

(1997) 04 GAU CK 0017

In the Gauhati High Court

Case No : Writ Appeal No. 624 of 1996 and Civil Rule No's. 6141 of 1996 and 1026 of 1997

Balen Baishya and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 10-04-1997

Acts Referred:

Assam Public Health Engineering Service Rules, 1996 — Rule 11, 11(3), 13, 13(2), 13(5)
Constitution of India, 1950 — Article 14, 15, 16, 16(4), 309

Citation : (1998) 1 GLT 165

Hon'ble Judges : V.D. Gyani, Acting C.J.; B.N. Singh Neelam, J

Bench : Division Bench

Advocate : R. Gogoi, K.N. Choudhury and P. Bhowmik, in W.A. No. 624/96, R.K. Borah and A.K. Phukan, in C.R. No. 1026/97 and V.M. Thomas, in C.R. No. 6141/96, for the Appellant; B.P. Bora, Sr. G.A., for the Respondent

Judgement

V.D. Gyani, A.C.J.

1. This Writ Appeal has been presented against the order dated 19.12.96 passed by a learned Single Judge of this Court in Civil Rule No. 6273/96, whereby, while issuing rule, the learned Single Judge refused to grant the interim relief as prayed for by the writ Petitioner Appellant, seeking to restrain the Respondents from proceeding with the selection of candidates for the post of Chief Engineer, Public Health Engineering Department scheduled to be held on 26.12.96 pending disposal of the petition. Alternatively, to consider the case of Respondents No. 1 to 4 for such promotion, by adopting sealed cover procedure. Hence, this appeal.

2. When the appeal was listed for admission on 20.12.96, a Division Bench of this Court ordered that no final orders for promotion to the post of Chief Engineer, shall be passed without the leave of the Court.

3. As the hearing for the appeal proceeded, almost day-to-day, barring an interruption for reconstitution of the Bench (as it turned out that one of Hon'ble

Judge happened to be a counsel for one of the aspirants to the post) it came to notice that apart from the writ Petitioner - Appellants, other claimants to the post of Chief Engineer had also filed similar writ petitions. With a view to avoid any conflict of orders such petitions were also directed to be listed along with this appeal. They were accordingly listed. These petitions are - Ranjit Kalita v. State of Assam and Ors. Civil Rule No. 6141/96 and Kamal Chandra Borthakur v. State of Assam and Ors. Civil Rule No. 1026/97. The Respondent State came out with its case by way of a petition for vacating the order dated 20.12.96 as passed in this Appeal. It was registered as Misc Case No. 38/97. Shri P.K. Duarah, who has been holding the charge of the post of Chief Engineer w.e.f. 22.8.96 (as claimed by him) filed a petition (registered as Misc. Case No. 39/97) complaining that he had not been made a party either in the writ petition or the appeal. It is his case that a meeting of the Selection Committee held on 19.2.97 he has been found eligible for promotion and it was his understanding that his name has been approved by the appointing authority. It is his case that but for the order dated 20.12.96 as passed by this Court, he would have been regularly promoted. He, therefore, prayed not only for being impleaded as a party, but also vacating the order dated 20.12.96 for which a separate petition has been filed by him registered as Misc. Case No. 40/97.

4. The other two writ petitions C.R. No. 6141/96 is by Shri Ranjit Kalita praying for proper fixation of his seniority and consideration for promotion to the post of Chief Engineer.

5. In Civil Rule No. 1026/97 Petitioner Kamal Chandra Borthakur has not only challenged the selection and purported approval by the appointing authority as regards Shri P.K. Duarah, but also the process of selection as a whole as adopted and undertaken by the Selection Board resulting in the selection of Shri Duarah as Chief Engineer at the Board's meeting held on 19.2.97.

6. Although the claimant aspirants are many, the post and issue is one and only one. Each of the claimants has placed his case in some form or other either as original writ petition or Misc. Case. Even the Respondent State also put forth its stand in the petition praying for vacating or modifying the interim order dated 20.12.96. As any such exercise would have been equally time consuming, learned Counsel appearing for the parties, agreed for disposal of the matter as a whole on merits.

7. Before we come to the rival contentions and arguments, as advanced to the bar by learned Counsel for the parties, few basic facts need be noted.

8. The selection for promotion to the post of Chief Engineer is to be made from the cadre of Addl. Chief Engineer. The seniority list as per notification dated 17.9.96 Annexure-C is as follows:

ORDERS BY THE GOVERNOR OF ASSAM NOTIFICATION DATED HENGHERABARI,
THE

17TH SEPTEMBER, 1996 No. PHED.143/96/Pt-I/46: The Governor of Assam is pleased to notify provisionally the inter-se-seniority of Addl. Chief Engineer (PHE) in the orders as shown below. Objection if any should be submitted to the undersigned within one month time from the date of issue of the notification.

S. No. Name of the officers 1. Shri P.K. Duarah, 2. Shri K.C. Barthakur, 3. Shri S. R. Saikia 4. Shri B.P. Sarma, 5. Shri R. Kalita, 6. Shri P.K. Chakravarry, 7. Shri H. Sarkar 8. Shri B. Baishya. Sd/- S.C.Bezborooa, Officer-on-Special Duty Public Health Engineering Deptt.

9. It was followed by another notification dated 15.11.96 (Annexure-K) as follows:

Dated Hengrabari the 15th November 1996 No. PHED. 143/96/Pt-I/114: The Governor of Assam is pleased to approve and fix finally the inter-se seniority of Addl. Chief Engineer (PHE) fixed provisionally vide Notification No. PHED.143/96/Pt-I/46 dated 17.9.96 in the orders as shown below:

S. No. Name of officers 1. Shri P.K. Duarah, 2. Shri K.C. Barthakur, 3. Shri S. R. Saikia 4. Shri B.P. Sarma, 5. Shri R. Kalita, 6. Shri P.K. Chakravarty, 7. Shri H. Sarkar (S/C) 8. Shri B. Baishya. (S/T)

Sd/- S.C.Bezborooa, Officer-on-Special Duty Public Health Engineering Deptt.

10. The criteria for selection, under the Assam Public Health Engineering Service Rules, 1996, as framed under the proviso to Article 309 of the Constitution, and published in the Assam Gazette dated 28.1.97, is merit with due regard to seniority and there is no dispute about the principle that in case of only one post, the question of reservation would not arise.

11. Now coming to the Appellant's case, who admittedly belongs to Scheduled Caste, he earned his promotion to the post of Addl. Chief Engineer on 8.8.91 whereas the Respondents Nos. 5, 6, 7 and 8 were promoted subsequent to that of the Appellant. Here, comes the Office Memorandum dated 12.6.96 (Annexure-I) issued by the State Government based on the judgment of the Supreme Court in Union of India and others etc. Vs. Virpal Singh Chauhan etc., The main thrust of Shri Gogoi's argument is that the ratio of the aforesaid judgment being prospective with effect from 10.2.95, it was not applicable to Appellant's case, who has been wrongly excluded from the zone of consideration, by placing him at Serial No. 8 in the seniority list Annexures-C and K. His inter-se-seniority was earlier fixed at Serial No. 4, he being admittedly senior to Respondents No. 5 to 8, the decision in Virpal Singh's case could not have been legally applied to his case. Which could only be prospectively applied with effect from 10.2.95. The learned Single Judge failed to appreciate this legal position. Indra Sawhney's case (1992) Suppl (3) SCC 217, was also referred to and it was contended that the Respondents Nos. 1, 2 and 3 malafide altered Appellant's seniority from 4 to 8 to keep him away from the zone of consideration. Relying on a letter dated 10.7.96 Annexure-N, addressed by the Commissioner and Secretary, Public

Health Engineering Department, Govt. of Assam and its communication in the context of Appellant's representation, it was urged that the post of chief Engineer should have been reserved for scheduled caste candidate. In any event, in face of two posts of Chief Engineer as reflected in Annexure-N, the Appellant was within the zone of consideration in view of Rule 13(2) of the Rules which provides the ratio of 1:4 keeping in view of the number of vacancies.

12. Mr. Bhattacharjee, learned Counsel appearing for P.K. Duarah, officiating Chief Engineer, Intervener argued that the seniority list of Addl. Chief Engineers as published on 15th November, 1996, Annexure-K is final and no legitimate grievance could be made against it. Apart from the application for vacating stay order dated 20th December, 1996, the Respondent State has also filed its affidavit-in-opposition in Civil Rule No. 6141/96 (Ranjit Kalita v. State of Assam and Ors.). It is sworn by Shri Sarat Chandra Bezbaruah, an Officer-on-Special Duty in the Public Health Engineering Department of the Govt. of Assam, who has also moved the petition registered as M.C. 38/97.

13. So far as writ Petitioner Ranjit Kalita's claim for being placed at Sl. No. 1 of the Seniority List of Addl. Chief Engineers, as contained in paragraphs 24, 25 and 26 of the Writ Petitioner, the Respondent State has come out with the following reply, as contained in paragraph 15 of the affidavit-in-opposition.

That with regard to the statements made in paragraphs 24, 25, 26, 27 and 28 of the writ petition, the deponent begs to state that the Petitioner was appointed as direct recruitment as Public Health Executive Engineer on recommendation of A.P.S.C. vide Notification No. HLB.419/72/365-A dated 12.8.75 whereas the Respondents No. 2 to 5 who were appointed as Executive Engineer under regulation 3 (f) has been regularised vide Notification No. HLB.419/72/365, dtd. 12.8.75. As such, he has no right to claim seniority over the Respondents.

14. Mr. Phukan, learned Counsel for the writ Petitioner Shri Ranjit Kalita pointed out that while the writ Petitioner was appointed as Assistant Public Health Engineer under Regulation 3(f) on 8.11.66 and regularised on 7.8.68, vide Annexure-21, the Respondent No. 2 Shri P.K. Duarah was appointed as Assistant Engineer on 26.4.64 and was regularised as such on 31.3.69 subsequent to the Petitioner Ranjit Kalita. It was contended by the learned Counsel that if the seniority is fixed with reference to the date of appointment as Assistant Engineer, the Respondent No. 2, Shri P.K. Duarah, presently officiating as Chief Engineer, would rank below Ranjit Kalita, who was regularised on 7.8.68 while Duarah was regularised on 31.3.69. Alternatively he submitted that if the seniority is to be determined with reference to the appointment as Executive Engineer, even then the writ Petitioner Ranjit Kalita would rank above the Respondents No. 2 to 5, since the Petitioner was promoted as Executive Engineer under Regulation 4(d) on 27.6.75 and regularised as such on 12.8.75, whereas the Respondents No. 2 to 5 were appointed under Regulation 3(f) and subsequently regularised on 12.8.75. The seniority of promotees under Regulation 4(d) is to be calculated from the date of such promotion while the seniority of appointees under

Regulation 3 (f) is to be regained from the date of their regularisation. In any event learned Counsel urged that the Petitioner Ranjit Kalita should have been placed above the Respondent No. 4 Shri S.R. Saikia who joined Public Health Engineering Department for the first time as Executive Engineer and later regularised on 12.8.75. He therefore contended that the writ Petitioner Ranjit Kalita has been given his due place in the seniority list at Sl. No. 5, in Annexure-K, he falls within the zone of consideration but his case was admittedly not considered by the Selection Board as is evident from the minutes of the meeting, Annexure-5.

15. Mr. Roy, learned Counsel for the Petitioner, in Civil Rule No. 1026/97 (Kamal Chandra Barthakur v. State of Assam and Ors.) (who is about to retire within three months) has, inter alia, challenged the process of selection as a whole on the ground that it contravenes Rule 13(5)(6) of the Rules, inasmuch as, the selection and recommendation of Respondent No. 4, that is, the officiating Chief Engineer, Shri P.K. Duarah, is de-horse the record, no comparative assessment on merit and suitability vis-a-vis other eligible candidates particularly the writ Petitioner (K. C. Barthakur) had been made. Now Rule 13 of the Rules provides for general procedure for promotion, which reads as follows,:

13. General procedure for promotion:

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

(2) The Appointing Authority shall then furnish the Selection Board, the following documents and information with regard to as many officers in order of seniority as four times the number of vacancies as assessed under Sub-rule (1).

(a) information about the number of vacancies;

(b) list of officers in order of seniority, eligible for promotion (separate list of promotion is to be considered);

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

(d) details about reservation in case of promotion to the posts in the service and about carry forward of vacancies as provided under Sub-rule (3) Rule 11; and

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

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

(4) The selection for promotion shall be made on the basis of merit with due regard to seniority in all cadres of posts.

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

(6) The Appointing Authority shall consider the select list prepared by the Board along with the Character rolls and personal files of the employees and approve the list unless it considers any change necessary. If the Appointing Authority considers it necessary to make any change in the list received from the Board, it shall refer the same with reasons to the Board for comments and after taking into account the comments, if any of the Board, may approve the list finally with modifications, if any, as may, in its opinion, be just and proper;

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

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

(8) The select list shall remain valid for 12 calendar months from the date of approval by the Commission in case of Assistant Engineer and 12 calendar months from the date of approval by the Appointing Authority in other cases.

(9) The promotion shall be in accordance with the lists finally approved by the Appointing Authority, or by the Commissioner, as the case may be.

16. A mere reading of Sub-rule (5) of Rule 13 would go to show that it enjoins the Selection Board to examine the documents and information furnished by the appointing authority. It further enjoins the Selection Board to select and recommend to the authority a list of officers about double the probable number of vacancies in order or preference found suitable for promotion, and it is from this list as prepared by the Selection Board that the appointing authority, as envisaged by Sub-rule (6) shall approve after examining the Character Roll and personal files of the employees, shall approve the list finally with modifications, if any.

17. In the instant case, it is not at all in dispute that the only name recommended for the post of Chief Engineer by the Selection Board to the Appointing Authority was that of Shri P.K. Duarah, as is evident from the minutes of the meeting of the Selection Board held on 19.2.97, Annexure-5 filed along

with the application No. MC. 3 8/97 for vacating the stay order dated 20.12.96.

Sub-para (1) of paragraph 4 reads as follows:

For filling up one vacancy in the post of Chief Engineer under the Public Health Engineering Department, the Cases of the 4 (four) seniormost Additional Chief Engineers, viz., S/Shri P.K. Duarah, K.C. Barthakur, S.R. Saikia and B.P. Sarma, as per the gradation list have been considered by the Selection Board. By considering their ACRS, with due regard to seniority, the Selection Board recommends Shri P.K. Duarah, Additional Chief Engineer for promotion to the post of Chief Engineer under the Public Health Engineering Department.

18. Justifying the recommendation of the sole name of P.K. Duarah, learned Sr. Govt. Advocate, Mr. B.P. Borah, urged that the use of the expression, "about double the probable number of vacancies" in Rule 13(5), does not indicate arithmetical accuracy in the matter of selection of candidates, by the Board. It could be less than "double" as indicated by the word "about".

19. Mr. N. Dutta, learned Counsel for Respondents 5, 7 and 8, submitted at the outset that if there are two vacancies, the Respondents 5, 7 and 8 had no objection, for the simple reason that all the eight Additional Chief Engineers fall within the zone of consideration. However, countering the argument of Mr. R. Gogoi, he explained the true import and legal connotations of Sabharwal's case as enunciated in *Ajit Singh Januja and others Vs. State of Punjab and others*, Paragraphs 13 and 15 thereof, reproduced below:

On behalf of the Respondents it was urged that in the case of *Union of India v. Virpal Singh Chauhan* the view expressed by this Court in respect of inter se seniority between the reserved category candidates who had been promoted on the basis of reservation and roster earlier than the general category candidates who were senior in the lower grade, and who have been promoted later, has not to be applied in all services. According to the Respondents that view was expressed on the basis of the circular which was under consideration, in that case where it had been provided that the seniority of the general category candidate was to be restored vis-a-vis the reserved category candidate after the general category candidate was promoted later. According to us, this question cannot be examined only on the basis of any circular, order or rule issued or framed by any State Government or the Union of India. This had to be tested on the basis of our constitutional scheme of Articles 14 and 16 of the Constitution.

20. The answer is to be found in paragraph 15 of the judgment which reads as follows:

When framers of the Constitution by Article 16 guaranteed equality of opportunity in matters of public employment, they aimed at combining democratisation with efficiency. In the process of democratisation Article 16(4) enabled the State to make provisions for reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not

adequately represented in the services under the State. As has been pointed out by this Court that at the same time Article 335 of the Constitution enjoins to take into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes "consistently with the maintenance of efficiency of the administration" while making appointments to services and posts in connection with the affairs of the Union or of a State. Thus it has been conceived by our Constitution that a process should be adopted while making appointments through direct recruitment or promotion in which the merit is not ignored. For attracting meritorious and talented persons to the public services, a balance has to be struck, while making provisions for reservation in respect of section of the society. this Court from time to time has been issuing directions to maintain that balance in the public services so that there should not be discontentment, heartburning and frustration, which can never be held to be in the larger interest of the society. It has been pointed out in the case of Indra Sawhney that reservation in promotions at various stages has resulted in considerable discontentment because many senior persons in spite of their efficiency and dedicated work find themselves superseded by their juniors belonging to the Scheduled Castes or Tribes for that reason alone. In many cases seniors to their horror find themselves made junior to even those who actually worked as their subordinates due to this factor alone. All concerned who are involved and interested in the uplift and growth of the nation have to work out a system by which the injustice done to a section of people in our society at a certain period of history can be rectified by providing protections to their descendants, but we have to be conscious, at the same time that the efficiency of the administration of the country is not harmed and there is no reverse discrimination. Promotion is an important incident of service. It covers both advancement between grades within the same class and between different classes. Seniority in service is one of the important factors in making promotion. Even where process of promotion by selection is adopted, seniority has an importance in case of equal merit. The principal object of a promotion system is to secure the best possible incumbents for the higher position while maintaining the morale of the whole organisation. The best public interest is served when equal opportunities for promotion exist for all qualified employees. Civil Servants are able to move up "the promotion ladder" as the merit deserves and the vacancies occur. Right to equality enshrined in the Constitution is to be preserved by preventing reverse discrimination as well. The guarantee of equality requires maintenance of original or panel inter se seniority between the general category candidate and the earlier promoted reserved category candidate under the reservation policy, for promotion to the higher general vacancy. The equality principle requires exclusion of the factor of extra weightage of earlier promotion to a reserved category candidate because of reservation alone, when he competes for further promotion to a general category with a general category candidate, senior to him in the panel. Any other view would amount to reverse discrimination and violative of the guarantee of equality in Articles 14 to 16.

21. Mr. Dutta argued that the main thrust of Mr. Gogoi's argument that in absence of any Rule framed by the State to the contrary, a beneficiary of accelerated promotion to higher post, would also get consequential accelerated seniority, falls to the ground in view of the principles enunciated in Ajit Singh's case (supra). Accelerated promotion through reservation on roster system, will not grant such promotees seniority over promotees belonging to general category, for next promotion in the general category post. As has been unequivocally held in Ajit Singh's case (supra), such reserved category promotees are not entitled to be considered, for promotion to general category posts, in still higher grade of service. Merely because of their accelerated promotion, they cannot be allowed to supersede their seniors in the general category who were promoted subsequently.

22. It was submitted by Mr. Gogoi in reply that if the accelerated seniority has been acted upon, prior to the judgment in Virpal Singh Chauhan's case, 10.2.9S, his contention is, if Sabharwal's case and Virpal Singh Chauhan's case are prospective in operation, Ajit Singh's case cannot be retrospective.

23. Sabharwal's case and Virpal Singh Chauhan's case came up for consideration before the Supreme Court in Akhil Bhartiya Soshit Karamchari Sangh and Another Vs. Union of India, through its Secretary, Ministry of Railway and Others, and the Court held:

This Court in Union of India and others etc. Vs. Virpal Singh Chauhan etc., accepted the direction in R.K. Sabharwal and others Vs. State of Punjab and others, that appointments according to roster already made prior to the judgment in Sabharwal case are legal and valid. In effect, they were declared legal and valid and direction was given to determine seniority in the light of the principles laid down therein. It was held that when the panel/select list was prepared at the time of making selections for promotion to the selection post in would be that panel and not the panel/select list prepared at the time of appointment to the initial grade that would determine the seniority to the post. It would obviously apply to future cases in accordance with the rule, the subject-matter of the interpretation in the judgment in Chauhan case. Therefore, the two judgments become effective from the date of the decision in Sabharwal case. All appointments made prior to that date being legal and valid including right to seniority in promoted post or cadre, they require to be given effect to.

24. Writ Petitioner/Appellant Balen Baishya's grievance is that the Respondent Nos. 2 and 3 committed manifest error of law apparent on the face of the records in fixing the inter se seniority of the writ Petitioner below the Respondents Nos. 5, 6, 7 and 8, purportedly on the basis of the impugned office Memorandum dated 12.6.96. The said Officer Memorandum, which was issued relying on the decision of the Apex Court Union of India and others etc. Vs. Virpal Singh Chauhan etc., could not have been applied in case of the writ Petitioner/Appellant as admittedly the writ Petitioner's promotion to the post of Additional Chief Engineer was made on 8.8.91. Admittedly, as pointed out in the said decision,

the ratio laid therein could be applied prospectively, that is, from 10.2.1995.

25. Let us have a look at the dates of promotion to the post of Additional Chief Engineer:

Sarvashri Balen Baishya 8.8.91. B.P. Sharma 9.9.91. R. Kalita 5.4.93. R.K. Chakravarty 23.3.94. Himangshu Sarkar 28.12.94

26. In the provisional inter se seniority list dated 17.9.96, Annexure-C, and the final list dated 15.11.96, Annexure-K, the writ Petitioner/Appellant is placed at Sl. No. 8, at the bottom, although as claimed by him, as per his representation dated 20.9.96 Annexure-H, he ought to have been placed at Serial No. 4.

27. The inter se seniority has been fixed on the basis of an Office Memorandum dated 12.6.96, Annexure-I, its relevant portion is extracted hereunder:

The Supreme Court of India in its judgment dated 10.10.95 as reported in Union of India and others etc. Vs. Virpal Singh Chauhan etc., in Union of India and Ors. v. Virpal Singh Chauhan and Ors. had held that while reserved candidates entitled to accelerated promotion, they would not be entitled to consequential seniority.

While the rule of reservation should be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate will regain his seniority over the reserved candidate notwithstanding that he is promoted subsequent to the reserved candidate. This principle would be operative from 10th February, 1995.

It is, therefore, decided that the principle of fixation of seniority of reserved candidate vis-a-vis general candidates in promotional posts in accordance with the above verdict of the Apex Court shall be followed by all concerned. While making revised gradation lists of all categories/Classes/Cadres of employees, the seniority of officers so fixed in the above principle should be effective from 10.2.95 only.

28. As already discussed above, the principle as sought to be applied by the Respondent State, runs counter to the prospectivity of judgment both in Sabharwal and Virpal Singh cases (supra). It does not stand to reasons that one promoted on 8.8.91 should be placed below another who earned his promotion on 28.12.94.

29. The seniority list, Annexure-K, cannot be allowed to stand. It is accordingly quashed. The Respondents are directed to settle the seniority of the Additional Chief Engineers in the light of what has been held above.

30. Mr. A. Roy, learned Counsel appearing for the writ Petitioner in Civil rule No. 1026/97 has made a valid point. Rule 13 (5) of the Rules has not been complied

with; while it is right to say, as argued by learned Sr. Govt. Advocate, that the Rule does not contemplate arithmetical accuracy, in case of double the number of vacancies, the Rule cannot be interpreted and applied de hors common sense. Say, in a case where there are three vacancies, the number of candidates to be recommended, may in a given case be five only; it is not exactly double, but about double the probable number of vacancies. What the Rule envisages in its spirit and substance is the number of candidates recommended, must be more than the number of probable vacancies. The object is obvious. The appointing authority has some choice and discretion in the matter. In case of only one vacancy, applying the interpretation of "about" and logic of learned Sr. Govt. Advocate, it could be 1 1/2 or 1 1/4, but that would be simply absurd. There has to be more than one, but it cannot be 1 1/4 or 1 1/2; the minimum will have to be at least two.

31. It is an admitted position that the sole candidate recommended by the Board is P.K. Duarah. The selection cannot therefore be said to be in accordance with Rules. It is liable to be set aside and is accordingly set aside. The Respondents are directed to make selection of candidates, after settling seniority, in accordance with Rules.

32. There still remains one point to be discussed. It relates to number of vacancies. According to the Appellant there are two vacancies, one of them is ex-cadre, which as contended by learned Sr. Govt. Advocate, cannot be taken into account.

33. The Appellant has filed a letter dated 10.7.96, Annexure-N, clearly stating:

It may be mentioned here, that this time also 2 (two) Officers are likely to be promoted in the rank of C.E. (PHE) out of which one will be posted as Chief Engineer (PHE) and the other as Managing Director in Assam Urban Water Supply & Sewerage Board on deputation from the P.H.E. Department.

34. Further, seeking a clarification it is stated in the said letter:

W.P.T. & B.C. Deptt. is requested to clarify whether Roster Point No. 1 which was filled up before enforcement of the Act and continued after enforcement may be treated as reserved for S.T. (P) or as General and whether Roster point No. 3 filled up on merit but who happened to be of S.C. Community will be treated as General and treated as back log for S.C. or not.

35. In the above state of affairs, the selection even to the ex-cadre post, whenever made, will have to be from amongst the Additional chief Engineers. While it is for the Respondent State to select, wherever it is felt necessary and required, it should not be unduly postponed, with a view to defeat anybody's prospects of selection.

36. In the result, Writ Appeal No. 624 of 1996 deserves to be allowed; it is accordingly allowed along with the Civil Rule No. 6273 of 1996. The seniority list dated 15.11.96, Annexure-K, is quashed. The Respondents are directed to settle

the seniority of Additional Chief Engineers as indicated above. As noted above the process of selection of Chief Engineer, having been quashed, Civil Rule No. 1026 of 1997 filed by K.C. Borthakur also stands allowed. In view of the above direction, for preparation of a fresh seniority list, Civil Rule No. 6141 of 1996, as filed by R. Kalita is also allowed in terms indicated hereinabove.

37. The Respondents are directed to consider the case of each of the aggrieved Additional Chief Engineers in accordance with the principles as discussed above, and prepare a fresh seniority list, if desired and felt necessary opportunity of personal hearing may also be provided. The preparation of seniority list should be completed within a month and the selection of Chief Engineer within next two weeks. Till then, status quo as it obtains for the present, shall continue.