affidavit in opposition filed on their behalf, has also submitted on the said line as submitted by the learned standing counsel and has further contended that what the Government has decided to do is to fill up the existing 51 vacancies from out of the selected candidates, instead of going for fresh selection, which is a time consuming process. Therefore, it is not that the Government wants to appoint anybody who has not been selected and wants to resort to the backdoor policy. Mr. Choudhury, therefore contends that the Government has rightly taken the decision to fill up 51 existing posts, though not advertised, and by such decision no rights of the Petitioners have been violated.

9. In the present writ petition the Respondent Nos. 1 and 2 as well as the Respondent Nos. 9 to 14 have filed their affidavit-in-opposition. The State Respondents also produced the records relating the decision taken to fill up the 51 more posts, before this Court. This Court vide order dated 2.6.2004 directed the Respondent authorities not to go for any appointment without the leave of this Court.

10. I shall first discuss the various decisions on which the learned Counsel for the parties have placed reliance:

(i) In *Prem Singh and Ors. (supra)*, the Apex Court while dealing with the question whether the State can deviate from the advertisement and make appointments on the posts falling vacant thereafter and whether the State can make more appointments than the number of post advertised even though the selection committee prepared the list of more candidates, has held that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for the future vacancies. It has further been held that if the requisition and the advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. However, the State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. The Apex Court has further held that even when the action of the Government in filling up of more posts than advertised, is challenged, the court may not, while exercising its extraordinary jurisdiction invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of the parties seeking public employment and what relief should be granted in such cases would depend upon the facts and circumstances of the each case.

In the said case though 62 posts were advertised and the process of selection started for those posts, which were of clear vacancies without taking into account the anticipated vacancies, subsequently the board made appointments against 138 posts. Since the anticipated vacancies were not taken into consideration and the persons have already been appointed in excess of the post advertised, the Apex Court for striking a balance between the interest of the State and the interest of the person seeking public employment has held that though strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement and the selection process which follows thereafter, however, as the Board could have taken into account not only the actual vacancies but also the vacancies, which were likely to arise because of retirement etc. by the time selection process was completed, it would not be just and equitable to invalidate all the appointments made on posts in excess of 62 but the appointments which were made against future vacancies must be regarded as invalid.

(ii) The Apex Court in *Surinder Singh and Ors.* (supra), has held that it would be an improper exercise of power to make appointments over and above those advertised. It is only the rare and exceptional circumstances and in emergent situation that this rule can be deviated from. It has further been held that even in case of deviation it should be clearly spelled out as to under what policy such a policy decision is taken and exercise of such power has to be tested on the touchstone of reasonableness. It has further been held that before any advertisement is issued, it would therefore, be incumbent upon the authorities to take into account the existing vacancies and anticipated vacancies. It is not a matter of course that the authority can fill up more posts than advertised. The Apex Court keeping in view the said principle of law while analysing the facts and circumstances of the said case, has found that neither any exceptional circumstances existed nor was there any emergent situation for the State to deviate from the principle of limiting the number of appointments to the posts advertised and hence up held the decision of the High Court in setting aside the appointments of persons over and above those advertised.

(iii) In *Pradip Gogoi* (supra), the Apex Court has held that even an eligible candidate has a fundamental right under Article 16(1) of the Constitution of India to lay his claim for consideration in his own right for recruitment to an office of post under the State. In the said case though an advertisement was issued in the year 1991 and select list was prepared in the month of November 1993, the appointments were made, but the vacancies existed thereafter could not be filled in. Hence the Petitioners approach the High Court for appointment against the post available as they were placed in the wait list and High Court has directed to fill up the post existed after the date of publishing the advertisement from the waiting list. But as some of the Petitioners before the High Court were still aggrieved by the said decision of the High Court they approach the Apex Court seeking a direction to make appointment from the wait list. The Apex Court on the said back ground facts has held that no direction to consider the cases for

appointment from wait list can be given, as the sympathetic vibration are also responsible for the sagging problem and moral degeneration. It has further been observed that the preparation of waiting list become a spinning ground for corruption and denial of constitutional right to equality to eligible candidates awaiting recruitment. The Apex Court therefore, directed the authorities to notifying those vacancies to the Public Service Commission for the purpose of taking expeditious action for recruitment and recommend the names to the authorities expeditiously so that the existing vacancies can be filled up.

(iv) In *Harjinder Singh Sodhi (supra)*, on which the learned Counsel for the Respondent No. 5 has placed reliance, the Apex Court has held that the Government having sought for nomination to the posts available in the year 1991, merit has to be considered only among the candidates for appointment to nine posts which arose in 1991 and therefore, the Government rightly did not consider the case for selection for subsequent vacancies which would affect the candidates who became qualified later.

(v) A division bench of this Court in *Debabrata Borgohain (supra)*, relying on the various decisions of the Apex Court including the decision in *Prem Singh* case has held that when the requisition and advertisement are for a certain number of posts only, the State cannot make more appointment than the number of posts advertised, but it can deviate from advertisement and make appointment for the post falling vacant thereafter in exceptional circumstances and in emergent situation by taking a policy decision on that behalf. However, keeping in view the peculiar fact and circumstances of the said case, directed that 168 candidates only will be appointed on the basis of their merit position in the select list, as the Chief Engineer, before selection was made, intimated the APSC that 168 posts were available.

11. In the backdrop of aforesaid principle of law laid down by the Apex Court, I shall now proceed to consider the submission of the learned Counsel for the parties.

12. In terms of the requisition of the Public Works Department, the APSC issued the advertisement dated 11.9.2001 for filling up of 187 posts of Assistant Engineer (Civil). Pursuant to the said advertisement the Petitioners, the private Respondents as well as others submitted their application. Thereafter on the basis of the interview conducted, a list containing the names of 392 candidates, in order of merit, was prepared by the APSC and recommended to the Government for appointment on 19.7.2002 against the said 187 posts. According to the Petitioner the Respondent authorities have taken a decision to fill up 51 more vacancies, which occurred after the advertisement was issued and the select list was prepared, from out of the selected candidate and beyond the post advertised. The Petitioners' case is that the Government cannot fill up more post than the post advertised as it will amount to depriving the Petitioners and others to seek selection against those 51 posts thereby violating their rights under Article 14 and 16 of the Constitution of India. The Respondents No. 1 and 2 on

the other hand in their affidavit-in-opposition has taken a stand that though 235 vacancies were available, the Government took a decision to fill up 187 posts because of the financial constrain, leaving the remaining posts vacant, but subsequently keeping in view the exigencies of service and sanctioned of different schemes as more Assistant Engineers (Civil) were required to be appointed, the Government decided to fill up those 51 posts from out of the candidates selected by the APSC vide select list dated 19.7.2002. According to the Government the said vacancies were existed even prior the advertisement dated 11.9.2001.

13. For the purpose of ascertaining whether those vacancies namely 51 vacancies existed prior to the issuance of advertisement or at the time of making the selection, the records were called for, from where it appears that those 51 vacancies were not the vacancies existed on the date of advertisement or when the selection was made but vacancies occurred much after the selection were made. It is evident from the note dated 17.7.2001 submitted to the Under Secretary that only 187 posts of Assistant Engineer (Civil) were available for filling up by direct recruitment and as such the proposal was submitted for filling up all the posts available i.e. 187, which was approved by the Secretary Public Works Department on 21.7.2001, by the Commissioner and Special Secretary, PWD on 23.7.2001 and by the Minister on 4.8.2001. The relevant note dated 21.7.2001 submitted by the Secretary, PWD to the Commissioner and Special Secretary and by the Commissioner to the Minister, PWD are quoted below:

C and Spl. Secy,

Notes from page 12N to 15N may kindly be seen. This is a subject of direct appointment of AE (Civil) of this deptt.

As per our calculation there are altogether 187 Nos. of posts are lying vacant, for which deptt. works are suffering badly.

Now, to avoid all future problem, I think we should go for recruitment through A.P.S.C.

Signature Sd/- 21.7.2001 Secy.PWD.

Notes at PP and above.

Total 187 Nos. AE (Civil) post is lying vacant in this department for which works suffered badly. Now we may go for recruitment through APSC.

Put up for approval.

MPWD.

Signature Sd/- Comm. and Spl. Secy. PWD.

Approved and send it

immediately to APSC

Signature Sd/- 4/8.

14. The records pertaining to file No. RBEB. 15/A/2001/Pt. I also reveals that after making appointment of candidates against 187 available vacancies, for which selection was made, the file was put up for appointment of more persons from out of the candidates selected vide the select list dated 19.7.2002 at the instance of the Minister, Social Welfare and Minister Home Affairs etc. It appears from the said record that a note dated 24.9.2003 was accordingly put up stating that 51 vacancies of Assistant Engineer (Civil) are available and therefore, those posts can be filled up from out of the candidates selected by the APSC. The file was ultimately put up to the personnel (B) department. The Deputy Secretary of the said department vide note dated 12.1.2004 sent back the file with the query to the Public Works Department as to the period for which the said posts of Assistant Engineer (Civil) have been lying vacant. The note was thereafter submitted by the Public Works Department on 28.1.2004 to the effect that the said posts are lying vacant for less than one year.

It is therefore, evident that those 51 posts, which are sought to be filled up by the Government, fell vacant sometimes in the year 2003 i.e much after the select list was prepared by the APSC on 19.7.2002. Moreover, the records produced before this Court does not reveal anything to the effect that 235 posts were available and the Government because of the financial constrain decided to fill up 187 post keeping the remaining post vacant, as contended by the Respondent No. 1 and 2 in their affi-davit-in-opposition filed before this Court. The record in fact reveals otherwise as discussed above. It is therefore evident that the 51 vacancies which the Respondent Nos. 1 and 2 (sic) now trying to fill up came into existence much after the select list was prepared and those were not the existing vacancies as contended by the State Respondents.

15. The power of State to initiate selection process by sending requisition to the Public Service Commission to fill up of existing and anticipated vacancies and sending of requisition and issuance of advertisement as well as making selection for a particular number of posts are two different aspects. The State, subject to the relevant recruitment rules, can send requisition to Public Service Commission for making advertisement and selection for existing and anticipated vacancies, but once the State has chosen to send requisition and accordingly Public Service Commission issued advertisement as well as made selection for a particular number of posts, it cannot subsequently fill up more posts than the posts advertised, for which selection was made, unless of course there exists exceptional circumstances or emergent situation, for which also, the State must take a policy decision.

16. A set of Rule namely Assam Engineering (Public Works Department) Service Rules 1978 (in short 1978 Rules) was framed by the Government laying down the procedure for making recruitment to the different posts including the post of Assistant Engineer (Civil). Rule 6 of the said rule provides that before end of each year the Government is to make an assessment regarding the likely number

of vacancies to be filled by direct recruitment during the next year and is to intimate the same to the APSC together with details about the reservation, requesting the APSC to recommend a list of candidates for direct recruitment, in order of preference. It also provides that list so prepared shall remain valid for 12 Calendar months, from the date of recommendation. For better appreciation Rule 6 of the 1978 Rules is quoted below:

6. Direct Recruitment-(1) Subject to Sub-rule (3) of Rule 11, direct recruitment to cadres of Assistant Engineers, Assistant Architects and Assistant Research Officer, Road Research Laboratory shall be made by the Governor on the basis of selection made by the Commission in accordance with the procedure hereinafter provided:

(a) Before the end of each year the Government shall make an assessment regarding the likely number of vacancies to be filled by direct recruitment during the next year and shall intimate the same to the Commission together with the details about reservation for candidates belonging to Scheduled Castes, Scheduled Tribes or any other category as laid down by Government, as provided under Rule 17 and about carry forward of such reservation;

(b) The Government shall simultaneously request the Commission to recommend a list of candidates for direct recruitment, in order of preference;

(c) The Commission shall make the selection in accordance with the scheme of selection prescribed by the Government in consultation with the Commission. The Commission may hold such test or interview and undertake scrutiny of published articles or thesis of the candidate, if any and the certificates and other documents, so may be considered necessary.

(d) The commission shall furnish Government with a list of candidates recommended by it in order of preference, found suitable for direct recruitment. The number of candidates in such a list may be approximately double the number of vacancies.

(e) The Commission shall simultaneously publish the list in the Assam Gazette and such other place the Commission may consider proper.

(2) The lists mentioned in Clauses (d) and (e) of Sub-rule (1) of this rule shall remain valid for 12 Calendar months from the date of recommendation.

(3) In the event of the Commission being unable to recommend sufficient number of candidates to fill up the vacancies in a year, it shall in consultation with the Appointing Authority, repeat the procedure as mentioned hereinbefore under Sub-rule (1) of this rule for recommending a subsequent list in the year:

Provided that the Appointing Authority shall not make appointment of any candidate from the subsequent select list until all the candidates of the earlier list of the same year, eligible for appointment, have been offered the appointment.

Rule 2(J) of 1978 Rules defines "year" as a calendar year.

17. Therefore, under 1978 Rules the authority is required to assess the likely number of vacancies to be filled up in next calendar year and intimate the APSC about such vacancy caused in the cadre of Assistant Engineer for selection in the next calendar year and the APSC is accordingly required to recommend the names of candidates. Such select list remains valid for 12 calendar months from the date of recommendation. The Rule, therefore, envisage year wise selection and preparation of select list and does not empower the Government to extend the validity of such select list beyond 12 months from the date of recommendation by APSC. Hence, in the present case the Public Works department having requested the APSC to make selection in respect of all the available vacancies existed then in the calendar year 2001, the Government cannot fill up the vacancies which were not notified and arose in the subsequent calendar years, in this case in the year 2003 as is evident from the office note as discussed above, for which under the Rules separate selection has to be made. That apart, the APSC having recommended the names of candidates on 19.7.2002, the said list remains valid up to 18.7.2003, i.e. for 12 calendar months in view of Rule 6(2) of the 1978 Rules, validity of which cannot be extended, such power having not been conferred by the Rules. Therefore, the process initiated by the government vide note dated 24.9.2003, i.e. after the expiry of validity of select list cannot be term as legal and valid.

18. In the instant case the Government in Public Works Department having verified the available vacancies, which were found to be 187, decided to request the Assam Public Service Commission to make selection and accordingly requisition was sent to the Commission. The APSC thereafter advertised the said 187 posts on 11.9.2001 and made the recommendation containing the list of selected candidates in order of preference on 19.7.2002. The Government having requested the APSC to make selection against all the available vacancies i.e. 187 then existed and the APSC thereafter having advertised and made selection against those posts, in any case, cannot be allowed to fill up more posts, vacancies of which arose much thereafter, than for which selection was made, more so when there is no policy decision taken by the Government to fill up more posts and also when the records produced do not disclose existence of any exceptional circumstances or emergent situation. Even otherwise also, even if such emergent situation existed in 2003, when the 1st note was put up on 24.9.2003 for filling up of 51 more posts, such situation cannot now be said to be existed after lapse of three years, as no appointment could be made by the Government till now. The approval given by the State Level Empowered Committee, headed by the Chief Secretary, cannot take his place of a policy decision of the Government.

19. The learned Counsel for the Respondent Nos. 1 and 2 has fairly contended that there is no policy decision taken by the Government to fill up more posts than the posts advertised and for which the selection was made. As discussed above, it appears from the records that at the relevant point of time when the requisition was made to the APSC to make selection and recommend the names,

only for 187 posts were available and the remaining 51 post become available sometimes in the year 2003 i.e. much after the APSC recommended the names of candidates for appointment in the year 2002. Therefore, even assuming the vacancies were available when the requisition was made to the APSC than also in the absence of a policy decision by the Government the post in excess of the posts advertised, for which the selection was made, cannot be filled up by the Government. In the instant case the stand of the Government is that an emergent situation arises to fill up those post as because certain projects were allotted by the Central Government to the State Government and those projects are required to be implemented within a fixed period of time and as delay will be caused in making fresh advertisement and selection, the Government decided to fill up the those 51 posts from out of the candidates, whose names appear in the select list prepared on 19.7.2002. But the record reveals that a process for making recruitment to those 51 post was indicated at the instance of the Minister, Social Welfare and others, on the basis of the representation, filed by the candidates, who were selected but who could not be appointed as the posts advertised were 187. It also appears from the record that the earlier advertisement was issued on 11.9.2001 and the recommendation was made by the APSC on 19.7.2002 i.e. within a period of less than one year and therefore there is no reason as to why the State Government cannot request the APSC to select persons against those 51 vacancies and also there is no reason of causing delay in recommending the name by the APSC as in earlier occasion it has recommended the names within a period of almost ten months from the date of advertisement. The State Respondents having initiated the process for recruiting the persons against those 51 posts on 24.9.2003, could have requested the Public Service Commission to advertise and make selection against those post, as no appointments are made against those 51 posts in view of the interim order passed by this Court on 4.6.2004 i.e. for about three years from the date of submission of 1st note dated 24.9.2003. Therefore, the contention of the State Respondents that the process of regular selection is time consuming and hence the decision was taken to fill up those 51 posts from out of the candidates already selected by APSC cannot be accepted and such stand of the Government, in view of lapse of time, does not hold good. Moreover the validity of the select list which was extended by six months vide order dated 27.1.2004 with effect from 19.1.2004 expired on 18.7.2004, and it is not the case of the Government that such validity has again been extended thereafter and select list is still valid, even if, the Government has the power to extend the validity of such list, in view of the clear provision contained in Rule 6(2) of the 1978 Rules that the select list remains valid for 12 months only from the date of recommendation by the APSC.

20. Another contention was raised by the learned Counsel for the Respondents challenging the locus standi of the Petitioner to challenge the decision of the Government to fill up 51 more posts pursuant to the selection made earlier, contending that as they were not selected in the earlier selection and two of the Petitioners have already crossed the age bar, no relief can be granted to them

and they also cannot maintain the writ petition. The said contention also cannot be accepted, firstly, as there are more than two Petitioners in the writ petition and only two Petitioners have crossed the upper age limit for getting a Government job and secondly, even if they were not selected in the earlier selection they will get a further opportunity if the post are advertised, to offer their candidature. In any case the Government can not fill up those 51 post as discussed above without there being any policy decision in that regard, the vacancies of which arose much after the selection was made and the list was published, as apparent from the records produced by the Government and if the Government is allowed to fill up those post that will amount to depriving the other candidates including the eligible Petitioners, from offering their candidature. Therefore, it cannot be said that the Petitioners are not "persons aggrieved".

21. In view of the aforesaid discussions, I am of the view that the decision of the PWD to fill up 51 more posts than the posts advertised by the advertisement dated 11.9.2001 for which the recommendation was made by the Assam Public Service Commission on 19.7.2002, is not legal and valid, hence such decision is set-aside and quashed. The Government, therefore, cannot fill up those 51 posts from the select list already prepared against 187 posts. It is open to the Government to request the Public Service Commission to make selection by issuing advertisement and to recommend the names of candidates for appointment in terms of the provisions of the 1978 Rules.

22. The writ petition is accordingly allowed. No cost.