

HON'BLE MR JUSTICE AMITAVA ROY
JUDGEMENT AND ORDER(ORAL)

The resolution dated 26.2.2008 of the Governing Body of Bongai gaon College, Bongaigaon(hereafter referred to as the 'College') recommending the promotion of the Respondent No.5 to the post of U.D.A. as a scheduled caste candidate and the order dated 18.3.2008 of the Director of Higher Education, Assam granting provisional approval thereto constitute the subject matter of challenge in the instant proceeding.

2. I have heard Mr SK Sarma, learned counsel for the petitioner, Mr OP Bhati, learned counsel for the Respondent Nos 3 and 4 and Mr N Choudhury, learned counsel for the Respondent No.5.

3. The petitioner's pleaded version in short is that she was appointed as LD Assistant in the College by order dated 4.10.1982 and since after joining in the post on 5.10.1982 has been serving as such till date. The Director of Public Instructions, Assam by order dated 8.12.1983 granted provisional approval to her appointment against a sanctioned post. A selection was held in the year 1985 for appointment to a post of LDA in the College and the Selection Committee recommended three candidates including the Respondent No.5 who topped the panel. The said respondent was thereafter appointed by order dated 3.8.1985 and he accordingly joined the service on 8.8.1985. In the seniority list of non teaching staff of the College, the petitioner's name appears at Sl. No.5 followed by that of the respondent No.5 at Sl. No.6. In the cadre of LDA, the inter se seniority position of the petitioner and the Respondent No.5 is 2: 3 one Sri Ramen Ch Nath occupying the first slot.

4. Two posts of UD Assistant in the College fell vacant following the retirement of Sri Jagadish Ch. Pathak and LK Choudhury on 28.2.2006 and 31.7.2007 respectively. Considering the petitioner's position in the select list, she was therefore under the bonafide expectation of being promoted to one of the said posts. However, the Governing Body of the College by the impugned Resolution No.5(A) adopted in its meeting held on 26.2.2008 decided to promote the Respondent No.5 against the vacancy caused due to retirement of Jagadish Ch Pathak. By Resolution No.5(B) taken in the same meeting, the Governing Body recommended the promotion of Ramen Ch Nath, an OBC candidate against the other vacancy. By the impugned order dated 18.3.2008 the Director of Higher Education, Assam has granted provisional approval to the Resolution No.5(A) pertaining to the Respondent No.5. According to the petitioner, the cadre strength of UDA being two, as per the 20 points roster, first vacancy was to be filled up by a ST(P) candidate and in his/her absence, by a candidate belonging to OBC/MOBC. As in the instant case, there is no ST(P) candidate, Ramen Ch Nath, seniormost LDA ought to have been promoted as an OBC candidate to fill up the first vacancy and the second vacancy ought to have been filled by her, a general candidate. The petitioner has asserted that the promotion of the respondent No.5 as a scheduled caste candidate has resulted in 100% reservation which is impermissible in law.

5. The Director of Higher Education, Assam in his counter while affirming that the post of UD Assistant is a promotional post, the feeder post being that of the LD Assistant, has provided the names and particulars of the Lower Division Assistants in the College at the time of effecting the promotion in hand :

Sl No.	Name of the employees	Designation	Date of approval	Case
(1)	Sri Rameh Ch Nath	LDA	01-12-80	OBC
(2)	Smti Gitika Pathak (petitioner)	LDA	06-10-82	OBC
(3)	Sri B.B. Sikdar (Respondent No.5)	LDA	05-08-85	SC
(4)	Sri H.C. Singha	LDA	01-02-88	OBC
(5)	Sri G.C. Rabha	LDA	10-01-90	ST(P)

The answering respondent clarified that while the provision of the Assam Scheduled Caste and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1978 (hereafter also referred to as the Act) and the rules framed thereunder were observable at the initial appointment for candidates belonging to ST(P), ST(H) and OBC/MOBC, the benefit of reservation in the matter of promotion is not extendable to OBC/MOBC candidates. According to the answering respondent, earlier no candidate of ST/SC candidate was promoted to the post of UDA for want of vacancies, but with the availability of two vacancies following the retirement of the earlier incumbents, the College authorities decided to implement the reservation policy for promotion thereto. As no ST(P) candidate was available within the zone of consideration to fill up the first vacancy, one belonging to SC category was considered therefor. The other vacancy was filled up by promoting the seniormost LDA as a general candidate. It was clarified that thereby the ceiling of 50% reservation in the promotional post was not breached.

6. The College in its affidavit maintained that Sri Ramen Ch Nath, the husband of the petitioner belongs to OBC category. The Governing Body in its meeting held on 26.2.2008 did not consider the petitioner for promotion to fill up the first vacancy, as in absence of ST(P) candidate, the same was decided to be filled up by a Scheduled Caste candidate to clear the backlog in terms of the 20 points roster maintained by the College with effect from 1.7.1979. By resolution No.5(B) of the same date, however, Sri Ramen Ch Nath was promoted against the second vacancy as a general candidate. The College reiterated that according to the 20 points roster, the posts were to be filled up to clear the backlog in respect of Scheduled Caste and Scheduled Tribes (Hills) candidates and therefore, the Respondent No.5 who belongs to Scheduled caste was promoted against the vacancy arising on the retirement of Jagadish Ch Pathak. As no ST(H) candidate was available, Sri Ramen Ch Nath was promoted against the other vacancy. The allegation of breach of permissible percentage of reservation has been categorically denied.

7. The Respondent No.5 has alleged that the Governing Body of the College on 1.10.1982 adopted a resolution to appoint candidates belonging to Scheduled castes /Scheduled Tribes in non teaching posts. The Director of Public Instructions, Assam approved the said resolution and required the Principal of the institution to fill up the next vacancies in compliance thereof. Two posts of LDA were sanctioned by the said Directorate and a decision to the said effect was communicated to the College by the letter of the Director of Public Instruction, Assam dated 28.3.1985. As one Bidyabati Brahma then was serving the institution, the Governing Body recommended her appointment against one such posts and decided to advertise the other for Scheduled caste candidate only. Steps were accordingly taken for such advertisement in response whereof the Respondent No.5 submitted his candidature and on the culmination of the process pertaining thereto, he was appointed as a LDA against the said post on 5.8.85. While claiming that at his induction as LDA was against the Scheduled caste quota, the answering respondent has averred that in the 20 points roster maintained by the College, the posts at 3rd and 12th point thereto are earmarked for Scheduled caste candidates. At the time of the impugned promotion, there was a backlog of vacancies earmarked for the Scheduled caste and accordingly he was promoted against the vacancy created by the retirement of Jagadish Ch. Pathak. As the roster for OBC/MOBC is adhered to only for the purpose of direct recruitment, the post of UDA being a promotional post, the petitioner's husband was promoted against the next second vacancy caused due to the retirement of Sri LK Choudhury, as a general category candidate being otherwise the seniormost LDA. The answering respondent has insisted that his promotion being against the backlog vacancy identified for Scheduled caste candidate and the vacancies being the 17th and 18th point in the roster for the combined cadre of the non teaching staff, the allegation of excess reservation is unfounded. The respondent No.5 in the alternative also reasoned that even if the UDA is taken to be an independent cadre, the vacancies in question were at the 3rd and 5th points of the 20 points roster. The 3rd point being even otherwise meant for a Scheduled caste candidate, his promotion against the 3rd vacancy is valid. The answering respondent dismissed the plea

against the reservation for the post of UDA contending that if the same is entertained, having regard to the number of posts to the said cadre, no Scheduled caste/Tribe candidate would ever avail the benefit of reservation having regard to the percentage prescribed.

8. Mr Sarma has emphatically urged that the cadre of UDA being exclusive and independent by itself, having regard to the reservation of 7% thereof earmarked for Scheduled caste candidates, no preferential promotion on the basis thereof is permissible. As the UDA constitutes of two posts, 7% whereof is 1.4 and thus no promotion of a Scheduled caste candidate on the basis of reservation is feasible. According to the learned counsel therefore, the impugned promotion of the Respondent No.5 is invalid. The Respondent No.5 being admittedly junior to the petitioner, he could not have superseded the petitioner on the plea of reservation, he urged. Mr Sarma seriously contended that in case there is conflict between the percentage and the roster point, the former is to prevail and as in the instant case, having regard to the number of posts in the UDA cadre, the respondent No.5 could not have been accommodated against the same on the strength of reservation prescribed by law, the impugned resolution and the provisional approval issued are liable to be quashed. Mr Sarma placed reliance on the following decisions of the Apex Court as well as of this Court.

- (1) (2005) 2 SCC 10, State of U.P. and Anr., Appellants Vs. Pawan Kumar Tiwari & Ors, Respondents ;
- (2) (2006) 6 SCC, 430, R.S. Garg Vs. State of U.P.;
- (3) 2007 (4) GLT 587, Khanindra Nath Choudhury vs. State of Assam.

9. Mr Bhati has pleaded that the vacancy against which the Respondent No.5 had been promoted being earmarked for Scheduled caste candidate, his promotion thereto is unassailable. The decision of the Apex Court in RK Sabharwal and others, vs. State of Punjab, (1995) 2 SCC 745 was pressed into service.

10. Mr Choudhury while endorsing the arguments advanced on behalf of the College has urged that in terms of the roster designed in the combined cadre of the non teaching staff of the institution, points therein at 3 and 12 are identified for Scheduled caste candidates. The total strength of the cadre being 16, computed on the basis of the prescribed 7% determined for the Scheduled caste candidates, even otherwise, one post is clearly available for the said category. The College having operated the said roster for the purpose of direct recruitment and promotion, the impugned recommendation to accommodate the respondent No.5 against the backlog vacancy of Scheduled caste is legal and in conformity with the legal precepts appertaining thereto. The learned counsel further argued that even if the UDA is taken to be a separate cadre, the vacancy against which the Respondent No.5 had been promoted being 3rd in order therein, meant for a Scheduled caste candidate, there being no reservation for OBC/MOBC in the matter of promotion in terms of the Office Memorandum No.TAD/BC/283/05 dated 20.12.2005, the impugned promotion cannot be faulted with.

11. The competing pleadings and the arguments have received the thoughtful consideration of this Court. A brief insight into the factual backdrop bearing on the reservation policy for induction in the non teaching cadre of the college would provide a befitting preface. The Governing Body of the College by Resolution No.3 dated 1.10.1982 decided to extend the preference of reservation to Scheduled caste and Scheduled Tribe candidates in appointment to the vacancies in its office. This decision found support of the Deputy Director of Public Instructions who not only approved the same but also instructed the institutional authorities to ensure that such vacancies are filled in compliance thereof. By order dated 28.3.85 of the same authority, amongst others two posts of LDA were created with effect from 1.1.85 in alignment with the letter and spirit of the earlier decision. The Governing Body of the college on 10.4.85 resolved to seek the approval of the Director of Higher Education, Assam to the appointment of Ms Bidyabati Brahma, a serving LDA against one of the two such posts. The other post was decided to be advertised exclusively for Scheduled caste candidate. After the selection process that was launched in terms of the above resolution the Respondent No.5 was appointed on selection and the Director of Higher Edu

cation, Assam by his order dated 7.5.1988 granted the provisional approval there to. The respondent No.5 joined the post of LDA on 5.8.85. There is no demurral that the petitioner is senior to the respondent No.5 in service as LDA and on the date of the impugned promotion, he was placed at Sl. No.3 as LDA being preceded by the petitioner and Sri Ramen Ch Nath in ascending order. The impugned resolution dated 26.2.08 discloses the recommendation of the Governing Body to appoint the respondent No.5 as a Scheduled caste candidate in compliance of the roster against the vacant post of UDA caused by superannuation of Jagadish Ch Pathak on 28.2.2006. Sri Ramen Ch Nath was promoted against the other vacancy. The 20 points roster maintained by the college with effect from 1.7.79 is patterned for the non teaching cadre as a whole. It conceives of 16 slots, the 3rd and 12th being identified for the Scheduled caste candidates. As on the date of the occurrence of the vacancies in the instant case, the 3rd vacancy in the post of UDA and identified to be reserved for Scheduled caste candidate had been held by Jagadish Ch Pathak. The roster reveals that the appointment of Jagadish Ch Pathak was not in compliance thereof and the vacancy on his superannuation was ascertained to be backlog meant for Scheduled caste candidate. The 10th post in the roster relating to the post of UDA was held by Late LK Choudhury who retired on 31.7.07. The roster discloses that his appointment was in observance thereof and the resultant vacancy was determined to be backlog for ST(H). As such the roster, the authenticity as well as acceptability whereof is not under challenge, clearly indicates that the vacancies created by the retirement of Sri Jagadish Ch Pathak and LK Choudhury had been identified to be backlog for Scheduled caste and Scheduled Tribe(H) candidates respectively. The positions of the roster reveals that the posts in various categories constituting the non teaching cadre have been assimilated therein on their creation from time to time, the present strength whereof is admittedly 16. This roster is thus being operated on the basis of the points referred to therein, computed on 20 points paradigm. The existing strength of the non teaching staff of the college being 16, 7 % thereof arithmetically is 1.42 which is available for the Scheduled caste candidates. In that view of the matter, one vacancy is clearly available for such reserved category candidate. This percentage if now applicable, post wise, one slot for the Scheduled caste candidates is reserved in the cadre of UDA as well.

Even if the cadre of UDA is construed to be exclusive and independent of the combined configuration of the non technical staff, co-incidentally, the vacancy created by the retirement of Jagadish Ch Pathak is the 3rd in the post of UDA which matches with point No.3 in the roster reserved for a Scheduled caste candidate. There being two posts of UDA, promotion to one thereof of a Scheduled caste candidate having regard to the existing backlog for that category cannot be impeached to be repugnant to the provision of Act and the constitutional imperatives.

12. The Apex Court in RK Sabharwal (Supra) underlined that a percentage of reservation having been prescribed corresponding to which reserved points in a roster are indicated, the same are to be filled up from amongst the members of the reserved category and the candidates belonging to the general category are not entitled to be considered therefor. Their Lordships enounced that a roster is to be implemented in the form of 'running account' from year to year, the underlying objective being to ensure that the Scheduled Caste/Scheduled Tribe and Backward Classes receive their percentage of reserved posts. It was ruled that at the 'running account' is to operate till the quota provided is reached and once the prescribed percentage of post is filled up, the vacancies occurring thereafter would be awarded to the category to which the posts belonged in the roster. It was clarified that the cadre strength is to be measured by the number of posts comprising the cadre and the percentage of reservation has to be worked out in relation thereto.

13. The rendering in RS Garg (Supra) endorses the view that commends to this Court for acceptance.

14. The decision in State of UP and Anr vs. Pawan Kumar Tiwari (Supra) reiterates the logic and justifiability of the rule of rounding off a fraction of .5 or more to the next integer. Their Lordships however, indicated that any inf

raction of the ceiling of 50% in reservation if occasioned thereby would however be unconstitutional.

15. That in case of a conflict between the percentage of reservation and the roster, the former should prevail was propounded by the Apex Court in RS Garg (Supra) .

16. In the facts and circumstances of the present case, the pronouncement in the above two decisions do not advance the case of the petitioner. Apparently in the face of the Office Memorandum dated 20.12.2005 (Annexure-M to the affidavit of the Respondent No.5) as well as the provisions of the Act , no reservation for OBC/MOBC candidates has been prescribed for promotion in service. The promotion of Sri Ramen Ch Nath by no means can be construed to be of a reserved category candidate . Having regard to the determination made hereinabove, in the singular facts in hand, as well as the roster employed by the institution , I am of the considered opinion that the petitioner's challenge lacks in substance and does not deserve to be sustained . Ordered accordingly.

17. In the result, the petition is dismissed. No costs.