

(2023) 02 GAU CK 0017

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 8318 Of 2019

Simanta Pradip Choudhury 18 Ors.

APPELLANT

Vs

State Of Assam And 23 Ors.

RESPONDENT

Date of Decision : 10-02-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 162, 226, 309
Assam Social Welfare (Recruitment and Promotion) Service Order, 1994 — Rule 5(c), 10, 11
U.P. Forest Service Rules, 1952 — Rule 3(h), 5, 5(a), 5(b)
Assam Public Service Commission(Limitation of Functions) Regulation, 1951 — Regulation 3(f)

Citation : (2023) 02 GAU CK 0017

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : K N Choudhury

Final Decision : Allowed

Judgement

1. Heard Mr. K.N. Choudhury, learned senior counsel, assisted by Mr. R.M. Deka, learned counsel for the petitioner. Also heard Mr. A. Talukdar, learned Government Advocate appearing for the respondent nos. 1 to 6, Ms. P. Sarma, learned counsel for respondent no. 7 and Mr. U.K. Nair, learned senior counsel, assisted by Mr. S.P. Sharma, learned counsel for the respondent nos. 8, 11, 13, 15 to 19, 21 and 22. The respondent nos. 9, 10, 12, 14, 20, 23 and 24 have not appeared despite deemed service of notice through newspaper publication.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioners have prayed for setting aside and quashing of the provisional gradation list published on 29.12.2017 and final gradation list published on 01.10.2019 so far as the seniority of the petitioners and the respondent nos. 8 to 24 are concerned, and for a direction to the respondent authorities to publish a fresh gradation list by placing the petitioners above the respondent nos. 8 to 24.

3. The case of the petitioners is that pursuant to a selection process initiated by the APSC vide advertisement dated 19.08.1997 to fill up 27 vacant posts of Child Development Project Officer (CDPO for short), the petitioners had participated in the selection process. The name of the petitioners appeared in the select list published on 17.07.2000 and accordingly, the petitioners were appointed as CDPOs in the Social Welfare Department in the year 2001. On 29.12.2017, the respondent authorities had published a provisional gradation list, where the name of the petitioners had appeared below that of the respondent nos. 8 to 24. It is projected that on enquiry, the petitioners acquired information that a Cabinet Memorandum dated 16.06.2000 was moved with a proposal of the Commissioner and Secretary to the Govt. of Assam, Social Welfare Department to regularise the service of 18 CDPOs/ Superintendent of Home in relaxation of rules 5(c) and 11 of the Assam Social Welfare (Recruitment and Promotion) Service Order, 1994 (hereinafter referred to as "1994 Service Order"). Thereafter, a Cabinet decision was taken on 13.10.2000 on the said proposal, which was followed by a notification dated 16.11.2000, issued by the competent authority of the Government of Assam, Social Welfare Department and accordingly, the service of the respondent nos. 8 to 24 were regularised, however, without concurrence of the APSC. Some of the petitioners had submitted their objection against the provisional seniority list, which was not addressed to and thereafter, final seniority list was published on 01.10.2019 in respect of Class-II Officers in the Social Welfare Department, wherein the names of the petitioners were placed below that of the respondent nos. 8 to 24.

Submissions by the learned senior counsel for the petitioners:

4. It was submitted that the decision to regularise the service of the respondent nos. 8 to 24 was bad on facts and in law. It was submitted that it was the admitted case of the private respondent nos. 8 to 24 and the State respondent nos. 1 to 6 as well as the APSC (respondent no.7) that the private respondents were appointed on ad hoc basis by invoking Regulation 3(f) of the APSC (Limitation of Functions) Regulation, 1951 (hereinafter referred to as the "APSC Regulation, 1951"), which was not in accordance with the prescription of recruitment envisaged under the 1994 Service Order. It was submitted that it was also not disputed that in the exercise carried out by the APSC for regularising the service of CDPO/ Superintendent of Home/ Probation Officer in the Social Welfare Department, all the private respondent nos. 8 to 24 had failed. Accordingly, it was submitted that on the failure of the respondent nos. 8 to 24 to clear the regularisation drive undertaken by the APSC, the service of all the said ad hoc appointees ought to have been terminated. It was submitted that by regularising the service of the "failed" employees, the right of other qualified persons to participate in recruitment process was violated, which was hit by Article 14 and 16 of the Constitution of India.

5. It was further submitted that the clauses of the 1994 Service Order could not have been relaxed for unsuccessful candidates. It was also submitted that as the

respondent nos. 8 to 24 were not appointed in accordance of or in compliance with the 1994 Service Orders, the appointments were otherwise void ab initio. It was also submitted that the manner in which service of the respondent nos. 8 to 24 was regularised was contrary to the test laid down in proposition (A) and (B) of the case of Direct Recruit Class-II Engineering Officers' Association & Ors. v. State of Maharashtra & Ors., (1990) 2 SCC 715.

6. It was submitted that in the present case, as the authorities were bound to make recruitment in accordance with the 1994 Service Orders, neither the respondent nos. 8 to 24 had become the member of cadre of CDPO/ Superintendent of Home/ Probation Officer in the Social Welfare Department, nor the State had the power to equate the respondent nos. 8 to 24 with the petitioners and place them higher than the petitioners in seniority by virtue of the impugned seniority lists. It was also submitted that the conditions of recruitment cannot be tinkered with as done in this case. It was also submitted that the manner in which the Cabinet decision was taken, did not amount to relaxation of Clause 11 of the 1994 Service Order.

7. In support of his submissions, the learned senior counsel for the petitioners has placed reliance on the following cases, viz., (i) R.N. Nanjundappa v. T. Thimmiah & Anr., AIR 1972 SC 1767, (ii) B.N. Nagarajan & Ors. v. State of Karnataka & Ors., AIR 1979 SC 1676, and (iii) State of U.P. v. Rafiquddin & Ors., 1987 (Supp) SCC 401, (iv) Keshav Chandra Joshi & Ors. v. Union of India & Ors., AIR 1991 SC 284, (v) Direct Recruit Class-II Engineering Officers' Association & Ors. v. State of Maharashtra & Ors., (1990) 2 SCC 715, (vi) R.S. Garg v. State of U.P. & Ors., (2006) 6 SCC 430, and (vii) Suraj Parkash Gupta & Ors. v. State of J&K & Ors., (2000) 7 SCC 561, (viii) Bhupendra Nath Hazarika v. State of Assam & Ors., (2013) 2 SCC 516. The learned senior counsel for the petitioner has made his submissions to distinguish the case of Mukul Saikia & Ors. v. State of Assam & Ors., (2009) 1 SCC 386.

8. Per contra, the learned senior counsel for the appearing private respondents had submitted that they were appointed much prior to the date when the petitioners were appointed. It was submitted that the service of the respondent nos. 8 to 24 were regularised by relaxing Clause 5(c) and 11 of the 1994 Service Order. It was submitted that this was not a case of giving benefit of any retrospective effect of regularisation to the respondent nos. 8 to 24 because the petitioners were admittedly appointed on different dates in the year 2001 and therefore, they could not have been given retrospective effect from a date prior to the date when the service of the petitioners was regularised. It was submitted that the petitioners had not raised any grievance at the appropriate moment when the notional benefit of appointment was not given from 17.07.2000, the date of publication of select list by the APSC.

9. Accordingly, by referring to the provisional gradation list dated 29.12.2017, it was submitted that the names of the respondent nos. 8 to 24 are at serial no. 37 to 53, and they are referred to belong to 2000 batch, whereas the names of the

petitioners are at serial no. 54 onwards and they are shown to belong to 2001 batch.

10. It has been submitted that as per the Cabinet decision dated 13.0.2000, the provisions of Clause 5(c) of the 1994 Service Order was specifically relaxed. However, the said decision had not been challenged. It has been submitted that in this writ petition, there was no challenge to the appointment of the petitioner under Regulation 3(f) and therefore, no case was made out to place the petitioners above the names of the appearing private respondents in the final gradation list. Moreover, it was submitted that the regularisation of the service of the petitioners got the seal of approval of the Supreme Court of India in the case of Mukul Saikia (supra).

11. In support of his submissions, the learned senior counsel for the appearing private respondents has placed reliance on the cases following cases, viz., (i) State of U.P. v. Rafiquddin, 1987 (Supp) SCC 401, (ii) Mukul Saikia & Ors. v. State of Assam & Ors., (2009) 1 SCC 386, (iii) Bhupendra Nath Hazarika v. State of Assam & Ors., (2013) 2 SCC 516, (iv) K. Meghachandra Singh & Ors. v. Ningam Siro & Ors., (2020) 5 SCC 689.

12. Having heard the learned senior counsel for the petitioners, appearing private respondents, learned Govt. Advocate and learned Standing counsel for respondent no. 7, perused (i) the writ petition, (ii) affidavit-in-opposition filed by the appearing private respondents, (iii) affidavit-in-reply filed by the petitioners, (iv) affidavit filed by respondent no. 6, (v) affidavit-in-opposition filed by the State respondent nos. 1 to 5, and (vi) affidavit-in-reply filed by the petitioner against affidavit-in-opposition filed by respondent nos. 1 to 5.

Date of appointment and date of regularisation:

13. As indicated herein before, there is no dispute at the Bar that the names of the petitioners appeared in the select list published by the APSC on 17.07.2000 and they were initially appointed for a two year probation period on various dates in the month of March, 2001. Nonetheless, it has been projected by the learned senior counsel for the petitioners that as per clause 10 of the 1994 Service Order, it is provided that seniority of a member of the service shall be maintained in order of their respective positions in the select list prepared by the Assam Public Service Commission (APSC for short).

14. However, it may be mentioned that the respondent nos. 8, 11, 13, 15 to 19, 21 and 22 (hereinafter referred to as the "appearing private respondents") have not pleaded the dates when their appointment was made. However, from the Cabinet Memorandum prepared on 15.05.2000, it is observed that the 18 persons had joined on different dates between 06.01.1995 and 08.04.1996.

15. However, from the statement made in the affidavit-in-opposition filed by the State respondent nos. 1 to 5, it has been mentioned that on being appointed under Regulation 3(f), the respondent nos. 8 to 24 had respectively joined on

different dates between 01.06.1994 and 08.04.1996. However, the date of regularisation was with effect on and from 16.11.2000.

Cabinet Memorandum dated 15.05.2000:

16. On a perusal of the Cabinet Memorandum under File No. SWD.34/99, circulated under Rule 17 of the Assam Rule of Executive Business, it is seen that mentioned has been made in para-1 thereof that during the year 1995-96, pending selection through APSC, 26 persons were appointed as CDPO/ Superintendent of Home/ Probation Officer under Regulation 3(f) of the APSC Regulation, 1951. It was further mentioned that out of 26 candidates, 16 could not come out successful in the written examination held by APSC on 26.06.1998. It is seen that the Cabinet Memorandum was moved as their service was found satisfactory and their service was needed to implement time bound projects. The said 16 persons had joined on different dates between 06.01.1995 and 08.04.1996 and as on 15.05.2000, when the Cabinet Memorandum was prepared, all the said 16 persons had completed more than 4 (four) years of service. In para-2 thereof, it has been mentioned that during 1995-96, the APSC had held written test for regularisation of service of 15 posts of CDPO/ Superintendent of Home/Probation Officer appointed under Regulation 3(f) of the APSC Regulation, 1951 and the APSC had recommended 33 names, out of which service of 2 (two) persons could not be regularised as their names appeared below the recommended zone, but they were working in the department. The said two persons had joined on 01.06.1994 and 07.07.1995 respectively. It appears that approval was granted by the Personnel (B) Department, Government of Assam. Thus, it appears that the said Cabinet Memorandum prepared on 15.05.2000 was for proposal of regularisation of 18 (i.e. 16+2) CDPO/Superintendent of Home/Probation Officer appointed under Regulation 3(f) of the APSC Regulation, 1951.

Cabinet decision dated 30.10.2000:

17. It is seen from the contents of the documents annexed to the writ petition that the Cabinet took a decision on 30.10.2000 to regularise the service of 18 (eighteen) officers, named therein, who were appointed under Regulation 3(f) of the APSC Regulation, 1951 from the date of their joining.

Subsequently, the Government in the Social Welfare Department had issued a notification of regularisation of service by invoking Order 11 of the 1994 Service Order.

APSC's stand post Cabinet decision dated 30.10.2000:

18. It appears that after the Cabinet had taken a decision to regularise the service of 18 CDPO/Superintendent of Home/ Probation Officer appointed in the Social Welfare Department, information was given to the APSC, but they had not responded. Therefore, the Social Welfare Department vide letter dated 17.02.2006, had written to the APSC to give its comment. Accordingly, vide

letter dated 20.04.2006, the Secretary, APSC responded by stating that since the service of the officers has been regularised by the Cabinet decision already, the Commission has no objection on it. Be that as it may, the herein before referred Social Welfare Department letter dated 17.02.2006 and APSC reply dated 20.04.2006, clearly and without any ambiguity discloses that there was no prior consultation with the APSC before regularisation of the service of 18 CDPO/ Superintendent of Home/Probation Officer, appointed under Regulation 3(f) of the APSC Regulation, 1951.

Cabinet Memorandum dated 16.02.2001:

19. It appears that once again a move was made to regularise the service of 13 numbers of CDPO/Superintendent of Home/Probation Officer appointed under Regulation 3(f) of the APSC Regulation, 1951 by way of a Cabinet Memorandum dated 16.02.2001. On a perusal of the said Cabinet memorandum prepared on 16.02.2001, it is seen that the Legal Remembrancer had given his view that the consultation with APSC in the matter of regularisation of a 3(f) appointee is a must, further mentioning that the Cabinet can act otherwise than in accordance with the advice of the APSC, but it does not mean that the Cabinet had the power to regularise the service of a 3(f) appointee without consultation of the APSC. It was further opined to the effect that no regularisation in exercise of the executive power is permissible, because this practice not only violates the mandate of Article 14 and 16 of the Constitution but also denies to all eligible candidates their legitimate right to apply for and stand for selection and get selected. Moreover, the said Cabinet Memorandum contained the views of the APSC, expressing regret in their inability to regularise the services of the appointees under Regulation 3(f) is view of standing select list and that it is necessary for the incumbent working under Regulation 3(f) of APSC Regulation 1951 to take part in the process of selection for appointment on regular basis. This Cabinet Memorandum prepared on 16.02.2001 was in respect of proposal for regularisation of service of 13 CDPO/ Superintendent of Home/ Probation Officer appointed under Regulation 3(f) of the APSC Regulation, 1951.

Relevant provisions of the 1994 Service Order:

20. It would be relevant to quote the provisions of Rule 5(c) and Rule 10 and 11 of the 1994 Service Order, which quoted below:-

5. Recruitment to the Cadre of the service shall be made in the following manners:-

(a) *** **

(b) *** **

(c) In the order of District SWO/ CDPO/ Special Home/ Principal Bal Bhawan VTRC/ Probationary Officer/ PWO/ Liaison Officer/ Vice Principal, Jorhat, Blind Institute. The posts shall be filled up by direct recruitment through the Commission as per norms fixed jointly with Ministry of Welfare, Government of

India by the Social Welfare Department.

10. The seniority of a member of the service in a cadre shall be according to the order in which one's name appeared in the selection list. If one joins the appointment within 15 days from the date of receipt of the order or within the extended period which not in all, exceed three months.

11. Where the Governor is satisfied that the operation of any of the provisions of these orders has caused undue hardship in any particular case, he may dispense with or relax the requirement of that provision to such extent and subject to such condition as he may consider necessary for dealing with the case in a just and equitable manner.

Provided that the case of any Government servant shall not be dealt with in any manner, less favourable to him than that provided in these orders."

Seniority position as envisaged under Rule 10:

21. As mentioned herein before, the names of the petitioners appear in the select list published by the APSC on 17.07.2000. As per the provisions of Clause 10 of the 1994 Service Order, the date when the petitioners had respectively joined is not material because the seniority relates back to the order in which their names appear in the select list. However, notwithstanding that the respondent nos. 8 to 24 had joined on different dates between 01.06.1994 and 08.04.1996, but their service was regularised with effect from 16.11.2000.

22. The State respondents as well as the appearing private respondents have not been able to refer to any provisions of law by which the seniority position of the officers in the cadre of CDPO/ Superintendent of Home/ Probation Officer appointed in the Social Welfare Department would be calculated from the date when the concerned officer had joined service, irrespective of whether his/ her/ their appointment was made on regular selection basis conducted by the APSC in accordance with the aforesaid 1994 Service Order, or ad-hoc appointment made under Regulation 3(f) of the APSC Regulation, 1951.

A glance of cases cited at the Bar by the learned senior counsel for the petitioners:

23. In the case of R.N. Nanjundappa (supra), was cited to bring home the point that the provisions of Article 162 does not confer power on the Government to make rules for the recruitment or conditions of service. In the said case, the Supreme Court of India was examining the validity of appointment of Class-III Officer to Class-I post, in the absence of 'rules' of recruitment. Later on, the Mysore Education Department Services (Technical Education Department) (Special Recruitment) Rules, 1967 came into force. However, when appointments were made the Mysore State Civil Services Rules, 1957 was in force. It is the said context, it was held to the following effect -

"There were 1957 rules which spoke of appointment by competitive examination

or by selection or by promotion. Even if specific rules of recruitment for such services were not made the rule as to appointment by competitive examination or selection or by promotion was there. Article 162 does not confer power on the Government to make rules for the recruitment or conditions of service. There can be rule for one person or one post but rules are meant for recruitment and conditions of service. Rules are not for the purpose of validating an illegal appointment or for making appointments or promotions or transfers. Rules under Article 309 are for the purpose of laying down the conditions of service and recruitment. Therefore, the regularisation by way of rules under Article 309 in the present case by stating that notwithstanding anything in the rules the appointment of the respondent was being regularised was in itself violation of the rules as to appointment and as to cadre and also as to the proper selection. If the respondent were to be appointed by direct recruitment, there should have been advertisements. Then others would have the opportunity of applying. That would be proper selection."

24. The case of B.N. Nagarajan (*supra*) was cited to show that in the said case, the Supreme Court of India had observed that all through the relevant period the promotees held appointments as Assistant Engineers in non-substantive capacity, i.e., either on an officiating or a temporary basis and that this being the position, it was held that they would all rank junior to the direct recruits who, from the very start, held appointments made "substantively in clear vacancies".

25. In the case of Keshav Chandra Joshi (*supra*), the observations made by the Supreme Court of India, while examining the issue of inter se seniority between direct recruits and promotees under U.P. Forest Service Rules, 1954, can be categorized as follows – (i) Under rule 5 read with Rule 3(h) of the U.P. Forest Service Rules, 1952 a member of the service means a person, be it a direct recruit under rule 5(a) or promotee under Rule 5(b), appointed in a substantive capacity to the service as per the provisions of the rules. (ii) In order to become a member of the service he must satisfy two conditions, namely, the appointment must be in substantive capacity and the appointment has to be to the post in the service according to rules and within the quota to the substantive vacancy. (iii) There exists marked distinction between appointment in a substantive capacity and appointment to the substantive post. Therefore, the membership to the service must be preceded by an order of appointment to the post validly made by the Governor and then only one becomes member of the service and that any other construction would be violation of the rules. (iv) The employees appointed purely on ad hoc or officiating basis due to administrative exigencies, even though continued for a long spell, do not become the members of the service unless the Governor appoints them in accordance with the rules and so they are not entitled to count the entire length of their continuous officiating or fortuitous service towards their seniority. Reckoning continuous officiating of ad hoc promotion would enable the less privileged to excel their latent capabilities in the cadre post.

26. In *Suraj Parkash Gupta & Ors. vs. State of J&K & Ors.*, (supra), the Supreme Court of India had observed as follows:-

"28. The decision of this Court have recently been requiring strict conformity with the Recruitment Rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules of recruitment."

27. However, in the present case in hand, on facts, the regularisation of the respondent nos. 8 to 24 herein has been upheld by the Supreme Court of India in the case of *Mukul Saikia* (supra).

28. Therefore, as the respondent nos. 8 to 24 have become member of service of cadre of CDPO/ Superintendent of Home/ Probation Officer, under 1994 Service Order with effect from 16.11.2000 by virtue of the decision rendered by the Supreme Court of India in the case of *Mukul Saikia* (supra), which has attained finality and binding on this Court, the ratio of the case of *Keshav Chandra Joshi* (supra), *R.S. Garg* (supra), *Bhupendra Nath Hazarika* (supra), *Vijay Singh* (supra), *R.M. Nanjundappa* (supra), *N. Nagarajan* (supra), *Rafiquddin* (supra), (iv) and *Direct Recruit Class-II Engineering Officers' Association* (supra), cannot be applied against the respondent nos. 8 to 24 on the ground that it would not be in consonance with the well settled judicial discipline.

A glance of the cases cited by the learned senior counsel for the appearing private respondents:

29. It is seen that the main plank of the defence of the appearing private respondents is the case of *Mukul Saikia* (supra).

30. The Supreme Court of India, in the case of *A. Umarani v. Registrar, Cooperative Societies & Ors.*, (2004) 7 SCC 112, and *National Fertilizers Ltd. & Ors. vs. Somvir Singh*, (2006) 5 SCC 493, had laid down that even the State cannot make rules or issue any executive instructions by way of regularization of service and that such a rule/ executive instructions would be in violation of the rules made under Article 309 of the Constitution of India and opposed to the Constitutional scheme of equality clauses contained in Articles 14 and 16.

31. The learned senior counsel for the appearing private respondents has referred to the decision of the Supreme Court of India in the case of *Mukul Saikia* (supra), and it has been submitted that the respondent nos. 8 to 24 in this writ petition were arrayed as respondent nos. 4 to 23 in the said case of *Mukul Saikia* (supra). To demonstrate the same, the learned senior counsel for the appearing private respondents has produced a copy of the common judgment and order dated 15.09.2006, passed by the Division Bench of this Court, thereby dismissing Writ Appeal Nos. 471/2003 and 08/2005 filed by the appellants before the Supreme Court of India against the common judgment and order dated 14.08.2003, passed by the learned Single Judge in WP (C) Nos. 2026/2001, 2036/2001, 4932/2001, by which the said writ petitions were dismissed. From the cause title of the said judgment, it is seen that the respondent nos. 8 to 24

were indeed arrayed as private respondents therein. On a perusal of the judgment rendered by the Supreme Court of India in the case of Mukul Saikia, it is seen that reference has been made to the APSC advertisement dated 19.08.1997 for filling up 27 posts of CDPOs. Reference has also been made to the select list dated 17.07.2000, containing the names of 64 candidates, which was far in excess of the notified vacancies was prepared and published by the APSC. The names of the 13 nos. of appellants before the Supreme Court appeared in the select list below 27 persons who were appointed on merit by the State Government. The appellants had filed two separate writ petitions before the High Court of Gauhati, inter alia, challenging the Cabinet Memorandum dated 16.02.2001 circulated by the Commissioner and Secretary, Government of Assam, Social Welfare Department under Rule 17 of the Assam Rules of Executive Business relating to the regularization of 18 CDPOs/ Probation Officers who were appointed under Regulation 3 (f) of the APSC Regulation, 1951 and praying for a direction to the State- respondents to appoint the appellants in the vacant/newly created posts of CDPOs/ Probation Officers. The appellants had also challenged the policy decision taken by the State to regularize the services of the private respondents (i.e. including respondent nos. 4 to 24 herein), who were initially appointed temporarily under Regulation 3 (f) of APSC Regulation 1951 and could not succeed in the selection process conducted by the APSC. The appellants contended before the High Court that giving benefit of regularization of service to the private respondents to the posts of CDPOs was contrary to the recruitment rules and the action of the State Government would amount to giving backdoor entry to the unsuccessful candidates into the State Services. The stand of the State respondents before the High Court was that 27 advertised vacant posts meant for direct recruitment quota, were filled up by the State Government on merits out of the select list prepared by the APSC dated 17.07.2000. The select list having thus exhausted, the appellants, whose names figured below the 27 selected candidates in the select list, therefore, could not claim to be appointed in excess of the advertised vacancies of CDPOs, and that if any future vacancies which arose after the publication of the advertisement, were to be filled up out of the left out candidates of the select list, the said appointment would amount to depriving other persons who, in the meantime, would have become eligible for selection and appointment. The stand of the State was that as soon as the posts advertised were filled up or the validity of the select list expired, whichever event was earlier in point of time, the candidates whose names appeared in the select list could not thereafter claim appointment as the select list got exhausted. It was stated that the appellants have neither challenged the policy decision taken by the Government on the basis of the Cabinet decision nor the Notification issued pursuant thereto by the State Government regularising the service of 18 CDPOs/ Probation Officers. The further stand of the State respondents was that the decision to regularize 18 CDPOs, who were initially appointed under Regulation 3 (f) of APSC Regulation, 1951, was taken by the State in view of the fact that they had already rendered more than four years of service satisfactorily and their continuation in service

was necessary to implement the time-bound scheme of the Government of India for which ICDS Project was created in the State of Assam. It was categorically stated that 18 CDPOs were regularized by the State Government to the posts meant for promotees.

32. Thus, it is seen that in the case of Mukul Saikia (supra), the Supreme Court of India had (i) upheld the regularisation of the service of the respondent nos. 8 to 24, (ii) upheld the decision of the Government to relax by invoking Clause 11 of 1994 Service Order. Thus, both the points decided by the Supreme Court of India has attained finality. The observations are quoted below:-

"The decision of the Cabinet and the Notification issued by the State Government pursuant thereto in our view, are both in consonance and in conformity with Clause 11 of the Service Order to save the services of the private respondents from being thrown out of the job which otherwise would cause extreme hardship and injury to them and to the members of their families."

Whether the petitioners are entitled to seniority over the respondent nos. 8 to 24:

33. Therefore, the question is whether the seniority of the petitioners is entitled to be placed en-bloc before the names of the respondent nos. 8 to 24.

34. It is seen that the Cabinet had taken a decision on 30.10.2000 to regularise the service of the respondent nos. 4 to 24. It has already been observed herein before that irrespective of their dates of joining, in terms of the provisions of Clause 10 of the 1994 Service Order, the seniority position of the petitioners would relate back to order in which their names appear in the select list published by APSC on 17.07.2000. However, although the respondent nos. 8 to 24 had joined on different dates between 01.06.1994 and 08.04.1996, but their service was regularised with effect from 16.11.2000. However, the names of the respondent nos. 8 to 24 do not appear in the APSC list.

35. Therefore, can it be said that because the names of the respondent nos. 8 to 24 do not appear in the APSC list, it would deprive the said respondents to claim seniority over the petitioners. If the Court considers the same in the affirmative, then it would lead to an anomalous situation because by dint of the provisions of Clause-10 of the 1994 Service Order, the respondent nos. 8 to 24 would have to be perpetually placed after the name of any other CDPOs, who have been regularly selected by the APSC and whose names appear in the APSC select list and thereby they would perpetually in the bottom of seniority list at any given point of time.

36. Therefore, when the Supreme Court of India, in the case of Mukul Saikia (supra), had upheld not only the regularisation of the service of the respondent nos. 8 to 24, but had also upheld the decision of the Government to relax by invoking Clause 11 of 1994 Service Order. Therefore, in respect of the respondent nos. 8 to 24, in the opinion of the Court, a legal fiction has been created by virtue of the decision of the Supreme Court of India rendered in the

case of Mukul Saikia (supra), and it has to be read as if for all intents and purpose, the regularisation of the service of the respondent nos. 8 to 24 has taken effect on and from 16.11.2000. Therefore, the Court is inclined to hold that by such legal fiction, the seniority of the respondent nos. 8 to 24 has to be calculated on and from 16.11.2000. There is no dispute that the names of the petitioners appear in the APSC select list dated 17.07.2000. Therefore, in the considered opinion of the Court, the seniority position of the petitioners would be above the position of the respondent nos. 8 to 24 because while the petitioners belong to the batch of APSC select list dated 17.07.2000, the respondent nos. 8 to 24 belong to the batch of 16.11.2000, i.e. the date with effect from when their service was regularised.

37. The Court does not find merit in the stand of the respondents that their seniority be reckoned from the respective dates on which they had entered into service. Firstly, seniority is required to be calculated on the basis of Clause 10 of the 1994 Service Order, and any other method of computation of seniority would frustrate the provisions of Clause 10 of the 1994 Service Order, for which such an interpretation is not legally permissible. Secondly, it is too well settled that the period of service rendered on ad hoc basis would be excluded while computing seniority and if one needs an authority on the point, the case of Vijay Singh (supra), may be referred to. There is no dispute that the respondent nos. 8 to 24 entered into service under Regulation 3(f) of the APSC Regulation, 1951.

38. Thus, the petitioners are found entitled to be placed above the private respondents in the gradation list.

CONCLUSION:

39. This Court is bound by the decision rendered in the case of Mukul Saikia (supra), wherein the Supreme Court of India had (i) upheld the regularisation of the service of the respondent nos. 8 to 24, (ii) upheld the decision of the Government to relax by invoking Clause 11 of 1994 Service Order.

40. In view of the decision rendered in the case of Mukul Saikia (supra), as the names of respondent nos. 8 to 24 were not recommended by the APSC, for the purpose of section 10 of the 1994 Service Order, a legal fiction has come into existence as the names and therefore, for all intents and purpose, the regularisation of the service of the respondent nos. 8 to 24 will be deemed to have taken effect on and from 16.11.2000. Therefore, as the names of the petitioners appear in the APSC select list dated 17.07.2000, the seniority position of the petitioners would be above the position of the respondent nos. 8 to 24.

Reliefs to which the petitioners are found entitled to:

41. The petitioners are found entitled to and are granted the following reliefs:-

i. The provisional gradation list published vide notification nos. SWD.544/2017/11 dated 29.12.2017, is set aside in so far as it relates to the seniority position of the petitioners vis-à-vis the respondent nos. 8 to 24.

ii. The final gradation/ seniority list vide notification no. SWD.544/ 2017/477 dated 01.10.2019 is set aside, in so far as it relates to the seniority position of the petitioners vis-à-vis the respondent nos. 8 to 24.

iii. For the purpose of Clause 10 of the Assam Social Welfare (Recruitment and Promotion) Service Order, 1994, the petitioners are liable to be treated as incumbents from the batch of APSC select list dated 17.07.2020. Similarly, the respondent nos. 8 to 24, are entitled to be treated as incumbents whose service has been regularised with effect from 16.11.2000, the date when notification no. SWD.34/99/104 dated 16.11.2000 was issued on the strength of Cabinet decision dated 30.10.2000.

iv. The respondent nos. 1 to 5 are directed to prepare and publish a fresh final gradation list by placing the names of the petitioner nos. 1 to 19 above the names of the respondent nos. 8 to 24 within a period of 1 (one) month from the date of service of a certified copy of this order on the Commissioner and Secretary to the Government of Assam, Social Welfare Department and/or the Head of the Social Welfare Department, by whatever nomenclature such post is being held.

42. The writ petition stands allowed to the extent as indicated above. The parties are left to bear their own cost.