

(2022) 03 GAU CK 0036

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 617, 744 Of 2020

Saurav Jyoti Parasor

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 14-03-2022

Acts Referred:

Constitution Of India, 1950 — Article 12, 14, 16, 16(4), 142, 162, 226, 309, 320, 320(1), 320(3)(a), 320(3)(b), 320(3)
Assam Engineering [Public Works Department] Service Rules, 1978 — Section 2(a), 6, 18, 28
Assam Panchayat And Rural Development Officers [Technical] Service Rules, 2015 — Rule 25
Assam Health Service Rules, 1995 — Rule 26
Assam Subordinate Engineering [Irrigation Department] Service Rules, 1978 — Rule 2(a), 3(1)(ii), 3(5), 6, 13
Central Inland Water Transport Corporation Limited - Service, Discipline And Appeal Rules, 1979 — Rule 9(i)
Assam Public Service Commission [Limitation Of Functions] Regulations, 1951 — Regulation 3, 3(a), 3(f)

Citation : (2022) 03 GAU CK 0036

Hon'ble Judges : Manish Choudhury, J

Bench : Single Bench

Advocate : D. Das, R. Sarma, D.K. Mishra, D. Saikia, P. Nayak, T.J. Mahanta, P.P. Dutta, A.K. Sarma

Final Decision : Dismissed

Judgement

1. By an Advertisement dated 14.08.2018, published by the Public Works Department [PWD], Government of Assam, applications were invited for filling up 156 nos. of posts of Assistant Engineers [Civil] in the Public Works Department under Regulation 3[f] of the Assam Public Service Commission [Limitation of Functions] Regulations, 1951 [‘the APSC Regulations, 1951’, for short] in the Pay Scale of Rs. 30,000 - Rs. 1,10,000 with Pay Band : Rs. 12,700.

1.1. By another Advertisement, also dated 14.08.2018, published by the Public Works Department [PWD], Government of Assam, applications were invited for

filling up 307 nos. of posts of Junior Engineer [Civil] in the Public Works Department under Regulation 3[f] of the APSC Regulations, 1951 in the Pay Scale of Rs. 14,000 – Rs. 49,000 with Pay Band : Rs. 8,700.

2. It was indicated in both the advertisements that the appointments would be purely on ad-hoc basis for a period of 4 [four] months and the details of the same could be seen in the concerned website. A common brief Advertisement dated 14.08.2018 was published.

3. As per the detail advertisements of even date published in the website, the total nos. of posts of Assistant Engineer [Civil] and Junior Engineer [Civil] were as under :-

Assistant Engineer [Civil]

UR

No. of Posts

79

RFW

24

OBC/MOBC

No. of Posts

42

RFW

13

STP

No. of Posts

16

RFW

5

SC

No. of Posts

11

RFW

3

STH

No. of Posts

8

RFW

2

TOTAL

No. of Posts

156

RFW

47

PwD

Orthopedically Handicapped/Hearing Handicapped/Low Vision

5

Junior Engineer [Civil]

UR

No. of Posts

157

RFW

47

OBC/MOBC

No. of Posts

83

RFW

25

STP

No. of Posts

31

RFW

9

SC

No. of Posts

21

RFW

6

STH

No. of Posts

15

RFW

5

TOTAL

No. of Posts

307

RFW

92

PwD

Orthopedically Handicapped/Hearing Handicapped/Low Vision

9

RFW = Reserved for Women PwD = Person with Disability

4. The advertisements prescribed the following as educational qualifications for the posts of Assistant Engineer [Civil] and Junior Engineer [Civil] :-

Assistant Engineer [Civil] :-

Education Qualification :-

(i) Bachelor Degree in Civil Engineering of an Indian or Foreign University recognised by the Government.

OR

Passed Parts A & B of the Associate Membership Examination of the Institution of Engineers [India] and possessing a certificate to that effect from the Institution of Engineers [India].

(ii) Apart from English, the candidate should have adequate knowledge of at least 1 [one] official language of the State of Assam [i.e. Assamese/Bengali/Bodo], except candidates belonging to Karbi Anglong Autonomous Council and Dima Hasao Autonomous Council.

Junior Engineer [Civil] :-

Educational Qualification :-

- (i) Diploma in Civil Engineering from a recognised Institute.
- (ii) Apart from English, the candidate should have adequate knowledge of at least 1 [one] official language of the State of Assam [i.e. Assamese/Bengali/Bodo], except candidates belonging to Karbi Anglong Autonomous Council and Dima Hasao Autonomous Council.

5. The advertisements further stated that the selection would be done on the basis of total marks obtained in the written examination and viva-voce/interview. Out of total 200 marks, 160 marks were earmarked for written examination and balance 40 marks were earmarked for viva-voce/interview. Both the detail advertisements also indicated that the Public Works Department would hold Multiple Choice Objective Type Written Examination for Paper-I and Part-I of Paper-II and Multiple Choice Objective Type Written Examination/Short Descriptive Type Examination for Parts – II & III of Paper-II. The Public Works Department would make the syllabi for Paper-I [Civil Engineering] and Paper-II [General Studies] available in the departmental website.

6. The petitioners in both the writ petitions having found themselves eligible in respect of the criteria prescribed therein, responded to the said advertisements by submitting their candidatures. The 132 nos. of writ petitioners in the writ petition, W.P.[C] no. 617/2020 vied for the post of Assistant Engineer [Civil] whereas the 195 nos. of writ petitioners in the writ petition, W.P.[C] no. 744/2020 applied for the post of Junior Engineer [Civil].

7. Notices dated 06.10.2018 and 15.10.2018 were published thereafter, announcing that the written examinations for the posts of Assistant Engineer [Civil] and Junior Engineer [Civil] would be held separately on 11.11.2018 and the admit cards for the same would be issued from 24.10.2018. It was further mentioned that the respective syllabus for the written examination in respect of both the posts would be uploaded in the departmental website on the dates mentioned therein.

8. After processing of applications, the Public Works Department issued admit cards to the candidates including the petitioners, for the written examinations scheduled on 11.11.2018 in respect of both the posts i.e. Assistant Engineer [Civil] and Junior Engineer [Civil]. Thereafter on 11.11.2018, the written examinations were held and the petitioners in both the writ petitions appeared in the said written examinations along with other candidates. In due course, the Public Works Department published results of the written examinations and the marks of the candidates scored in the written examinations for both papers were uploaded in the Public Works Department website.

9. The petitioners in both the writ petitions were found successful in the written examinations and accordingly, they were called to appear along with others in the interviews scheduled to be held on different dates in January, 2019 by

issuing individual call letters to the successful candidates in the written examinations. After completion of the interviews and scrutiny of marks obtained during the selection process, the petitioners in both the writ petitions were found selected.

10. By a Notification dated 05.03.2019 issued under the hand of the Commissioner & Special Secretary to the Government of Assam, Public Works Department, the Department notified the list of 156 nos. of candidates who were selected for appointment for the post of Assistant Engineer [Civil] provisionally under Regulation 3[f] of the APSC Regulations, 1951 pending receipt of their final police verification reports. In the said notification, the places of posting of the successful candidates were indicated. The names of the petitioners in W.P.[C] no. 617/2020 figured in the said list of successful candidates who were offered the appointments. The successful candidates were directed to join their places of posting within stipulated time period along with a medical fitness certificate and self attested copies of the original documents viz. educational qualification, proof of age, caste certificate, etc. for official record.

10.1. In terms of the notification dated 05.03.2019, all the petitioners in W.P.[C] no. 617/2020 joined their respective places of posting by submitting joining reports. The police verifications of the petitioners were also carried out in due course and reports to that effect were also submitted. The petitioners were also made to undergo medical examinations. Though initially the appointments were made for a period of 4 [four] months, it was extended for a further period of 4 [four] months by a communication dated 16.08.2019. Thus, their services were continued through subsequent extension orders and their period of service was lastly extended for a further period of 4 [four] months vide communication dated 27.11.2019.

11. By another similar notification dated 04.06.2019 issued under the hand of the Commissioner & Special Secretary to the Government of Assam, Public Works Department, the Department notified the list of 307 nos. of candidates who were selected and appointed for the post of Junior Engineer [Civil] provisionally under Regulation 3[f] of the APSC Regulations, 1951 pending receipt of their final police verification reports. In the said notification, the places of posting of the successful candidates were indicated. The names of the petitioners in W.P.[C] no. 744/2020 figured in the said list of successful candidates who were offered the appointments. The successful candidates were directed to join their places of posting within stipulated time period along with a medical fitness certificate and self attested copies of the original documents viz. educational qualification, proof of age, caste certificate, etc. for official record.

11.1. In terms of the notification dated 04.06.2019, all the petitioners in W.P.[C] no. 744/2020 joined their respective places of posting by submitting joining reports. The police verifications of the petitioners were also carried out in due course and reports to that effect were also submitted. The petitioners were also made to undergo medical examinations. Though initially the appointments were

made for a period of 4 [four] months, their services were thereafter, continued through subsequent extension orders and their period of service was lastly extended for a further period of 4 [four] months vide a communication dated 27.01.2020.

12. After joining their services, the petitioners were receiving their salaries from time to time and there were incremental increases with the enhancement of DA, etc. The respondent authorities were also deducting the contributions towards National Pension Scheme [NPS] in respect of some of the petitioners who were allotted Permanent Retirement Account Numbers [PRAN].

13. When both the sets of petitioners in W.P.[C] no. 617/2020 and W.P.[C] no. 744/2020 were so working in the posts of Assistant Engineer [Civil] and Junior Engineer [Civil] respectively in the Public Works Department, another advertisement came to be published by the Assam Public Service Commission [‘the APSC’, and/or ‘the Commission’, for short] vide Advertisement no. 06/2019 dated 19.11.2019 whereby applications were invited for filling up of 156 nos. of vacancies in the post of Assistant Engineer [Civil] and 307 nos. of vacancies in the post of Junior Engineer [Civil] respectively under the Public Works Department. The scale of pay, eligibility criteria and educational qualification criteria indicated in the Advertisement dated 19.11.2019 are same with the Advertisements dated 14.08.2018 for both the posts. As per the said advertisement, the last date of submission of application was 21.12.2019. The 156 nos. of vacancies in the post of Assistant Engineer [Civil] and 307 nos. of vacancies in the post of Junior Engineer [Civil] have been identified in the following manner :-

Assistant Engineer [Civil]

Name of the Post

Assistant Engineer [Civil] under Public Works Roads Department

Open Category

Total

63

RFW

19

OBC/MOBC

Total

52

RFW

16

SC

Total

0

RFW

0

STP

Total

13

RFW

4

STH

Total

12

RFW

4

EWS

Total

16

RFW

5

Total

Total

156

RFW

48

Post for Reserved for

PWD & Type Disability

i) Blindness & LV=3 ii) Deaf & HI=3 iii) Locomotor Disability etc.=2 iv) Autism etc.=3

Junior Engineer [Civil]

Name of the Post

Junior Engineer [Civil] under Public Works Roads Department

Open Category

Total

Total

RFW

RFW

OBC/MOBC

Total

Total

RFW

RFW

SC

Total

Total

RFW

RFW

STP

Total

Total

RFW

RFW

STH

Total

Total

RFW

RFW

EWS

Total

Total

RFW

RFW

Total

Total

Total

RFW

RFW

Post for Reserved for

PWD & Type Disability

i) Blindness & LV=3 ii) Deaf & HI=3 iii) Locomotor Disability etc.=2 iv) Autism etc.=3

14. Aggrieved by the publication of the said advertisement by the APSC on 19.11.2019, the petitioners submitted representations before the respondent authorities in the Public Works Department as well as to the APSC on 25.11.2019 and 19.12.2019. Ventilating their grievances for undertaking a recruitment process for filling up 156 nos. of vacancies in the post of Assistant Engineer [Civil] and 307 nos. of vacancies in the post of Junior Engineer [Civil] in the Public Works Department again the petitioners, by the said representations, had requested for their regularization and also prayed for preference in terms of weightage in both the written examination as well as in the viva-voce/interview by taking into account the unblemished services they had been rendering in the Public Works Department since after their joining pursuant to a selection process.

15. The petitioners thereafter, submitted their candidatures responding to the Advertisement no. 06/2019 dated 19.11.2019 of the APSC. In the Advertisement no. 06/2019, it was stipulated that the candidates for the post of Junior Engineer [Civil] should not be less than 21 years of age and not more than 38 years of age as on 01.01.2019. The upper age limit was relaxable for the candidates belonging to SC/ST/OBC/MOBC/PwD, as had been indicated therein. On 28.11.2019, the APSC published a Corrigendum whereby the minimum age for the post of Junior Engineer [Civil] had been reduced to 18 years instead of 21 years. By a subsequent notification dated 19.12.2019, the last date of submission of application forms for both the posts of Assistant Engineer [Civil] and Junior Engineer [Civil] was extended up to 01.01.2020. The APSC had subsequently notified the syllabi for the written examinations for both the posts of Assistant Engineer [Civil] and Junior Engineer [Civil] under the Public Works Department.

16. When no response was received in respect of their representations seeking regularisation and also preference [weightage] in the selection process that was going to be undertaken pursuant to the Advertisement no. 06/2019, the two writ

petitions under Article 226 of the Constitution of India have been preferred.

17. The writ petition, W.P.[C] no. 617/2020 was filed on 30.01.2020 and the other writ petition, W.P.[C] no. 744/2020 was filed on 01.02.2020.

18. In continuation of the Advertisement no. 06/2019 published on 19.11.2019, it had been notified by the APSC by way of an Addendum dated 06.05.2020 that the Government in the Public Works Department had intimated about additional 104 nos. of vacancies in the post of Assistant Engineer [Civil] vide their letter dated 20.03.2020. By the said Addendum, the break up of 104 nos. of vacancies as intimated by the Government, over and above 156 nos. of vacancies already advertised, had been published in the following manner :-

Assistant Engineer

UR

Nos. of Post

64

RFW

19

OBC/MOBC

Nos. of Post

22

RFW

7

STP

Nos. of Post

7

RFW

2

STH

Nos. of Post

2

RFW

1

SC

Nos. of Post

9

RFW

3

EWS, 10%

Nos. of Post

10

RFW

3

Total

Nos. of Post

104

RFW

35

PWD @ 4%

Blindness by LV deaf by H.1 Locomotor disability etc. Autism etc.

4

It was informed by the said Addendum that those who intended to apply for the said 104 nos. of vacancies in the post of Assistant Engineer [Civil] should submit their applications in the prescribed form on or before the last date of receipt of application fixed on 16.06.2020. It was further informed that those who had already applied earlier in response to Advertisement no. 06/2019 need not apply again. In the Addendum, it was mentioned that the APSC had, on 06.03.2020, notified to hold screening test [OMR based] on the basis of the Advertisement no. 06/2019 on 05.04.2020. Subsequently, however, the screening test [OMR based] was postponed due to outbreak of Corona Virus vide Notification dated 26.03.2020 and the screening test so notified, stood suspended temporarily. It was further informed that a fresh notification for holding the screening test would be notified on the basis of the vacancy position in 260 [=156+104] nos. of posts of Assistant Engineer [Civil] later on.

19. In the writ petition, W.P.[C] no. 617/2020, the advertisement made in relation to the vacancies in the post of Assistant Engineer [Civil] vide Advertisement no. 06/2019 has been assailed. By seeking setting aside of Advertisement no. 06/2019, the petitioners, 132 in nos., have sought for a direction for their regularization and/or absorption in the sanctioned permanent

posts of Assistant Engineer [Civil] in the Public Works Department, Government of Assam. In addition, the petitioners have also sought for a direction to the respondent authorities to give quantitative preference [weightage] to the petitioners who are presently working as Assistant Engineer [Civil] in the Public Works Department, in the selection process initiated pursuant to the Advertisement no. 06/2019.

19.1. In the other writ petition, W.P.[C] no. 744/2020, the advertisement made in relation to the vacancies in the post of Junior Engineer [Civil] vide Advertisement no. 06/2019 has been assailed in the similar manner. By seeking setting aside of Advertisement no. 06/2019, the petitioners, 195 in nos., have sought for a direction for their regularization and/or absorption in the sanctioned permanent post of Junior Engineer [Civil] in the Public Works Department, Government of Assam. In addition, the petitioners have also sought for a direction to the respondent authorities to give quantitative preference [weightage] to the petitioners who are presently working in the Public Works Department as Junior Engineer [Civil], in the selection process initiated pursuant to the Advertisement no. 06/2019.

20. As both the writ petitions have arisen out of the same Advertisement no. 06/2019 dated 19.11.2019; the prayers made in the two writ petitions are similar and the State respondents in both the writ petitions are same, the two writ petitions are taken up together for final consideration at the request of the learned counsel for the parties.

21. I have heard Mr. D. Das, learned senior counsel assisted by Mr. R. Sarma, learned counsel for the petitioners in W.P.[C] no. 617/2020 and Mr. D.K. Mishra, learned senior counsel assisted by Ms. D. Saikia, learned counsel for the petitioners in W.P.[C] no. 744/2020. I have also heard Mr. D. Saikia, learned Advocate General, Assam assisted by Mr. P. Nayak, learned Standing Counsel, Public Works Department for the respondent nos. 1 – 5 in both the writ petitions; Mr. T.J. Mahanta, learned senior Standing Counsel, APSC assisted by Mr. P.P. Dutta, learned Additional Standing Counsel, APSC for the respondent nos. 6 and 7 in both the writ petitions; and Mr. A.K. Sarma, learned counsel for the private respondent nos. 8 – 50 in the writ petition, W.P.[C] no. 617/2020.

Writ Petition, W.P.[C] no. 617/2020 :-

22. Mr. D. Das, learned senior counsel appearing for the petitioners in W.P.[C] no. 617/2019 has, at the beginning, submitted that though a prayer for a direction to regularise the services of the petitioners who are working in the post of Assistant Engineer [Civil] in the Public Works Department in terms of their selection and recruitment under Regulation 3[f] of the APSC Regulations, 1951, has been made in the writ petition but he is not pressing the said prayer for regularisation of the petitioners' services in the post of Assistant Engineer [Civil].

22.1. Advancing his submission on the issue of preference in the form of weightage, he has referred to the provisions of the Assam Engineering [Public

Works Department] Service Rules, 1978 [‘the PWD Service Rules’, for short]; the Assam Panchayat and Rural Development Officers [Technical] Service Rules, 2015 [‘the P&RD Service Rules’, for short] and the Assam Health Service Rules, 1995 [‘the Health Service Rules’, for short]. Bringing specific reference to the clause with regard to relaxation appearing in all the said three sets of service rules i.e. [a] Rule 28 in the PWD Service Rules; [b] Rule 25 in the P&RD Service Rules; and [c] Rule 26 in the Health Service Rules, he has submitted that all the said three rules appearing in the three sets of service rules are *pari materia*.

22.2. It is his submission that if the Government is satisfied that the operation of any one of the rules in the service rules has caused undue hardship in any particular case, it may dispense with or relax the requirement of that rule to such an extent and subject to such conditions as the Government may consider necessary for dealing with a case in a just and equitable manner. Thus, the State Government in the concerned department has the power and authority to deal with the present situation by providing preference [weightage] to the candidates who are working in the Public Works Department for a substantial period of time, like the present petitioners, since it is apparent that the petitioners are likely to suffer hardship in facing open competitions *vis-à-vis* all other candidates in the written examination as well as in the viva-voce/oral interview.

22.3. He has submitted that because of their rendering services in the post of Assistant Engineer [Civil] at different places of posting throughout the State of Assam, they cannot be equated with other candidates. Bringing reference to an Advertisement dated 24.06.2020 published by the APSC for filling up 344 nos. vacancies in the post of Junior Engineer [Civil] under the P&RD Department, he has submitted that in the said advertisement, no preference was initially given to the eligible candidates who were serving as Contractual Accredited Engineers in the P. & R. D. Department. When a writ petition, W.P.[C] no. 2839/2020 [All Assam Accredited Engineers Association vs. the State of Assam and others] was instituted before this Court, this Court by an order dated 21.07.2020 allowed the petitioners’ Association therein to make a representation collectively before the Government in the P&RD Department raising their claim for a consideration of the relaxation clause under Rule 25 of the P&RD Service Rules, 2015. The Government in the P&RD Department thereafter, took a decision on 14.08.2020 in respect of filling up the 344 nos. of vacancies in the post of Junior Engineer and as per Rule 25 of the P&RD Service Rules by relaxing the age and also by providing different weightages based on their service experiences in the department.

22.4. He has also brought reference to another advertisement published by the APSC on 05.10.2016 for filling up 208 nos. of vacancies in the post of Registrar / Resident Physician / Resident Surgeon / Refractionist / Demonstrator, etc. in various departments of the Government Medical Colleges in the State of Assam under the Health & Family Welfare [B] Department wherein it was specifically provided that preference would be given to doctors working under Regulation

3[f] of the APSC Regulations, 1951 while specifying M.D. or M.S. Degree in the concerned subject as the requisite educational qualification.

22.5. Reference is also made to another Advertisement dated 20.06.2020 published by the Medical and Health Recruitment Board, Assam whereby applications for filing up 112 nos. of vacancies in the post of Medical Officer [Critical Care] in the Government Medical Colleges and Hospitals under the Health & Family Welfare Department were invited. In the said advertisement, it was specifically mentioned that preference would be given to the Doctors working under Rule 17B of MHRB Regulations or on Contractual basis in Medical Colleges and Hospitals of Assam.

22.6. There was two other advertisements published by the APSC on 01.11.2011 and 30.12.2019 for filing up vacancies in the posts of Registrars / Resident Physician / Resident Surgeon / Refractionist / Demonstrator / Anaesthetist / Resident Pathologist, etc. in various departments of the Government Medical Colleges in the State of Assam under the Health & Family Welfare Department and for filing up the post of Fishery Development Officers and Allied Cadre under the Fishery Department wherein it was mentioned that preference would be given to the Doctors working under Regulation 3[f] of the APSC Regulations, 1951 and to those candidates having experience in serving Fishery Department under various projects related to Aquaculture and Fishery Extension respectively.

22.7. Bringing references to the aforesaid instances, he has submitted that it is very much evident that the Government in those cases had provided preference [weightage] to the candidates who were serving in the concerned department for a considerable period of time either under Regulation 3[f] of the APSC Regulation 1951 or under contractual terms. The case of the present petitioners is no different from the candidates who were given preference [weightage] in the recruitment processes undertaken through those advertisements. It is, thus, incumbent on the part of the petitioners for providing preference in the form of weightage in the recruitment process undertaken vide Advertisement no. 06/2019 dated 19.11.2019 by taking into account the experience as well as the hardships faced by the petitioners by dealing with the cases in a just and equitable manner. In support of his above submissions, Mr. Das has relied upon the decisions in Shankar K. Mandal and others vs. State of Bihar and others, reported in [2003] 9 SCC 519. The decision in V. Lavanya and others vs. State of Tamil Nadu, reported in [2017] 1 SCC 322, is relied upon to canvas that even if the process of selection has already been initiated, it is permissible to grant relaxation, which would not amount to change of the rule of the game in the mid-way.

22.8. Referring to the additional affidavit filed on behalf of the petitioners on 19.08.2021, he has submitted that upon publication of the Addendum on 06.05.2020 whereby additional 104 nos. of vacancies in the post of Assistant Engineer [Civil] were notified, more number of applications were received from the candidates. The last date of submission of application was 16.06.2020. As

per the settled position of law, a candidate should have the essential educational qualification which is Bachelor Degree in Civil Engineering in the case in hand. But the APSC has allowed a number of ineligible candidates who did not have the above degree qualification as on 16.06.2020, to sit in the written examination held on 15.11.2020. By referring a few names of such candidates, as mentioned in the Table in paragraph 4 thereof, he has submitted that the final results of those candidates' were declared only on 18.09.2020. Yet, the APSC has permitted those ineligible candidates to appear in the written examination. Such action on the part of the APSC has not only vitiated the selection process but also has caused prejudice to the chances of the petitioners, he submits. He has also made reference to a number of instances from Annexure-4 and Annexure-5, appended to the said additional affidavit, to submit that instances are found which go to show that the same candidate was issued two admit cards for the same written examination. It is his submission that the Commission is duty bound to adhere to the principle observed in Shankar K. Mandal [supra] with regard to issue of eligibility of the appearing candidates are concerned.

Writ Petition, W.P.[C] no. 744/2020 :-

23. Mr. D.K. Mishra, learned senior counsel for the petitioners in the writ petition, W.P.[C] no. 744/2020 has submitted that the petitioners responded to the Advertisement dated 14.08.2018 and after completion of the selection process, the petitioners came to be appointed as Junior Engineer [Civil] vide the notification dated 04.06.2019. The petitioners are eligible to be appointed as Junior Engineer [Civil] in the Public Works Department. It was after completion of about 3 [three] months of their service as Junior Engineer [Civil], the impugned Advertisement was published whereby 307 nos. of vacancies in the post of Junior Engineer [Civil] have been sought to be filled up by the Public Works Department.

23.1. Drawing attention to the syllabus published after the Advertisement dated 14.08.2018 and the syllabus published after the Advertisement dated 19.11.2019, he has submitted that the contents of the two syllabi for the paper in Civil Engineering are almost similar. He has, thus, submitted that the syllabus for the selection process where the petitioners emerged successful was substantially similar to the syllabus published for the written examination in terms of the second advertisement. It is his submission that the said assertion of the petitioners has not been denied by the State respondents in their affidavit-in-opposition. It is his contention that when the petitioners had emerged successful pursuant to the first advertisement they ought not to have been compelled to undergo a selection process which is based on an almost similar syllabus.

23.2. According to Mr. Mishra, learned senior counsel, the post of Junior Engineer [Civil] under the Public Works Department would not come under the purview of the APSC. It is his submission that the proviso to Clause [3] of Article 320 of the Constitution of India has provided enabling power to the Governor to make regulations specifying the matters in which it shall not be necessary for the State Public Service Commission to be consulted. It is in exercise of such enabling

power, the APSC Regulations, 1951 have been made. The APSC Regulations, 1951 have provided for three situations in respect of which there is no requirement to consult the APSC and they are, firstly, when the appointment to the service is made by an authority other than the Governor; secondly, when appointment is made to a post with a maximum pay scale of Rs. 1,166/- per month; and thirdly, when appointment is made to a post shown in the Schedule of the APSC Regulations, 1951, even if such post carries a pay scale exceeding Rs. 1,166/- per month. It is his submission that for appointment to the post of Junior Engineer [Civil] in the Public Works Department the Commission has no role to play as the post comes within the purview of the afore-mentioned first two situations.

23.3. He has submitted that there is no service rules governing the selection and appointment to the post of Junior Engineer [Civil] in the Public Works Department. In absence of such service rules, the Public Works Department has followed the Assam Subordinate Engineering [Irrigation Department] Service Rules, 1978 [‘the Irrigation Department Service Rules, 1978’, for short] for recruitment to the post of Junior Engineer [Civil] in the Public Works Department. Referring to a reply dated 03.02.2020 furnished under the Right to Information [RTI] Act, 2005, he has submitted that the respondent Public Works Department has admitted about the said position. In the affidavit-in-opposition also, the respondent no. 2 has admitted that the Public Works Department is following the Irrigation Department Service Rules, 1978 in the selection process initiated for filling up the vacancies in the post of Junior Engineer [Civil] in the Public Works Department. As the case of the respondents is that they are following Irrigation Department Service Rules, 1978, they cannot now be permitted to resile from the above stand. He has referred to the decision of the Hon’ble Supreme Court of India in *Dr. Amarjit Singh Ahluwalia vs. the State of Punjab and others*, reported in [1975] 3 SCC 503, paragraph no. 9, to stress that as the State respondents had professed to have followed the Irrigation Department Service Rules, 1978 for the purpose of recruitment to the post of Junior Engineer [Civil] in the Public Works Department, it has to be held that they shall scrupulously observe the same rules at all times on pain of invalidation of an act in violation of those rules. Mr. Mishra has, thereby, canvassed that the process undertaken pursuant to Advertisement no. 06/2019 dated 19.11.2019 being contrary to law, is to be interdicted with by setting it aside.

23.4. It is his submission that from a conjoint reading of Rule 2[a], Rule 3[1][ii] and Rule 3[5] of the Irrigation Department Service Rules, 1978, it is evident that the Appointing Authority for the post of Subordinate Engineer Grade-I is the Chief Engineer, Irrigation Department and the post of Subordinate Engineer Grade-I is a Class-III, non-Gazetted post. The post of Subordinate Engineer Grade-I was re-designated as Junior Engineer by a notification dated 27.06.1983 of the Finance [Pay Commission] Department on the basis of the report of the Assam Pay Commission, 1979 and the same was published in the Official Gazette on 22.07.1983. From Rule 6 of the Irrigation Department Service Rules, 1978, it

is clear that direct recruitment to the post of Junior Engineer i.e. erstwhile Subordinate Engineer Grade-I is to be made by the Chief Engineer of the Department on the basis of selection made by a Selection Board, constituted under Rule 13 of the Irrigation Department Service Rules, 1978, as per the procedure laid down in Rule 6.

23.5. Mr. Mishra has, thus, submitted that viewed from the above context, the post of Junior Engineer [Civil] in the Public Works Department is also a non-Gazetted post in respect of which the Appointing Authority is the Chief Engineer, Public Works Department. That the post of Junior Engineer [Civil] in the Public Works Department is a non-Gazetted post is also reflected from the pay-slip of the petitioners. As such, the procedure laid down in the Irrigation Department Service Rules, 1978 are mandatorily required to be followed and the same was followed in the selection process undertaken pursuant to the Advertisement dated 14.08.2018. Moreover, the posts of Junior Engineer [Civil] in which the petitioners are presently working, are permanent posts and not temporary posts. Since one of the essential conditions for making recruitment under Regulation 3[f] of the APSC Regulations, 1951 is that the post[s] is/are to be temporary post[s] the posts of Junior Engineer [Civil] in the Public Works Department where the petitioners are presently working, do not fall under the purview of the Commission and they could not have been appointed under Regulation 3[f] of the Regulations, 1951.

23.6. He has placed reliance in the observation made in paragraph no. 16 of the decision of the Hon'ble Supreme Court of India in M.T. Khan and others vs. Govt. of A.P. and others, reported in [2004] 2 SCC 267, where it has reiterated the well-settled principle of law that non-mentioning or wrong mentioning of a provision of law does not invalidate an order in the event it is found that a power therefor exists. He has also placed reliance in the decision in State of Sikkim vs. Dorjee Tshering Bhutia and others, reported in [1991] 4 SCC 243, wherein, in paragraph no. 16, it has been observed that when the source of power can be validly traced then the State action in the exercise of such power cannot be struck down on the ground that it was labelled under a different provision.

23.7. With such contentions, the learned Senior Counsel for the petitioners has submitted that the procedure adopted for selection and appointment of Junior Engineer [Civil] in the Public Works Department by the impugned advertisement is contrary to law and as such, the impugned advertisement as well as the process of selection in the case in hand is liable to be set aside. He has strenuously argued that for all intents and purposes, the Advertisement dated 14.08.2018 is to be treated as an advertisement for direct recruitment under Rule 6 of the Irrigation Department Service Rules, 1978 and the appointments of the petitioners in the posts in which they are presently working, have to be treated as regular appointments. Merely because the Advertisement dated 14.08.2018 mentioned about the recruitment to be under Regulation 3[f] of the APSC Regulations, 1951 it could not be labelled as such. In such situation, the

petitioners ought to be treated as regular appointees as the entire process of recruitment for the post falls outside the purview of the Commission.

23.8. The learned Senior Counsel has also referred to the decision in *Roshan Lal Tandon vs. Union of India* [UOI], reported in AIR 1967 SC 1889, to highlight the point that once a person is appointed to a post or an office in the Government he acquires a status. He has further submitted that in the present scenario, the possibility of securing a Government job is a tough task as there is a huge force of educated unemployed persons. In such difficult situation, the petitioners took part in the earlier selection process and secured employment in the Government after emerging successful therein. The Court cannot be oblivious of existence of gross inequality in bargaining powers between the employer and the employees. The manner in which the services of the petitioners have been sought to be dispensed with is, he has contended, unconscionable in the context of the decision of the Hon'ble Supreme Court of India in *Central Inland Water Transport Corporation Limited and another vs. Brojo Nath Ganguly and another*, reported in [1986] 3 SCC 156.

Writ Petition, W.P.[C] no. 617/2020 and Writ Petition, W.P.[C] no. 744/2020 :-

24. Mr. D. Saikia, learned Advocate General, Assam has submitted that in the Advertisements published on 14.08.2018, it was made clear that the process of selection was undertaken under Regulation 3[f] of the APSC Regulations, 1951 and the appointments would be purely on ad-hoc basis for a period of 4 [four] months initially. It was further made clear that to become eligible for regular appointment, a candidate must qualify in the regular recruitment process as and when held. The petitioners in both the writ petitions are highly qualified persons and they cannot contend that they responded to the said advertisements for filling up the posts of Assistant Engineer [Civil] and Junior Engineer [Civil] under Regulation 3[f] of the APSC Regulations, 1951 without knowing about the resultant consequences when a regular selection process would be undertaken to fill up the posts.

24.1. It is his submission that the petitioners herein had hardly about 5 [five] months or 3 [three] months of experience when the Advertisement no. 06/2019 was published on 19.11.2019. He has submitted that it is well settled that an appointee under Regulation 3[f] cannot claim regularization as such appointment is purely ad-hoc pending regular selection. Adverting to the submissions made by the learned senior counsel for the petitioners in the writ petition, W.P.[C] no. 617/2020, Mr. Saikia has submitted that the prayer for regularisation of services of the petitioners therein has rightly been dropped in view of the authoritative pronouncements on the point by several Division Bench decisions of this Court in [i] *Hemanta Kumar Pegu and others vs. State of Assam and others*, reported in 1988 [1] GLJ 383; [ii] *Pranjit Kumar Das vs. State of Assam and others*, reported in 1995 [2] GLT 28; [iii] *Debabratt Bargohain and others vs. Dilip Hazarika and others*, reported in 1996 [3] GLT 310; [iv] *Santanu Baruah and others vs. State of Assam and others*, reported in 1996 [3] GLT 323; and [v]

Nabin Chandra Bordoloi vs. State of Assam and others, reported in 2003 [2] GLT 147. His further submission is that the principles emerging from these decisions would go to show that the petitioners' other pleas also do not have any merit and the ratios laid down therein are also applicable in respect of the petitioners in the writ petition, W.P.[C] no. 744/2020.

24.2. When the Advertisements dated 14.08.2018 were published for appointment under Regulation 3[f] a large number of candidates holding the requisite educational qualifications for the posts of Assistant Engineer [Civil] and Junior Engineer [Civil] did not apply knowing fully well that the appointments made under the said advertisements would be only under Regulation 3[f] and the appointees had to make way ultimately to the regularly selected candidates at a later point of time.

Writ Petition, W.P.[C] no. 617/2020 :-

25. Responding to the submissions of the petitioners in the writ petition, W.P.[C] no. 617/2020 with regard to the contention regarding grant of preference in the form of weightage with reference to Rule 28 of the PWD Service Rules, the learned Advocate General has submitted the said relaxation clause can be invoked only when the Appointing Authority reaches a satisfaction in the facts and circumstances obtaining in a particular case that the operation of any of the rules has caused or will cause undue hardship in that particular case. It is only then the requirement of that rule can be dispensed with or relaxed. In the case in hand, the Appointing Authority has not reached any such satisfaction regarding hardship, not to speak of undue hardship. It is his submission that absence of hardship can be gauged from the large number of candidates participating in the selection process for both the posts initiated vide the Advertisement dated 19.11.2019. Any grant of preference in the form of weightage in the selection process under reference to the appointees appointed under Regulation 3[f] like the petitioners, would be in conflict with Article 14 and Article 16 of the Constitution of India.

25.1. It has been submitted that the selection process which is being undertaken pursuant to the Advertisement dated 19.11.2019, is neither in violation of any extant service rules nor in violation of any norms inconsistent with Article 14 and Article 16 of the Constitution of India. The petitioners have failed to show any legal right to insist for any kind of preference [weightage] in the ensuing selection process.

25.2. It is his further submission that the comparison that has been sought to be made by the petitioners with the other advertisements where the preference clause existed, is completely misplaced. In the other advertisements, the Government in the concerned Department had decided to give preference to Regulation 3[f] appointees considering either the long years of experience gained by the Regulation 3[f] appointees or due to dearth of qualified candidates in the concerned discipline/field. The State Government had especially experienced

dearth of candidates intending to serve in the State Health Services and accordingly, it was consciously decided, on those occasions, to give preference to the doctors working under Regulation 3[f] of the APSC Regulations, 1951. The case of the petitioners in view of large pool of candidates available in the field/branch of Civil Engineering for the posts of Assistant Engineer [Civil] and Junior Engineer [Civil], is not comparable.

25.3. It is contended by him that the petitioners cannot claim that the State Government should extend the benefit of preference [weightage] to them when no satisfaction about hardship has been reached by the State Government. One of the relevant factors to consider with regard to hardship to dispense with or relax the requirement of any rule is the duration of service one renders in the department. The services rendered by the petitioners herein fall short on that count. He has, thus, submitted that in the fact situation obtaining in the case, it is not even possible to give consideration about relaxation and/or weightage, not to speak of grant of preference and/or weightage.

25.4. He has further placed reliance in the decisions in *State of Orissa and others vs. Prasanta Kumar Sahoo*, reported in [2007] 15 SCC 129; *Bedanga Talukdar vs. Saifudaullah Khan and others*, reported in [2011] 12 SCC 85; and *Dr. M. Laitphlang and others vs. State of Meghalaya and others*, reported in [2004] 2 GLR 546.

Writ Petition, W.P.[C] no. 744/2020 :-

26. The learned Advocate General responding to the submissions advanced on behalf of the petitioners in the writ petition, W.P.[C] no. 744/2020, has submitted some of the contentions advanced are without the necessary pleadings.

26.1. He has submitted that the contention advanced on behalf of the petitioners to the effect that there has been admission on the part of the State respondents that the Public Works Department [PWD] has been following the Irrigation Department Service Rules, 1978 for recruitment to the post of Junior Engineer [Civil] in the Public Works Department [PWD] is a misstatement. A look at the question no. 7 and the answer given thereof in the reply dated 03.02.2020 furnished under the RTI Act, 2005 and the statement in the affidavit-in-opposition would completely displace the notion.

26.2. Mr. Saikia has submitted that the post of Junior Engineer [Civil] in the Public Works Department [PWD] is admittedly not a post within the Schedule of the APSC Regulations, 1951 and the same cannot be a ground of challenge for the petitioners in W.P.[C] no. 744/2020. The petitioners' case does not attract the provision of Regulation 3[a] of the APSC Regulations, 1951 on the count of maximum pay scale also. Regulation 3[a] of the APSC Regulations, 1951 has mentioned about a post on a pay scale the maximum of which is less than Rs. 1,166/- per month in respect of which it is not necessary for the Commission to be consulted. The said part of the APSC Regulations, 1951 was amended in the year 1987 but even in the year 1983 the maximum of the pay scale of the post

of Junior Engineer in the Public Works Department [PWD] was not less than Rs. 1,166/-. He has contended that vide a notification dated 26.07.2000, Gazetted status was conferred on the post of Junior Engineer in the Public Works Department [PWD] and the Appointing Authority for the post of Junior Engineer in the Public Works Department [PWD] is the Governor. On that basis, it has been contended that there is no applicability of the third ground of exemption contained in Regulation 3[a] of the APSC Regulations, 1951. Consequently, all the contentions of the petitioners sought to be built on the premises of Regulation 3[a] have fallen flat.

26.3. The petitioners had participated in the process of recruitment undertaken under Regulation 3[f] of the APSC Regulations, 1951 knowing fully well from the advertisement itself that their engagements would be temporary and the appointees under Regulation 3[f] must have to qualify through regular recruitment process as and when held and such appointment shall not be a ground for claiming regular appointment whatsoever in future. Now, the petitioners cannot make a volte face to claim that their appointments were regular appointments. The learned Advocate General has, thus, contended that the decisions relied upon on behalf of the petitioners in W.P.[C] no. 744/2020 are not applicable to the facts and circumstances in the case in hand.

26.4. It has been submitted that it is correct that the petitioners in W.P.[C] no. 744/2020 came to be appointed in the post of Junior Engineers [Civil] pursuant to a process of selection conducted by a selection body pursuant to the advertisement dated 14.08.2018 and by a notification issued by the Appointing Authority on 04.06.2019. But it was made specific in the advertisement dated 14.08.2018 that their appointments would be purely on ad-hoc basis for a period of 4 [four] months and to be eligible for regular appointment under the Public Works Department [PWD], they had to qualify themselves through regular recruitment process. It was also made clear that their appointments under Regulation 3[f] of the APSC Regulations, 1951 shall not be a ground for claiming regular appointments whatsoever in future. The notification dated 04.06.2019 was also specific to the extent that they were appointed provisionally under Regulation 3[f] of the APSC Regulations, 1951. Thus, it is not open for the petitioners to claim continuation in the post as regular recruits even if they had undergone some kind of selection process prior to their appointments under Regulation 3[f].

Writ Petition, W.P.[C] no. 617/2020 :-

27. Mr. T.J. Mahanta, learned Senior Counsel appearing for the respondent APSC authorities has submitted that the Commission had published the advertisement as per the draft advertisement forwarded by the Government in the Public Works Department. It is submitted by him that when the extant service rules, that is, the PWD Service Rules, have not provided for any preference [weightage], the petitioners merely because they are working after being appointed under Regulation 3[f] of the APSC Regulations, 1951, do not have any legal right for

any preference [weightage]. The petitioners have not been able to make out any case for preference in the form of weightage on the ground of hardship. He has further submitted that the preference [weightage] can be given only when there is specific mention in the concerned advertisement.

27.1. He has submitted that as to when the relaxation clause can be invoked has been settled by a catena of decisions of the Hon'ble Supreme Court of India. The power of relaxation, as incorporated in Rule 28 of the PWD Service Rules, would be applicable to mitigate undue hardship and to meet a particular situation. Resort to the said relaxation clause is not to be taken in a normal situation but in an extreme situation when eligible and qualified candidates in sufficient numbers are not available or interested for selection and appointment, which is albeit not the case in hand. To support his such submissions, he has placed reliance in the decision of Hon'ble Supreme Court of India in Rajendra Kumar Agrawal vs. State of Uttar Pradesh and others, reported in [2015] 1 SCC 642, wherein the decision in J.C. Yadav vs. State of Haryana, reported in [1992] 2 SCC 189, was referred to as the said decision had dealt on the issue of relaxation of rule. He has also referred to the decision in State of U.P. and another vs. Om Prakash and others, reported in [2006] 6 SCC 474, where the decision in Secy., A.P. Public Service Commission vs. Y.V.V.R. Srinivashulu, reported in [2003] 5 SCC 341, was referred to as to how and when preference can be granted. To buttress his submissions, he has also relied upon the decision in State of Gujarat and others vs. Arvindkumar T. Tiwari and another, reported in [2012] 9 SCC 545.

27.2. In reply to the submissions made by Mr. Das, learned Senior Counsel for the petitioners in W.P.[C] no. 617/2020 on the basis of the additional affidavit, Mr. Mahanta has referred to the averments made in the Commission's affidavit-in-reply filed in response to the said additional affidavit. Denying the contentions of the petitioners, he has submitted that there was no violation of the terms of the Advertisement no. 06/2019 dated 19.11.2019 in allowing some candidates who were not qualified for the post of Assistant Engineer [Civil] till the last date of submission of application i.e. 16.06.2020, in the written examination for the post of Assistant Engineer [Civil] held on 15.11.2020. It is submitted by him that considering the urgency for recruitment and to save time, a resolution was taken by the Commission on 27.08.2020 to conduct the screening of applications after the written examination was over and before calling the required number of candidates for interview as per the prescribed ratio. All the candidates who have applied for the post of Assistant Engineer [Civil], have been allowed to appear in the written examination.

27.3. It has been pleaded by the APSC that scrutiny of all the applications for the recruitment process has been completed and lists of selected candidates and rejected candidates have been made ready for publication before declaration of the OMR based test results. The rejection list has not been published by the Commission due to operation of the interim order in the present two writ petitions. It has been clarified that the shortlisting of candidates for viva-voce/

interview at the ratio of 1:3 would be made only from the eligible candidates as per the advertisement. With regard to the allegation of issuance of more than one admit cards for the same candidate, it has been averred that not more than one admit card was issued against one single application. In case any candidate had submitted two application forms, admit cards might have been issued against it accordingly because admit cards were issued based on the applications only. There was no instance to the effect that two candidates had appeared in the written examination held on 15.11.2020 against two admit cards issued against one particular candidate. He has, thus, submitted that the apprehensions raised through the additional affidavit is completely misplaced. Furthermore, there is no prejudice caused to the petitioners in any manner whatsoever at this stage.

Writ Petition, W.P.[C] no. 744/2020 :-

28. Mr. Mahanta, learned Senior Standing Counsel appearing for the APSC in the writ petition, W.P.[C] no. 744/2020, has submitted that there is no service rules framed either under Article 309 or under the proviso to Article 309 of the Constitution of India to govern the matter of recruitment to the post of Junior Engineer [Civil]. In such a case, it is the executive instructions received from the Government which would govern the field. The Commission has published the Advertisement no. 06/2019 dated 19.11.2019 as per the draft Advertisement received from the Government in the Public Works Department vide communication bearing no. RBEB.159/2018/66 dated 19.08.2019. It did not contain any instruction to follow the provisions of the Irrigation Department Service Rules, 1978.

Writ Petition, W.P.[C] no. 617/2020 :-

29. Mr. A.K. Sarma, learned counsel appearing for the private respondent nos. 8 – 50 has adopted the submissions made by the learned Advocate General and learned Senior Standing Counsel, APSC. The private respondents have impleaded themselves as party-respondents in the writ petition, W.P.[C] no. 617/2020. It is the case of these respondents that they had applied pursuant to the advertisement published and on the basis of their eligibility, they were allowed to appear in the written examination. As they all had performed well, they are legitimately expecting that they would clear the written examination and would be called for the viva voce/interview. Their further case is that all of them were eligible at the time of submission of the applications. Merely because the petitioners are working in the Department on ad-hoc basis after their selection under Regulation 3[f] of the APSC Regulations, 1951 no right has accrued to the petitioners either to claim regularization or to claim preference [weightage] for such period of service. Only because the private respondents did not apply in response to the earlier Advertisement dated 14.08.2018 for the fact that the advertisement was only for ad-hoc service the same cannot be a ground to put the petitioners on a higher pedestal over and above them as it would amount to unjust discrimination and as such, none of the prayers made in the writ petition

is tenable.

30. I have duly considered the rival submissions advanced by the learned counsel for the parties and also have gone through the materials brought on record by the parties through their respective pleadings. I have also gone through the decisions cited by the learned counsel for the parties in support of their respective submissions with the caveat that a decision is an authority for what it decides and not what can logically be deduced therefrom and even a slight distinction in fact or an additional or different fact may make a lot of difference in the decision making process.

Writ Petition, W.P.[C] no. 617/2020 and Writ Petition, W.P.[C] no. 744/2020 :-

31. Article 14 enshrines the principle that the State shall not deny any person equality before the law or the equal protection of the laws within the territory of India. Article 16 of the Constitution of India states that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The purport and object of this fundamental right is to extend the right to equality of opportunity in getting employment in public offices. Article 14 is the genus and Article 16 is one of the species of the same principle of equality contained in broad terms in Article 14. The word, employment or appointment includes initial appointment. The initial appointment to any post under the State like the posts in the cases in hand, can only be made after widest possible publication of an advertisement, thereby, inviting applications from eligible and interested candidates. It envisages a process of selection conducted by a selection committee/board and wherever it is necessary, by the Public Service Commission consisting of a written examination and/or interview/viva-voce or some other rational criteria with the aim to judge the inter se merits of the participating candidates in a fair, transparent and non-discriminatory manner.

32. The background facts leading to the institution of these two writ petitions have already been delineated above. It can be noticed easily that both the sets of petitioners are highly qualified having degrees and diplomas in the Civil Engineering branch. It is, therefore, not open for both the sets of petitioners to say that they applied to the advertisements dated 14.08.2018 without knowing that the applications were invited for filing up the posts under Regulation 3[f] of the APSC Regulations, 1951.

33. The written examinations for the vacancies in the post of Assistant Engineer [Civil] and Junior Engineer [Civil] pursuant to the Advertisement dated 19.11.2019 were already over where all the petitioners along with the other candidates appeared. By the dates of filing of the writ petitions on 30.01.2020 and 01.02.2020 respectively, the concerned advertisement had already been published on 19.11.2019. At the times of filing of the writ petitions, the written examinations were not held but during the pendency of the writ petitions, the written examinations were held on 15.11.2020.

34. Both the sets of petitioners herein have got appointments in the Public Works Department after being appointed under Regulation 3[f] of the APSC Regulations, 1951. It would, thus, be appropriate to refer to the provisions of Regulation 3[f] of the APSC Regulations, 1951. Contentions are also advanced on behalf of the set of the petitioners in the writ petition, W.P.[C] no. 744/2020 regarding non-requirement of consultation with the Commission for recruitment to the post of Junior Engineer [Civil] in the Public Works Department and such reference is also necessary in that context.

35. Having regard to such contentions made in the two writ petitions, the relevant parts of Regulation 3 of the APSC Regulations, 1951 are extracted hereinbelow :-

"3. It shall not be necessary for the Commission to be consulted in matters relating to methods of recruitment to civil services and post or the suitability of the candidates for such appointments, in the following cases, namely –

[a] When an appointment is to be made by an authority other than the Governor or by the Governor to a post on a pay scale the maximum of which is less than "Rupees Eleven hundred and Sixty six" per month and in respect of post as shown in the Schedule although the maximum of the pay scale of these posts exceed "Rupees Eleven hundred and Sixty six", where direct recruitment can be made.

[b] * * * * *

[c] * * * * *

[d] * * * * *

[e] * * * * *

[f] When an appointment is to be made by direct recruitment to a temporary post created in a service, if it is necessary in the public interest that the appointment should be made immediately and reference to the Commission would cause undue delay; provided that if the post has been sanctioned for, or is likely to last for more than four months, the Commission shall, as soon as possible, be consulted in all matters mentioned in sub-clause 3 of Article 320 of the Constitution;

[g] * * * * *

[h] * * * * *

36. Regulation 3[f] of the APSC Regulations, 1951 has inter alia provided that when an appointment is to be made by direct recruitment to a temporary post created in civil service and post, if it is necessary in the public interest that the appointment should be made immediately and the reference to the Commission would cause undue delay, the Commission is not required to be consulted in matters relating to the methods of recruitment or with regard to the suitability of

the candidates for such appointment. The proviso to it has provided that if the post has been sanctioned for or is likely to last for more than four months, the Commission shall, as soon as possible, be consulted inter alia in all matters mentioned in sub-clause [3] of Article 320 of the Constitution. Regulation 3[f] of the APSC Regulations, 1951 has indicated that an appointment, made under Regulation 3[f], shall be in a post which is temporary in nature. If the State Government is of the view that there is an immediate need to make an appointment in such temporary post and a reference to the Commission would cause undue delay, the State Government can make such appointment in the temporary post in a service or post by way of direct recruitment under Regulation 3[f]. From the narrative of Regulation 3[f], it is clear that an appointment made under Regulation 3[f] is purely ad-hoc in nature until the regular selection is made by the Commission in accordance with the provisions laid down in the concerned service rules, if any, and in the absence of any service rules, in a manner consistent with Article 14 and Article 16 of the Constitution of India. The proviso has further made it clear that if the post has been sanctioned or likely to last for more than four months, the only option available is to fill up the post in a regular selection process held in consultation with the Commission. As a natural corollary, once regular selection is made, the appointee who is working in the post by virtue his appointment under Regulation 3[f], has to make way for the candidate selected through the regular selection process and the Government/Appointing Authority when any candidate selected through the regular selection process is available, has to give appointment to such regular selectee and it shall not be open for the Government/Appointing Authority to keep such regular selectee at bay while allowing the appointee under Regulation 3[f] to continue working in the post. If such an eventuality arises, the regularly selected candidate has to be appointed even by terminating the services of the appointee appointed under Regulation 3[f] of the APSC Regulations, 1951.

37. Issues pertaining to Regulation 3[f] of the APSC Regulations, 1951 came up for consideration in a number of cases before this Court, as has been indicated above.

37.1. In *Pranjit Kumar Das* [supra], an advertisement was published by the Commissioner and Secretary to the Government of Assam, Handloom, Textile and Sericulture Department on 29.07.1989 calling for applications for ad-hoc appointments in the post of Senior Inspector of Handloom and Textile. The writ appellants-petitioners along with others were interviewed by a selection committee and a select list was prepared. Thereafter, the writ appellants-petitioners were appointed under the provisions of the Assam Public Service Commission [Ad-hoc] Appointment Rules, 1986 on different dates in 1990. After one year of their services, they were terminated w.e.f. 22.05.1991 and they were re-appointed in the same post on the next date i.e. 23.05.1991. The Government of Assam by a letter dated 30.05.1991 requested the APSC to take necessary steps for regularisation of the writ appellants-petitioners' posts. The Assam

Public Service Commission [Ad-hoc] Appointment Rules, 1986 was, thereafter, repealed by a notification dated 18.05.1992 and the earlier appointments of the writ appellants-petitioners were converted to appointments under Regulation 3[f] of the APSC Regulations, 1951, initially for a period of 4 [four] months and subsequently extended from time to time. Another advertisement was published by the Commission on 09.10.1991 calling for applications for filling up the vacancies in the post of Senior Inspector of Handloom and Textile which posts the writ appellants-petitioners were holding. The writ appellants-petitioners also applied in response to the advertisement dated 09.10.1991 but in the select list prepared on the basis of merits, the names of the writ appellants-petitioners did not figure as they failed to qualify in the interview conducted by the Commission for the post.

37.2. In the backdrop of those events when the writ appellants-petitioners approached this Court, the Division Bench of this Court in *Pranjit Kumar Das* [supra] had held as under :-

“11. This Regulation 3[f] of the Regulation of 1951 came up for consideration by the Division Bench of this Court in *Hemanta Kumar Pegu and others vs. State of Assam*, 1988 [1] GLJ 383. The Division Bench considered Regulation 3[f] and held in paragraph 27 of the judgment that this Regulation does not provide a source of power for appointment, but only provides the mode of appointment and that regularise does not connote permanence. The contention that the persons who were appointed under Regulation 3[f] can be regularised if they are otherwise qualified was not accepted by the Court and it was held that regularisation means making regular appointment by selection irrespective of the question whether the petitioners were already appointed under Regulation 3[f] or not. The ratio laid down in the above decision in our opinion is the correct proposition of law and there is no reason to take a different view. Therefore, in view of the above ratio, we are constrained to hold that merely because of the appointments of the appellants were converted to appointment under Regulation 3[f] of the Regulation of 1951, they cannot claim regularisation due to length of their service.”

37.3. The observations made by two decisions of Division Benches of this Court in *Debabratt Bargohain and others* [supra] and *Santanu Baruah and others* [supra] can be referred to as both decisions were rendered in connection with Regulation 3[f] of the APSC Regulations, 1951 qua appointments made in the Public Works Department, Government of Assam.

37.4. The decision in *Santanu Baruah and others* [supra] was in reference to the Assam Engineering [Public Works Department] Service Rules, 1978 [‘the PWD Service Rules’]. While explaining the rights of the candidates selected through process of selection undertaken by the APSC vis-à-vis the rights of the appointees under Regulation 3[f] of the APSC Regulations, 1951, the Division Bench had observed as under :-

"19. In our opinion, this observation has been made by the learned Single Judge in the context of the rights of the selected candidates vis-à-vis the rights of the appointees under Regulation 3[f]. A reading of sub-Regulation

[f] would show that the appointment made under it is purely temporary pending selection by the APSC and the appointment letters issued in favour of the appointees under Regulation 3[f] contains a clause that regularisation of service of the appointee will depend upon his selection by the APSC within the required position in the list of the candidates recommended by the APSC for regularisation. Since the parties in these batch of cases who were appointed under Regulation 3[f] did get the opportunity of applying to the APSC for the selection, and their names do not find place within the required position of the list of candidates recommended by the APSC for appointment to the 39 vacancies in the post of Assistant Engineer [Civil] under the PWD as on 30.12.1994, they should make room for appointment of the candidates selected by the APSC and the authorities would be entitled to terminate their services. To retain such appointees under Regulation 3[f] in the 39 vacancies as on 30.12.1994 for which candidates have been selected and recommended by the APSC would, in our opinion, violate the rights of the selected candidates under Articles 14 and 16 of the Constitution."

37.5. In *Debabrat Bargohain and others* [supra], the subject-matter was recruitment to a number of vacancies in the posts of Junior Engineer [Civil] and Junior Engineer [Mechanical] in the Public Works Department for which the APSC after publishing an advertisement for the same on 21.10.1993, proceeded to conduct written examination and interview. After completion of written examination and interview, the APSC prepared a select list and a waiting list of candidates and submitted the same to the Government on 18.09.1995. Since the selection process was taking some time, those vacant posts, in the intervening period, were filled up temporarily by the petitioners under Regulation 3[f] of the APSC Regulations, 1951. While examining the same issue, the Division Bench had observed as follows :-

"16. The law, thus, having been enunciated by the Apex Court, let us examine the cases of those petitioners who have been appointed under Regulation 3[f] and as to whether any of their rights under the statutory provision, the appointment letter or the Constitution have been violated. The statutory provision in Regulation 3[f] makes it clear that the appointment under it is purely temporary pending reference to and selection by the APSC. The appointment letters issued to the 3[f] appointees clearly contain a clause that the appointment being under Regulation 3[f] continuance in service vis-à-vis regularisation in service thereof will depend upon in being selected by the APSC within the required position in the list of candidates recommended by the APSC for regularisation. It will be the responsibility of the appointee, to apply and to appear in the selection notified/advertised by the APSC for filling up the posts of Junior Engineer and that in case he does not appear or is not able to appear or in

case he is not selected by the APSC within the required position of the select list, the appointment will stand automatically terminated. From the facts narrated earlier, it is clear that except the two petitioners in Civil Rule No. 2623/95, all other appointees under Regulation 3[f] have had the opportunity of appearing in the APSC selection for public employment and hence their rights either under Articles 14 and 16 of the Constitution or under Regulation 3[f] or their appointment letters have not been violated. All these appointees, except two, did apply and appear and thus did avail of a chance and at the behest of such appointees under Regulation 3[f] who have been found unsuccessful, this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution will not grant them any relief of quashing the selection of candidates by the APSC in excess of the advertised posts or in continuing them in the posts to which they were temporarily appointed pending regular selection by the APSC."

37.6. It follows from the observations made in the decision in Santanu Baruah and others [supra] that if a person who has been serving in the Public Works Department after being appointed in terms of Regulation 3[f] of the APSC Regulations, 1951, wants himself to become a member of Assam Engineering [Public Works Department] Services Rules, 1978 then he has to apply and appear in the selection process when applications for filling up the vacancy in the post in which he is working are invited for filling up the same by an advertisement published by the Commission through a regular selection process. In the event such a person working under Regulation 3[f] does not appear or does not get selected after participation in the process of selection undertaken by the Commission then such person shall have to make way for a candidate who is selected in the selection process undertaken by the Commission. Similar is the proposition laid down in Debabrat Bargohain and others [supra].

37.7. In Nabin Chandra Bordoloi [supra], a Division Bench of this Court after referring to paragraph no. 11 [supra] of the decision in Pranjit Kumar Das [supra], has gone on to observe, in paragraph no. 7 thereof, as under :-

"7. The Division Bench of this Court has taken a categorical view that the appointments made under Regulation 3[f] of Regulation 1951 does not authorise the very person to claim regularisation on the basis of appointment made under Regulation 3[f]. Thus, in other words this Court has held that the service rendered by any incumbent under the appointment made in exercise of power under Regulation 3[f] of Regulation 1951 cannot be a ground for regularisation of the incumbent on that basis. For the same reason, the services rendered by the incumbent cannot be counted for the purpose of assigning the seniority."

38. At this juncture, reverting back to the factual matrices of both the cases, it is seen that the Advertisements dated 14.08.2018 as well as the common brief Advertisement dated 14.08.2018 had specifically mentioned that the applications were invited under Regulation 3[f] of the APSC Regulations, 1951 and the appointments would be purely on ad-hoc basis for a period of 4 [four] months and to become eligible for regular appointment, a candidate must qualify himself

in the regular recruitment process as and when held. For ready reference, the relevant excerpts from the common brief Advertisement dated 14.08.2018 are quoted hereunder :-

Government of Assam

Public Works Department, Dispur, Guwahati – 6

No. CON/B&NH/22/2018/10 Dated : Dispur, the August 14, 2018

ADVERTISEMENT

Public Works Department, Govt. of Assam invites applications from Indian Citizens for the under-mentioned posts under Public Works Department, Government of Assam under Regulation 3[f] of the Assam Public Service Commission [Limitation of Functions] Regulations, 1951, in the Scale of Pay and Grade Pay as indicated below along with usual allowances as admissible under Rules of the Govt. of Assam. The appointment will be purely on ad-hoc basis for a period of 4 [four] months and to become eligible for regular appointment a candidate must qualify himself in the regular recruitment test as and when held.

Name of the post

No. of vacancy

Scale of Pay

Assistant Engineer

156

Rs. 30,000/- to 1,10,00/- PB 4

with Grade Pay of Rs. 12,700/-

Junior Engineer

307

Rs. 14000-49000 PB with

Grade Pay of Rs. 8700/-

39. In the notification dated 05.03.2019 whereby the petitioners in W.P.[C] no. 617/2020 came to be appointed in the post of Assistant Engineer [Civil] and in the notification dated 04.06.2019 whereby the petitioners in W.P.[C] no. 744/2020 came to be appointed in the post of Junior Engineer [Civil], it was specifically mentioned that they were appointed under Regulation 3[f] of the APSC Regulations, 1951. It is also noticed that both these notifications were issued as Orders by the Governor of Assam.

40. Having accepted the position that in the event they were selected and recruited in the advertised posts pursuant to the advertisement dated

14.08.2018, they would be appointed only under Regulation 3[f] of the Regulations, 1951 and they would not be treated as regular appointees, all the petitioners are precluded from making the prayer for regularization. The principle that one cannot approbate and reprobate is found applicatory in the cases of the petitioners. The principle that an ad-hoc appointee appointed under Regulation 3[f] of the APSC Regulations, 1951 cannot claim regularisation and has to make way for the regularly selected candidate, as authoritatively laid down in the decisions mentioned above, applies proprio vigore in the cases of both the sets of the petitioners in W.P.[C] no. 617/2020 and W.P.[C] no. 744/2020.

Writ Petition, W.P.[C] no. 617/2020 :-

41. One of the issues that has arisen for consideration in the writ petition, W.P. [C] no. 617/2020 is whether in view of their selection and appointment in the post of Assistant Engineer [Civil] pursuant to the Advertisement dated 14.08.2018 any right gets accrued to the petitioners to claim any preference in the form of weightage in the selection process undertaken by the APSC vide Advertisement No. 06/2019 dated 19.11.2019 for filling up 156 nos. of post of Assistant Engineer [Civil] under the Public Works Department.

42. The Assam Engineering [Public Works Department] Services Rules, 1978 is framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India. Under Article 309 of the Constitution of India, the Legislature is empowered to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. The proviso to Article 309, inter alia, empowers the Governor, in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment and conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the Legislature. It is settled that rules made under the proviso to Article 309 to the Constitution of India are legislative in character and, thus, such rules are constitutional rules, not like rules under a statute. They have the same force as a statute, though made by the executive. It is not a piece of delegated legislation like a rule made under a statute.

43. Rule 6 of the PWD Service Rules has laid down the procedure for direct recruitment. For ready reference, the provision contained in Rule 6 is quoted hereunder :-

“Rule 6 :-

Direct Recruitment- [I] Subject to sub-rule [3] of Rule 11, direct recruitment to cadres of Assistant Engineers, Assistant Architects and Assistant Research Officers, 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, as 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; and

[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 herein before under sub-rule [1] of this rule far 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 earliest list of the same year, eligible for appointment, have been offered the appointment."

44. From Rule 6 of the PWD Service Rules, one thing is clear beyond any cavil of doubt that the process of regular selection for filling up the vacancies in the post of Assistant Engineer [Civil] can be made only through the Commission and not by any other body/agency.

45. Before any dilation on the issue of preference in the form of weightage to the petitioners in W.P.[C] no. 617/2020, it would be apt to refer to Rule 28 of the PWD Service Rules, on which the petitioners have heavily relied, to grant them preference in the form of weightage in the process of selection initiated by the Advertisement no. 06/2019 dated 19.11.2019.

46. Rule 28 of the PWD Service Rules reads as under :-

"Rule 28. Relaxation :-

Where the Appointing Authority is satisfied that the operation of any of these rules causes undue hardship in any particular case, it may, dispense with or relax the requirement of that rules to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner :

Provided that the case of any person shall not be dealt with in any manner less favourable to him than that provided in any of these rules.”

Rule 25 in the P&RD Service Rules and Rule 26 in the Health Service Rules are almost similarly worded with the only difference therein is that instead of the word, ‘the Appointing Authority’, the word, ‘the Government’ appears in the said two set of rules. As per Rule 2[a] of the PWD Service Rules, ‘the Appointing Authority’ means the Governor of Assam. In that view of the matter, all the said three rules appearing in the three sets of service rules are *pari materia*.

47. From the facts already adverted above, it is clear that the petitioners in W.P. [C] no. 617/2020 have the requisite eligibility prescribed in the PWD Service Rules to be appointed to the post of Assistant Engineer [Civil]. The petitioners have sought for weightage in the process of selection initiated by the Advertisement no. 06/2019 dated 19.11.2019.

48. The concept of preference aptly came to be considered in the decision of J.C. Yadav [supra] in the context of existence of a relaxation clause in the concerned service rules. In paragraph no. 6 in J.C. Yadav [supra], the Hon’ble Supreme Court of India has observed as under :-

“6. The Rule confers power on the Government to dispense with or to relax the requirement of any of the Rules to the extent, and with such conditions as it may consider necessary for dealing with the case in a just and equitable manner. The object and purpose of conferring this power on the Government is to mitigate undue hardship in any particular case, and to deal with a case in a just and equitable manner. If the Rules cause undue hardship or Rules operate in an inequitable manner in that event the State Government has power to dispense with or to relax the requirement of Rules. The Rules do not restrict the exercise of power to individual cases. The Government may in certain circumstances relax the requirement of Rules to meet a particular situation. The expression ‘in any particular case’ does not mean that the relaxation should be confined only to an individual case. One of the meanings of the expression ‘particular’ means ‘peculiar or pertaining, to a specified person - thing time or place not common or general’. The meaning of the word particular in relation to law means separate or special, limited or specific. The word ‘case’ in ordinary usage means ‘event’, ‘happening’. ‘situation’, ‘circumstances’. The expression ‘case’ in legal sense means ‘a case’, ‘suit’ or ‘proceeding in Court or Tribunal’. Having regard to these meanings of the words ‘particular’ and ‘case’ the expression ‘in any particular case’ would mean, in a particular or pertaining to an event, situation or circumstance. Rule 22 postulates relaxation of Rules to meet a particular event or situation, if the operation of the Rules causes hardship. The relaxation of the

Rules may be to the extent the State Government may consider necessary for dealing with a particular situation in a just and equitable manner. The scope of Rule is wide, enough to confer power on the State Government to relax the requirement of Rules in respect of an individual or class of individuals to the extent it may consider necessary for dealing with the case in a just and equitable manner. The power of relaxation is generally contained in the Rules with a view to mitigate undue hardship or to meet a particular situation. Many a times strict application of service rules create a situation where a particular individual or a set of individuals may suffer undue hardship and further there may be a situation where requisite qualified persons may not be available for appointment to the service. In such a situation the Government has power to relax requirement of Rules. The State Government may in exercise of its powers issue a general order relaxing any particular Rule with a view to avail the services of requisite officers. The relaxation even if granted in a general manner would enure to the benefit of individual officers.”

48.1. With regard to the power of relaxation, the Hon’ble Supreme Court of India in paragraph no. 10 in the decision of Arvindkumar T. Tiwari [supra] has observed as under :-

“10. In a particular case, where it is so required, relaxation of even educational qualification[s] may be permissible, provided that the rules empower the authority to relax such eligibility in general, or with regard to an individual case or class of cases of undue hardship. However, the said power should be exercised for justifiable reasons and it must not be exercised arbitrarily, only to favour an individual. The power to relax the recruitment rules or any other rule made by the State Government/Authority is conferred upon the Government/Authority to meet any emergent situation where injustice might have been caused or, is likely to be caused to any person or class of persons or, where the working of the said rules might have become impossible. [Vide: State of Haryana vs. Subhash Chandra Marwah, [1974] 3 SCC 220; J.C. Yadav vs. State of Haryana, [1992] 2 SCC 189; and Ashok Kumar Uppal vs. State of J & K, [1998] 4 SCC 179].”

48.2. Explaining as to how the preference clause is to be applied, the Hon’ble Supreme Court of India in paragraph nos. 10 and 11 in the decision in Y.V.V.R. Srinivashulu [supra] has expounded as under :-

“10..... The word ‘preference’ in our view is capable of different shades of meaning taking colour from the context, purpose and object of its use under the scheme of things envisaged. Hence, it is to be construed not in an isolated or detached manner, ascribing a meaning of universal import, for all contingencies capable of an invariable application. The procedure for selection in the case involve, a qualifying test, a written examination and oral test or interview and the final list of selection has to be on the basis of the marks obtained in them. The suitability and all round merit if had to be adjudged in that manner only what justification could there be for overriding all these merely because, a

particular candidate is in possession of an additional qualification on the basis of which, a preference has also been envisaged. The rules do not provide for separate classification of those candidates or apply different norms of selection for them. The 'preference' envisaged in the rules, in our view, under the scheme of things and contextually also cannot mean an absolute en bloc preference akin to reservation or separate and distinct method of selection for them alone. A mere rule of preference meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence. Such a construction would not only undermine the scheme of selection envisaged through Public Service Commission, on the basis of merit performance but also would work great hardship and injustice to those who possess the required minimum educational qualification with which they are entitled to compete with those possessing additional qualification too, and demonstrate their superiority, merit-wise and their suitability for the post. It is not to be viewed as a preferential right conferred even for taking up their claims for consideration. On the other hand, the preference envisaged has to be given only when the claims of all candidates who are eligible are taken for consideration and when anyone or more of them are found equally positioned, by using the additional qualification as a tilting factor, in their favour vis-à-vis others in the matter of actual selection.

11. Whenever, a selection is to be made on the basis of merit performance involving competition, and possession of any additional qualification or factor is also envisaged to accord preference, it cannot be for the purpose of putting them as a whole lot ahead of others, de hors their intrinsic worth or proven inter se merit and suitability, duly assessed by the competent authority. Preference, in the context of all such competitive scheme of selection would not mean that other things being qualitatively and quantitatively equal, those with the additional qualification have to be preferred. There is no question of eliminating all others preventing thereby even an effective and comparative consideration on merits, by according en bloc precedence in favour of those in possession of additional qualification irrespective of the respective merits and demerits of all candidates to be considered.....”

49. When the observations made in the above decisions with regard to relaxation of rules are read together with Rule 28 of the PWD Service Rules, it can be said that the Government or the Appointing Authority, as the case may be, if conferred with the power to dispense with or to relax any rule, then such power of dispensing with or relaxing any rule can be exercised in a just and equitable manner to meet any emergent situation where undue hardship might have been caused or is likely to be caused to a person or a class of persons or where the working of any rule/rules might have become impossible. For example, the power can also be exercised when the Government/Appointing Authority arrives at a satisfaction that qualified persons in requisite nos. are not available for appointment to a post/service. It can be noted herein that the eligibility for the post of Assistant Engineer [Civil] means the minimum criteria for selection prescribed in the PWD Service Rules which the petitioners indubitably have. The

question of relaxation of educational qualification has not arisen in the case of the petitioners. Having fulfilled the eligibility criteria in respect of educational qualification, the petitioners have now claimed preference in the form of weightage in the selection process for their experience.

50. The principle that can be deduced from the above decisions is that relaxation of any rule is permissible only in case there is undue hardship. Undue hardship means something more than only hardship. It has to be excessive hardship. It is the situation of only undue hardship which will permit the Appointing Authority to consider making any relaxation under Rule 28. If one proceeds with the assumption that it is implicit in Rule 28 that the relaxation can be in the form of weightage, then as and when a process of selection is undertaken for recruitment through a competitive examination consisting of written examination and viva voce/interview on the basis of merits, any preference [weightage] for any additional qualification or relevant experience has to be envisaged at the inception as to how such preference [weightage] would be given. But such preference in the form of weightage can be given for any additional qualification or relevant experience only after it is found that other things being equal and at the final stage of calculation of marks. But it is at the inception, there has to be a conscious decision on the part of the Government or the Appointing Authority that the particular situation calls for exercise of such discretion to grant preference in the form of weightage and there has to be some rational basis to give such weightage to a candidate or a particular category of candidates.

51. What the petitioners in W.P.[C] no. 617/2020 herein have contended that they should be given preference in the form of weightage in the selection process as they have gained experience for the post of Assistant Engineer [Civil] after being appointed in the post under Regulation 3[f] of the APSC Regulations, 1951 and putting them at par with other candidates would cause hardship to them. Such a contention is required to be considered in the backdrop of the fact situation obtaining in the case. It is to be noted that the Advertisement no. 06/2019 did not envisage any preference [weightage] to them as the Government/Appointing Authority did not take any conscious decision earlier to give such preference.

52. Few instances have been referred on behalf of the petitioners in W.P.[C] no. 617/2020 to support their case for grant of preference [weightage].

52.1. One such instance is an Advertisement no. 08/2019 dated 30.12.2019 whereby the APSC invited applications for filling up 12 [twelve] nos. of post of Fishery Development Officer and allied cadre under the Fishery Department. It was mentioned therein that preference should be given to those candidates having experience in serving the Fishery Department under various projects related to Aquaculture and Fishery Extension. Disputing the same, the learned senior counsel for the Commission by placing a Corrigendum dated 08.07.2021 issued by the Commission whereby it was notified that the preference clause from the said advertisement had been dropped/discarded pursuant to a

communication received from the Government. Thus, the said instance is not of assistance to the case of the petitioners.

52.2. 3 [three] advertisements – two of them published by the APSC vide Advertisement no. 14/2016 dated 05.10.2016 & Advertisement no. 08/2011 dated 01.11.2011 and the third one published by the Medical & Health Recruitment Board [‘the MHRB, Assam’] on 20.06.2020 – are also placed to further the contention. The advertisements published by the APSC were for filling up the posts of Registrar / Resident Physician / Resident Surgeon / Refractionist / Demonstrator, etc. in various departments of the Government Medical Colleges in the State of Assam under the Health & Family Welfare Department. The prescribed qualification was M.D. or M.S. Degree in the concerned subject and it was mentioned that preference would be given to the doctors working under Regulation 3[f] of the Regulations, 1951. By the advertisement published by the MHRB on 20.06.2020, 112 nos. of Medical Officers [Critical Care] in the Government Medical College Hospitals under the Health & Family Welfare Department, Government of Assam were sought to be filled up. The prescribed educational qualification was at least M.B.B.S. or equivalent degree from a university. The advertisement mentioned that weightage would be given to a candidate having degree/diploma in Anaesthesiology or Critical Care or Emergency Medicine and preference shall be given to the doctors working under Regulation 17[B] of MHRB Regulations or on contractual basis in Medical College Hospitals of Assam. What is notable is that in these three advertisements, all pertaining to posts in the Medical Colleges, the Government/Appointing Authority prior to issuance of the advertisements, had taken the decision to give preference to those eligible candidates who had gained experience in working in such posts under the Medical College Hospitals under Regulation 3[f]. But in the case in hand, no such prior decision was taken by the Government/Appointing Authority to give any preference [weightage] to the persons who had gained experience by working under Regulation 3[f]. The petitioners in W.P.[C] no. 617/2020 have sought a direction in the nature of mandamus to the State respondents to grant them preference [weightage] for their experience gained under Regulation 3[f]. In so far as the weightage required to be given to a candidate having degree/diploma in Anesthesiology or Critical Care or Emergency Medicine is concerned, the same is not applicable in the case of the petitioners in W.P.[C] no. 617/2020 as the petitioners have sought preference [weightage] in terms of experience and not in terms of any additional educational qualification relating to the Public Works Department. The decisions to grant preference [weightage], in the said three cases, were taken prior to the advertisements and those decisions might be for the reason that the experienced gained by those category candidates by working in the Medical College Hospitals would be of more value than that of the candidates with no experience at all. The situation existing in a different branch like Medical Science cannot be ipso facto made comparable and applicable in a completely different branch like Engineering, like the case here, without laying any foundation before the Court which is otherwise

also does not sit as an expert in such matters, to see as to whether there can be any comparison between two situations and for that matter, any similarity. This Court is also not in a position to assess on its own to arrive at a decision as to whether the Government/Appointing Authority had exercised its discretion on a proper and valid basis in those occasions.

52.3. The last instance was an Advertisement no. 03/2020 dated 24.06.2020 published by the Commission whereby vacancies in the post of Junior Engineer [Civil] under the P&RD Department were sought to be filled up. Pursuant to an order dated 21.07.2020 passed in W.P.[C] no. 2839/2020, the Governor of Assam took a policy decision to relax the age criteria and to give due weightage to the experience gained by a large number of Contractual Accredited Engineers under the Department in the said selection process. In the Executive Order dated 14.08.2020, it was mentioned that the Contractual Accredited Engineers who were recruited through a selection process and had rendered long years of service, had evolved as trained manpower of the Department for implementation of various development schemes. By the Executive Order, it was decided that the Contractual Accredited Engineers who had experience in between 2 years and above would be given weightage in the form of additional marks out of the total marks and in the age criterion, relaxation up to 10 years would be given. By the order dated 21.07.2020, it was made clear that there was no direction to consider the claim of the petitioners by allowing it. It was stated that the requirement of consideration to be given by the Department and to pass a reasoned order either accepting or rejecting the claim as may be appropriate under the law. Thus, the Executive Order dated 14.08.2020 was the result of the discretion vested in the Government/Appointing Authority to grant relaxation and it was not fettered in any manner by the order of this Court. The petitioners in W.P.[C] no. 617/2020 have sought to bring similarity of their case to the case of the Contractual Accredited Engineers. But the vital distinctive feature is that it was those Contractual Accredited Engineers who had minimum 2 [two] years of experience, would be given the weightage in terms of marks. Another distinctive feature is that the Government/Appointing Authority had found those Contractual Accredited Engineers with above 2 [two] years of experience as trained manpower, but such kind of recognition is not available in the case of the petitioners herein who had about 5 ½ months of experience of working the Public Works Department prior to the Advertisement no. 06/2019 dated 19.11.2019.

53. In all the above instances, the Government was found to have taken a policy decision to provide relaxation, that is, to extend preference or weightage to the identified category of candidates. Such policy decisions were taken before the initiation of the selection process or before the last date of submission of applications or before the date of holding of the examination. Even when such power of relaxation is available in the rules, it is obligatory on the part of the Government or the Appointing Authority to mention in the advertisement that relaxation is being provided to an identified category of candidates. Such publication of grant of relaxation, either in the form of preference or weightage

or relaxation in age, etc., prior to the advertisement is necessary so that all the candidates who come within the identified category or who become eligible due to such relaxation, get equal opportunity to apply and participate. Extending the benefit of relaxation after the advertisement and after a part of the selection process is over would amount to re-writing the advertisement in the mid-stream. Any change in the norms when the selection process has already got underway would be contrary to the principle of equality contained in Article 14 and Article 16 of the Constitution of India. The Court does not issue a direction to the Appointing Authority to take a policy decision in any particular manner.

54. In the case in hand, the stand of the State respondents is that no policy decision has been taken to grant any relaxation in the form of weightage to the petitioners. It is the Governor or the Appointing Authority, as the case may be, who can lay down the essential qualification in the extant service rules and in addition, by making a policy decision, may prescribe additional or desirable qualification or provide relaxation in age or grant weightage for relevant experience, etc. in exercise of the power conferred on it under the extant service rules and or by taking a policy decision in exercise of its power under Article 162 of the Constitution, without supplanting the extant service rules. The Court in exercise of its power of judicial review cannot lay down the condition of eligibility or relax the condition of eligibility or do not give direction to the Governor or the Appointing Authority to treat a particular qualification as additional or desirable qualification or to provide relaxation in age, qualification, etc., or grant weightage for having any particular experience as it does not sit in appeal in such situations which are the exclusive preserve of the Governor or the Appointing Authority. It is settled that if the language in the advertisement is clear and specific and there is no violation of the extant service rules, the Court is in no position to sit in judgment over the same. While exercising the power of judicial review, the Court does not decide what is best for the employer/the Appointing Authority unless there is infraction of any statutory provision.

55. The power to relax or for that matter, to grant weightage under Rules 28 of the PWD Service Rules vests exclusively in the Appointing Authority, that is, the Governor and this power cannot be assumed by the Court in exercise of the power of judicial review by issuing any direction in the nature of mandamus. The writ of mandamus can be issued by the Court only when there is existence of a legal right in the writ petitioner and corresponding legal obligation in the State. The writ petitioners in the writ petition, W.P.[C] no. 617/2020 have not been able to show any legal right to the effect that just because they had worked in the same post of Assistant Engineer [Civil] for a period of about 5 [five] months they have acquired a legal right to be granted the privilege in the form of weightage in the selection process undertaken pursuant to the Advertisement no. 06/2019. A Division Bench of this Court in Dr. M. Laitphlang and others [supra] has held that notwithstanding the availability of the power of relaxation in the extant service rules, when the question of granting relaxation comes in the circumstances of a particular case, the satisfaction is to be reached by the Government or the

Appointing Authority, as the case may be, about the undue hardship caused to any person or class of person and not by the Court.

56. In *V. Lavanya* [supra], the policy decision of State Government to grant concessions/relaxation of 5% marks in the passing marks of 60% in State Teacher Eligibility Test [TET] to candidates belonging to Scheduled Castes/Scheduled Tribes/Backward Classes, etc. was challenged on a number of counts. It has been observed by the Hon'ble Supreme Court that Article 16[4] of the Constitution has enabled the State to make provision for reservation in appointments or posts in favour of any backward class of citizens which, in its opinion, is not adequately represented in the services under the State. Preferential treatment or concession granted to SC/ST, Backward Classes, etc. has been held to be within the concept of equality and is in furtherance of the Constitutional obligation of the State to the underprivileged for creation of an equal level-playing field. The decision in *V. Lavanya* [supra] is found not relevant to the case of the petitioners in W.P.[C] no. 617/2020 as the claim of the petitioners herein is not relatable to any fundamental or constitutional or statutory right, but of seeking a direction in the nature of mandamus to the State Government/Appointing Authority to exercise its discretion available under Rule 18 of the PWD Service Rules to grant preference [weightage] to them. The policy decision of the State to grant relaxation which was in tune with the Constitutional philosophy is to be followed in a selection process for public employment and it is immaterial at what stage of the selection process it came to be implemented.

56.1. In *Shankar K. Mandal* [supra], the subject-matter was about illegally appointed elementary teachers. When orders for their termination were passed the same were challenged before the High Court. In the judgment passed therein, direction was passed to make appointment of teachers by inviting applications from all the persons who had been removed and to make relaxation for age, wherever necessary. The Hon'ble Supreme Court affirmed the same. In the fresh exercise undertaken thereafter, the appellants were not selected and they filed writ petitions. The Division Bench of the High Court made different observations in respect of different appellants, affirming the age relaxation for some and discarding age relaxation for some. When the judgment of the Division Bench was challenged in one appeal laying down the tests to be followed regarding fulfilment of prescribed qualification relating to age by a candidate, the Hon'ble Supreme Court directed the State respondents to find out the eligibility of the appellants by applying the tests indicated therein. In the other connected appeal, though the point of relaxation relating to age was found not to have been taken before the Single Judge and the Division Bench the Hon'ble Supreme Court in the second appeal finding the appellants therein to be similarly situated like the appellants in the first appeal in respect of whom direction for consideration of the age aspect was already made, observed it as appropriate if similar consideration was made in respect of the appellants in the second appeal too and directed in that manner. No law appeared to have been laid down by the Hon'ble Supreme Court in *Shankar K. Mandal* [supra] on the aspect of relaxation. It was

a direction made under Article 142 of the Constitution. The fact situation obtaining in the case of Shankar K. Mandal [supra] is, thus, not applicable to the fact situation obtaining the case in hand and as such, the decision made therein and the direction are not relevant for the purpose of the case in hand.

57. In the light of the above discussion, this Court is of the unhesitant view that the plea of the petitioners in the writ petition, W.P.[C] no. 617/2020 for issuance of a direction to grant them weightage in the process of selection initiated by the Advertisement no 06/2019 dated 19.11.2019 is found unsustainable. Consequently, the writ petition, W.P.[C] no. 617/2020 is found devoid of any merit and the same is liable to be dismissed. It is accordingly dismissed.

THE WRIT PETITION, W.P.[C] NO. 744/2020

58. It is not a condition precedent and not obligatory for the Government and/or the Appointing Authority to make any rules under Article 309 of the Constitution of India or under the proviso to Article 309 of the Constitution of India before constitution of a service or creation of or filling up a post. The State Government has executive power under Article 162 of the Constitution, in relation to all matters in respect to which the Legislature of the State has power to make laws. Article 309 of the Constitution has not curtailed the executive power of the State Government to act under Article 162 of the Constitution when there are no rules framed either under Article 309 or under the proviso to Article 309 of the Constitution. If such rules have not been made, in a particular case, by the Legislature or by the Governor of the State then it would be open for the State Government under Article 162 of the Constitution to issue executive instructions regulating the matters of recruitment and conditions of service of persons appointed to civil services and posts in connection with the affairs of the State. The executive power is co-extensive with the legislative power of the State and in exercise of the powers under Article 162 the State can create civil posts and fill them up according to executive instructions which must be consistent with Article 14 and Article 16 of the Constitution.

59. It is an admitted position that there are no rules framed either under Article 309 of the Constitution or under the proviso to Article 309 of the Constitution regulating the matter of recruitment to the post of Junior Engineer [Civil] in the Public Works Department [PWD]. In the absence of such rules, it is the executive instructions which will govern the same. Contentions have been raised on behalf of the petitioners in the writ petition, W.P.[C] no. 744/2020 that there is an admission on the part of the State respondents that in the matter of making recruitment to the post of Junior Engineer [Civil] in the Public Works Department [PWD], the Public Works Department has been following the Irrigation Department Service Rules, 1978. The basis of such contentions have already been recorded in the preceding paragraphs.

60. Article 320[1] of the Constitution of India has laid down that it shall be the duty of the State Public Service Commission to conduct examination for

appointments to the services of the State. It is the mandates of Article 320[3][a] and Article 320[3][b] that the State Public Service Commission shall be consulted on all matters relating to methods of recruitment to civil services and for civil posts and on the principles to be followed in making appointments to civil services and posts and on the suitability of candidates for such appointments. There is a proviso to sub-clause [3] of Article 320 which amounts to an exception and it has provided that the Governor, as respects services and posts of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for the State Public Service Commission to be consulted.

61. It was in exercise of the power conferred by the provision to Clause [3] of Article 320 of the Constitution of India, the Governor of Assam has made the Assam Public Service Commission [Limitation of Function] Regulations, 1951 [‘the APSC Regulations, 1951’] as respects services and posts in connection with the affairs of the State of Assam, specifying matters in which it shall not be necessary for the State Public Service Commission to be consulted. The meaning ascribed to ‘Service’ or ‘Post’ in the APSC Regulations, 1951 is civil service or post in connection with the affairs of the State of Assam.

61.1. The mandate under Article 320[3][a] of the Constitution is that the State Public Service Commission shall be consulted on all matters relating to methods of recruitment to civil services and for civil posts. Under Article 320[3][b] of the Constitution, the mandate is inter alia that the State Public Service Commission shall be consulted on the principles to be followed in making appointments to civil services and civil posts.

61.2. The learned Senior Counsel for the petitioners in the writ petition, W.P.[C] no. 744/2020 has advanced his submissions in a line that since the matter of recruitment to the post of Junior Engineer [Civil] is outside the purview of the Commission, there is prohibition for the Commission to enter into the arena of recruitment to fill up the vacancies in the post of Junior Engineer [Civil] in the Public Works Department by initiating the process of selection with the Advertisement no. 06/2019. He has sought to contend that the Advertisement no. 06/2019 being an illegality and the earlier process of selection whereby the petitioners were appointed was in consonance with law, the petitioners should be treated as regular appointees.

61.3. Such contention regarding prohibition cannot be countenanced when Article 320 of the Constitution of India and Regulation 3 of the APSC Regulations, 1951 are read together. The word ‘shall’ appearing in Article 320[1] of the Constitution of India has made it mandatory to involve the State Public Service Commission to conduct examinations for appointments to the services of the State. The word ‘shall’ which appears in Article 320[3] of the Constitution makes the consultation with the State Public Service Commission obligatory for the purposes indicated in Clause [a] to Clause [e] therein. As per proviso to Article 320[3], the Governor, as respects other services and posts in connection with the affairs of a State,

'may' make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstance, it shall not be necessary for a State Public Service Commission to be consulted. While the word 'shall' appearing in the substantive part of Article 320[1] and Article 320[3] of the Constitution has made such consultation mandatory but the opposite cannot be accepted as mandatory. It cannot be said that the words 'shall not be necessary' appearing in the proviso to Article 320[3] of the Constitution as well as in Regulation 3 of the APSC Regulations, 1951 carries a meaning that if the State Public Service Commission is consulted then the matters included in the regulations framed in exercise of the powers conferred by the proviso to Article 320[3] of the Constitution will bear a stamp of illegality.

62. By the query no. 7 in their application under the RTI Act, 2005, the petitioners made a query to the respondent authorities in the Public Works Department about the rules which were used during the recruitment process made under Regulation 3 [f] of the APSC Regulations, 1951. By the reply dated 03.02.2020, it was informed that the Irrigation Department Service Rules, 1978 was followed during the said process of recruitment of Junior Engineer [Civil] under Regulation 3[f]. In the affidavit-in-opposition also, the same position has been reiterated. Thus, it is apparent that it was only during the recruitment process undertaken under Regulation 3[f] whereby the petitioners themselves came to be appointed as Junior Engineer [Civil], the Public Works Department followed the provision of the Irrigation Department Service Rules, 1978 but not in the recruitment process initiated by the Advertisement no. 06/2019 dated 19.11.2019. Such a statement does not go to establish that the provisions of the Irrigation Department Service Rules, 1978 were followed in toto and in its entirety. The State respondents have not stated that in the matter of recruitment to the post of Junior Engineer [Civil] in the Public Works Department, there is adoption of the Irrigation Department Service Rules, 1978. It has been asserted and averred by the State respondents that due to absence of service rules for recruitment to the post of Junior Engineer [Civil] in the Public Works Department [PWD], the department is following the Irrigation Department Service Rules, 1978 as far as practicable and applicable with Irrigation Department being a similar works/technical department but there was no adoption of the Irrigation Department Service Rules, 1978, meaning thereby, the same are not binding upon the Public Works Department [PWD]. If there is no adoption of the Irrigation Department Service Rules, 1978 in the matter of recruitment to the post of Junior Engineer [Civil] in the Public Works Department, then it cannot be expected from the State respondents to produce something which is not in existence. Since it is the petitioners who have claimed that there was adoption of the Irrigation Department Service Rules, 1978 it is for them to produce something tangible in that respect. There is abject failure on the part of the petitioners save and except the bald allegations, on that count. Consequently, the decision in Dr. Amarjit Singh Ahluwalia [supra], cited by Mr. Mishra, is found not relevant to the case of the petitioners. Assuming for a moment that there

was adoption of the Irrigation Department Service Rules, 1978 by the Public Works Department by a resolution then also the Irrigation Department Service Rules of 1978 would not retain any statutory character in their application to an incumbent in the post of Junior Engineer in the Public Works Department under Regulation 3[f] and they would be mere executive instructions having no statutory colour and no enforceability, thus, leaving no ground for the petitioners to argue anything regarding violation of any of their constitutional or statutory or legal rights. The petitioners herein have even failed to establish that there is any kind of adoption.

63. The State respondents in its affidavit-in-opposition have categorically asserted that it was since around 1982-1983, the APSC has been conducting the recruitment for the post of Junior Engineer [Civil] in the Public Works Department. The subject-matter in Debabrat Bargohain and others [supra] was also recruitment to a number of vacancies in the post of Junior Engineer [Civil] in the Public Works Department and the concerned advertisement was published by the APSC on 21.10.1993 and the consequent selection process was also held by the APSC. From the above stand and the advertisement, it is clear that the Commission has been conducting the recruitment process for the post of Junior Engineer [Civil] in the Public Works Department since a long time. In this case also, the Government in the Public Works Department by forwarding the draft Advertisement by its communication dated 19.08.2019, which was in the nature of executive instructions, entrusted the task of conducting the selection process to the APSC.

64. By the notification dated 20.07.2000 of the State Government in the Administrative Reforms and Training Department and issued under an order by the Governor, the Junior Engineers under various department of the Government of Assam had been conferred the Gazetted status on entry into the service. The notification was issued in exercise of the powers under Article 162 of the Constitution. It can be iterated here, at the cost of repetition, that no rules have been framed till date either under Article 309 of the Constitution or under the proviso to Article 309 of the Constitution regulating the matter of recruitment in respect of vacancies in the post of Junior Engineer [Civil] in the Public Works Department [PWD]. Thus, conferment of such Gazette status to the Junior Engineer [Civil] in the Public Works Department is permissible by way of an executive instruction. But the same may not be the case in respect of the Junior Engineer serving in the Irrigation Department. The matter of recruitment to and the condition of service of the persons appointed to the Assam Subordinate Engineering [Irrigation Department] Service of which the cadre/post of Junior Engineer, earlier known as Subordinate Engineer Grade-I, is a part are regulated by the Irrigation Department Service Rules, 1978 which were framed in exercise of the powers conferred by the proviso to Article 309 of the Constitution. Sub-rule [5] of Rule 3 of the Irrigation Department Service Rules, 1978 states that the status of the members shall be non-Gazetted in Class-III Government Service. In such situation, the notification 20.02.2000 cannot supplant Rule 3[5]

of the Irrigation Department Service Rules, 1978. Mere reflection of the word, non-Gazetted in the pay slip of the petitioners sans any other details, does not alter the above legal position regarding conferment of Gazetted status to the post of Junior Engineer [Civil] in the Public Works Department.

65. It is also the stand of the State respondents that the Appointing Authority for the post of Junior Engineer [Civil] in the Public Works Department is the Governor of Assam and the Appointing Authority in case of the cadres under the Irrigation Department Service Rules, 1978 is the Chief Engineer, Irrigation Department, Assam since as per Rule 2[a] thereof, 'Appointing Authority' means the Chief Engineer, Irrigation Department, Assam. The petitioners are found to have maintained silence as regards the Appointing Authority for the post of Junior Engineer [Civil] in the Public Works Department. The very notification dated 04.06.2019 by which the petitioners in W.P.[C] no. 744/2020 came to be appointed under Regulation 3[f] of the APSC Regulations, 1951 as Junior Engineer [Civil] was also issued under an order by the Governor of Assam and under the hand of the Commissioner & Special secretary to the Government of Assam, Public Works Department. Thus, the contention that the Chief Engineer, Public Works Department is the Appointing Authority for the post of Junior Engineer [Civil] in the Public Works Department is belied by the materials on record and has fallen flat.

66. This Court does not find any merit in the contention regarding impermissibility for the Commission to hold recruitment process for appointment to the post of Junior Engineer [Civil] in the Public Works Department which is made by referring to Regulation 3[a] of the APSC Regulations, 1951. The concept of civil post definitely brings within its ambit the post of Junior Engineer [Civil] in the Public Works Department, Government of Assam. Though the post is not a part of any civil service but it is a civil post in the Public Works Department which is a part of the State Government. From the discussion above, it has already been established that the Appointing Authority for the post of Junior Engineer [Civil] in the Public Works Department is the Governor. It shall not be necessary for the Commission to be consulted, as contained in Regulation 3[a] of the APSC Regulations, 1951, in a matter relating to methods of recruitment to a civil post when an appointment is to be made by the Governor to a post on a pay scale the maximum of which is less than Rs. 1,166/- per month. It was by a notification no. ABP.2/84/77 dated 20.08.1987, the figure, 'Rs. 1,166/-' was substituted in place of 'Rs. 651/-' and it came into effect from the date of its publication in the Assam Gazette dated 20.08.1987. No dilation is necessary to say that the pay scale of Junior Engineer [Civil] in the Public Works Department does not come within the said condition to dispense with the necessity of consultation with the Commission. The post of Junior Engineer [Civil] in the Public Works Department does not also figure in the Schedule appended to the APSC Regulations, 1951 in reference to Regulation 3[a]. For the reasons above, the decisions in M.T. Khan [supra] and Dorjee Tshering Bhutia [supra] are not found of any assistance to the case of the petitioners.

67. There is no necessity to deliberate anything further on the well settled proposition of law that an ad-hoc employee has no right to a post. Thus, the decision in Roshan Lal Tandon [supra] is not found of any relevance to the case of the petitioners. The decision in Central Inland Water Transport Corporation Limited ['the appellant-Corporation', for short] was rendered in connection with termination of two permanent employees by invocation of Rule 9[i] of the 'Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules' of 1979, framed by the appellant-Corporation, an instrumentality of the State under Article 12 of the Constitution. The Hon'ble Supreme Court of India had found that there were no laid down guidelines to indicate the circumstances when the power given by Rule 9[i] was to be exercised by the appellant-Corporation and there was no provision of giving any opportunity of a hearing whatsoever to the permanent employee who was sought to be terminated. Having found the power exercised by the appellant-Corporation an absolute, arbitrary and unguided one and in total violation of the audi alteram partem rule, one of the two great rules of natural justice, the Hon'ble Supreme Court of India regarded the same as arbitrary, discriminatory, opposed to public policy and violative of the Article 14 of the Constitution of India. It declared Rule 9[i] void, unconscionable and ultra vires to the extent it conferred power to the appellant-Corporation the right to terminate the employment of a permanent employee by giving him three months' notice in writing or three months' pay in lieu of such notice. The petitioners in writ petition, W.P.[C] no. 744/2020 being ad-hoc employees of 5½ months duration, cannot claim parity with two permanent employees who put in more than 15 years' of service in the appellant-Corporation before the impugned termination, and in view of their service of ad-hoc nature under Regulation 3[f] of the APSC Regulations, 1951. The legal position about such ad-hoc nature of service under Regulation 3[f] have already been dissertated by the decisions of this Court, referred herein above.

68. On perusal of the two syllabi, it is noticed that the chapters pertaining to Hydraulics & Structural Mechanics in the first advertisement for the post of Junior Engineer [Civil] were missing in the second advertisement and chapters pertaining to Water Supply Engineering & Sanitary Engineering in the second advertisement were missing in the first advertisement. In the General Studies paper, the difference was in the portion relating to General English. While it was 'Comprehension and Expression' in the first advertisement, it was replaced by 'Precis Writing' in the second advertisement. This Court is not an expert in such academic matters to arrive at any finding as to whether the syllabus published for the post of Junior Engineer [Civil] in the first advertisement was substantially similar or different. As such, this Court has refrained itself from making any comment on such issues, which are to be left for academic experts in the field.

69. There is another relevant aspect in the case. It was made clear and specific in the advertisement dated 14.08.2018 by the State respondents that the appointment made in terms of the advertisement would be ad-hoc in nature for a period of 4 [four] months and the same would be under Regulation 3[f] of the

APSC Regulations, 1951. Having noticed such specific condition of unambiguous nature and being aware of the legal position about such nature of appointments under Regulation 3[f] many a qualified candidates, who could be much meritorious than the petitioners, might not have responded to the advertisement and/or participated in the selection process undertaken pursuant to the advertisement with the anticipation to participate in the selection process as and when an advertisement to fill up the vacancies in the said posts in regular manner is published. There is also a possibility that many an eligible candidates who might working in some posts with the assurance of regular pay and better scope of gaining work experience, did not respond to the advertisement and/or did not participate in the selection process even after applying, because of the ad-hoc nature of the appointments. Any direction to treat the appointments of the petitioners in W.P.[C] no. 744/2020 under Regulation 3[f] of the APSC Regulations, 1951 as regular appointments to the cadre of Junior Engineer [Civil] in the Public Works Department would amount in denying all the other available eligible candidates which are albeit substantial in numbers, from the benefit of participation. Such denial of the benefit of participation would, in turn, be in violations of the fundamental rights enshrined in Article 14 and Article 16 of the Constitution of India.

70. In view of the above discussion, this Court has not found merits in any of the contentions advanced on behalf of the petitioners in the writ petition, W.P.[C] no. 744/2020. As a result, the writ petition stands dismissed.

71. With regard to the contentions made by the learned Senior Counsel for the petitioners in the writ petition, W.P.[C] no. 617/2020 on the basis of the averments made in the additional affidavit, filed on 19.08.2021, about permitting ineligible candidates to appear and issuance of more than one admit card in the name of same candidate to appear in the written examination i.e. screening test [OMR based], held on 15.11.2020, for the post of Assistant Engineer [Civil], it is to be noted that by Advertisement no. 06/2019 dated 19.11.2019, applications were invited for filling up of 156 nos. of posts of Assistant Engineer [Civil]. As per the said advertisement, the last date of submission of applications was 21.12.2019. In continuation of the Advertisement no. 06/2019 dated 19.11.2019, the Addendum was published on 06.05.2020 whereby it was notified that applications would also be received for an additional 104 nos. of vacancies in the post of Assistant Engineer [Civil]. In view of the publication of the Addendum, the last date of submission of applications was extended to 16.06.2020.

71.1. It has been contended that the Commission had accepted the applications of a number of ineligible candidates to appear in the screening test for the post of Assistant Engineer [Civil] despite the fact that the results of the qualifying examination in respect of those candidates were declared much after 16.06.2020. To substantiate the said submission, the petitioners have mentioned the names of 23 nos. of candidates and have brought on record the results of the

8th Semester [Final] B.E. Civil Engineering Examination of the Gauhati University held in May, 2020 and the list of candidates including the said 23 nos. of candidates, whose applications had been accepted by the Commission for appearing in the screening test for the post of Assistant Engineer [Civil]. A conjoint perusal of the same goes to indicate that the results of B.E. [Final] Civil Engineering Examination of those 23 nos. of candidates were declared on 08.09.2020, meaning thereby, they passed the qualifying examination prescribed in the afore-stated advertisements for the post of Assistant Engineer [Civil] only on 08.09.2020. But, the Commission had permitted them to appear in the written examination i.e. screening test [OMR based] held on 15.11.2020. The petitioners have also been able to show from the list of candidates whose applications had been accepted by the Commission for appearing in the screening test for the post of Assistant Engineer [Civil] and other documents, annexed at Page nos. 15–105 of the said additional affidavit, that more than one admit card had been issued in the name of the same candidate to appear in the written examination i.e. screening test [OMR based] held on 15.11.2020.

71.2. With regard to the cut-off date fixed for fulfilling the prescribed qualification, the principle has been settled by the Hon'ble Supreme Court of India in Shankar K. Mandal [supra] in the following manner :-

5....the principles culled out from the decisions of this Court are as follows :

[1] The cut-off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules.

[2] If there is no cut-off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications.

[3] If there is no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority.

71.3. The Advertisement no. 06/2019 stipulated that only those candidates who fulfil all the terms and conditions of the advertisement in respect of the post for which they were applicants shall be entertained. It further stipulated that only those applications which were accompanied by all particulars as called for in the application form prescribed by the Commission shall be considered and the candidates fulfilling all the terms of the advertisement of the respective post shall be called for the screening/written test/viva-voce interview. The advertisement further mentioned that the applications which were not accompanied by the certificates and mark-sheets of the qualifying examination shall not be entertained and incomplete application in terms of the advertisement would be summarily rejected. The candidates had to ensure that they fulfil all the eligibility conditions.

71.4. In view of the above terms and conditions of the advertisement and the

position of law with regard to the cut-off date, it is evident that the candidatures of those candidates who did not have the prescribed qualification on 16.06.2020 are liable to be rejected.

71.5. As per the notification dated 11.12.2020, the total number of candidates to be shortlisted for personality test/interview for the post of Assistant Engineer [Civil] would be at the ratio of 1:3.

71.6. In view of the above fact situation, it clearly emerges that in the event the performance of ineligible candidates in the written examination, held on 15.11.2020, are taken into consideration in shortlisting the candidates for personality test/interview then the interests of the eligible candidates including that of the petitioners, are liable to be prejudicially affected.

71.7. In its affidavit-in-reply filed on 23.09.2021, the Commission has asserted that it will check the eligibility of the required number of candidates for interview at the ratio prescribed. It has further averred that a list of selected candidates and a list of rejected candidates are ready for publication before declaration of the OMR based screening test's results and the same have not been published due to the operation of the interim order. The Commission in its affidavit has further averred that instructions were issued to invigilators to verify the identity of the candidates who appeared in the screening test by taking into account the photograph and the facsimile signature of the candidates so as to prevent impersonation.

71.8. In view of the above fact situation obtaining in the case, more particularly, to protect the interests of the eligible candidates the Commission shall ensure to remove the names of such candidates who did not have the requisite qualification on the last date of submission of the application, prior to shortlisting and publication of the list of eligible candidates to appear in the viva-voce/interview in the ratio of 1:3. The Commission shall also ensure that no two or more persons had appeared in the name of one single individual against whom more than one admit card had been issued.

72. Summing up, both the writ petitions are dismissed. The interim orders stand recalled. The State respondents and the Commission are at liberty to proceed with the selection processes initiated by the Advertisement no. 06/2019 to bring the same to its logical conclusion by taking into consideration the observations made above. There shall, however, be no order as to cost.