



GAHC010203162018

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

Case No. : WP(C)/6314/2018

RANJAN SINGHA AND 4 ORS.
S/O MR.L. SINHA
R/O H/NO. 31, SATGAON
MANIPURI COLONY,
DIST.KAMRUP (M), ASSAM,
PIN - 781171.

2: DR. UTPAL BORAH
S/O LT. DHANESWAR BORAH
R/O MAHALYA APARTMENT

FLAT NO. B-101
USHA NAGAR
BYE LANE NO. 1
SUPERMARKET
DISPUR

DIST. KAMRUP (M)
ASSAM

PIN - 781006.

3: DR. KABITA RAY
W/O HIRES CH PATHAK
R/O VILL- MAKHIBAHA
P.O.MAKHIBAHA
DIST.NALBARI
ASSAM

PIN - 781374.

4: DR. GEETIMA BARMAN
D/O KANAK CH. BARMAN
R/O TETELIBARI



NALAPARA
P.O. SAUKUCHI
DIST. KAMRUP (M)
ASSAM
PIN - 781040
ASSAM

5: DR RUPAK KUMAR NATH
S/O LT. TILENDRA KUMAR NATH
R/O RRB ROAD
SOUTH HAIBARGAON
P.O. HAIBARGAON
DIST. NAGAON
ASSAM
PIN - 782002

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REP. BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM,
JANATA BHAVAN, DISPUR, GUWAHATI-06.

2: COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM

ANIMAL HUSBANDRY AND VETERINARY DEPARTMENT

JANATA BHAVAN
DISPUR
GUWAHATI -06.

3: PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM

PERSONNEL (B) DEPARTMENT

JANATA BHAVAN
DISPUR
GUWAHATI-06.

4: SECRETARY

ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
SIX-MILE
KHANAPARA
GUWAHATI -22.

5: UNDER SECRETARY



ASSAM PUBLIC SERVICE COMMISSION

JAWAHAR NAGAR
SIX-MILE

KHANAPARA
GUWAHATI-22.

6:DEPUTY SECRETARY

ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
SIX-MILE

KHANAPARA
GUWAHATI-22

Advocate for the Petitioner : MR. D. K. DAS

Advocate for the Respondent : MR. T. C. CHUTIA
:MR. T. J. MAHANTA
:MS. M. M. KOTOKI
: MR. P. P. DUTTA

Linked Case : WP(C)/6397/2018

RUBAL CHANDRA ROY
S/O LATE MR. MUKUL CHANDRA ROY
RESIDENT OF VILLAGE ROKAKHATA
PO HAKAMA
PS BILASHIPARA
DIST DHUBRI
ASSAM 783348

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT OF OF
ASSAM
JANATA BHAWAN
DISPUR



GUWAHATI-06

2:COMMISSIONER AND SECRETARY
TO THE GOVERNMENT OF ASSAM
ANIMAL HUSBANDRY AND VETERINARY DEPARTMENT
JANATA BHAWAN
DISPUR

GUWAHATI-06

3:PRINCIPAL SECRETARY TO THE GOVERNMENT OF ASSAM
PERSONNEL (B) DEPARTMENT
JANATA BHAVAN
DISPUR

GUWAHATI-06

4:SECRETARY
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR SIX MILE

KHANAPARA

GUWAHATI-22

5:UNDER SECRETARY
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
SIX MILE

KHANAPARA

GUWAHATI-22

6:DEPUTY SECRETARY
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
SIX MILE

KHANAPARA

GUWAHATI-22

Advocate for the Petitioner : MR. D. K. DAS

Advocate for the Respondent : MR. T. C. CHUTIA
:MR. T. J. MAHANTA
:MS. M. M. KOTOKI
: MR. P. P. DUTTA

Linked Case : WP(C)/6650/2018

MANIKA BURAGOHAIN
D/O- KANAK BURAGOHAIN
R/O- VILL- BAM GOHAIN
P.O. DEMOW
P.S. DEMOW
DIST- SIBSAGAR



ASSAM
PIN- 785662

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REP. BY THE CHIEF SECY. TO THE GOVT.OF ASSAM
JANATA BHAVAN
DISPUR
GHY-6

2:COMM. AND SECY.
TO THE GOVT. OF ASSAM
ANIMAL HUSBANDRY AND VETERINARY DEPTT.
JANATA BHAVAN
DISPUR
GHY-06

3:PRINCIPAL SECY. TO THE GOVT. OF ASSAM
PERSONNEL (B) DEPTT.
JANATA BHAVAN
DISPUR
GHY-06

4:SECY.
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
SIX MILE
KHANAPARA
GHY-22

5:UNDER SECY.
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
SIX MILE
KHANAPARA
GHY-22

6:DY. SECY.
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
SIX MILE
KHANAPARA
GHY-22

Advocate for the Petitioner : MR. D. K. DAS

Advocate for the Respondent : MR. T. C. CHUTIA
:MR. T. J. MAHANTA
:MS. M. M. KOTOKI
: MR. P. P. DUTTA

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (CAV)

Date : 01-06-2023

Heard Mr. D. K. Das, the learned counsel appearing on behalf of the petitioners and Mr. T. C. Chutia, the learned Government Advocate appearing on behalf of the respondent Nos. 1 and 3. I have also heard Ms. M. M. Kotoki, the learned Standing counsel appearing on behalf of the respondent No.2 and Mr. T. J. Mahanta, the learned Senior counsel assisted by Mr. P. P. Dutta, the learned counsel appearing on behalf of the respondent Nos. 4, 5 and 6.

2. The three writ petitions are taken up for disposal together as the facts involved are similar and the questions raised are in pari materia.

3. The facts involved in the instant three writ petitions are that the Assam Public Service Commission (hereinafter referred to as "the APSC") issued an advertisement bearing ADVT No.1/2018 and No.132PSC/DR-5/1/2017-2018 dated 17.02.2018 inviting applications from eligible candidates for 113 Class-II Gazetted (Junior) post of Veterinary Officer/Block Development Veterinary Officer under the Animal Husbandry and Veterinary Department Assam as well as for various other posts under different departments. The petitioners in the 3 (three) writ petitions claims to be degree holders in Veterinary Science and Animal Husbandry i.e. the Bachelor of Veterinary Science and Animal Husbandry from recognized universities. The petitioners also claimed that they belonged to the Other Backward Classes (for short the "OBC") and

have enclosed documents evidencing certificates issued to them that they belonged to OBC category.

4. The petitioners applied in pursuance to the said advertisement dated 17.02.2018 by depositing the required fee through challan. At the time of depositing the application form, the concerned authority of the APSC had also issued a receipt to the petitioners thereby acknowledging the receipt of the application form. Pursuant thereto, the petitioners were eagerly waiting for their call letters for viva-voce to be conducted by the APSC for the aforementioned posts. To their utter shock and dismay, the APSC had published a list on 06.09.2018. The said list pertained to those candidates whose applications were rejected. The names of the petitioners in WP(C) No.6314/2018 featured at Serial No.9, 14, 15, 29 and 31 in the said list; the petitioner in WP(C) No.6397/2018 featured at Serial No.12 of the said list and the petitioner in WP(C) No.6650/2018 featured at Serial No.38 of the said list.

5. It further transpires from a perusal of the said list issued by the Deputy Secretary of the APSC that the applications of the petitioners were rejected for the post of Veterinary Officer/Block Veterinary Officer under the Animal Husbandry and Veterinary Department on the ground of "Over age". It was the case of the petitioners that the petitioners belonged to the OBC category, they were within the age (in terms with the Office Memorandum dated 03.03.2016). It was the case of the petitioners that in terms with the said Office Memorandum dated 03.03.2016, the upper age limit of an OBC candidate would be 46 years and all the petitioners were below 45 years. Subsequent thereto, the APSC vide its notification dated 29.08.2018

published a list of dates for holding the interview/viva-voce for the post of Veterinary Officer/Block Veterinary Officer under the Animal Husbandry and Veterinary Department, Assam.

6. It was further the case of the petitioners that there is an Office Memorandum dated 27.03.2012 issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions wherein age relaxation has been given to various categories including the OBC to the extent of 3 (three) years on the basis of Office Memorandum dated 25.01.1995 and the Office Memorandum dated 22.10.1993 issued by the Government of India. It is therefore the case of the petitioners that by virtue of the Office Memorandum dated 03.03.2016, the Government of Assam had already granted the relaxation in upper age limit and even assuming the said Office Memorandum being not applicable, there is already an Office Memorandum of the Government of India dated 27.03.2012 which can be adopted by the Government of Assam for the purpose of granting relaxation of upper age limit to the petitioners. On the basis of the above, the petitioners approached this Court challenging the reject list issued by the Deputy Secretary of the APSC whereby the petitioners' candidature were put in the reject list on account of over age as well as the notification dated 29.08.2018 whereby all concerned were informed that the APSC would hold the interview/viva-voce for the posts in question on various dates mentioned therein. WP(C) No.6314/2018 was filed on 10.09.2018, WP(C) No.6397/2018 was filed on 13.09.2018 and WP(C) No.6650/2018 was filed on 20.09.2018.

7. It appears from the records that this Court vide separate orders provisionally permitted the petitioners to participate in the selection process.

It was however made clear that such participation shall however be subject to the outcome of the writ petitions. On the basis of the interim orders passed by this Court, all the petitioners participated in the selection process.

8. It appears from the records that on 13.02.2019, the Secretary of the APSC had filed an affidavit-in-opposition. It was mentioned in the said affidavit-in-opposition by the respondent No.4 that the APSC had published the advertisement dated 17.02.2018 and the petitioners have not challenged the said advertisement. The age limit prescribed in the said advertisement is that the candidates should not be less than 21 years and not more than 43 years as on 01.01.2018 as per the Government O.M. No. ABP 06/2016/04 dated 03.03.2016 and O.M. No. ABP 06/2016/07 dated 26.09.2016. It was further mentioned that the upper age limit is relaxable for the candidates of reserved SC/ST category as per existing provision. It was further mentioned that the candidature of the writ petitioners were not found within the age limit and accordingly, their applications were rejected being over aged. In paragraph No.7 of the said affidavit-in-opposition, it was further mentioned that the Government in the Personal (B) Department vide O.M. dated 03.03.2016 had decided to revise the upper age limit for entry into Government service by 5 years from existing 38 years and the SC/ST and all other categories of candidates who have already been enjoying relaxation in upper age limit may add 5 years to the existing relaxed upper age limit. It was further mentioned that the OBC/MOBC candidates were never provided age relaxation of upper age limit in the State services at that relevant point of time. Further, it was mentioned that the State Government had never granted such relaxation to OBC/MOBC. Referring to the Office Memorandum dated 27.03.2012 issued by the Government of India, it was categorically

mentioned that the said O.M. is only in respect to services under the Union Government and does not concern itself with that of the State Government services. It was further mentioned that the said Office Memorandum was not a part of the advertisement. In paragraph No.9 of the said affidavit filed by the respondent No.4, it was mentioned that the writ petitioners were allowed to take part in the interview process in compliance to the orders passed by this Court however the aforesaid participation of the petitioners were subject to the outcome of the writ petition.

9. Subsequent thereto, the petitioners in WP(C) No.6314/2018 filed an additional affidavit on 20.04.2019 to bring on record certain documents. In the said additional affidavit, the petitioners in WP(C) No.6314/2018 further tried to develop their case by stating that as they belonged to the OBC category and they were working under different departments of the Government, the APSC ought to have considered their candidatures to undergo further selection process in the recruitment for the vacant advertised post. It was also mentioned that the Government of India, Department of Personnel & Training vide Office Memorandum bearing No. 43013/2/95-Estt.(SCT) dated 25.01.1995 provided that the upper age limit prescribed for direct recruitment shall be relaxed by 3 (three) years in respect of the candidates belonging to the Other Backward Classes (OBC) which have never been suspended or revoked by the Government.

10. On the basis of the said Office Memorandum, it is the case of the petitioner that the APSC ought to have provided the petitioners with age relaxation of upper age limit by 3 (three) years while considering their candidatures for the next stage of recruitment process since they belonged

to the OBC category. It was further mentioned in paragraph No.7 of the said additional affidavit that it had come to their knowledge that 3 (three) of the petitioners in WP(C) No.6314/2018 have been duly selected for appointment but due to pendency of the writ petitions, the names of the 3 (three) selected candidates have not been declared. It was mentioned that the petitioners in the meantime have also approached the concerned respondent authorities namely the respondent No.2 who is the Secretary, Animal Husbandry and Veterinary Department by filing a representation which was received on 05.04.2019 for upper age relaxation by the said authority.

11. It further appears that on 07.05.2019, an affidavit-in-opposition was filed by the Respondent No.3 through the Deputy Secretary, Personnel Department Assam. In the said affidavit-in-opposition, it has been mentioned that the Government in the Personnel (B) Department issued Office Memorandum bearing No.ABP.06/2016/04 dated 03.03.2016 regarding the relaxation of upper age limit for Government jobs by 5 (five) years from existing 38 years for a period of 2 (two) years from the date of issuance of the Office Memorandum. The terms and conditions of the O.M. expired on 02.03.2018. The advertisement of the Assam Public Service Commission was issued on 17.02.2018 and as the advertisement was issued before the expiry of the O.M. dated 03.03.2016, the upper age relaxation as per the O.M. would be applicable i.e. as on 01.01.2018, the age of the applicants who were $(38+5)=43$ years were eligible to apply. For SC, ST and other categories enjoying existing relaxation, the number of years of such relaxation would be added to the 43 years. It was further mentioned that the petitioners crossed the age of 43 years as on 01.01.2018. For OBC/MOBC candidates, there was no other existing relaxation in the upper age for entry

in the Government jobs at the time of advertisement. It was denied that the other OBC community was availing 3 (three) years upper age relaxation in appointment process since long. It was categorically stated that the benefit of 3 (three) years regarding upper age relaxation given to OBC/MOBC candidates came into force on 25.04.2018 i.e. the date of issue of the Office Memorandum bearing No.ABP.06/2016/09 dated 25.04.2018 and as such as on 01.01.2018, the OBC/MOBC candidates were not eligible for the benefit of upper age relaxation of 3 (three) years. It was further mentioned that there was no provision of relaxation of upper age limit for OBC/MOBC in line with the Office Memorandum dated 27.03.2012 of the Government of India. It was only on 25.04.2018, the Government of Assam issued the Office Memorandum bearing No.ABP.06/2016/09 relaxing the upper age limit prescribed for entry into the Civil Posts, Services and Public Sector Undertakings under the Government of Assam through direct recruitment of 3 (three) years for candidates belonging to Other Backward Classes/More Other Backward Classes with immediate effect.

12. It further appears that on 26.04.2022, two affidavit-in-replies were filed by the petitioners against the affidavit-in-oppositions filed by the respondent No.3 as well as the respondent No.4 respectively. In the affidavit-in-reply filed against the affidavit-in-opposition filed by the respondent No.3, the petitioners further tried to develop a new case on the basis of the Office Memorandum dated 25.04.2018 stating inter alia that the final interview for the posts in question was scheduled on 26.09.2018 as notified by the APSC on 20.09.2018 and the Office Memorandum dated 25.04.2018 was given immediate effect. Under such circumstances, the respondents APSC were not justified in depriving the candidatures of the

petitioners by not giving the benefit of the Office Memorandum dated 25.04.2018. It was further stated that the Office Memorandum dated 25.04.2018 has to be read as it is in continuation of the Office Memorandum dated 03.03.2016 and the gap in issuance of the subsequent O.M. dated 25.04.2018 with that of the earlier O.M. dated 03.03.2016 of 55 days would cover the said days respectively apart from the fact that the Office Memorandum dated 25.01.1995 issued by the Department of Personnel & Training was still in operation which otherwise covers the gap of the said period. The affidavit-in-reply filed to the affidavit-in-opposition of the respondent No.4 is similar in content however in the said affidavit, the results dated 03.10.2018 issued by the APSC was enclosed as Annexure-A.

13. From a perusal of Annexure-A to the affidavit-in-reply filed by the petitioners on 26.04.2022, it is seen that the positions 19, 36 and 53 have been mentioned with the following remark "Subject to outcome of the final order of the Hon'ble Gauhati High Court".

14. In the backdrop of the above materials on record, let this Court further take into consideration the respective contentions of the parties as well as certain materials which came into light during the course of the hearing of the instant writ petitions as would appear from the orders passed in the writ petitions.

15. The learned counsel appearing on behalf of the petitioners, Mr. D. K. Das had raised manifold contentions. The learned counsel for the Respondents had also raised pertinent contentions. Let this Court analyze the respective contentions.

16. The first submission of Mr. D. K. Das, the learned counsel was in respect to the interpretation of the Office Memorandum dated 03.03.2016 wherein it has been mentioned that the Government had decided to revise the upper age limit for entry into the Government services by 5 years from the existing 38 years and the Scheduled Castes and Schedule Tribes and all other categories of candidates who have already been enjoying the relaxation in upper age limit, may add 5 (five) years to their existing upper age limits. It was therefore the submission of the learned counsel appearing on behalf of the petitioners that OBC category was included within the term "and all other categories of candidates" and as such by virtue of the Office Memorandum dated 03.03.2016, the petitioners as they belong to the OBC category would enjoy a further relaxation of 3 years from 43 years i.e. their upper age limit would be 46 years.

17. The said submission was vehemently contested by the learned Government Advocate Mr. T. C. Chutia. The learned Government Advocate submitted that it is a specific stand taken in the affidavit filed by the respondent No.3 that till 25.04.2018, there was no benefit of 3 (three) years given regarding upper age relaxation to OBC/MOBC. Reference was made to paragraph No.5 of the affidavit filed by the respondent No.3. It is relevant to take note that this Court even prior to the commencement of hearing had by an order dated 02.08.2022 directed the respondents to produce the Government of Assam notifications/Office Memorandums prior to 03.03.2016 giving relaxation of age to various reserved categories for appointment against the posts under the Government of Assam. It is seen from the records that on 05.01.2023, the Government Advocate, Mr. T. C. Chutia produced copies of the Office Memorandums dated 27.03.1980, 04.01.1992,

10.03.2008 and 03.03.2016 along with a host of circulars issued by the Government of Assam. The said Office Memorandums and Circulars so produced, have been kept on record and marked with the letter "X".

18. From a perusal of the various Circulars and Office Memorandums, it would transpire that candidates belonging to the OBC category were not included in Office Memorandums as well as the circulars thereby granting relaxation of the upper age limit which is in conformity with paragraph No.5 of the affidavit-in-opposition filed by the respondent No.3. Therefore, it would be seen that it was only on 25.04.2018 that for the first time, the Government of Assam, Department of Personnel (B) Department have granted relaxation as regards the upper age limit to those candidates belonging to the OBC/MOBC categories. Therefore, the said submission made by the petitioners that as the petitioners belonged to the OBC category were enjoying relaxation of the upper age limit by virtue of the Office Memorandum dated 03.03.2016 is misconceived. Before further proceeding, this Court also finds it relevant to take note that the Petitioners failed to produce any Office Memorandum/Circular whereby upper age relaxation was granted to OBC/MOBC candidates prior to 03.03.2016 or till 25.04.2018.

19. Mr. D. K. Das, the learned counsel appearing on behalf of the petitioners submitted that reservation being the highest form of special provision while preference, concession, exemption, relaxation are lesser in forms as observed by the Supreme Court in paragraph No.743 in the case of ***Indra Sawhney and Others Vs. Union of India and Others reported in (1992) Supp. 3 SCC 217***, therefore he further submitted that the constitutional

scheme and context of Article 16(4) means that the larger concept of reservations takes within its sweep, all supplemental and ancillary provisions as also the lesser types of special provisions like exemptions, concessions and relaxations; consistent, no doubt with the requirement of maintenance of efficiency of administration - the admonition of Article 335 of the Constitution. On the edifice of the said proposition of law, the learned counsel for the petitioners therefore contended that as the petitioners are entitled to reservations as they belong to the OBC category and on the basis of such reservations in the advertisement, posts were reserved for OBC, the petitioners who belonged to the OBC category would be automatically entitled to relaxation in the upper age limit as relaxation is a species of reservation.

20. The submission though looks attractive but in the opinion of this Court is misconceived inasmuch as the power to give benefits by the State is mentioned in Article 16(4) of the Constitution which is an enabling provision. The manner and extent to which reservation is provided has to be spelt from the orders issued by the State from time to time, meaning thereby that, merely because certain posts have been reserved would not mean that the persons entitled to be considered for the posts would be automatically entitled to certain exemptions and relaxations of age limit without there being a specific order being passed by the Government from time to time. It is well settled that reservation is wide enough to include exemptions, relaxations, concessions etc. The exemptions, relaxations, concessions etc. are allowable to the reserved category candidates to effectuate and to give effect to the object behind Article 16(1) of the Constitution but such power has to be exercised by the State. The Supreme Court at paragraph 743 in

the case of **Indra Sawhney (supra)** also observed that when the State finds it necessary for the purpose of giving effect to the provisions of reservation to provide exemption, concession, preference to members of backward classes, it can extend the same under Article 16(4) of the Constitution.

21. In the instant case, it would be seen from the documents marked with the letter "X" that for SC and ST candidates, such relaxation have been given by the Government long time back however in respect to the OBC category of candidates, the Government of Assam chose to give only from 25.04.2018. It is absolutely within the prerogative of the State by way of legislation as well as Executive Officer to make such provision. The Supreme Court in the case of **Chairman and Managing Director, Central Bank of India and Others Vs. Central Bank of India SC/ST Employees Welfare Association and Others reported in (2015) 12 SCC 308** observed that the Courts cannot issue any Mandamus to the State to make a provision or to exercise the power under Article 16(4) of the Constitution. It was observed by the Supreme Court that it is for the State to act, in a given situation, and to take such affirmative action. Paragraph 26 of the said judgment is reproduced hereinbelow.

“26. In the first instance, we make it clear that there is no dispute about the constitutional position envisaged in Articles 15 and 16, insofar as these provisions empower the State to take affirmative action in favour of SC/ST category persons by making reservations for them in the employment in the Union or the State (or for that matter, public sector/authorities which are treated as State under Article 12 of the Constitution). The laudable objective underlying these provisions is also to be kept in mind while undertaking any exercise pertaining to the issues touching upon the reservation of such SC/ST

employees. Further, such a reservation can not only be made at the entry level but is permissible in the matters of promotions as well. At the same time, it is also to be borne in mind that clauses (4) and (4-A) of Article 16 of the Constitution are only the enabling provisions which permit the State to make provision for reservation of these category of persons. Insofar as making of provisions for reservation in matters of promotion to any class or classes of post is concerned, such a provision can be made in favour of SC/ST category employees if, in the opinion of the State, they are not adequately represented in services under the State. Thus, no doubt, power lies with the State to make a provision, but, at the same time, courts cannot issue any mandamus to the State to necessarily make such a provision. It is for the State to act, in a given situation, and to take such an affirmative action. Of course, whenever there exists such a provision for reservation in the matters of recruitment or the promotion, it would bestow an enforceable right in favour of persons belonging to SC/ST category and on failure on the part of any authority to reserve the posts, while making selections/promotions, the beneficiaries of these provisions can approach the Court to get their rights enforced. What is to be highlighted is that existence of provision for reservation in the matter of selection or promotion, as the case may be, is the sine qua non for seeking mandamus as it is only when such a provision is made by the State, a right shall accrue in favour of SC/ST candidates and not otherwise."

22. Therefore, in the opinion of this Court, the submission made by the learned counsel for the petitioners that merely because the petitioners belonging to the OBC category are entitled to reservation and in the advertisement, posts have been reserved for OBC category, the petitioners would be entitled to age relaxation on the basis thereof is misconceived.

23. The learned counsel appearing on behalf of the petitioners further tried to develop the case of the petitioners on the basis of the pleadings

contained in the affidavit-in-reply. The learned counsel appearing on behalf of the petitioners further referring to the Office Memorandums dated 25.01.1995 and 27.03.2012 issued by the Government of India, Department of Personnel & Training had tried to submit that the Government of Assam follows Office Memorandums issued by the Department of Personnel & Training of the Government of India unless there is any Office Memorandum contrary thereto and therefore, the said Office Memorandums dated 25.01.1995 and 27.03.2012 should be deemed to be holding the field till the coming into effect of the notification dated 25.04.2018 and on the basis thereof, the petitioners would be entitled to relaxation on the upper age limit as they belong to the OBC category. This submission is faulty on two grounds. First, these Office Memorandums are Office Memorandums issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training which would only be applicable for recruitment to various categories of posts under the Central Government. In case, the same have been adopted, the same have to be done by the State of Assam by way of notifications, Office Memorandums, Circulars etc. Nothing of such sort have been shown by the petitioners that the State of Assam have adopted the Office Memorandums dated 25.01.1995 as well as 27.03.2012 insofar as the relaxation of the upper age limit of the OBC category. Secondly, to accept the contention without the State of Assam adopting the Office Memorandums would result in this Court either exercising the powers reserved for the State under Article 16(4) of the Constitution or issuing a mandamus to the State to exercise the powers under Article 16(4) of the Constitution, which in both instance would be not permissible. As already stated hereinabove while referring to the judgment in

the case of ***Chairman and Managing Director, Central Bank of India (supra)***, the Supreme Court had categorically observed that the said power lies with the State to make provisions under Article 16(4) of the Constitution and the Court cannot issue any Mandamus to the State to necessarily make a provision.

24. A further contention was advanced by the learned counsel for the petitioners to the effect that the Office Memorandum dated 25.04.2018 should be treated as a continuation to the Office Memorandum dated 03.03.2016 which also in the opinion of this Court would not be permissible inasmuch as the same would also amount to giving retrospective effect to the Office Memorandum dated 25.04.2018, which is also not permissible.

25. Before further proceeding, this Court finds it relevant to note that the learned counsel for the petitioners during the course of hearing placed reliance upon the following judgments.

(i) ***Indra Sawhney Vs. Union of India and Others reported in 1992 Supp (3) SCC 215.***

(ii) ***State of Kerala and Another Vs. N. M. Thomas and Others reported in (1976) 2 SCC 310.***

(iii) ***Jitendra Kumar Singh and Another Vs. State of U.P. and Others reported in (2010) 3 SCC 119.***

26. In so far as the judgment in the case of ***Indra Sawhney (supra)***, this Court has duly dealt with the same. As regards the judgment in the case of ***N. M. Thomas (supra)***, the learned counsel for the petitioners referred it to show the evolution of the law as regards Article 16(4) of the Constitution

which was duly dealt with by the Supreme Court in the case of **Indra Sawhney (supra)** at paragraph 743, the reference to which have already been made in earlier segments of the present judgment. Now coming to the judgment of the Supreme Court in the case of **Jitendra Kumar Singh (supra)**, this Court deems it proper to deal with at a later stage.

27. On the other hand, the submissions of Mr. T. C. Chutia, the learned Government Advocate are to that effect that the advertisement was issued on 17.02.2018. In the said advertisement, the particulars as regards "Age" was categorically mentioned at Serial No.6 which is quoted hereinbelow:

*"6. **Age** : A candidate should not be less than 21 years and more than 43 years of age as on 01.01.2018 as laid down in Govt. O.M. No. ABP06/2016/04, dtd. 03.03.2016 and ABP06/2016/07, dtd. 26.09.2016. The upper age limit is relaxable for the candidates of reserved category as per existing provision."*

28. It is therefore, the submission of the learned counsel for the State Government that as the selection process have already started with the issuance of an advertisement and the last date of submission of the application form was fixed on 19.03.2018, now at this stage to give benefit to the petitioners on the basis of the Office Memorandum dated 25.04.2018 would not only change the rule of the game but would also affect the other similarly situated persons like the petitioners who could have also applied to the posts or in other words, giving the benefit at this stage on the basis of the Office Memorandum dated 25.04.2018 to the petitioners would affect the rights of other similarly situated candidates under Article 14 and 16 of the Constitution. In that regard, the learned counsel for the State Government referred to the judgment of the Supreme Court in the case of **K. Manjusree**

Vs. State of A.P. and Another reported in (2008) 3 SCC 512, the judgment of this Court in the case of ***Chandana Deka Vs. State of Assam and Others reported in MANU/GH/0997/2018*** as well as the judgment of this Court in the case of ***Achyut Kalita Vs. State of Assam and Others reported in MANU/GH/0880/2017***.

29. To the said submission, Mr. D. K. Das, the learned counsel for the petitioners submitted that the Office Memorandum dated 25.04.2018 if read as a continuation to the Office Memorandum dated 03.03.2016 and the same if read with the advertisement at Clause-6, that the relaxation for upper age will be considered as per existing rules would neither violate the rights under Article 14 and 16 of the Constitution in respect to similarly situated candidates nor would also violate the principles that the rules of game cannot be changed amidst a selection process.

30. This Court in the previous segment of the instant judgment have already opined that it is not possible to read that the Office Memorandum dated 25.04.2018 to be in continuation of the Office Memorandum dated 03.03.2016 inasmuch as the Government in its wisdom have exercised the power insofar as the OBC category candidates to give age relaxation concession only on 25.04.2018 under Article 16(4) of the Constitution. From Clause-6 of the advertisement as already quoted hereinabove, it would clearly transpire that the age in terms with the said advertisement should be not less than 21 years and not more than 43 years as on 01.01.2018. The relaxation in terms with the advertisement was spelt out only in terms with the Office Memorandums dated 03.03.2016 and 26.09.2016 which however did not cover the case of OBC category candidates.

31. This Court supra had already observed that there was no relaxation given to the OBC candidates on the basis of the Office Memorandum dated 03.03.2016 and the State in its wisdom have granted the upper age limit relaxation only vide the Office Memorandum dated 25.04.2018. It is also relevant to take note of that the advertisement is not a subject matter of challenge in the instant proceedings and as such the criteria insofar as the age is concerned has to be in terms with Clause-6 of the advertisement dated 17.02.2018. It would further be seen from Clause (d) that the last date of receiving the duly filled up application form was fixed on 19.03.2018.

32. In terms with the advertisement when the age had been specifically spelt out and there being no challenge to the said advertisement, the question therefore arises as to whether it would be permissible to take into account a subsequent Office Memorandum which was issued after the issuance of the advertisement as well as after the last date for submission of forms. To decide the said question, let this Court take into account the law in that regard.

33. The Supreme Court in the case of ***Madan Mohan Sharma and Another Vs. State of Rajasthan and Others*** reported in ***(2008) 3 SCC 724*** had categorically held at paragraph No.11 that once the advertisement had been issued on the basis of the circular obtaining at that particular time, the effect would be that the selection process should be continued on the basis of the criteria which was laid down and it cannot be on the basis of the criteria which has been made subsequently. The Supreme Court in the case of ***K. Manjusree Vs. State of A.P. and Others*** reported in ***(2008) 3 SCC 512***, observed that when the Selection Committee prescribed minimum marks

only for the written examination before the commencement of the selection process, it cannot either during the selection process or after the selection process add that there would be minimum marks for the interview.

34. This Court finds it relevant to refer to a judgment of the Supreme Court in the case of ***Gaurav Pradhan and Others Vs. State of Rajasthan and Others*** reported in ***(2018) 11 SCC 352*** which in fact touches on the issues involved in the instant proceedings. In the said case, the issue involved amongst others was whether a circular dated 11.05.2011 issued by the State Government changing the criteria for migrating reserved category candidates to general category candidates can be applied in respect to the selection process which had already begun on issuance of an advertisement dated 14.10.2010 and 25.10.2010. The Supreme Court after taking into consideration the judgment in the case of ***Indra Sawhney (supra)***, ***Jitendra Kumar Singh (supra)*** as well as the scope and ambit of Article 16(4) of the Constitution observed that the recruitment commenced by the advertisements dated 14.10.2010 and 25.10.2010 and at that time, only the circular dated 24.06.2008 was in force, hence the subsequent circular dated 11.05.2011 could not be applied to the said recruitment. It was observed that there cannot be any dispute that the policy of reservation can always be changed by the State Government and the State Government can change the manner and methodology of implementing the reservation and criteria of reservation of the reserved category candidates and the general category candidates. Accordingly, the Supreme Court observed that the candidates belonging to SC/ST/OBC category who had taken relaxation on age were not entitled to be migrated to the unreserved vacancies on the basis of the circular dated 11.05.2011 which came into existence pursuant to the

selection process having commencement with the advertisement.

35. It is interesting to note that in paragraph Nos. 24 to 30, the Supreme Court dealt with the judgment of **Jitendra Kumar Singh (supra)** upon which the Petitioners have laid great emphasis and observed that the said judgment has to be read in the context of the statutory provisions and the Government order dated 25.03.1994 and the said observations cannot be applied in a case where Government orders are to the converse effect. In paragraph No.27, the last line of the Government instruction dated 25.03.1994 was quoted which stipulated as under:

“It shall be immaterial that he has availed any facility or relaxation (like relaxation in age-limit) available to reserved category.”

36. It was observed by the Supreme Court while dealing with the said judgment in the case of **Jitendra Kumar Singh (supra)** that the provisions of Section 3 Sub-Section (6) of the Act of 1994 read with the Instructions dated 25.03.1994 clearly meant that the grant of age relaxation to reserved category candidates does not militate against him being treated as a general category candidate if he had obtained more marks than the last general category candidate. Therefore, in the opinion of this Court and taking into account the observations made in the case of **Gaurav Pradhan (Supra)**, the judgment of the Supreme Court in the case of **Jitendra Kumar Singh (supra)** has to be read in the context of the Government order dated 25.03.1994 and the said observations cannot be applied in a case where the Government orders are to the converse effect. The Supreme Court further in the said judgment taking note of that the circular dated 24.06.2008 of the State of Rajasthan observed that the judgment in the case of **Jitendra Kumar Singh**

(supra) cannot be applied. Paragraph No. 30 to 32 of the said judgment is quoted hereinunder:

“30. The ratio of the judgment in Jitendra Kumar Singh has to be read in the context of statutory provisions and the Government Orders dated 25-3-1994 and the said observation cannot be applied in a case where the government orders are to the converse effect. As noted above, the State of Rajasthan has issued Circular dated 24-6-2008 where the following is provided in Para 6.2:

“Circular dated 24-6-2008

6.2. In the State, members of the SC/ST/OBC can compete against non-reserved vacancies and be counted against them, in case they have not taken any concession (like that of age, etc.) payment of examination fee in case of direct recruitment.”

31. It is relevant to note that in the case before us, the Circular dated 24-6-2008 was not under challenge. The State has come up with the Circular dated 11-5-2011 which was issued during process of recruitment. The Division Bench has already recorded a finding that recruitment process had begun prior to the Circular dated 11-5-2011. The State clearly provided that candidates belonging to reserved category irrespective of having availed any of the special concessions secure benchmark prescribed for general/open category candidates, if selected, such a reserved category candidate shall be counted against unreserved/open category candidates.

32. We are of the view that the judgment of this Court in Jitendra Kumar Singh which was based on statutory scheme and the Circular dated 25-3-1994 has to be confined to scheme which was under consideration, statutory scheme and intention of the State Government as indicated from the said scheme cannot be extended to a State where the State circulars are to the contrary especially when there is no challenge before us to the converse scheme as delineated by the Circular dated 24-6-2008.”

37. Further to that in respect to the issue as regards the principles that the

rules of the game cannot be changed pursuant to the selection process having been initiated, the Supreme Court in the case of **Gaurav Pradhan (supra)** had observed at paragraph No.47 which is as hereinunder:

“47. As noticed above, Rule 7(1) of the 1989 Rules expressly provides that: “reservation of vacancies for the Scheduled Castes and the Scheduled Tribes shall be in accordance with the orders of the Government for such reservation in force at the time of recruitment i.e. by direct recruitment and by promotion”.

(emphasis supplied)

The circular of the Government shall be treated to be in force for the purpose of reservation which is in force at the time of recruitment. Recruitment commenced by the advertisement dated 7-10-2010 and 25-10-2010; at that time only the Circular dated 24-6-2008 was in force, hence, the subsequent Circular dated 11-5-2011 cannot be applied in the present recruitment. There cannot be any dispute that the policy of reservation can always be changed by the State Government and the State Government can change the manner and methodology of implementing the reservation and criteria of reservation of the reserved category candidates and general category candidates. It is also relevant to note that both the learned Single Judge, and the Division Bench have not approved the Circular dated 11-5-2011 in toto. Both the courts have held, that apart from age relaxation, if the candidate has taken any other relaxation, the Circular dated 11-5-2011 cannot help him in migrating into general category candidate.”

38. The above propositions as could be seen from the judgments referred hereinabove upon being applied to the facts of the instant case and the Office Memorandum dated 25.04.2018 if allowed to be taken into account, would be permitting the authorities concerned to change the rule of the game pursuant to the selection process having been initiated that too at the

time of advertisement as well as in the advertisement, it was categorically mentioned that the Office Memorandum dated 03.03.2016 and 26.09.2016 would be applicable. At the cost of repetition, this Court reiterates that Clause-6 of the advertisement was never put to challenge by the petitioners and also there was no challenge to the Office Memorandum dated 03.03.2016.

39. Another very important aspect which also needs to be taken note of is the judgment of the Supreme Court in the case of ***Ashok Kumar Sharma and Others Vs. Chander Shekhar and Another*** reported in (1997) 4 SCC 18 wherein at paragraph No.6 it was observed that the proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone. The rationale behind the proposition had also been explained in paragraph No.6 is that, if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview, other similarly placed persons could have also applied. It was observed that just because some of the persons had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Paragraph No.6 of the said judgment being relevant is quoted hereinbelow:

“6. The review petitions came up for final hearing on 3-3-1997. We heard the learned counsel for the review petitioners, for the State of Jammu & Kashmir and for the 33 respondents. So far as the first issue referred to in our Order dated 1-9-1995 is concerned, we are of the respectful opinion that majority judgment (rendered by Dr T.K. Thommen and V. Ramaswami, JJ.) is

*unsustainable in law. The proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their applications ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority judgment. This is also the proposition affirmed in *Rekha Chaturvedi v. University of Rajasthan*. The reasoning in the majority opinion that by allowing the 33 respondents to appear for the interview, the recruiting authority was able to get the best talent available and that such course was in furtherance of public interest is, with respect, an impermissible justification. It is, in our considered opinion, a clear error of law and an error apparent on the face of the record. In our opinion, *R.M. Sahai, J.* (and the Division Bench of the High Court) was right in holding that the 33 respondents could not have been allowed to appear for the interview.”*

40. Applying the said principle, it would be seen that as per the advertisement dated 17.02.2018, the last date for filing up the forms was 19.03.2018. On that date, the petitioners were not eligible as they were over aged and there was no relaxation of the age limit in respect to OBC



candidates. The Office Memorandum came into existence on 25.04.2018, after the last date for submission of the forms and as such, on the ground that the petitioners have filled up the forms though not eligible at that point of time and now if benefits are given on the basis of the Office Memorandum dated 25.04.2018, it would be giving preferential treatment to the petitioners which would violate the mandate of Article 14 and 16 of the Constitution.

41. In view of the above, this Court does not find any merits in the instant writ petitions and accordingly all the three writ petitions stands dismissed.

42. This Court further finds it relevant to observe before parting that the mere participation of the petitioners on the basis of interim orders passed by the Court would not create any right upon the petitioners to be considered for appointment in respect to the 3 (three) posts not declared during the pendency of the instant proceedings.

JUDGE

Comparing Assistant