
(2008) 01 GAU CK 0029

Gauhati High Court

Case No: W.A.Nos. 118 & 134 of 2008

Mohan Chandra Boro & Ors.

APPELLANT

Vs

Ajoy Chandra Bordoloi & Ors.

RESPONDENT

Date of Decision: Jan. 1, 2008

Acts Referred:

- Assam Engineering (Public Works Department) Service Rules, 1978 - Rule 13, 13

Citation: (2009) 4 GLR 200 : (2009) 1 GLT 1

Hon'ble Judges: Jasti Chelameswar, C.J. and B.K.Sharma, J

Bench: Division Bench

Advocate: K.N.Choudhury, M.Goswami, P.Lahkar, P.P.Rao, R.Deka, S.K.Medhi, S.Saikia, Sk.Muktar, I.Choudhury, K.H.Choudhury, K.Bhattacharjee, A.K.Bhattacharjee, A.M.Mazumdar, B.Chakraborty, B.Goyal, D.Goswami, Advocates appearing for Parties

Judgement

B.K. Sharma, J.

The matter relates to promotion to the post of Secretary in the Public Works Department, Government of Assam. The challenge made to the promotion of the appellant in the first writ appeal i.e. W.A. 118/2008 having been upheld by the learned Single Judge, these two writ appeals have been preferred, one by the promotee Secretary and the other by the Slate. Sri Ajay Chandra Bordoloi, the respondent No. 1 in both the writ appeals, filed the writ petition. The promotee Secretary whose promotion has been set aside by the learned Single Judge is Sri Mohan Chandra Boro.

BASIC RELEVANT FACTS

2. The writ petition being WP(C) No. 3573/2007 was filed by the respondent No. 1 challenging the notification dated 26.6.2007, by which the Government of Assam in the Personnel Department promoted the appellant in W.A. No. 118/2008 to the post of Secretary in the Public Works Department (Roads). Be it stated here that the post of Secretary is a promotional post in the Department from the post of Chief

Engineer.

3. A revised inter-se seniority list of Chief Engineer, PWD was published vide notification dated 6.6.2007 issued by the Government of Assam in the Public Works Department, in which, the respondent No. 1 was placed at serial No. 1 while the writ appellant was placed at serial No. 3. Two other Chief Engineers included in the list namely Sri Mrinal Ranjan Das and Sri Mumtaz Uddin Ahmed were placed at serial No. 2 and 4 respectively. The Selection Committee constituted for the purpose of considering promotion to the post of Secretary from amongst the Chief Engineers within the zone of consideration applying the ratio of 1:4 considered the said four Chief Engineers for such promotion. The Selection Committee recommended the appellant and Sri M.R. Das (respondent No. 2) in order of merit. Pursuant to such recommendation, the appellant having been promoted to the post of Secretary by the impugned notification dated 26.6.2007, the respondent No. 1 filed the writ petition which having been allowed, the appellant has filed the writ appeal coupled with the writ appeal filed by the State.

4. In the writ petition it is the case of the petitioner/respondent No. 1 that the criterion of merit-cum-seniority as envisaged under the relevant rules was not followed while considering the case of the incumbents and that the Selection Committee was also not constituted as per the laid down procedure. It will be apposite to quote the relevant provisions of the recruitment rules i.e. the Assam Engineering (Public Works Department) Service Rules, 1978.

"3. Class, Cadre, Branch and Status 1. The service shall consist of the following classes and cadres

(a) Class 1 (Senior Grade): It shall include the Cadres/Posts

(I) Secretary, PWD

(II) Deputy Secretary, PWD equivalent to the rank of Superintending Engineer, PWD

(III) Chief Engineer, PWD

(IV) Addl. Chief Engineer, PWD

(V) Superintending Engineer, PWD

(VI) Director, Road Research Laboratory

(VII) Sr. Architect in the rank of Superintending Engineer, PWD.

4.

5. Method of Recruitment

1.....

2. Recruitment to ClassI (Senior Services) an Executive Engineer shall be made by promotion only in accordance with Rr. 12 and 13

12. Promotion

(1) All vacancies in ClassI services as Executive Engineer, Architect, Deputy Architect, Research officer of ClassI, Junior Grade shall be filled by promotion :

Provided that the Governor may, for good and sufficient reasons, fill up any of the posts in ClassI (Senior Grade) for specialized investigation, designed and Research post temporarily or on tenure by transfer or deputation from outside the service, if it is satisfied that there is no suitable officer in the service available for filling the vacancies

(2) Subject to suitability as may be decided by the Selection Board and by the Appointing Authority as set forth in R 13 and also subject to possessing such qualification and experience as may be prescribed by the Governor, from time to time, a member shall be eligible for promotion to the corresponding higher cadre in the manner hereinafter provided. The qualifications and experience prescribed as on the date of commencement of these rules are furnished in subRr (3 and 4) of this rule and also in schedule III:

(i)

(ii)

(iii)

(iv)

(v)

(vi) From Assistant Executive Engineer to Executive Engineer

(vii) From Executive Engineer to Superintending Engineer

(viii) From Superintending Engineer to Additional Chief Engineer

(ix) From Additional Chief Engineer to Chief Engineer

(x) From Chief Engineer to Secretary

(3).....

(4) For promotion from Executive Engineer to Superintending Engineer and for further promotion, an officer shall have the academic prescribed qualification as in the rule for a direct recruit Assistant Engineer.

13. General procedure for promotion (1) Before the end of each year the Government shall make an assessment of the likely number of vacancies to be filled up by promotion in the next year in each cadre.

(2) The Appointing Authority shall then furnish to the Selection Board the following documents and information with regard to as many officers in order of seniority as four times the number of vacancies as assessed under subR..

(1):

(a) information about the number of vacancies;

(b) list of officers in order of seniority, eligible for promotion (separate lists for promotion to different cadres shall be furnished) indicating the cadre to which the case of promotion is to be considered;

(c) character rolls and personal files of the officers listed together with all papers showing that any adverse remark recorded in the character rolls has been duly communicated to the person concerned and any representation against such adverse remarks has been disposed of after due consideration;

(d) details about reservation in case of promotion to Class II of the service and about carry forward of vacancies as provided under subR.(3)of the R.11; and

(e) any other documents and information as may be considered necessary by the Appointing Authority or inquired by the Board.

(3) The Appointing Authority shall simultaneously request the Selection Board to recommend within one month a list of officers, found suitable for promotion in order of preference, in respect of promotion to each of the cadres in which recruitment is to be made by promotion.

(4) Promotions up to the rank of Superintending Engineer, Senior Architect will be made on merit and suitability with due regard to the seniority and promotions above the rank of Superintending Engineer on meritcum seniority.

(5) The Selection Board, after examination of the documents and information furnished by the Appointing Authority, shall recommend to the Appointing Authority a select list of officers about double the probable number of vacancies, in order of preference, found suitable for promotion. In case the Board does not consider an officer suitable for promotion according to seniority, it shall record the reasons thereof in writing and forward to the Appointing Authority together with the select list.

(6) The Appointing Authority shall consider the select list prepared by the Board alongwith character rolls and personal files of the employees and approve the list unless it considers any change necessary. If the Appointing Authority considers it necessary to make any change in the list received from the Board, he shall inform the Board of the changes proposed and after taking into account the comments, if any, as may, in his opinion, be just and proper.

Provided that it shall not be necessary for the Appointing Authority to consider the list submitted by the Board recommending candidates for promotion under R. 11. This list shall be forward by the Appointing Authority to the Commission, as provided under R. 14 (1).

(7) The inclusion of a candidate's name in a select list shall confer no right to promotion unless the Appointing Authority is satisfied after such enquiry, as may be considered necessary, that a candidate is suitable for promotion.

(8) The select lists shall remain valid for we months from the date of approval by the Commission in case of Assistant Engineers and for 12 months from the date of approval by the Selection Board in other cases.

(9) The promotions shall be in accordance with the list finally approved by the Appointing Authority.

(10) The select list as finally approved shall be published by the Appointing Authority in the Assam Gazette within 15 days from the date of approval.

Provided that the Government can remove any name from the select list in case of misconduct etc., coming to the notice of the Government and that no claim for promotion can be made on the basis of the select list.

15. Selection Board The Selection Boards as referred to in Rr 11, 12 and 13 shall consist of the following:

(1) Selection Board for the posts of Chief Engineer and Additional Chief Engineer:
Chairman:

(i) Chief Secretary Member

(ii) Secretary, Irrigation

(iii) Secretary, Flood Control Member Secretary

(iv) Secretary, PWD

(2)....."

PLEADED CASE OF THE APPELLANTS IN THE WRIT PROCEEDING

5. In the counter affidavits filed by PWD, Personnel Department and the respondent No. 1, it is their specific case that the appellant was promoted, he being the seniormost officer in the cadre of Chief Engineer and otherwise fit for promotion to the post of Secretary, PWD in terms of the executive instruction issued under No. AAP 617 81/Pt/62 dated 10.11.2000. In this connection the specific averments made in the respective counter affidavits are reproduced below:

COUNTER AFFIDAVIT OF PWD

"3. That at the very outset respectfully begs to state that the basic and relevant facts leading to the issuance of the notification No. AAP.77/07/33 dated 26.6.2007 have not been stated in the writ petition for reasons not known to the answering respondent. As such, the answering respondent respectfully begs to place on record the relevant facts that are necessary for adjudication of the issues involved in the instant case."

"3 .A That the competent authority in the Government of Assam noticed that there is a basic fallacy/lacuna in the Assam Engineering (PWD) Service Rules, 1978, particularly with regard to the post of Secretary to the Government of Assam, PWD. Though the said post is envisaged in Class I (Senior Grade) Cadre and Rule 13(4) provides that all promotions above the rank of Superintendent Engineer will be made on the basis of merit cum seniority, there is no Selection Board provided for in the Rules of 1978 for selection of an incumbent to the post of Secretary PWD. The Personnel (A) Department, Government of Assam deliberated upon the issue and ultimately the matter was placed before the Hon"ble Chief Minister of Assam. The Hon"ble Chief Minister upon deliberations and discussions and after examining the issue thoroughly passed the following order in file No. AAP.61/81/Pt/62 dated 10.11.2000.

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

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

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

"4. B That the order passed by the Hon"ble Chief Minister in file No. AAP 61/89/Pt as quoted in paragraph 3 A above not being under challenge in the instant case, the relief as prayed for in the writ petition cannot, in any even be granted. It is pertinent to state at this stage that the respondent No. 4 being the senior most officer in the cadre of Chief Engineer and being otherwise fit for promotion to the post of

Secretary, PWD, he was promoted to the said post vide notification dated 26.6.2007, strictly in terms of the executive instruction reflecting an executive policy of the Government of Assam. The answering respondent humbly submits that it is a settled position of law that the parent action itself not being under challenge the petitioner is not entitled to challenge the actions taken in consequence thereof. As such, the writ petition is not maintainable and hence liable to be dismissed."

"5. That the answering respondent humbly begs to submit that there was a clear lacuna/gap in the Assam Engineering (PWD) Service Rules, 1978. Such gap/lacuna, having come to the notice of the authorities, the matter was examined thoroughly at the highest level and a conscious policy decision was taken as stated in paragraph 3B of the instant affidavit. It is humbly submitted that it is no more *res integra* that a gap in the Service Rules can be filled up by way of executive instructions. Moreover, since the date on which this executive instructions reflecting the executive policy of the government, officers have been promoted to the cadre of Secretary, PWD on the basis of the said executive instructions i.e. on the basis of seniority and not on the basis of meritcum seniority. Recourse to issuance of the said executive instructions had to be taken as the relevant Service Rules were unworkable. It is a settled position of law that when statutory provisions are unworkable, it is very much within the powers and ambit of the Government to act in exercise of the executive powers. As such, it is humbly submitted that there has not been any illegalities or arbitrariness in the instant case as is sought to be projected by the petitioner. Apparently no fundamental or legal right of the petitioner has been violated in the instant case. As such, the writ petition is liable to be dismissed."

COUNTER AFFIDAVIT OF PERSONNEL DEPARTMENT

"9. That the statements made in paragraph 22 and 23 of the writ petition are incorrect and misconceived and hence, categorically denied by the answering respondent. Although, the petitioner has deemed it fit to reproduce the provisions of Rule 13(4) of the Rules of 1978, he has conveniently avoided making even a passing reference to the fact that there is no Selection Committee envisaged for promotion to the post of Secretary under the said Rules of 1978. For reasons best known to the petitioner, he has also failed to disclose the fact that the Government of Assam noticed that there is a lacuna in the Assam Engineering (PWD) Service Rules, 1978, particularly with regard to the post of Secretary to the Government of Assam PWD. Though the said post is envisaged in Class I (Senior Grade) Cadre and Rule 13(4) provides that all promotions above the rank of Superintending Engineer will be made on the basis of meritcum seniority, there is no Selection Board provided for in the Rules of 1978 for selection of an incumbent to the post of Secretary, PWD. The Personnel (A) Department, Government of Assam deliberated upon the issue and ultimately the matter was placed before the Hon'ble Chief Minister of Assam. The then Hon'ble Chief Minister, upon deliberations and discussions and after examining the issue thoroughly, passed the following order in the file No.

AAP.61/89/Pt and communicated the same to the PWD vide letter No. AAP.61/89/Pt/62 dated 10.11.2000.

The post of Commissioner and Secretary, PWD is the, senior most administrative post of the department and is outside the cadre. In order to ensure the administrative efficiency and discipline, this post is to be filled up by the senior most person among the Chief Engineers. In accordance with this principle, Sri M.C. Gogoi should be appointed as Commissioner and Secretary, PWD.

As regards the filling up the post of Secretary, PWD, though the Selection Committee is not provided for in the rules, I would like to accept the recommendations of the Committee for the time being, though strictly speaking, the post of Secretary, PWD shall be filled up strictly according to the seniority of the Chief Engineers. Incidentally Sri Bora is also the senior most man after Sri Gogoi and therefore, he needs to be appointed formally as Secretary, PWD.

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

The answering respondent humbly submits that it is apparent from the facts and circumstances narrated in the instant paragraph that the Rules of 1978, in so far as the post of Secretary is concerned, was unworkable, accordingly, the Government of Assam took an executive decision to promote the senior most Chief Engineer to the post of Secretary and said procedure has been followed all along since the year 2000. In the above circumstances, the provision of rule 13(4) laying down the criteria of meritcum seniority has no application in the instant case. In any event, the petitioner, inspite of being aware of the above executive decision of the Govt. of Assam, has deemed it fit not challenge the same. As such, in the humble submission of the deponent, the consequences thereof are not open to challenge."

"14. That the statements made in paragraph 31 of the writ petition are entirely irrelevant and misconceived in the backdrop of the facts and issues involved in the instant case and hence, the same are categorically denied by the answering respondent. The answering respondent reiterates that there was a serious lacuna in the rules of 1978 and the said Rules have become unworkable for the purpose of promotion to the post Secretary under the Public Works Department. It was in this factual background that the Government of Assam took a conscious policy decision to make promotion to the said post strictly on the basis of seniority in the cadre of Chief Engineer. The said practice and procedure is being followed since the year 2000. As such, going by the petitioner's own submissions, the manner having been prescribed for promotion to the post of Secretary, PWD by the Government of

Assam in exercise of powers under Article 162 of the Constitution of India, the said manner/procedure is required to be followed and has been strictly followed in the present case. As such, it is further humbly submitted no legal right of the petitioner has been infringed in the instant case that would necessitate interference at the hands of the Hon"ble Court. Hence, the writ petition is liable to be dismissed."

COUNTER AFFIDAVIT OF THE APPELLANT SRI M.C. BORO

"13. That as regards the statements made in paragraph 22 of the writ petition, the deponent states that the interpretation sought to be given while seeking to explain the Rule for giving promotion to the post of Secretary, PWD, is absolutely is conceived in law and the same is not maintainable. The deponent states that under the relevant Rules i.e. Assam Engineering (Public Works Department) Service Rules, 1978, though the post of Secretary, PWD is a Cadre post and Rule 13.4 provides that promotions above the rank of Superintendent Engineers would be made on the basis of merit cum seniority of the incumbents in the zone of consideration, the Service Rules do not provide for any selection board for the post of Secretary. Therefore the Service Rules of the department could not be acted upon for making selection to the post of Secretary, PWD. The government accordingly decided that the post of Secretary PWD would be filled up by the senior most person at the rank of the Chief Engineer. This fact is also available from the affidavit filed by respondent No. 2 in the writ petition."

"21. That the deponent states that the promotion to the post of Secretary by order dated 26.6.2007 has been made on the basis of the order passed in the file No. AAP.61/89/PT by the Chief Minister and communicated to the PWD department by Personal (A) Department by letter No. AAP.61/89/PT/62 dated 10.11.2000, taking into account the seniority of the incumbents in the rank of Chief Engineers as the criterion for giving promotion to the post of Secretary, PWD and the order/guideline is in order and holding the field and therefore there is no illegality in the matter of selection of the deponent to the post of Secretary, PWD."

PLEADED CASE OF THE APPELLANTS IN THE WRIT APPEALS STATE APPEAL (W. A. 134/2008)

6. As in the writ proceeding in the appeal proceeding also, it is the case of the State appellant that the selection was conducted on the basis of the aforesaid executive instruction. In this connection specific averments in the appeal are quoted below:

"17. That pursuant to the recommendations made in a selection conducted on 22.6.2007 based on the principles laid down by the Chief Minister's order which also has been the uniform practice in the Public Works Department since the issuance of the said order, the Government of Assam vide Notification No. AAP.11/07/33 dated 26.6.2007, promoted the Proforma Respondent/Respondent No. 4 to the post of Secretary, Public Works Department."

"III3. That, although Rule 13 (4) of the Service Rules of 1978 generally provides for selection based on the criteria of meritcum seniority for the posts above the rank of Superintending Engineer, the Rule making authority did not provide for a Selection Board for promotion to the post of Secretary, PWD. Admittedly, the intention of the Rule making authority is not discernible even upon a close scrutiny of the Rules. On the face of such ambiguity, the Hon"ble Chief Minister of Assam consciously issued office memorandum providing that the interse merits of the officers having been assessed at several previous stages, on having reached the rank of Chief Engineer, they are more or less of equal merit and hence, the criteria of seniority was required to be followed for promotion to the post of Secretary, PWD. It is evident that there existed a lacunae in the Rules, which was filled up as indicated above in exercise of powers under Article 162 of the Constitution of India as well as Assam Rules of Executive Business, 1968. Moreover, the order so passed by the Hon"ble Chief Minister dated 10.11.2000."

"VIII 5. For that, the learned Single Judge entirely failed to appreciate the fact that although the Rule 13(4) of the Service Rule of 1978 provides for selection based on the criteria of meritcum seniority for posts above the rank of Superintending Engineer, the Rule making authority did not provide for a Selection Board for promotion to the post of Secretary, Public Works Department. Admittedly, the intention of the Rule making authority is not discernible even upon a close scrutiny of the Rules. On the face of such ambiguity, the Chief Minister, Assam consciously issued the order providing that the interse merits of the officers having been assessed at several previous stages, on having reached the rank of Chief Engineer, they are more or less of equal merit and hence, the criteria of seniority should take precedence for promotion to the post of Secretary, Public Works Department. The learned Single Judge entirely failed to appreciate that it was fully within the authority, power and jurisdiction of the Chief Minister to issue such an order under Article 162 of the Constitution of India read with the provisions of the Assam Rules of Executive Business, 1968."

"VIII 6. For that the learned Single Judge committed a gave error in law in entirely misconstruing and misinterpreting the ambiguity/lacunae/fallacy in the Service Rules, 1978, which had resulted in the issuance of the order by the Chief Minister providing for the criteria of seniority for promotion to the post of Secretary, Public Works Department. The learned Single Judge committed a manifest error of law in failing to appreciate that a lacunae/fallacy in Service Rules framed under Article 309 of the Constitution of India can be filled up by the executive instructions."

"VIII 7. For that the learned Single Judge committed a manifest error in law in delving into issues that were not even pleaded by the writ petition in his writ petition. In fact, the respondent No. 1/writ petitioner had not only withheld the fact pertaining to the order passed by the Chief Minister, but had also suppressed the fact that the criteria of seniority has been consistently followed in making

promotions to the post of Secretary, Public Works Department since the year 2000. The learned Single Judge not only overlooked these facts, but also failed to appreciate that the said order of the Chief Minister was not even put to challenge by the respondent No. I/writ petitioner."

"VIII 8. For that the learned Single Judge entirely failed to appreciate that the Chief Minister having issued the order providing for the criteria for promotion to the post of Secretary, Public Works Department, the said criteria was consistently followed by the Government of Assam in making promotions to the said post of Public Works Department. The learned Single Judge, on the face of such consistent practice, coupled with the factum of ambiguity in the Service Rules, 1978, out not to have caused an interference by taking a contrary view and unsettling the settled practice in the Department as has been held by the Apex Court in the case N. Suresh Nathan & Anr. Vs Union of India & Ors reported in 1992 Supp (1) SCC 584."

"VIII 9. For that the learned Single Judge entirely failed to appreciate the fact that the admitted ambiguity in the Rules of 1978 rendering the intention of the Rule making authority in the Rule making authority totally indiscernible, had in turn, rendered the Rules for promotion to the post of Secretary, Public Works Department unworkable and inoperative. The Hon"ble Supreme Court in the case of State of Sikkim Vs Dorjee Tshering Bhutia & Ors. reported in(1991) 4 SCC 243 conclusively held that "It is the operative statutory provisions which have the effect of ousting executive power of the State from the same field. When in a peculiar situation, as in the present case, the statutory provisions could not be operated there was no bar for the State Government to act in exercise of its executive power". On the face of this factual and settled legal position, there was no scope for interference with the State action."

"VIII 10. For that the learned Single Judge committed a manifest error in law in misconstruing the above factual and legal position. Even assuming but not admitting to the contrary, Rule 28 of the Rules of 1978 vests the power to dispense with or relax the requirement of any rule and Rule 29 provides that if any question arises relating to the interpretation of the Rules, the decision of the Government shall be final. On the face of the provisions of Rule 28 and Rule 29, the issuance of the Chief Minister"s order and the consistent practice of adopting the criteria of seniority for promotion to the post of Secretary, Public Works Department, it is a clear case of deemed relaxation of Rule 13 (4) of the Service Rules of 1978. As will be evident from a catena of Judgment rendered by the Hon"ble Supreme Court on the subject." W.A. No. 118/2008

"1.3 In view of the ambiguity in the Rules, the issue was discussed at the level of the Chief Minister who passed an order dated 10.11.2000 to the effect that as the post of Commissioner and Secretary, Public Works Department is outside the cadre in order to ensure the administrative efficiency and discipline this post is to be filled up by the senior most persons among the Chief Engineer. He also suggested that

before any vacancy arises in the post of Commissioner/Secretary, Public Works Department, the Rules should be amended to provide the criteria of seniority among the Chief Engineer for the selection for these two posts is Commissioner and Secretary, Public Works Department. He considered it desirable in view of the fact that once the officers have been promoted to the level of Chief Engineer they are more or less equally placed as far as merit is concerned and seniority should take precedence over the merit factor."

"3 A. contention of the respondent No. 4 (appellant) in the writ petition before the learned Single Judge.

1. A conjoint reading of Rule 13 and 15 makes it abundantly clear that the rule making authority consciously did not provide for a Selection Board for promotion to the post of Secretary in accordance with the Rules and, therefore, the petitioner's insistence on the adherence thereto is per se flawed and untenable.

"B. 2 Contentions of the State respondents No. 1, 2 and 3.

The absence of a Selection Board under Rule 15 for the post of Secretary of the Department not only signifies the intention of the Rule making authority to exclude the said post from the purview of the provisions thereof pertaining to promotion thereto, it has been otherwise rendered the Rules unworkable visavis the said post."

"3. The observation of the Chief Minister of the State also in administrative charge of the Department recommending seniority to be the criteria for promotion from the post of Chief Engineer to that of the Secretary in exercise of its powers under Article 162 of the Constitution of India and the Rules of Executive Business constitutes a binding executive instruction and/or policy. As the petitioner has refrained from questioning the legality of the executive instruction/policy there is no room for him to complain on the applicability thereof to the impugned selection process."

"4. At the level of Chief Engineer all the eligibility officers are almost at par on merit. Therefore the decision to adopt seniority as the decisive criteria for further promotion is not inconsistent with the letter and spirit of the Rules either. As no constitutional or legal right of the petitioner has been violated by the impugned action, the writ petition is liable to be rejected."

EXPOSITION

7. From the above pleaded case of the appellants, it is clearly exposed that the Selection Committee headed by the Chief Secretary as the Chairman followed the aforesaid executive instructions in the matter of promotion to the post of Secretary laying down the criterion of seniority alone, and not Rule 13 of the rules laying down the criterion of merit cum seniority. Be it stated here that the State has filed the writ appeal through the Chief Secretary, who was the Chairman of the Selection Committee. Strangely enough, the same very Chief Secretary has filed an affidavit in opposition in the writ appeal filed by Sri M.C. Boro (W.A. No. 118/2008)

taking altogether a different stand in respect of the criterion adopted in the matter of selection to the post of Secretary. In the said affidavit, it has been stated that the Selection Board considered both merit and seniority of the officers in accordance with the provisions of the Assam Engineer (PWD) Rules, 1978, while drawing the merit list and recommending the candidates for promotion to the post of Secretary, PWD. This stand on the part of the Chief Engineer is a complete volteface from the stand in the writ proceeding as well as in this proceeding on the basis of which even an interim order of stay of the impugned judgment and order has been obtained.

8. Law is well settled that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. The Apex Court, longtime ago, in *Comr. of Police, Bombay Vs. Gurdhandas Bhangi* reported in AIR 1952 SC 16 observed thus:

"Public order, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

SUBMISSIONS

9. True to the above deviation from the pleaded case of the appellants, Mr. K.N. Choudhury, learned Addl. Advocate General, Assam representing the State, submitted that irrespective of the pleadings of the appellant both in the writ proceeding as well as in the appeal proceeding, true nature of consideration of the cases of the incumbents by the selection committee being in conformity with the criterion of meritcum seniority, this Court should accept the recommendation of the selection committee. To the pointed question asked to him in reference to the aforesaid pleadings as to whether this Court should be oblivious of such pleadings including the pleadings adopted in the writ appeal filed by the Chief Secretary of the State, who incidentally was the chairman of the selection committee, Mr. Choudhury, learned Addl. Advocate General, Assam submitted in the affirmative. Adopting the same very argument, Mr. A.M. Majumdar, learned Sr. counsel appearing for the promotee/appellant in his reply to the submission made by Mr. A.K. Bhattacharjee, learned Sr. counsel appearing for the respondent No. I/writ petitioner submitted that this Court should go by the minutes of the selection committee and ignore the pleaded case of the appellants. Both Mr. Choudhury and Mr. Majumdar submitted that the above referred pleadings should be avoided in deciding the issue having regard to the minutes of the selection committee which

according to them speak consideration of the cases of the incumbents under consideration applying the test of meritcum seniority as envisaged under rule 13 of the Rules.

10. Contrary to the aforesaid submissions made by both Mr. Choudhury and Mr. Majumdar, Mr. P.P. Rao, learned Sr. counsel assisted by Mr. M. Goswami who opened up the argument on behalf of the promotee appellant (concluding arrangement was made by Mr. A.M. Majumdar, learned Sr. counsel who also represented the promotee appellant) submitted that learned Single Judge ought not have interfered with the findings arrived at by the selection committee. He emphasized on the scope and ambit of the writ Court in exercising the power of judicial review in the matter of selection so as to interfere with the same. Referring to the reply affidavit filed by the writ petitioner/respondent No. 1 in respect of the counter affidavit filed by the respondent No. 2, i.e. PWD, he submitted that as per the own understanding of the writ petitioner, the executive instruction referred to above, was never followed. In this connection, he also referred to the impugned judgment and order, pointing out the emphasis put by the learned Single Judge on the criterion of meritcum seniority so as to emphasize that if the merit were to be considered, the writ petitioner would certainly score a march over the promotee appellant. Referring to the respective date of joining the various posts in the hierarchy right from Assistant Engineer to Chief Engineer by all the four incumbents who were considered for the post of Secretary, he submitted that the final and/or overall gradings in the ACRs will have to be judged relatively in reference to the periods for which the incumbents held the different posts. In this connection he submitted that the promotee appellant having promoted to the post of Chief Engineer on 19.06.04 as against such promotion of the writ petitioner/respondent No. 1 w.e.f. 23.06.06, the appellant would definitely get weightage in respect of longer period of duties and responsibilities shouldered in the post of Chief Engineer.

11. Mr. Rao, learned Sr. counsel has referred to the following decisions:

- 1) (2002) 10 SCC 359 (Ved Prakash & Ors Vs. State of Haryana & Ors.)
- 2) (2002) 8 SCC 395 (Badrinath Vs. Govt. of Tamil Nadu & Ors.)
- 3) (1992) 2 SCC 299 (Baikuntha Nath Das & Anr. Vs. Chief District Medical Officer, Baripada & Anr.)
- 4) (1984) 2 SCC 8 J.D. Srivastava Vs. State of Madhaya Pradesh & Ors.)
- 5) (1981) 1 SCC 490 (Brij Behari Lal Agarwal Vs. Hon"ble High Court of Madhya Pradesh & Ors.)
- 6) (2008) 2 SCC 199 (M. V. Thimmaiah & Ors. Vs. Union Public Service Commission & Ors.)
- 7) (1990) 1 SCC 305 (Dalpat Abasaheb Solunke & Ors. Vs. Dr. B.S. Mahajan & Ors.)

12. Mr. K.N. Choudhury, learned Addl. Advocate General apart from the aforementioned submission also submitted that, in fact the case of the writ petitioner/respondent No. 1 ought not to have been considered for promotion to the post of Secretary as he was not within the zone of consideration applying the ratio of 1:4. In this connection, he submitted that the writ petitioner/appellant could come into the zone of consideration because of delay caused by him by way of obtaining an interim order in another writ petition being W.P.(C) No. 4602/07 filed by him relating to the seniority dispute. Referring to the common judgment and order dated 22.02.07 passed by this Court in two writ petitions one of which W.P.(C) No. 4602/06 filed by the present writ petitioner/respondent No. 1, he submitted that it is only because of the observation made in the said judgment, the name of the petitioner came to be included in the seniority list vide notification dated 06.06.07. In the said judgment it was observed that if a seniority list of Chief Engineer had been published it was not understandable as to why all such persons who were holding the post of Chief Engineer should not be included there under. As regards the plea of the writ petitioner/respondent No. 1 claiming seniority over the promotee appellant in the post of Chief Engineer, same was rejected on the ground of delay on the part of writ petitioner in raising the grievance. Referring to the various observations made by the learned Single Judge in respect of the plea that the writ petitioner was not within the zone of consideration, he submitted that the learned Single Judge did not consider the matter in its true perspective. He also submitted that the learned Single Judge could not have sat in appeal over the minutes of the selection committee. He also referred to the decisions of this Court as well as the Apex Court which are as follows:

i) 2005 (1) GLT 90 (Bhumidhar Kalita & Ors Vs. State of Assam

ii) 2003 (2) GLT 371 (Molitatu & Anr. Vs. State of Arunachal Pradesh and Ors.)

iii) (1978) 1 SCC 40 (Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.)

iv) AIR 1952 SC 16 (Commissioner of Police, Bombay vs. Gordhan Das Bhanji).

13. Mr. K.H. Choudhury, learned Sr. counsel assisted by Mr. S.K. Muktar, learned counsel appearing for the respondent No. 2, i.e. Shri Mrinal Ranjan Das who was the second nominee in this impugned selection, made submission in tune with the submissions made by the learned counsel for the appellants. As recorded in the impugned judgment and order, after promotion of the promotee appellant to the post of Secretary by the impugned notification dated 26.06.07, he has further been promoted to the post of Commissioner and Secretary of the Department by notification dated 15.11.07 and in the resultant vacancy of the Secretary, the respondent No. 2 said Shri Das, who was the second nominee in the selection for the post of Secretary has been promoted. Mr. K.H. Choudhury, learned counsel appearing for him submitted that the respondent No. 2 having been promoted to

the post of secretary in the resultant vacancy caused by further promotion of the promotee appellant, same should not be interfered with.

14. Countering the above arguments Mr. A.K. Bhattacharjee, learned Sr. counsel assisted by Mr. S.K. Medhi, learned counsel for the writ petitioner/respondent No. 1 in his submission referred to paragraph 21 of the counter affidavit filed by the respondent No. 4 (the promotee appellant) in the writ proceeding, which is reproduced below:

"21. That the Deponent states that the promotion to the post of Secretary by order dated 26.06.2007 has been made on the basis of the order passed in the file No. AAP. 61/89/PT by the Chief Minister and communicated to the PWD department by Personnel (A) Department by letter No. AAP. 61/89/PT/62 dated 10.11.2000, taking into account the seniority of the incumbents in the rank of Chief Engineers as the criterion for giving promotion to the post of Secretary, PWD and the order/guideline is in order and holding the filed and therefore there is no illegality in the matter of selection of the Deponent to the post of Secretary, PWD."

15. Mr. Bhattacharee also referred to paragraph 3 of the counter affidavit filed by the personnel department, i.e. the respondent No. 3, which is quoted below:

"3. That, I have gone through a copy of the affidavit filed on behalf of the Respondent No. 2. The answering Respondent adopts the stand taken by the Respondent No.2 in the said affidavit filed on 20.09.2007 and also reiterates the same.

16. Referring to the aforementioned pleadings of the appellants, he submitted that the appellants will have to have a definite stand in the matter and cannot approbate and reprobate as per the demand of the situation. He also submitted that the State instead of acting as a model employer and behaving in a fair manner, has acted in the entire episode in the partisan manner even to the extent of making contrary statements only to save the impugned promotion of the promotee appellant. Mr. Bhattacharye has placed reliance on the following decisions:

- i) AIR 1979 SC 49 (S.R. Venkataraman Vs. Union of India)
- ii) 1950 AELR, Vol. I (Pilling Vs. Abergele)
- iii) (2006) 6 SCC 430 (R.S. Garg Vs. State of UP & Ory.)
- iv) AIR 1967 SC 1910 (Sant Ram Sharma Vs. Stute of Rajasthan)
- v) AIR 1974 SC 87 (Union of India Vs. ML Kapoor & Ors.)
- vi) (2007) 1 SCC 309 (Sankar Deb Acharya Vs. Biswanath Chakraborty)
- vii) (1998) 6 SCC 720 (B. V. Sivaiah and Ors. Vs. K. Addanki & Ors.)

17. In reply submission made both by Mr. K.N. Choudhury, learned Addl. Advocate General, Assam and Mr. A.M. Majumdar, learned Sr. counsel appearing for the promotee appellant, reiterated their aforementioned submissions and further relied on the following decisions:

i) (1985) Sppl. SCC 42 (B. Prabhakar Rao & Ors. Vs. State of Andhra Pradesh & Ors.)

ii) (1996) 8 SCC 762 (SBI Vs. Kashinath Kher)

iii) (2005) 10 SCC 15 (UPSC Vs. K. Rajaiah & Ors.)

iv) (1997) 1 SCC 280 (Anil Katiyar (Mrs.) Vs. Union of India & ors.)

v) (1990) 1 SCC 305 (Dalpat Abasaheb Solunke & Ors. Vs. Dr. B.S. Mahajan & Ors.)

vi) AIR 1951 Allahabad 746 (FB)

vii) (2002) 1 SCC 33 (Ghulam Qadir Vs. Special Tribunal & Ors.)

SUMMARIZATION OF SUBMISSIONS

18. From the tenor of the submissions made by the learned counsel for the parties what has emerged and could be gathered is that it is the case of the appellants that irrespective of the pleadings both in the writ proceeding as well as in the appeal proceeding so far as the same relates to the stand that the above referred executive instruction emphasizing on the need to promote the officers on the basis of the seniority alone, when the minutes of the selection reflect that the criterion of meritcum seniority as envisaged under rule 13 of the Rules was followed by the selection committee, in absence of any malafide and/or colourable exercise of power discernible on the face of the records, the writ Court should be reluctant to interfere with the conclusions arrived at by the selection committee. Another ground urged on behalf of the appellants is that when the vacancy of the Secretary occurred, the writ petitioner/respondent No. 1 being not within the zone of consideration, his case ought not have been considered.

19. As against the aforesaid submission advanced by the learned counsel for the appellants, it is the case of the writ petitioner/respondent that if the mandate of meritcum seniority in terms of Rule 13 of the Rules were followed, it is the writ petitioner who would have been found more suitable than the other three incumbents including the promotee appellant, having regard to general assessment/over all gradings earned by the incumbents in their ACRs for the relevant period. As regards the zone of consideration, it is the stand of the writ petitioner/respondent No. 1 that the case of the writ petitioner having been considered by the selection committee as per his entitlement and as forwarded by the appointing authority, it does not lie on the mouth of the State appellant to take such plea so as to sustain the promotion of the promotee appellant at any cost and by all means.

PRINCIPLES UNDERLYING THE DECISIONS AND THE SUBMISSIONS

20. The above referred decisions on which the learned counsel for the parties have placed reliance are primarily to impress upon the principles underlying the power of assessment of the selection committee in the matter of promotion and limited scope of interference in such matter exercising the power of judicial review under Article 226 of the Constitution of India; in case of accumulated vacancies requirement of preparing year wise penal confining the selection only to the eligible officers; malice in law; waiver, estoppel and acquiescence; requirement or otherwise the necessity to assign reasons by the selection committee; principle relating to selection in the touchstone of meritcum seniority etc. As pointed out above, Mr. P.P. Rao, learned Sr. counsel representing the promotee appellant while opening Ms argument at the first instance confined his argument without any reference to the aforementioned executive instruction in terms of which seniority alone should be the criterion for promotion to the post of Secretary. His only argument was that since the selection committee made its own assessment of the officers on the basis of the ACRs etc., the writ Court will not sit in appeal over such assessment made by the selection committee. His further submission was that since the promotee/appellant has rendered more length of service in the post of Chief Engineer than any other officers, he was entitled to get due weightage on that count as the ACRs of the officers are to be considered relatively in reference to the post held by them and the period thereof. He did not argue regarding alleged ineligibility of the writ petitioner/respondent No. 1 so far as zone of consideration is concerned.

21. Per contra to the submission made by Mr. Rao, Mr. Majumdar, learned Sr. counsel in his reply argument submitted that the writ petitioner/respondent No. 1 was not within the zone of consideration. In reference to the date of vacancy, same was the argument of Mr. Choudhury, learned Addl. Advocate General, Assam. This plea is in addition to the submission made by both of them that irrespective of the pleadings relating to the aforesaid executive instruction, the matter regarding selection of the promotee/appellant needs to be considered as the one adopting the criterion of meritcum seniority as the same is the reflection as per the minutes of the selection committee. Additionally, Mr. Choudhury, learned Addl. A.G also referred to the affidavit in opposition filed by the Chief Secretary of the State who was the Chairman of the Selection Committee by which justifying the selection of the promotee/appellant, he has stated that the selection was conducted on the basis of the comparative merit and seniority of the officers. It is with such submissions both Mr. Majumdar and Mr. Choudhury representing the appellants referred to the decisions indicated above.

22. In *Bhumidhar Kalita* (supra), this Court emphasized on the need for preparation of year wise penal in the context of the rules in terms of which selection is to be held every year. Same is the view in *Molitatu* (supra). The cases of *Mohinder Singh Gill* and *Gordhan Das Vanji* (supra) have been referred to by the learned Addl. A.G so as

to contend that the understanding of the writ petitioner/respondent No. 1 of the impugned selection being one of adopting the criterion of meritcum seniority, he cannot now turn around the same so as to fall back on the executive instruction taking the plea that more emphasis was given in the said executive instruction which speaks of only "seniority in the matter of promotion to the post of Secretary from that of Chief Engineer".

23. Learned Addl. A.G. has placed reliance on Kashinath Kher (supra) so as to argue that although considering the overall gradings earned by both the promotee appellant and the writ petitioner/respondent No. 1 would go to show that the writ petitioner/respondent No. 1 has better gradings than that of the promotee respondent, but the same by itself will not be the parameter to give the writ petitioner higher merit as the selection committee is not to adopt the confidential reports in toto and it is entitled to go for cross verification from the character rolls or the records and then to make independent assessment of merit and ability of each candidate. The decision in K. Rajaiah (supra) has been referred to, to bring home the point of argument that the selection committee is not bound to record reasons while giving the lesser grading to a candidate whose selection is under consideration.

24. Mr. A.K. Bhattacharjee, learned Sr. counsel for the writ petitioner/respondent No. 1 has placed reliance in Sant Ram Sharma (supra) in support of his submission that the executive instruction even if validly issued cannot override the provision of the statutory rules, i.e. the aforesaid rules of 1978. He has placed reliance on the decision of the Apex Court in B. V. Siviah (supra) to emphasize on the principles of meritcum seniority visavis the seniority cum merit. In so far as the decision in R.S. Garg (supra) is concerned, Mr. Bhattacharjee has placed reliance on the principle underlying "malice" in its legal sense. This decision has been referred to, to counter the argument that in absence of any allegation of colourable exercise of power, the writ Court will be reluctant to interfere with the selection made by the selection committee.

25. The principles of law laid down in various decisions referred to above are reiteration and reaffirmation of all such set principles. Those principles are to be applied in consideration of the fact situation involved in each and every case. Needless to say that the ratio of any decision must be understood in the background of facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follow from it (see Lord Hollsbury in Queen vs. Leathern, 1910 AC 495).

26. In Kashinath Kher (supra), the particular observation made by the Apex Court in respect of cross verification from the character rolls or the record and requirement of independent assessment of merit and ability was made by the Apex Court when it was found that the confidential reports submitted were adopted in toto by the committee considering the promotion without any cross verification from the

character rolls and independent assessment of merit and ability. The particular observation made by the Apex Court is reproduced below:

"16. It would also appear from the record that the confidential reports submitted were adopted in to by the Committee considering promotion without any cross verification from the character rolls or the record and independent assessment of merit and ability. That would also be clearly illegal. Being a competent authority to consider the claim of the candidates, the committee for promotion has to independently assess the merit and ability of each candidate from the reports and the records etc. consistent with the weightage prescribed in the rules and then to determine the relative merit and ability of officers and then to arrange order of merit of the officers for promotion. Being selection posts, the selection record also must indicate reasons, however, brief they may be, so that when tested by judicial review, the Court would be better assisted by such record to reach correct decision in law. This exercise should also be done by the appellant. If the confidential reports written earlier are by superior officers, then the entire record could be secured by the controlling officers. They should be considered by the promotion Committee and each case must be examined in the light of the record of each officer. It would be desirable to prepare a columnar statement with all relevant columns. The C.Rs. and other relevant record should be preserved. The matters considered by the promotion committee should also be preserved." 27. From the above observations made by the Apex Court it is seen that apart from the point on which the learned Addl. A.G. has agitated, it has also been emphasized that in respect of selection posts, the selection record also must indicate reasons, however brief they may be, so that tested by judicial review, the Court would be better assisted by such records to reach correct decision in law. The selection committee must examine each case in the light of the recdd of each officer and that it would be desirable to prepare columnar statement with all relevant columns. It has also been emphasized that the ACRs and other relevant records should be preserved and that the matters considered by the promotion committee should also be preserved.

28. As regards the decision in case of K. Rajaiah, it has been placed reliance to put emphasis that the selection committee need not assign any reason. It will have to be borne in mind that said decision was in respect of promotion from State Police service to IPS applying the norms prescribed by the provisions of Indian Police Service (Appointment by Promotion) Regulation 195 5. As per the provisions of the Regulation, the Officers are to be graded as outstanding, very good, good and unfit etc. and the same is vested with the selection committee. That is a function incidental to the selection process. The classification given by the State Govt. authorities in the ACRs is not binding on the committee. No doubt, the committee is by and large guided by classification adopted by the State Govt., but for good reasons, the selection committee can evolve its classification which maybe at variance with the gradation given in the ACRs.

29. The aforesaid decision refers to the decision in *R.S. Das Vs. Union of India* reported in 1986 (Sppl.) SCC 617 dealing with the view that the selection committee ought to have recorded reasons. In *S.R. Venkataraman (supra)* on which Mr. A.K. Bhattacharjee, learned Sr. counsel has placed reliance, the Apex Court observed that the selection committee should assign reasons in making selection. That was also a case relating to the promotion to All India Services. Having regard to the amendment of Regulation 5 and 6, it was held by the Apex Court that the Committee was under no legal obligation to record reasons for supersession of junior officer. In *Stant Ram Sharma (supra)*, the Apex Court was concerned with promotion to "selection Grade Posts" in the IPS which was not automatic on the basis of the ranking in the gradation list but was primarily based on merit and not on seniority alone. Upholding the administrative practice being followed, it was observed that it cannot be said that till statutory rules governing promotion of selection grade posts are framed, the Govt. cannot issue administrative instructions regarding the principles to be followed.

30. Same is not the case in hand. As noticed above, there is definite set of rules, i.e. Rules of 1978 governing the conditions of promotion which is meritcum seniority. The decision in *Sant Ram Sharma*, bears another significance having regard to the issue involved in the instant case with the contradictory stand of the appellants as noted above, and which is, while in the pleadings the appellants have conveniently referred to the executive instruction mandating consideration of the cases of the incumbents holding the post of Chief Engineer for promotion to the post of Secretary on the basis of seniority alone, but during the course of argument it was argued that the selection was conducted on the basis of the criterion laid down under Rule 13 of the Rules which is meritcum seniority. The Apex Court observed thus:

"... in our opinion, the respondents are right in their contention that the ranking or position in the Gradation List does not confer any right on the petitioner to be promoted to selection post and that it is a well established rule that the promotion to selection grade or selection posts is to be based primarily on merit and not on seniority alone".

31. In *R.S. Garg (supra)*, the Apex Court held that the State cannot make rules or issue any executive instruction by way of regularization of service. In the event of doing so it cannot be in violation of the rules made under Article 309 of the constitution of India and opposed to the constitutional scheme of equality clause contained in Articles 14 and 16. It was in that context, the Apex Court dealt with the terms "malice" in its legal sense. Even in absence of any malicious intention, the principle of malice in law can be invoked. Malice in its legal sense means malice such as may be assumed from doing of a wrongful act intentionally but without just cause or excuse or for want of reasonable or probable cause. The Apex Court observed thus:

"33. A discretionary power as is well known cannot be exercised in an arbitrary manner. It is necessary to emphasize that the State did not proceed on the basis that the amendment to the Kales v. S. was not necessary. The action of a statutory authority, as is well known, must be judged on the basis of the norms set up by it and on the basis of the reasons assigned therefore. The same cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.

32. In *B.B. Siviah (supra)*, the Apex Court dealing with the principles underlying promotion on the basis of "meritcumseniority" and "senioritycummerit" held that the principles of meritcumseniority lays greater emphasis on merit and ability and seniority places less significant role. Seniority is to be given weightage only when merit and ability are approximately equal. In the context of the then existing rule 5 (2) of the Indian Police Service (Appointment and Promotion) Regulations 1955, which prescribes that "selection for inclusion of such list shall be based on merit and suitability in all respects with due regard to seniority", the Apex Court in *Union of India Vs. M.L. Kapoor* reported in (1973) 2 SCC 836 observed thus:

"22... the correct view, in conformity with the plain meanings of words used in the relevant Rules, is that the "entrance" or "inclusion" test for a place on the select list, is competitive and comparative applied to all eligible candidates and not minimal like pass marks at an examination. The Selection Committee has an unrestricted choice of the best available talent, from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is the governing factor. A simple reading of the Regulation 5(2) clearly indicates this to be the correct view. The required number has thus to be selected by a comparison of merits of all the eligible candidates of each year. But, in making this selection, seniority must play its due role. Seniority would, however, only be one of the several factors affecting assessment of merit as comparative experience in service should be. There could be a certain number of marks allotted, for purposes of facilitating evaluation, to each year of experience gained in the service. When the required number for the list is thus chosen, the respective roles of seniority and exceptional merit would be governed by Regulation 5(3). This seems to be the correct interpretation of rules as they stand."

"37.... for inclusion in the list shall be based on merit and suitability in all respects with due regard to seniority, what it means is that for inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or, if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale. But, to say, as the High Court has done, that seniority is the determining factor and that it is only if the senior is found unfit that the junior can be thought of for inclusion in the list is, with

respect, not a correct reading of Regulation 5(2). I do not know what the High Court would have said had Regulation 5(2) said : "Selection for inclusion in the select list shall be based on seniority with due regard to merit and suitability". Would it have said that the interpretation to be put upon the hypothetical subregulation (2) is the same as it put upon the actual subregulation?"

FINDINGS AND CONCLUSIONS

33. Rule 3 of the Rules 1978 detailing the class, cadre, branch and status includes the post of Secretary, PWD as a ClassI (Senior Grade) post. Thus, admittedly the post of Secretary is a cadre post included in the rules. Rule 5 (2) prescribes that recruitment to ClassI (Senior Services) shall be made by promotion only in accordance with Rules 12 and 13. Rule 12 provides that all vacancies in ClassI services shall be filled up by promotion. Rule 12 (2) provides that a member shall be eligible for promotion to the corresponding higher cadre in the manner provided in Rule 13. Rule 13 lays down the general procedure for promotion which has been quoted above. As per the requirement of Rule 13, before the end of each year the Govt. shall make an assessment of the likely number of vacancies to be filled up by promotion in the next year in each cadre. It is on the basis of this provision, learned counsel for the appellants during their submission emphasized that the requirement of the rule is to prepare year wise plan and that in such an eventuality, the writ petitioner/respondent No. 1 would not have come within the zone of consideration inasmuch as his seniority position as on the date of vacancy was beyond 4, applying the test of 1:4 as envisaged under Rule 13 (2).

34. Rule 13 (2) lays down the procedure of selection. As per the requirement of the said Rules, apart from other details, the selection committee is to be furnished with the character rolls and personal files of the officers listed together with all papers including that of any adverse remarks against any officers and the status report, if any. Apart from such documents, the selection committee may also consider any other documents and opinion as maybe considered necessary. Selection Board is to recommend the candidate found suitable for promotion in order of preference. Rule 13 (4) mandates that the promotion above the rank of Superintending Engineer should be on meritcum seniority. In case a senior officer is not found suitable for promotion, the Selection Board is to record reasons thereof in writing. It is on the basis of this provision, it was emphasized by the learned counsel for the appellants that the selection committee is not required to give any reasons as there was no supersession, the petitioner/respondent No. 1 being admittedly junior to the promotee appellant.

35. Apart from the above quoted pleadings both in the writ proceeding as well as in the appeal proceeding, the State appellant in its appeal has also enclosed Annexure B purported executive instruction dated 10.11.2000 forwarded to the Commissioner and Special Secretary to the Govt. of Assam, PWD by the Under Secretary to the Govt. of Assam in the Personnel (A) Department. The letter was

written on the subject "Amendment of Service Rule of PW Department". The letter was written in the context of the particular selection in respect of promotion to the post of Secretary. While accepting the recommendation made, it was emphasized that the post of Secretary, PWD should be filled up strictly according to the seniority of C.Es. It was found that the incumbent concerned who was recommended for promotion as Secretary was the seniormost C.E. It was suggested that appropriate amendment should be made to the Rules providing criterion of seniority alone among the C.Es. for selection to the posts of Commissioner and Secretary, PWD and Secretary PWD. The idea behind was that once the officers are promoted to the level of C.Es., they are more or less equally placed as far as the merit is concerned and seniority should take precedence over the merit factor.

36. From the entire tenor of the pleadings of the appellants about which mention has been made above, there is no manner of doubt that the competent authority adopted the criterion of seniority alone while considering the case of promotion of C.Es. However, in view of fallacy of such a position, which the appellants could realize during the course of hearing, they have switched over to the kind of argument discussed above. No other glaring example of denial of own stand through pleadings in the form of approbate and reprobate is generally seen in such matters. Although whole basis of the claim of the appellants throughout the proceeding through their pleaded case is the aforesaid purported executive instruction making the basis for selection, but being confronted with the resistance that the same is violative of the statutory rules and in direct conflict with the same, learned counsel for the appellants adopted a device making a volte face to the whole basis of their pleadings, so as to contend that minutes of the selection would reflect consideration of the cases of the incumbents applying the test of meritcum seniority. As noted above, the Chief Secretary of the State was the Chairman of the Selection Board and it is through him the State has preferred the appeal.

37. During the pendency of the appeal, the Chief Secretary has filed an affidavit stated to be the affidavit in opposition in WA No. 118/08 filed by the promotee appellant. When both the promotee appellant and the State appellant are sailing on the same boat, we fail to understand as to how the affidavit in opposition could be filed by the Chief Secretary to the writ appeal filed by the promotee appellant. However, reason behind is obvious. In this affidavit the Chief Secretary has tried to develop the case even to the extent of disowning the stand in the writ proceeding as well as in this proceeding. The affidavit speaks of giving more weightage to the quality and duration of service rendered by the eligible officers in the post of Chief Engineer as compared to the service in the post lower than the feeder post which is in tune to the submission made by Mr. P.P. Rao, learned counsel for the promotee appellant. The affidavit also speaks of consideration of merit and seniority of the officers by the Selection Board as per the provisions of 1978 Rules. No such reasons are discernible in the minutes of the selection. As pointed out above, the State

cannot supplement its stand as it stood earlier, by filing affidavit assigning additional reasons. Thus, the decision on which Mr. Choudhury, learned Addl. A.G has placed reliance, i.e. Mohinder Gill and Gordhan Singh (supra), would be more applicable to such untenable stand on the part of the State.

38. As regards the plea that the writ petitioner/respondent No. 1 understood the selection to be one of meritcum seniority and thus he cannot turn round the same, suffice it to say that such understanding of the writ petitioner/respondent No. 1 even if accepted to be so, cannot have any bearing on the actual fact involved in the case. In the counter affidavits filed by the appellants in the writ proceeding, it was their specific case that in absence of any provision relating to constitution of Selection Board for promotion to the post of Secretary, the recruitment Rules of 1978 is a bit ambiguous and in such a situation there was nothing wrong to follow the aforementioned executive instruction. Even in the appeal proceeding the stand of the appellants has been noted above. Having said so by way of specific pleadings, the State cannot disown its responsibility from such pleading so as to contend that irrespective of such pleading, the court must accept that the mandate of Rule 13, i.e. meritcum seniority was followed in the matter of selection to the post of Secretary.

39. A point which is ostensibly a point of law is required to be substantiated by facts. The parties raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondents, from the counter affidavit. In the instant case the pleaded case of the appellants is that the executive instruction got precedence over the statutory rules. If that be so, the selection effected on that basis cannot stand judicial scrutiny being violative of the mandate of Rule 13 which is meritcum seniority.

40. The quell any doubt, we have verified the relevant records as contained in file No. AAP. 77/2007 Personnel (A) Deptt. The process towards filling up the vacant post of Secretary was initiated vide the note dated 07.04.07. Thereafter, the matter was dealt with in the file in respect of constitution of Selection Board which got finalized on 14.05.07. On 14.05.07 itself the note was put up to the Commissioner and Secretary indicating constitution of Selection Board. Significantly the note also mentioned about the letter dated 13.04.07 addressed to the Chief Secretary by 5 signatories, 3 of whom are the Minister of Parliamentary Affairs & Water Resources, Minister of Public Health Engineering and Minister of Soil Conservation & Fishery. In terms of the said letter by which it was conveyed that promotion/selection of the candidates for the top jobs, the senior most candidate according to the latest gradation list should be considered/preferred, it was mentioned in the note that as per the said letter seniority should be the basis of promotion. However, the note also pointed out that as per the service rules promotion to the top post is to be made on the basis of merit providing gradings like "outstanding", "very good", "good", "average" etc. It was also pointed out that the service rules does not provide for consideration of the promotion only on the basis of seniority. However, in the

note it was observed that a copy of the letter should be sent to the member Secretary for placing the same before the Selection Board. Thereafter the selection committee purportedly met on 22.06.2007 and prepared the merit list in order of preference in which the promottee/appellant occupied position at serial No. 1 while the respondent No. 2 occupied the position at serial No. 2. The minutes of the selection committee held on 22.06.07 is reproduced below:

"MEMBERS PRESENT:

- 1) Shri P.C. Sharma, Chief Secretary, Assam ...Chairman
- 2) Shri V.S.Bhaskar, Commissioner & Secretary Health & F.W., IT, Sports Y.W. Dept.... Member
- 3) Shri N. Kakati Secretary, PHE Dept. ... Member Secretary

The Selection Board has been informed that there is a post of Secretary Public Works Department, which fell vacant due to the retirement of Shri M. Pathak, the then Secretary, PWD on 31.07.2006. It was further informed that the post could not be filled up due to pendency of a number of cases in the Hon"ble High Court. The Selection Board has perused the Orders of the Hon"ble Gauhati High Court in a Division Bench dated 17.05.2007. The Selection Board has also perused the Order of the Public Works Department vide No. Con. 75/2006/114 dated 06.06.2007 by which the interse seniority of the Chief Engineers, PWD has been fixed. The said order had been issued in pursuance to the orders of the Division Bench of the Hon"ble Gauhati High Court. The interse seniority of the Chief Engineer, PWD is as follows:

1. Shri M.C.Boro
2. Shri M.R. Das
3. Shri A.C. Bordoloi
4. Shri M.U.Ahmed

There is only one vacancy and the Selection Board is required to recommend two names in order of priority. The Selection Board has also gone through the Annual Confidential Reports of the Officers. The Public Works Department informed the Selection Board that there is no departmental proceeding pending or contemplated against any of the officer.

After having considered all the above, the following two officers are found suitable for promotion to the post of Secretary, Public Works Department in order of merit.

1. Shri M.C.Boro
2. Shri M.R. Das

Sd Sd/ Sd/

(N. Kakati, Member Sect.) (V.S. Bahaskar, Member) (P.C. Sharma, Chairman)"

41. Except mentioning about the interse seniority of the officers under consideration and that the Selection Board has also gone through the annual confidential reports of the Officers, there is no indication as to in what manner the ACRs of the incumbents were considered. It is on record that the selection committee was furnished with a sheet of paper entitled "statement of ACRs of Chief Engineer, PWD (Civil) as per the seniority list dealing the dates of birth, dates of joining and overall gradings earned in the ACRs for the period from 20022006". Thus, although the selection was held on 22.06.07, the ACRs of 20062007 was not under consideration. The ACR dossiers of the Officers furnished by the learned State counsel also contain the ACR upto 31.03.06. The chart which has been prepared by promottee appellant and furnished to the Court are reproduced below:

TABLE I

Name Date of Joining

Assistant Engineer Executive Engineer Suptd. Engineer Addl. Chief Engineer Chief Engineer

Mohan Ch. Bora (Appellant) 28.12.81 31.03.99 19.09.02 26.12.03 19.06.04

Ajoy Ch. Bordoloi (Respondent No.1) 06.02.79 3.7.2000 07.05.03 26.12.03 23.06.06

Mrinal Ranjan Das (Res. No. 2) 04.08.71 13.06.95 19.11.07 26.12.03 19.06.04

M.U. Ahmed 22.09.72 04.05.96 21.02.02 19.10.04 26.03.06

TABLE II

Annual confidential reports for F. Y. 20022006

Name Assistant Engineer Executive Engineer Suptd. Engineer Addl. Chief Engineer Chief Engineer

Date of Joining 01.04.02 31.03.03 01.04.03 31.03.04 01.04.04 31.03.05 01.04.05 31.03.06 01.04.06 31.03.07

Mohan Ch. Boro (Appellant) Very good (Ex. Engineer) Very good (Ex. Eng/Sptd Eng.) Very good (Suptd. Eng/Adl. Chief Eng.) Very good (Addl.Ce ChiefCE Very good (Chief Engineer)

Ajoy Ch. Borddoi (Respondent No. 1) Outstanding Executive Engineer Very good (Exec. Eng/Supt Eng.) Outstanding Suptd. Eng./Addl. Chief Eng. Outstanding (Addl. C.E.) Very good (Addl. C.E.)

Mrinal Ranjan Das (Res. No. 2) Outstanding (Suptd. Engineer) Outstanding (Suptd. Engineer) Good (Suptd. Eng./Adl Chief Eng.) Very good (Addl. CE Chief Eng.) Good (Chief Eng.)

M.U. Ahmed Very good (Exec. Eng./Suptd. Eng. Very good (Suptd. Eng.) Outstanding (Suptd. Eng.) Outstanding/very good (Suptd. Eng./Addl. CE) Very good (Addl. Chief Engineer)

42. It will be pertinent to mention here that the respondent PWD issued the notification dated 28.04.03 laying down the criterion relating to awarding of points in the matter of promotion to different grades including the rank above the Superintending Engineer. The copy of the notification was produced by the learned counsel for the appellants during the course of hearing. The notification was issued pursuant to the direction of this Court in certain writ petitions concerning the promotion in PWD. It was submitted that while judging the meritcum seniority the guidelines formulated in the notification dated 28.04.03 are to be followed. As per the notification towards judging meritcum seniority the gradings are to be awarded to the incumbents under consideration. Such gradings are "below average", "average", "good", "very good" and "outstanding". Points are also to be awarded against each grading. As per the said guidelines there should be categorization in the matter of promotion from Superintending Engineer to Addl. C.E. and above on the basis of the marks obtained against the gradings. The guidelines further provides that ACRs for a period of 5 years on the 1st January on the year of promotion should be considered. In the instant case the promotion was effected by the impugned order dated 26.06.07, pursuant to the purported selection held on 22.6.2007.

43. As noted above, the selection committee in its minutes apart from mentioning seniority position of the incumbents and the purported consideration of the ACRs did not mention anything as to how such consideration was made. When the aforesaid guidelines provide for gradation of the officers, it was incumbent on the part of the selection committee to provide gradings on the basis of the ACRs and other relevant materials. Rule 13 of the Rules apart from mandating consideration of the character rolls also provides for consideration of the personal files and other relevant materials. It will be pertinent to mention here that the 1978 Rules do not prescribe any minimum length of service in the post of Chief Engineer for promotion to the post of Secretary. At the time of consideration of the cases of the incumbents, all of them were holding the post of Chief Engineer with variations in respect of duration of such posting. It was in that context, Mr. Rao learned counsel for the promotee appellant submitted that the appellant having longer period of service in the post of Chief Engineer would carry more weightage than other incumbents having lesser duration of service as Chief Engineer.

44. Although the Chief Secretary of the State who was the Chairman of the Selection Committee in his above referred affidavit in opposition, has projected that the selection committee considered the merit of the incumbents giving weightage to longer period of service in the post of Chief Engineer, but on perusal of the minutes of the selection committee as well as the records of the selection committee, same

is not discernible. Such plea on the part of the State appellant is by way of furnishing additional reason by filing affidavit, but nothing is discernible from the records. Moreover, this aspect of the matter need not detain us when the pleaded case of the appellants is that the aforementioned purported executive instruction was the guiding factor towards making selection. As the records of the selection committee has revealed, there was also a letter from 5 signatories including 3 Ministers suggesting promotion on the basis of the seniority alone. Once it is held that seniority alone was made the basis of the selection, all other arguments necessarily fall through and although need not be embarked upon, but we have considered the same.

45. If we go by ACRs of different incumbents certainly the writ petitioner/respondent No. 1 has got a better grading in the ACRs. However, we refrain from expressing any opinion on merit in respect of selection as the same is within the exclusive domain of the selection committee. It need not be over emphasized that the selection committee is entitled to make its own assessment from the relevant materials including the ACRs, but at the same time cannot altogether deviate from the gradings earned in the ACRs. The aforesaid guidelines issued vide notification dated 28.04.03 rather debars reassessment of the ACRs by the Selection Board during the selection meeting, while laying down that the Selection Board shall examine the documents and information furnished by the appointing authority and recommend the select list of the Officers. It is in this context, learned Single Judge has observed that as per the ACRs, it is the writ petitioner/respondent No. 1 who would score a march over the promottee appellant and others.

46. Learned Single Judge dealing with the specific plea of the appellants that executive instruction dated 10.11.2000 claimed to have been made in exercise of executive power of the State under Article 162 of the Constitution of India observed that such executive instruction by no means can substitute the statutory rules. Learned Single Judge has also referred to the decision of the Apex Court in Mahadeo Bhau Khilare Vs. State of Maharashtra reported in (2007) 5 SCC 524 in which it has been held that any scheme by way of executive instruction in terms of Article 162 of the Constitution of India, if violative of the statutory rules would not be legally sustainable. Learned Single Judge has also referred to the decision in Sankar Dev Acharya vs. Biswanath Chakraborty reported in (2007; SCC 309 in which it was held that when the principle of "meritcum seniority" is applied, greater emphasis should be on merit and seniority plays a less significant roll.

47. As we have found that the records pertaining to selection do not contain the ACRs of the Officers, but only include a table dealing with the gradings earned in the last 5 years up to 2006. Learned Single Judge has also experienced the same and has quoted the table furnished to the selection committee. In an overall consideration of the entire matter, the learned Single Judge having found that the recommendation

made by the selection Board being visibly the infringement of the statutory rules and the prescribed norms in assessing the suitability of the Officers for promotion to the post involved was left with no option than to interfere with the same.

48. A strong objection was raised by the learned counsel for the appellants that the Single Judge ought not have gone to the extent of assessing the ACRs of the incumbents so as to comment that the writ petitioner/respondent No. 1 is best among the incumbents, if judged by the norms of meritcum seniority. Such observation of the learned Single Judge cannot stand on the way in interfering with the selection made by the selection committee when it is found that the recommendation of the selection Board was on the basis of judging the Officers in the touchstone of the seniority as suggested by the purported executive instruction and not meritcum seniority as envisaged in the rules. We did not find anything to interfere with the finding arrived at by the learned Single Judge that there was violation of the selection criterion of meritcum seniority as prescribed in Rule 13 inasmuch as, as noted above and so also found by the learned Single Judge, the selection committee only followed the executive instruction suggesting consideration of seniority alone which is also the pleaded case of the appellants.

49. This now leads us to the second leg of submission made by the learned counsel for the appellants that the writ petitioner/respondent No. 1 was not within the zone of consideration when the vacancy occurred inasmuch as the writ petitioner was at serial No. 5 of the gradation list. It was submitted that the writ petitioner/respondent No. 1 by chance came to be considered on the retirement of the particular incumbent, one Mr. Dutta on 28.02.07. According to learned Addl. A.G. since the vacancy arose on 01.08.06, as per the mandate of 1978 Rules, while considering the lone vacancy only 4 incumbents could have been considered and thus, the writ petitioner/respondent No. 1 being at serial No. 5 of the gradation list, was not within the zone of consideration.

50. It was admitted at the Bar that the particular vacancy of the Secretary arose w.e.f. 01.08.06 on account of further promotion of the incumbent to the post of Commissioner and Secretary. Such promotion of the incumbent could not have been anticipated by the end of the year 2005. Rule 13 speaks of assessment of likely number of vacancies to be filled up by the promotion in the next year in each cadre. Such assessment is to be made before the end of each year. The vacancy having arisen only on account of the promotion of the incumbent, same cannot be said to be anticipated vacancy which position has been fairly admitted by the learned counsel for the appellants.

51. The term "assessment of likely number of vacancy" as envisaged under Rule 13 of the Rules will take into its fold the existing vacancy as well. Thus, assessment was to be made only at the end of the year 2006, inasmuch as at the end of the year 2005 there was no likely number of vacancy. The post of Secretary having fallen vacant w.e.f. 01.08.06, that was a vacancy to be considered in the selection to be

followed which was held on 22.06.07. The writ petitioner/respondent No. 1 in the meantime having been promoted to the post of Chief Engineer w.e.f. 23.06.06 was in the feeder grade for promotion to the post of Secretary. Further, the State Govt. having considered the case of the writ petitioner/respondent No. 1 as one of the eligible Officers as being in the zone of consideration cannot now turn around the said position so as to contend that the writ petitioner/respondent No. 1 was not within the zone of consideration. Such plea cannot be raised collaterally. The State appellant in one hand has defended the selection of the promotee appellant visavis the petitioner/respondent No. 1, but on the other hand as a second leg of argument has contended that he was not in the zone of consideration. Such a plea on the part of the State appellant is really unfortunate and tend to suggest that it is the all out effort of the State to save the promotion of the promotee appellant at any cost. Possibly this is the reason as to why in paragraph 7 of the State appeal, the State appellant is identified as promotee appellant. 52. During the course of hearing Mr. K.H. Choudhury, learned counsel, representing the respondent No. 2 submitted that the promotee appellant, after the impugned promotion as Secretary, having further been promoted as Commissioner & Secretary, the respondent No. 2, who was the second nominee in the impugned selection conducted for the post of Secretary has been promoted as such against the resultant vacancy. On being pointed out that the impugned select list stood expired on promotion of the promotee appellant as the Secretary vide the impugned notification 26.6.2007 and thus from the said list, the respondent No. 2 could not have been promoted, Mr. Choudhury could not give any satisfactory reply. Learned Additional Advocate General, Assam also did not furnish any reply to the same. Thus the State appellant has played a role unbecoming of a model employer. From the entire episode and the tenor of argument advanced on behalf of the State what has emerged is that it has all alone been a matter of convenience for the State appellant to project its stand as per the need of the situation.

53. Inspite of consideration of the case of the writ petitioner/respondent No. 1 without any reservation as has been revealed from the records, the State appellant has raised the untenable plea of being not within the zone of consideration. When to that extent, the State appellant has placed reliance on rule 13 of the 1978 Rules, but in respect of the most vital aspect of the matter i.e. to apply the test of meritcum seniority, the State has conveniently violated the same in falling back in the executive instruction stating that 1978 Rule so far the same relates to promotion to the cadre post of Secretary, is unworkable. The State has also acted upon the list stood expired on promotion of the promotee appellant against the lone vacancy of Secretary. On further promotion of the promotee appellant as Commissioner & Secretary, it was incumbent on the part of the State appellant to hold a fresh selection for the post of Secretary, but instead it operated the expired list. Having regard to all these aspects of the matter, Mr. A.K. Bhattacharyya, learned counsel for the writ petitioner/respondent No. 1 rightly emphasized on the plea of malice in law.

54. As noted above, although rule 13 of the rules does not specifically provide for recording of reason but as observed by the Apex Court in *State of Rajasthan Vs. Sriram Verma* reported in (1996) 6 SCC 493, in all such cases the selecting authority should follow the method of grading all the candidates. In fact the State Government also issued the aforesaid notification dated 28.4.2003 pursuant to the decision of this Court laying down the guidelines relating to grading the candidates by the Selecting Committee. On perusal of the minutes of the Selection Committee, no such gradings are discernible. In this connection, the relevant observation of the Apex Court may be referred to.

"..... it is equally true that even in administrative matters, this Court has been insisting upon the duty to act fairly which may sometimes require an opportunity of hearing. But having regard to the nature of function of selection and taking into consideration of the fact that the only right of the Government servant is a right to be considered and not a right to promotion we do not think it possible to infer the requirement of record in reasons in all situations. At the same time, we think that it is always desirable that procedure adopted by the selecting body should be fair and such as to lend credence to the process; it should be such as to inspire confidence in all concerned within the practicable limits. From this point of view, it would be a wholesome state for the Government of Rajasthan for that matter, all Governments to provide either by amendment of Rules or by general instruction that in the matter of promotion on the basis of merit or meritcum seniority/meritcum suitability, the selecting authority should follow the method of grading all the candidates appearing before them. This requirement we are suggesting in cases where the Rules do not provide for grading or awarding marks or for recording of reason for overlooking senior; where, however, the rules already provide for awarding of marks or any other appropriate method our suggestion may not be applicable. It must also be understood clearly that ours is a suggestion to avoid complaints of arbitrariness and primarily with a view to make the process credible. The Governments shall keep this underlying object in mind and cause appropriate amendments or issue appropriate instructions. It is obvious that any such amendments/instruments shall have only prospective operation."

55. In our opinion, this being a case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore, it is coupled with a duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. The executive instruction, even if held to be so, although having not been promulgated in terms of the provisions of the Assam Rules of Executive Business, 1968, cannot override the statutory provisions. It is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. [vide *Shrilekha Vidyarthi Vs. State of U.P.* (1991) 1 SCC 212.]

56. The appellant in W. A. 134/2008 is the State Government and therefore, it is natural expectation of the Court from the State to place all the facts fairly before the Court so as to enable the Court to consider them and to take an appropriate decision in accordance with law. In our considered opinion having regard to the facts and circumstances involved about which detail discussions have been made above, the State failed to do so, so much so that apart from the fact that it has conspicuously identified itself with the promottee appellant and while doing so raised all sorts of untenable pleas even to the extent of turning around and/or making a volte face to their own stand throughout the proceeding.

57. For all the aforesaid reasons, we are not impressed with the assertions made in the writ appeals and see no reason to interfere with the findings arrived at by the learned Single Judge. Consequently, the writ appeals are dismissed. The matter shall now go back to the Selection Committee for a fresh selection for the post of Secretary consistently with the observations made above. We make it clear that the selection Committee will make its own assessment without being guided by the much debated observation of the learned Single Judge to the effect that going by the gradings allotted to the officers and if the same are the index of merit, the writ petitioner/respondent is the best amongst them.

58. Writ appeals are dismissed, leaving the parties to bear their own costs.