

GAHC010070192023



2024:GAU-AS:7841-DB

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1944/2023

RUPJYOTI BORAH,
SON OF JUGESWAR BORAH,
PERMANENT RESIDENT OF VILL. AND P.O.- PULINAHARANI,
P.S.- BIHPURIA, DIST.- LAKHIMPUR, PIN- 784165.

.....**Petitioner**

-Versus-

1.THE STATE OF ASSAM,
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, DEPARTMENT OF HIGHER EDUCATION,
DISPUR, GUWAHATI- 781006.

2:THE JOINT SECRETARY TO THE GOVT. OF ASSAM,
HIGHER EDUCATION (TECHNICAL) DEPARTMENT,
GOVT. OF ASSAM,
DISPUR,GUWAHATI- 781006.

3:THE DIRECTOR OF HIGHER (TECHNICAL) EDUCATION, ASSAM,
KAHILIPARA, GUWAHATI- 781019.

4:THE ASSAM PUBLIC SERVICE COMMISSION (APSC),
KHANAPARA, GUWAHATI-22,
REPRESENTED BY ITS CHAIRMAN OR SECRETARY.

5:THE ASSAM ENGINEERING SERVICE RECRUITMENT BOARD (ASERB),
ASSAM TEXTILE INSTITUTE, GUWAHATI-01
REPRESENTED BY ITS CHAIRMAN.

.....**Respondents**

– BEFORE –
HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE SUMAN SHYAM

For the Petitioner : Mr. K.N. Choudhury, Senior Advocate assisted by Mr. S. Hazarika, Advocate.

For the Respondent(s) : Mr. D. Saikia, Advocate General, Assam assisted by Mr. K. Gogoi and Mr. S. Das, Standing Counsel, Education (Higher) Department.

: Ms. P. Sarma, Advocate on behalf of Mr. T.J. Mahanta, Senior Advocate/Standing Counsel, APSC for respondent No.4.

Date of Hearing : 01.08.2024.

Date of Judgment : 13.08.2024.

JUDGMENT & ORDER (CAV)

[Vijay Bishnoi, CJ]

Heard Mr. K.N. Choudhury, learned Senior Counsel assisted by Mr. S. Hazarika, learned counsel for the petitioner. Also heard Mr. D. Saikia, learned Advocate General, Assam assisted by Mr. K. Gogoi and Mr. S. Das, learned Standing Counsel, Education (Higher) Department and Ms. P. Sarma, learned counsel appearing on behalf of Mr. T.J. Mahanta, learned Senior Counsel and Standing Counsel, APSC.

2. This writ petition is filed by the petitioner with a prayer to grant the following reliefs:

“In the premises aforesaid, it is therefore prayer that that Your Lordship’s would be graciously pleased to admit this Writ Petition, call for the records and issue rule, calling up the Respondents to show cause as to why:

a) a Writ in the nature of Certiorari should not be issued to set aside and quashed Notification No.ATE.165/2021/30 dated 23/06/2021 by the Higher Education (Technical) Department, Govt. of Assam constituting Assam Engineering Service Recruitment Board Regulations, 2021 as it being ultra vires of the Constitution of India.

b) A Writ in the nature of Certiorari should not be issued to set aside and quashed the Assam Technical Education Services (Amendment) Rules, 2022 amended vide its notification dated 31/05/2022 issued by the Higher Education (Technical) Department, Govt. of Assam as it being ultra vires.

c) a Writ in the nature of Certiorari should not be issued to set aside and quash selection process sought to be conducted vide Advertisement No.AESRB-01/2023 AESRB-02/2023, AESRB-03/2023 and AESRB-04/2023 dated 21.02.2023 issued by the aforesaid Assam Engineering Service Recruitment Board.

d) a Writ in the nature of Mandamus should not be issued directing the Assam Engineering Service Recruitment Board Regulations, 2021 to for bear from conducting any recruitment to the Technical Services which APSC is empowered to conduct in terms of Assam Technical Education Service Rules, 1981.

e) To issue a writ in the nature of Mandamus and/or any other appropriate order or directions to the respondent authorities not to bring the power of recruitment to the posts of Lecturer Technical and Non-Technical of the Govt. Polytechnics at Assam and Assistant Professor of Engineering Colleges under the AESRB.

f) And/or be pleased to pass such further order/orders as Your Lordships may deem fit and proper in the facts and circumstances of the case.”

3. The brief facts of the case are that the Government of Assam, Department of Higher Education (Technical) started 5(five) new Polytechnic Colleges in the State of Assam and for that purpose, in March, 2021, 260 posts were sanctioned which included Principals, Head of the Departments, Lecturers (Technical and Non-Technical), Library Staff, Workshop Staff, Administrative Staff, Supporting (Teaching) Staff, Senior Instructor (Mechanical Engineering), Junior Instructor, Scientific Assistants (Physics and Chemistry) and other Grade IV staff.

4. Advertisement No.04/2022 dated 25.02.2020 was issued by the Director of Technical Education, Government of Assam, inviting applications for filling up 120 numbers of post of Lecturer (Technical), Lecturer (Non-Technical) and Senior Instructor under Regulation 3(f) of the Assam Public Service Commission (Limitation of Functions) Regulations, 1951 (hereinafter to be referred as the "Regulations of 1951") purely on *ad hoc* basis for a period of 4(four) months. Out of those 120 posts, 80 posts belonged to Lecturer (Technical) and 25 posts belonged to Lecturer (Non-Technical). Pursuant to the above referred advertisement, the petitioner applied for the post of Lecturer (Technical) and was appointed on *ad hoc* basis and thereafter, the said *ad hoc* appointment continued by granting extension from time to time.

5. 04.06.2022, the Assam Engineering Service Recruitment Board (hereinafter to be referred as "AESRB") issued an advertisement No.02/2022 inviting on-line applications for filling up 80 numbers of posts of Lecturer (Technical) in different Branches of Government Polytechnics under the Higher Education (Technical) Department, Government of Assam.

6. Being aggrieved with the same, the persons who were continuing on the posts of Lecturer on *ad hoc* basis, preferred several writ petitions before this Court. However, during the pendency of the said writ petitions, the respondent authorities had withdrawn the said advertisement and, consequently, the writ petitions were closed as withdrawn by this Court vide order dated 29.09.2022.

7. Thereafter, the petitioner along with other persons filed WP(C) No.1605/2023 challenging the validity of constitution of AESRB. However, later on, the said writ petition also came to be dismissed as withdrawn vide order dated 20.03.2023 passed by this Court with liberty granted to the petitioners therein to file afresh to ventilate their grievance as per law.

8. On 21.02.2023, the Chairman of the AESRB issued 4(four) advertisements, being Advertisement Nos.AESRB-01/2023, AESRB-02/2023, AESRB-03/2023 and AESRB-04/2023 for filling up 61, 46, 80 and 57 vacant posts of Assistant Professors, Assistant Professor (Non-technical) in the State Engineering Colleges, Lecturer (Technical) and Lecturer (Non-Technical) in Government Polytechnics respectively.

9. This writ petition was filed initially by the petitioner and one other person jointly but the other person had withdrawn his challenge later on and accordingly, his name was deleted from the array of the petitioner vide order dated 13.12.2023 passed in I.A.(Civil) No.3522/2023.

10. In the writ petition, the petitioner has challenged the Notification dated 23.06.2021, whereby the Governor has framed the Assam Engineering Service Recruitment Board Regulations, 2021 (hereinafter to be referred as the

"Regulations of 2021") and the Notification dated 31.05.2022, whereby the Governor amended certain Rules of the "Assam Technical Education Service Rules, 1981" (hereinafter to be referred as the "Rules of 1981") and enacted the "Assam Technical Education Services (Amendment) Rules, 2022" (hereinafter to be referred as the "Amendment Rules of 2022"). The validity of the advertisement Nos. AESRB-01/2023, AESRB-02/2023, AESRB-03/2023 and AESRB-04/ 2023, dated 21.02.2023 are also under challenge.

11. Mr. K.N. Choudhury, learned Senior counsel appearing for the petitioner has argued that the constitution of the AESRB itself is a nullity because any other agency such as AESRB cannot be entrusted with the functions of the Public Service Commission.

It is contended by Mr. Choudhury that certain functions are assigned to the Public Service Commission under Article 320 of the Constitution of India and those functions can only be performed by it. It is further contended that as per Article 320(3), the State Public Service Commission is required to be consulted in certain matters including the matter relating to the recruitment and appointment of civil posts and such consultation cannot be given away in any circumstances.

It is argued by Mr. Choudhury that the Governor of Assam, by framing the Regulations of 2021, in exercise of powers conferred under proviso to Article 309, has completely taken away the function of consultation with the State Public Service Commission and assigned the same to AESRB, which is unconstitutional. Hence, the Regulations of 2021 are liable to set aside by declaring the same as unconstitutional.

12. It is further contended by Mr. Choudhury, learned Senior Counsel for the

petitioner that in certain circumstances, certain public posts can be taken out of the purview of the Public Service Commission only by exercising powers conferred under proviso to Article 320(3) of the Constitution of India and not by exercising powers under proviso to Article 309 of the Constitution of India.

In other words, it is the contention of learned Senior Counsel for the petitioner that any public post can be taken out of the purview of the Public Service Commission only by making Rules and Regulations under proviso to Article 320(3) of the Constitution of India and not otherwise.

To buttress his above submissions, Mr. Choudhury has referred to the Regulations of 1951 and argued that these Regulations are framed by the Governor under the powers conferred by proviso to Article 320(3), therefore, it is clear that he was conscious of the position that any civil post can be taken out of the purview of the State Public Service Commission only by making Regulation under the powers conferred by proviso to Article 320(3).

13. Mr. Choudhury, learned Senior Counsel for the petitioner has also contended that the power conferred under proviso to Article 320(3) of the Constitution of India is not a power to be exercised randomly and even if the Governor/Government wants to withdraw certain posts out of the purview of the Public Service Commission, the same is to be done in exceptional circumstances, whereas in the present case, no exceptional circumstance exists.

14. It is further argued by Mr. Choudhury that the mandate of Article 320(3) of the Constitution of India cannot be negated in exercise of ordinary legislative power and it can only be done by taking recourse of Article 368 of the Constitution of India.

15. Mr. Choudhury has, therefore, argued that the action of the Governor of Assam of framing the Regulations of 2021 vide Notification dated 23.06.2021 and of amending the Rules of 1981 vide Notification dated 31.05.2022, are illegal and unconstitutional and therefore, the same are liable to be set aside.

16. Mr. Choudhury, learned Senior counsel for the petitioner has further submitted that the action of the Chairman of the AESRB of inviting on-line applications, vide advertisement dated 21.02.2023 for filling up the posts of Assistant Professors, Assistant Professors (Non-Technical) in State Engineering Colleges, Lecturer (Technical) and Lecturer (Non-Technical) in Government Polytechnics in Assam is also illegal.

17. It is contended that 260 Nos. of posts including the posts of Assistant Professor (Technical and Non-Technical) and Lecturer (Technical and Non-Technical) are permanent posts and the same cannot be filled up on *ad hoc basis* by resorting to Regulation 3(f) of the Regulations of 1951. It is contended that the recruitment on the said posts, pursuant to the advertisement dated 25.02.2020, was regular recruitment and therefore, the persons selected pursuant to the said advertisement can be termed as regularly appointed on permanent posts.

It is contended that the post on which the petitioner was appointed was a permanent sanctioned post and not a temporary post and in such circumstances, the action of the Chairman of the AESRB of issuance of fresh advertisement Nos. AESRB-01/2023, AESRB-02/2023, AESRB-03/2023 and AESRB-04/2023 dated 21.02.2023 for filling up the posts of Assistant Professor, Assistant Professor (Non-Technical) in Government Engineering Colleges and

Lecturer (Technical and Non-Technical) in Government Polytechnics is illegal and is liable to be set aside.

18. In support of the above contentions, Mr. Choudhury, learned Senior Counsel for the petitioner has placed reliance on the decisions of the Hon'ble Supreme Court rendered in the following cases:

1. ***B.N. Nagarajan & Ors. -Vs- State of Karnataka & Ors.***, reported in ***(1979) 4 SCC 507***.
2. ***V. Sreenivasa Reddy & Ors. . -Vs- Govt. of A.P. & Ors.***, reported in ***1995 Supp (1) SCC 572***.
3. ***K. Kuppusamy & Anr. -Vs- State of Tamil Nadu & Ors.***, reported in ***(1998) 8 SCC 469***.

19. Per contra Mr. D. Saikia, learned Advocate General, Assam has vehemently opposed the writ petition and has argued that the Governor has not committed any illegality in framing the Regulations of 2021 vide Notification dated 23.06.2021 in exercise of powers conferred under proviso to Article 309 of the Constitution of India.

20. It is argued by Mr. Saikia that the contention of the learned Senior Counsel for the petitioner that the constitution of AESRB is nullity is baseless. It is further argued that there is no illegality in constitution of the AESRB and the same is constituted in accordance with law.

21. It is submitted by Mr. Saikia that though as per Article 320(3) of the Constitution of India, certain functions are assigned to the State Public Service

Commission in the matter of recruitment, appointment of civil posts and also in disciplinary matters and as per the same, requirement of consultation by the State Public Service Commission is there but the recommendation of the State Public Service Commission on those matters are not binding.

22. It is further submitted by Mr. Saikia that it is settled that the provisions of Article 320(3) of the Constitution of India are not mandatory and therefore, there is no force in the contention of the learned Senior Counsel for the petitioner that the Regulations of 2021 are violative of constitutional provisions.

23. It is also argued by Mr. Saikia that the contention of the learned Senior counsel for the petitioner that the civil posts can only be taken out of the purview of the Public Service Commission by framing Regulations under proviso to Article 320(3) of the Constitution of India, is without any merit and the same is liable to be rejected. It is contended that while taking out any civil post out of the purview of the Public Service Commission, Regulations can very well be framed by the Governor under the powers conferred by the proviso to Article 309 of the Constitution of India.

24. It is further submitted by Mr. Saikia that the Governor of Assam has very well acted within his jurisdiction in amending the Rules of 1981 by enacting the Amendment Rules of 2022 vide Notification dated 31.05.2022 in exercise of powers conferred by the proviso to Article 309 of the Constitution of India.

25. It is submitted by Mr. Saikia that before formation of the AESRB, recruitment to the key categories of faculties in the Government Engineering

Colleges and Polytechnics were done through the selection process conducted by the Assam Public Service Commission (in short, "APSC"). However, it is experienced that the selection process conducted through APSC for filling up the posts of faculties in the Government Engineering Colleges and Polytechnics unduly took long time and such delay has hampered the recruitment process of faculties in the entry level posts in Engineering Colleges as well as the Polytechnics. It is contended that since the year 2017, 3 new Government Engineering Colleges and 16 new Polytechnics have been established in the State of Assam but no permanent faculty at the entry level could have been recruited because the APSC has failed to complete the recruitment process.

26. It is further submitted by Mr. Saikia that the APSC issued an advertisement dated 25.05.2017 for filling up 353 numbers of vacant posts in Engineering Colleges and Polytechnics of Assam. However, the said recruitment process could not be completed because the APSC failed to set the question papers on account of not receiving good response from the technical and non-technical faculties of the Colleges.

27. Mr. Saikia, has submitted that from the above facts and circumstances, it is clear that the APSC is not well equipped in conducting the selection process for the post of Professors and Lecturers in the Engineering Colleges and Polytechnics of Assam due to lack of expertise in fixing the syllabus, modalities of screening test, setting of question papers etc.

28. It is contended by Mr. Saikia that faced with the said difficulties, it was decided to have a dedicated specialized body to recruit technical educational professionals for the purpose of recruitment of technical personnel in

Government Engineering Colleges and Polytechnics in Assam and therefore, it was decided to constitute the AESRB by framing the Regulations, 2021. The Governor has framed the said Regulations under proviso to Article 309 of the Constitution of India by taking the posts of Assistant Professor, Assistant Professor (Non-Technical) in Government Engineering Colleges and Lecturer (Technical) and Lecturer (Non-Technical) out of the purview of the APSC under proviso to Article 320(3) of the Constitution of India.

It is further submitted by Mr. Saikia that the AESRB is an autonomous body under the Higher Education (Technical Education) Department, consisting of experts with the intention to select candidates for appointment on the post of faculty and other technical categories of posts in the Government Engineering Colleges and Polytechnics in expeditious manner.

29. It is further submitted by Mr. Saikia that it is settled that legislative enactments cannot be struck down by a Court unless it is demonstrated that the Legislature does not have the competence to enact Rules and Regulations or such enactment is violative of Fundamental Rights guaranteed under Part III of the Constitution of India or any other constitutional provision.

30. Mr. Saikia submits that in the present case, the petitioner has failed to satisfy these tests and therefore, his challenge to the Regulations of 2021 and the amendment to the Rules of 1981, is baseless and is liable to be rejected.

31. It is further argued by Mr. Saikia that vide advertisement dated 25.02.2020, the Director, Technical Education, Assam invited applications from the eligible candidates for appointment on the post of Lecturer (Technical and

Non-Technical) and Senior Instructor under Regulation 3(f) of the Regulations of 1951 purely on *ad hoc* basis, and in such circumstances, the contention of the petitioner that his selection and appointment to the post of Lecturer (Technical) pursuant to the said advertisement is of permanent nature, is bereft of any merit.

Mr. Saikia has submitted that in the said advertisement itself, it was clearly mentioned that the appointment would be purely on *ad hoc* basis and in such circumstances, by no stretch of imagination, it can be said that the selection and appointment of the petitioner on the post of Lecturer (Technical) pursuant to the advertisement dated 25.02.2020 is of permanent nature.

Mr. Saikia has, therefore, argued that there is no merit in this writ petition and the same is liable to be dismissed.

32. In support of his contentions, Mr. Saikia has placed reliance on the decisions of the Hon'ble Supreme Court rendered in the following cases:

- 1. *Jatinder Kumar & Ors. -Vs- State of Punjab & Ors.*, reported in (1985) 1 SCC 122.**
- 2. *Dr. M.C. Bindal -Vs- R.C. Singh & Ors.*, reported in (1989) 1 SCC 136.**
- 3. *State of U.P. -Vs- Manbodhan Lal Srivastava*, reported in 1957 SCC OnLine SC 4.**
- 4. *Ashok Kumar Shrivastava & Ors. -Vs- Ram Lal & Ors.*, reported in (2008) 3 SCC 148.**

33 Heard the learned counsel appearing for the parties and perused the material available on record.

34. It is well settled that the law made by the Parliament or the Legislature can be struck down by a Court on the following two grounds:

- (i) Lack of legislative competence and
- (ii) Violative of Fundamental Right guaranteed under part III of the Constitution of India or any other constitutional provisions.

35. The main thrust of challenge of the petitioner to the Regulations of 2021 is that the provisions of Article 320 of the Constitution of India are bypassed and therefore, the said Regulations are unconstitutional.

36. Article 320 of the Constitution of India defines functions of Public Service Commission. Clause (1) of Article 320 provides that the Union and the State Public Service Commissions are duty bound to conduct examinations for appointments to the services of the Union and the services of the State respectively. Clause (2) of Article 320 mandates that the Union Public Service Commission, on request by any two or more States, is duty bound to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required. As per Clause (3) of Article 320, the Union Public Service Commission or the State Public Service Commission are necessary to be consulted on certain aspects, as elaborated in sub-Clause (a) to (e) and it further provides that the Public Service Commission is also duty bound to advise on any matter referred to it by the President or the Governor of a State as the case may be.

However, proviso to Article 320(3) provides that the President in respect of all India Services and other services and posts in connection with the affairs

of the Union and the Governor in respect of services and posts in connection with the affairs of a State may make regulations specifying the matters wherein it shall not be necessary for a Public Service Commission to be consulted.

37. Now, a question arises as to whether, in case the Public Service Commission is not consulted as provided under Article 320(3) of the Constitution of India, there is any contingency in the Constitution specifying consequences such as nullifying the action of the State Government.

38. The Hon'ble Supreme Court in the case of the ***State of U.P. -Vs- Manbodhan Lal Srivastava*** (supra), considering this aspect held as under:

“7. Article 320 does not come under Chapter I headed “Services” of Part XIV. It occurs in Chapter II of that part headed “Public Service Commissions”. Articles 320 and 323 lay down the several duties of a Public Service Commission. Article 321 envisages such “additional functions” as may be provided for by Parliament or a State Legislature. Articles 320 and 323 begin with the words “It shall be the duty...”, and then proceed to prescribe the various duties and functions of the Union or a State Public Service Commission, such as to conduct examinations for appointments; to assist in framing and operating schemes of joint recruitment; and of being consulted on all matters relating to methods of recruitment or principles in making appointments to Civil Services and on all disciplinary matters affecting a civil servant. Perhaps, because of the use of the word “shall” in several parts of Article 320, the High Court was led to assume that the provisions of Article 320(3)(c) were mandatory, but in our opinion, there are several cogent reasons for holding to the contrary. In the first place, the proviso to Article 320, itself, contemplates that the President or the Governor, as the case may be, “may make regulations specifying the matters in which either generally, or in any particular class of case or in particular circumstances, it shall not be necessary for a Public Service Commission to be consulted”. The words quoted above give a clear indication of the intention of the Constitution makers that they did envisage certain cases or classes of cases in which the Commission need not be consulted. If the provisions of Article 320 were of a mandatory character, the Constitution would not have left it to the discretion of the Head of the Executive Government to undo those provisions by making regulations to the contrary. If it had been intended by the makers of the Constitution that consultation with the Commission should be mandatory, the proviso would not have been there, or, at any rate, in the

terms in which it stands.”.

8. Secondly, it is clear that the requirement of the consultation with the Commission does not extend to making the advice of the Commission on those matters, binding on the Government. Of course, the Government, when it consults the Commission on matters like these, does it not by way of a mere formality, but with a view to getting proper assistance in assessing the guilt or otherwise of the person proceeded against and of the suitability and adequacy of the penalty proposed to be imposed. If the opinion of the Commission were binding on the Government, it may have been argued with greater force that non-compliance with the rule for consultation would have been fatal to the validity of the order proposed to be passed against a public servant. In the absence of such a binding character, it is difficult to see how non-compliance with the provisions of Article 320(3)(c) could have the effect of nullifying the final order passed by the Government.

9. Thirdly, Article 320 or the other articles in Chapter II of Part XIV of the Constitution, deal with the constitution of the Commission and appointment and removal of the Chairman or other members of the Commission and their terms of service as also their duties and functions. Chapter II deals with the relation between Government and the Commission but not between the Commission and a public servant. Chapter II containing Article 320, does not, in terms, confer any rights or privileges on an individual public servant, nor any constitutional guarantee of the nature contained in Chapter I of that Part, particularly Article 311. Article 311, therefore, is not, in any way, controlled by the provisions of Chapter II of Part XIV, with particular reference to Article 320.

10. The question may be looked at from another point of view. Does the Constitution provide for the contingency as to what is to happen in the event of non-compliance with the requirements of Article 320(3)(c)? It does not, either in express terms or by implication, provide that the result of such a non-compliance is to invalidate the proceedings ending with the final order of the Government. This aspect of the relevant provisions of Part XIV of the Constitution, has a direct bearing on the question whether Article 320 is mandatory. The question whether a certain provision in a statute imposing a duty on a public body or authority was mandatory or only directory, arose before their Lordships of the Judicial Committee of the Privy Council in the case of Montreal Street Railway Company v. Normandin [LR (1917) AC 170]. In that case the question mooted was whether the omission to revise the jury lists as directed by the statute, had the effect of nullifying the verdict given by a jury. Their Lordships held that the irregularities in the due revision of the jury lists, will not ipso facto avoid the verdict of a jury. The Board made the following observations in the course of their judgment:

‘...The question whether provisions in a statute are directory or

imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th Edn., p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.'

The principle laid down in this case was adopted by the Federal Court in the case of Biswanath Khemka v. King-Emperor [(1945) FCR 99]. In that case, the Federal Court had to consider the effect of non-compliance with the provisions of Section 256 of the Government of India Act, 1935, requiring consultation between public authorities before the conferment of magisterial powers or of enhanced magisterial powers, etc. The Court repelled the contention that the provisions of Section 256, aforesaid, were mandatory. It was further held that non-compliance with that section would not render the appointment otherwise regularly and validly made, invalid or inoperative. That decision is particularly important as the words of the section then before their Lordships of the Federal Court, were very emphatic and of a prohibitory character.

11. *An examination of the terms of Article 320 shows that the word "shall" appears in almost every paragraph and every clause or sub-clause of that article. If it were held that the provisions of Article 320(3)(c) are mandatory in terms, the other clauses or sub-clauses of that article, will have to be equally held to be mandatory. If they are so held, any appointments made to the public services of the Union or a State, without observing strictly, the terms of these sub-clauses in clause (3) of Article 320, would adversely affect the person so appointed to a public service, without any fault on his part and without his having any say in the matter. This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid.* On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. In that connection, the following quotation from Crawford on Statutory Construction — Article 261 at p. 516, is pertinent:

'The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must

govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other....’

12. *We have already indicated that Article 320(3)(c) of the Constitution does not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation, should not afford him a cause of action in a court of law, or entitle him to relief under the special powers of a High Court under Article 226 of the Constitution or of this Court under Article 32. It is not a right which could be recognized and enforced by a writ. On the other hand, Article 311 of the Constitution has been construed as conferring a right on a civil servant of the Union or a State, which he can enforce in a court of law. Hence, if the provisions of Article 311, have been complied with in this case — and it has not been contended at any stage that they had not been complied with — he has no remedy against any irregularity that the State Government may have committed. Unless, it can be held, and we are not prepared to hold, that Article 320(3)(c) is in the nature of a rider or proviso to Article 311, it is not possible to construe Article 320(3)(c) in the sense of affording a cause of action to a public servant against whom some action has been taken by his employer.*

13. *In view of these considerations, it must be held that the provisions of Article 320(3)(c) are not mandatory and that non-compliance with those provisions, does not afford a cause of action to the respondent in a court of law.*
.....”

(Emphasis Supplied)

39. Further in ***Jatinder Kumar -Vs- State of Punjab*** (supra), the Hon’ble Supreme Court held as under:

“11. Article 320 of the Constitution enumerates the duties to be performed by the Union or the State Public Service Commissions:

‘(i) to conduct examinations for appointments to the services of the Union and the services of the State respectively;

(ii) if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required;

(iii) to advise on matters enumerated under clause (3) of Article 320; and

(iv) to advise on any matters so referred to them and any other matter which the President, or as the case may be, the Governor of the State may refer to them.'

The fact that there is no provision in the Constitution which makes the acceptance of the advice tendered by the Commission, when consulted, obligatory renders the provisions of Article 320(3) only directory and not mandatory."

40. In ***Dr. M.C. Bindal -Vs- R.C. Singh & Ors.*** (supra), the Hon'ble Supreme Court held as under:

"12. It is the duty of the Commission with the help of experts in the particular subject to hold interview and to find out and select the candidates having the requisite qualifications and experience fit to be recommended to the government for appointment to the said post of Food and Drug Controller. Therefore, under Article 320(3)(a) and (b), it is the duty of Public Service Commission to consider and to get itself satisfied as to which of the candidates has fulfilled the requisite qualifications specified in the advertisement. The Commission in this particular case has duly got verified the certificates of Dr. Bindal in regard to his experience of five years in drug testing by a Deputy Secretary of the Commission and after considering his report as well as the certificates came to the conclusion that the appellant though fulfilled educational qualifications, lacked in the requisite experience of five years in drug testing. The Commission, therefore, revised its earlier decision and withdrew the candidature of the appellant and also cancelled its recommendation earlier given in favour of the appellant. This decision of the Public Service Commission, in our considered opinion cannot be faulted. It is the constitutional requirement envisaged in Article 320 that the Commission will have to perform the duty of recommending the candidate fulfilling all the requisite qualifications for the post to the Government for being considered for appointment to the post concerned. It is, of course, a well-settled legal position that the duty to consult the Commission in the matter of appointment to civil posts by the Government is not mandatory but directory and as such the absence of consultation with the State Public Service Commission does not render any appointment made by the Government in civil posts invalid or illegal....."

41. In ***Ashok Kumar Shrivastava & Ors. -Vs- Ram Lal & Ors.*** (supra), the Hon'ble Supreme Court held as under :

"77. It is clear that the proviso to Clause (3) of Article 320 of the Constitution

empowers the Governor of a State to withdraw from the purview of the Public Service Commission services and posts in connection with the affairs of a State and to make regulations in support thereof.”

42. In view of the above, it can be concluded that non-compliance of the provisions of Article 320(3) of the Constitution would not make any Rules or Regulations unconstitutional, wherein the requirement of consultation with State Public Service Commission, in the matter of recruitment and appointment on civil posts, is taken away.

43. It is to be noticed that it is nowhere provided in the proviso to Article 320(3) that Regulations providing non-consultation of Public Service Commission in certain matters are to be framed strictly under this proviso only. On the other hand, proviso to Article 309 of the Constitution provides that the President or the Governor, as the case may be, may make Rules regulating the recruitment condition of service of persons to any service and post, meaning thereby that it is open for the President or the Governor to make Rules or Regulations regarding non-consultation with the Public Service Commission in certain matters either exercising the powers under proviso to Article 309 or proviso to Article 320(3) of the Constitution of India.

Moreover, it is settled that non-mentioning or wrong mentioning of a provision of law will not render any action illegal when such power exists with the authority under the law, who has initiated the action.

We are of the view that the Governor had the power to frame the Regulations of 2021 under the Constitution of India and even if the notification of framing these Regulations indicates incorrect Article, it would not result in any illegality.

44. Now the another issue is whether there exist sufficient reasons with the Government for framing the Regulations of 2021 which resulted into taking out certain posts out of purview of the Public Service Commission.

The respondents in their counter affidavit and Mr. Saikia, learned Advocate General, in his submissions has explained the reasons which necessitated the framing of the Regulations of 2021. No material is available on record to doubt those reasons. As such, it can safely be concluded that the framing of Regulations of 2021 is fully justified.

45. We have also gone through the scheme of Regulations of 2021.

As per Regulation 3 of the Regulations of 2021, the State Government is empowered to constitute a body to be known as "Assam Engineering Service Recruitment Board" which consists of 4 (four) Members including the Chairman; Regulation 4 specifies the term of office of the Member of the Board; Regulation 5 is regarding pay of the Chairman and the Members of the Board; Regulation 6 speaks about pensionary benefits of the Chairman and the Members; Regulation 7 is about leave whereas Regulation 8 is about Pension of the Chairman and the Member of the Board; Regulation 9 is in relation to travelling and other allowances of the Board and Regulation 10 speaks about staff of the Board and their conditions of service. Regulation 11 speaks about the duties and functions of the Board and as per the said Regulation 11, the Board shall recruit teachers/faculty members to fill up vacancies in the Engineering Education Institute which are identified. Regulation 12 is regarding the procedure of recruitment.

46. The post of Lecturer in Polytechnics is identified under the Regulations

of 2021, on which the petitioner was appointed on *ad hoc* basis and is continuing.

With the framing of the Regulations of 2021, by which the AESRB is specifically empowered to recruit teachers and faculty members in the Government Engineering Colleges and Polytechnics, it was necessary to amend the Rules of 1981 because the said Rules provide that the selection for the post of Assistant Professor (Technical and Non-Technical) in the Engineering Colleges and Lecturer (Technical and Non-Technical) in Polytechnics is to be conducted by the APSC. Since under the Regulations of 2021, the said vacancies are to be filled up by the AESRB, the Governor of Assam, vide Notification dated 31.05.2022, has amended Rule 2, Rule 6, Rule 10 and Rule 15, etc., of the Rules of 1981 and enacted the Amendment Rules of 2022. Vide the said amendment, the definition of the "Board (AESRB)" is provided and a new clause giving definition of the "Committee" is introduced. The word "Commission" is substituted with the word "Board" and the provision regarding consultation with the Commission has been omitted. The word "Board" is substituted with the word "Committee" in the principal rule and the words "Selection Board" are substituted with the words "Selection Committee".

The said Notification was issued by the Governor while exercising powers conferred by proviso to Article 309 of the Constitution of India.

47. As observed above, once the Regulations of 2021 came into force, it was necessary to amend the Rules of 1981, accordingly, the Governor of Assam, in exercise of powers conferred under proviso to Article 309 of the Constitution, has framed the Amendment Rules of 2022 and we find that there is no illegality in the same.

48. So far as the contention of the learned Senior Counsel for the petitioner to the effect that the petitioner was appointed permanently on the post of Lecturer (Technical) pursuant to the advertisement dated 25.02.2020 is concerned, we do not find any merit in the said argument.

It is to be noticed that as per the petitioner the permanent posts of Lecturer (Technical) were sanctioned by the Government in March, 2021. It is impossible to comprehend that even though the posts were sanctioned in March, 2021 but to fill those posts advertisement was issued prior to that i.e. in February, 2020.

Otherwise also the said recruitment process was conducted by resorting to Regulation 3(f) of the Regulations of 1951, purely on *ad hoc* basis, and in any circumstances, any appointment made pursuant to the said advertisement dated 25.02.2020, cannot be termed as permanent.

49. We have also taken into consideration the judgments on which the learned Senior Counsel for the petitioner has placed reliance.

In **B.N. Nagarajan** (supra), the Hon'ble Supreme Court was examining a case wherein the Government took some action while exercising its executive powers though the Rules framed under Article 309 of the Constitution of India were in force. In that case, the Hon'ble Supreme Court has observed that the executive power of the Government cannot be exercised which results into over-riding of the Rules framed under Article 309 of the Constitution of India.

Here in the present case, the facts are altogether different as the Governor has framed the Regulations of 2021 in respect of certain civil posts which has resulted into taking such civil posts out of the purview of the State

Public Service Commission.

In **V. Sreenivasa Reddy** (supra), the Hon'ble Supreme Court has deprecated the practice of the Government whereby it made massive *ad hoc* appointments by resorting to proviso to Clause 3 of Article 320 *de hors* the Rules.

In the present case, the Governor has framed new Regulations in exercise of powers conferred by proviso to Article 309 of the Constitution of India for the purpose of recruitment of faculties in the Engineering Colleges and Polytechnics and the present case is not a case of making *ad hoc* appointments *de hors* the Rules.

In **K. Kuppusamy** (supra), the Hon'ble Supreme Court has held that merely a decision to amend the Rules does not mean that the Rules stood obliterated and till the Rules are amended, the Rules apply. However, the said situation is not available in the present case.

In the above circumstances, the judgments on which the learned Senior Counsel for the petitioner has placed reliance are of no help to the petitioner.

50. In view of the discussion made hereinabove, we do not find any merit in this writ petition and the same is, therefore, dismissed.

JUDGE

CHIEF JUSTICE

Comparing Assistant