

## Nandita Das Vs State of Assam and Others

**Court:** Gauhati High Court

**Date of Decision:** Dec. 22, 2006

**Citation:** (2007) 2 GLR 434 : (2006) GLT 313 Supp

**Hon'ble Judges:** B.K. Sharma, J

**Bench:** Single Bench

### Judgement

B.K. Sharma, J.

The matter relates to selection and appointment of lecturer of English in a degree college. The petitioner has challenged

the selection of respondent No. 6. The facts as narrated in the writ petition are as follows:

2. The petitioner is an MA in English, the degree which she obtained in 2001 from Tezpur University securing 56.2% marks. She had Major in

English in her BA course, which she cleared obtaining 2nd Class. She had secured 2nd Division both in HSLC and HSSLC examinations. She is

also a B.Ed. The petitioner belongs to Hira Community, which is recognized as SC.

3. In response to the advertisement published in the newspaper on 18th and 20th August, 2001 for the post of lecturer in English in Dudhnoi

college, she responded to the same by offering her candidature. The post was reserved for SC candidates as per 20 point roster. Altogether three

candidates were there, whom the Selection Board, on 30.9.2001, interviewed. According to the petitioner she had secured first position in the

selection. However, the Governing Body of the college did not act upon the recommendation and the selection was abandoned. The

representations made by the petitioner went in vain.

4. When the matter rested thus, the petitioner was appointed as a tutor in the department of English of the same college on contract basis on a

fixed honorarium of Rs. 1,000 with effect from 19.7.2004, which continued upto 18.10.2004. She was again appointed as such for the period

from 28.10.2004 to 31.12.2004. At the time of filing of the writ petition, she was continuing as such.

5. The petitioner was surprised to come across the advertisement published in the issue of Assam Tribune dated 4.8.2003 inviting applications for

the said post. This time the applications were invited from candidates belonging to both SC/ST. According to the petitioner, this was illegal as, as

per the 20 point roster, there is no vacancy for ST candidates. Be that as it may, the petitioner offered her candidature in response to the

advertisement.

6. The interview for the post was conducted by the Selection Committee on 28.9.2004. This time also, altogether three candidates appeared

including the respondent No. 6, who belongs to ST. Similarly the other candidate also belongs to ST, while the petitioner belongs to SC.

According to the petitioner the respondent No. 6 was not even eligible to apply for the post as she did not have UGC norms as required, in terms

of which the candidate must secured 55% marks in Post Graduation. According to the petitioner, while she alongwith the other candidate was

eligible having secured 56.2 and 55.1% of marks respectively in their post graduation, the respondent No. 6 was not eligible, she having secured

only 50% marks.

7. After the selection conducted by the Selection Committee, the Governing Body of the college by its resolution adopted in its meeting held on

7.11.2004, recommended the respondent No. 6 for appointment. Thereafter, the respondent No. 5, i.e., the Principal of the College by his letter

dated 17.11.2004 requested the respondent No. 2, i.e., the Director of Higher Education, Assam to accord necessary approval towards

appointment of the respondent No. 6.

8. According to the petitioner, she occupied first position in the merit list and the respondent No. 6 occupied second position. The remaining

candidate was placed at serial No. 3. This being the position, the Governing Body could not have recommended the respondent No. 6 for

appointment, the petitioner asserts. In such circumstances, the father of the petitioner made a representation dated 9.11.2004 to the respondent

No. 2, who in turn endorsed the same to the respondent No. 5. In his letter dated 1.12.2004 issued in this regard to the Principal of the College,

he conveyed the decision that the proposal for appointment of respondent No. 6 cannot be approved as she does not possess the UGC norms.

Accordingly, the proposal was returned, however, with the liberty to the Governing Body to take action as per Rule 19(iv) of the Assam Non-

Government College Management Rules, 2001 (as amended).

9. After the aforesaid development, the Principal of the College by his letter dated 9.12.2004 submitted fresh proposal for appointment of the

respondent No. 6 as per the resolution adopted by the Governing Body of the College in its meeting held on 7.11.2004. In the letter, it was

indicated that the respondent No. 6 is a local ST candidate duly selected by the Selection Board for appointment against the sanctioned post lying

vacant on superannuation of the earlier incumbent. Alongwith the letter the related documents including the comparative statement of the candidates

were also forwarded. In the resolution adopted by the Governing Body of the College, the respondent No. 6 was recommended for appointment.

It was at that stage, the petitioner filed the instant writ petition and this court while entertaining the same by order dated 23.12.2004 debarred the

respondent No. 2 from taking any steps towards approval of the fresh proposal.

10. The petitioner has challenged the action on the part of the college authorities towards recommending the respondent No. 6 on the following

grounds.

(i) The respondent No. 6 is not qualified to hold the post of lecturer, she having not conformed to the requirement of UGC norms of 55% marks in

her MA degree.

(ii) The post could not have been reserved for both SC and ST candidates, more particularly when as per the reservation roster, there is no

vacancy for ST candidates.

(iii) The respondents ought to have appointed the petitioner as per the first advertisement and the selection thereof, in which the petitioner was

selected and placed at merit position No. 1.

(iv) Even if, the second advertisement and selection is acted upon, the petitioner having secured the first position in the selection, the Governing

Body of the College could not have recommended the respondent No. 6, who secured only second position.

11. The respondents in their counter affidavits have denied the contentions raised in the writ petition. The Governing Body of the College, its

President and Principal i.e. the respondent Nos. 3, 4 and 5 have filed the joint affidavit and the respondent No. 6 has filed her individual affidavit.

12. In the affidavits, it has been stated that the second advertisement was issued after cancellation of the first advertisement and the selection

thereof. As regards the plea of the respondent No. 6 lacking in requisite qualification, it has been stated that for SC/ST candidate, the minimum

marks in post graduation being 50%, the respondent No. 6 being an ST candidate conforms to the said requirement. It has been stated that while

the petitioner obtained her MA degree from Tezpur University under semi star system, the respondent No. 6 obtained her MA degree from

Gauhati University securing 50.2 % marks. It has also been stated that as against the second divisions obtained by the petitioner in her HSLC and

HSSLC examinations, the respondent No. 6 secured first division in both the examinations. As regards the selection, it has been stated that since

the petitioner had secured second class in her MA examination, as per the standing circular regarding awarding of marks, she was entitled to only 5

marks, but she was wrongly given 10 marks on that count. After rectification of the mistake, it was found that as against the total 49 marks secured

by the petitioner, the respondent No. 6 secured 51 marks in the selection and accordingly she was recommended for appointment.

13. As regards the fresh proposal sent by the Governing Body of the College, it has been stated that the Governing Body after rectification of

mistake, etc., has sent the same alongwith all related documents to the respondent No. 2. In this connection, they have referred to the Governing

Body's letter dated 12.11.2005, by which the respondent No. 2 was intimated about the mistake committed in awarding 10 marks to the

petitioner treating her to be in a first class in MA. Since she is a second class like that of the respondent No. 6 in MA examination, she was also

entitled to get only 5 marks as against 10 marks awarded to her. Taking into account this correction made, it is the respondent No. 6, who stood

first in the selection.

14. The respondent No. 6 in her affidavit has also highlighted the above aspects of the matter. As regards the first advertisement, she has stated

that the first advertisement was issued by the then Principal in-charge of the College without taking into confidence the Governing Body of the

College and accordingly, same had to be cancelled towards issuance of the second advertisement. She has also stated about the mistake

committed in awarding 10 marks to the petitioner reckoning her to be a first class in MA although, intact she is a second class holder and

consequently was entitled to only 5 marks on that count. Referring to Annexure-A guidelines dated 20.2.2003 issued by the Government of Assam

in the Education (Higher) Department, the respondent No. 6 has stated that as per the said guideline she conforms to the requirement of UGC

norms and accordingly, there was nothing wrong in selecting her. According to her she being better qualified and being a better candidate has been

recommended for appointment.

15. I have heard Mr. HRA Choudhury, learned senior counsel assisted by Mr. F.U. Borbhuiya, learned Counsel for the petitioner as well as Mr.

J.I. Borbhuiya, learned Counsel representing the respondent No. 6. I have also heard Mr. B. Sinha, learned Counsel appearing on behalf of the

respondent Nos. 3,4 and 5. Mr. T. Islam, learned Standing Counsel, Education Department represented the official respondents. Mr. Sinha,

learned Counsel representing the college has also produced the relevant records. Learned Counsel for the parties made their submissions on the

basis of the pleadings as well as the records.

16. I have given my anxious consideration to the submissions made by the learned Counsel for the parties. I have also gone through the materials

on record. The first issue raised is as to whether the respondent No. 6 conforms to the requirement of UGC norms, which is confined only to the

argument that she has not secured 55% marks in her MA examination. However, this issue will have to be considered in the context that the post is

a reserved one for the candidates belong to the reserved category and accordingly they are entitled to relaxation in respect of fixed norms of 55%

marks. As per relaxation, it is 50% for SC/ST candidates. While it is the case of the petitioner that this 50% cannot be in the form of rounding off,

it is the case of the respondent No. 6 that such rounding off is permissible.

17. The respondent No. 6 appeared in the MA final examination, 2002 from Gauhati University held in March 2003 and she secured 399 marks

out of 800 and thus was short by one 1 mark to that magic figure of 400 to secure 50% marks. However, she appeared in the betterment

examination as was allowed by the University under a particular scheme and this time could secure total marks of 402 out of 800 and thus secured

more than 50% marks. This betterment examination was necessarily in reference and relation to her earlier MA examination and the 3 more marks

she secured in the betterment examination was added to her earlier 399 marks raising the same to 402 out of 800. Thus, the two positions which

emerged were that at the time of offering the candidature, the respondent No. 6 was 1 mark short of the required 50%, but at the time of

appearing in the interview she had the required 50% marks, since by that time she could secure 3 more marks by appearing in the betterment

examination.

18. The respondent No. 6 did not appear in any independent examination. She only appeared in the betterment examination, which was in

continuation of her earlier examination. This is precisely the reason as to why the additional marks she could secure in the betterment examination

was added to her original marks. It is the original total mark, which was 399 which got increased to 402 out of 800 marks. If this total 402 marks

is taken into account then the respondent No. 6 was eligible to appear in the interview held on 28.9.2004. The betterment examination was held in

March 2004, well ahead of the interview held on 28.9.2004. Even if, shortage of 1 mark to reach the magic figure 400 out of 800 so as to

constitute 50% in aggregate is held to have rendered the respondent No. 6 ineligible, such ineligibility got removed once the respondent No. 6

secured the desired marks in her betterment examination, which was in relation and reference to the earlier examination. Thus, at the time of

appearing in the interview, she had to her credit more than 50% marks in her MA examination. In such a situation, I am of the considered opinion

that the respondent No. 6, who is an ST candidate cannot be said to have lacked in her eligibility in appearing in the selection.

19. The second issue raised is that the advertisement could not have been reserving the post both for SC and ST. According to the petitioner,

there is no vacancy for ST as per the reservation roster. However, nothing could be pointed out as to why there cannot be any reservation for ST.

Mr. Sinha, learned Counsel representing the college authority during the course of hearing submitted that the post was all along held by a general

category candidate and when the same had fallen vacant the Governing Body decided to fill up the post through ST candidate only. In this

connection, the reservation roster under the Assam Scheduled Cast and Scheduled Tribes (Reservation of Vacancies in Services and Post) Act,

1978 and the schedule thereto may be referred to. The schedule indicates reservation roster as per which the first vacancy goes to ST (Plains). If

no reservation was provided all throughout and the first vacancy, as per the roster being meant for ST (Plains), the post in question, if is in respect

of the first vacancy, then necessarily the same will have to be filled up by an ST (P) candidate. There is no dispute that the respondent No. 6 is ST

(Plains) candidate.

20. The records produced by Mr. Sinha, learned Counsel for the college authority, have revealed the following.

The Governing Body of the College in its meeting held on 15.12.2002 adopted resolution Nos. 9 and 10 proposing to fill up the post of lecturer in

English by canceling the earlier selection process. Thereafter, another resolution was adopted in the meeting held on 18.1.2003 and by resolution 9

adopted in the meeting, the decision was taken to fill up the post through ST candidate only. However, in the subsequent meeting held on

19.7.2003 in deviation from the earlier resolution to fill up the post through ST candidate, it was resolved to advertise the post for both SC/ST

candidate. Although, the advertisement was issued making the post open for SC/ST candidates, the post necessarily will have to be filled up as per

the reservation roster, which by operation of the roster is meant for ST(P) candidate. Thus, although, as per the advertisement both SC and ST

candidates were eligible to apply, the post will have to be filled up as per the reservation roster as well as considering the merit of the candidates.

21. In the instant case, if the vacancy of the post is the first in the point of time, then as per the reservation roster the same will go to ST(P)

candidate. Even otherwise also, the respondent No. 6 has secured 51 marks as against 49 marks secured by the petitioner and thus necessarily,

she will have to be preferred over the petitioner. I have perused the records produced by the learned Counsel for the college authority. As per the

selection guidelines, a candidate securing first class in MA examination is to get 10 marks. In the instant case, neither the petitioner nor the

respondent No. 6 has secured first class and thus as per the norms, both of them are entitled to only 5 marks. However, the records have revealed

that the petitioner was awarded 10 marks showing her to be a first class in MA. Learned Counsel for the petitioner fairly admitted that the

petitioner being a second class in MA was not entitled to get 10 marks. It was this mistake on the strength on which she had scored a march over

the respondent No. 6 by securing 54 marks as against 51 marks secured by the respondent No. 6. Once this mistake is corrected, it is the

respondent No. 6 who would score a march over the petitioner, she having secured 51 marks against 49 marks secured by the petitioner.

22. As regards the selection procedure, the petitioner has not made any challenge to the same. Even otherwise also, it is not the business of the

Writ Court to sit on appeal over the selection conducted by a duly constituted Selection Board. After the proposal of the Governing Body was

returned back by the respondent No. 2, the Governing Body adopted the fresh resolution rectifying the aforesaid mistake and sent a fresh

proposal, which is now pending with the respondent No. 2 for a decision. The Principal of the College was authorized to do the needful in this

regard by the Governing Body of the College vide its resolution No. 4 adopted in its meeting held on 11.11.2005. The respondent No. 2 also

while remanding back the matter to the Governing Body granted the liberty to take action as per Rule 19(iv) of the Assam Non-Government

College Management Rules, 2001. Rule 19(iv) empowers the Governing Body of the College to appoint persons in connection with the affairs of

the college against the post or posts sanctioned by the Government with scrupulous compliance of the reservation policy under 20 point roster of

the State Government.

23. As regards the plea of the petitioner that she ought to have been appointed in terms of the first advertisement and selection, the plea has spent

its force, she having appeared in the second selection taking a chance for favourable consideration. In this connection the following observation of

the Apex Court in *Suneeta Aggarwal Vs. State of Haryana and Others*, may be referred to, to answer the plea:

We have heard learned Counsel for the parties. Narration of aforesaid facts would show that the appellant had disentitled herself to seek relief in

the writ petition filed by her before the High Court. The appellant did not challenge the order of the Vice Chancellor declining to accord approval

to her selection and, on the contrary, she applied afresh to the said post in response to re-advertisement of the post without any kind of protest.

Not only did she apply for the post, but also she appeared before the Selection Committee constituted consequent upon re-advertisement of the

post and that too without any kind of protest, and on the same day she filed a writ petition against the order of the Vice Chancellor declining to

accord his approval and obtained an ad-interim order. In the writ petition she also did not disclose that she has applied for the post consequent

upon second advertisement. The appellant having appeared before the Selection Committee without any protest and having taken a chance, we are

of the view that the appellant is estopped by her conduct from challenging the earlier order of the Vice Chancellor. The High Court was justified

refusing to accord any discretionary relief in favour of the appellant. The writ petition was rightly dismissed.

24. The Director of Higher Education, Assam i.e. the respondent No. 2 will have to take a decision in the matter consistently with the observations

made above and also taking into account all other relevant factors including the UGC norms and the State Government guidelines. By such

consideration of the matter, the respondent No. 2 shall now take the final decision in the matter. This shall be done as expeditiously as possible,

preferably within 28th February, 2007.

25. The writ petition is answered in the above manner, leaving the parties to bear their own costs.