

GAHC010045982021



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

**Case No. : WP(C)/1714/2021**

JARINA KHATUN  
W/O. ABDUL KODDUS ALI, VILL. KUMULLIPARA, P.O. GOREMARI, P.S.  
HOWLY, DIST. BARPETA, ASSAM, PIN-781314.

VERSUS

THE STATE OF ASSAM AND 8 ORS  
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM, EDUCATION  
(ELEMENTARY) DEPTT., DISPUR, GUWAHATI-06.

2:THE STATE LEVEL SCRUTINY COMMITTEE  
REP. BY THE DIRECTOR OF ELEMENTARY EDUCATION  
ASSAM  
KAHILIPARA  
GUWAHATI-19.

3:THE DIRECTOR OF ELEMENTARY EDUCATION  
ASSAM, KAHILIPARA  
GUWAHATI-19.

4:THE DISTRICT SCRUTINY COMMITTEE  
FOR ELEMENTARY EDUCATION REP. BY ITS CHAIRMAN CUM DY.  
COMMISSIONER OF BARPETA DISTRICT  
ASSAM, PIN-781301.

5:THE DISTRICT ELEMENTARY EDUCATION OFFICER  
BARPETA  
DIST. BARPETA  
ASSAM, PIN-781301.

6:THE BLOCK ELEMENTARY EDUCATION OFFICER  
BHAWANIPUR  
DIST. BARPETA  
ASSAM, PIN-781352.

7:THE HEADMISTRESS CUM SECRETARY OF DAKSHIN KUMULLIPARA  
M.E. MADRASSA  
VILL. KUMULLIPARA  
P.O. GAREMARI  
P.S. HOWLY  
DIST. BARPETA  
ASSAM, PIN-781314.

8:THE DAKSHIN KUMULLIPARA M.E. MADRASSA  
REP. BY THE PRESIDENT  
SCHOOL MANAGING COMMITTEE (SMC) OF DAKSHIN KUMULLIPARA  
M.E. MADRASSA  
KUMULLIPARA  
P.O. GAREMARI  
DIST. BARPETA  
ASSAM, PIN-781314.

9:ALI KHANAM  
TUTOR OF 1506 NO. PASCHIM BANJARAPARA L.P SCHOOL  
C/O. HEAD MASTER OF 1506 NO. PASCHIM BANJARAPARA L.P. SCHOOL  
VILL. BANJARAPARA  
P.O. GAREMARI  
P.S. HOWLY  
DIST. BARPETA  
ASSAM  
PIN-781314

**Advocate for the Petitioner** : MR. M U MAHMUD  
**Advocate for the Respondent** : SC, ELEM. EDU

**B E F O R E**

**Hon'ble MR. JUSTICE SANJAY KUMAR MEDHI**

Advocate for the petitioner: Shri M. U. Mahmud, Advocate.

Advocate for respondents : Shri P. K. Borah, SC,  
Elementary Education,  
Shri M. A. Sheikh, Advocate, Respondent Nos. 7, 8 & 9,

**Date of hearing** : **25.07.2023**

**Date of judgment** : **25.07.2023**

## **JUDGMENT & ORDER**

The matter of provincialisation of service under the ***Assam Education (Provincialisation of Services of Teachers and Re-Organization of Educational Institutions) Act of 2017*** (for short Act of 2017) of the petitioner *vis-à-vis* the respondent no. 9 is the issue which arises for determination in the present petition filed under Article 226 of the Constitution of India. The petitioner has put to challenge the process by which the services of the respondent no. 9 has been provincialised as Tutor and has made a further claim that it is the petitioner who should have been given the benefit of such provincialisation. The School in question where the contesting parties were serving is the Dakshin Kumullipara M. E. Madrassa (hereinafter the School) in the district of Barpeta.

**2.** I have heard Shri M. U. Mahmud, learned counsel for the petitioner whereas the Department is represented by Shri P. K. Borah, learned Standing Counsel. The private respondent nos. 7, 8 & 9 are represented by the learned counsel, Shri M. A. Sheikh. Both the official respondents as well as the private respondents have filed their respective affidavit-in-opposition.

**3.** The case projected by the petitioner is that both the petitioner and the respondent no. 9 were serving in the School. In pursuance to the Act of 2017, steps were taken for provincialising the services of the Teachers/Tutors. The relevant provision of the Act is reproduced here for the sake of convenience:-

*“Section 3 (1)(xi) In case of Venture Upper Primary School there shall be minimum three teachers or tutors at least one teacher each for (a) Science and Mathematics (b) Social Studies and (c) Languages:*

*Provided that for additional posts it shall be considered in accordance with the norms and standard stipulated in the Schedule under Sections 19 and 25 of the Right of Children to Free and Compulsory Education Act, 2009 (Central Act No. 35 of 2009)”*

**4.** The genesis of the challenge is that while the petitioner was an Assistant Teacher in the subject of Social Studies, instead of provincialising her service, the services of the respondent no. 9 has been provincialised by treating the said respondent no. 9 as a teacher of Social Studies.

**5.** The petitioner has relied upon a number of documents to demonstrate that the respondent no. 9 was the Head Mistress of the School and was not a teacher teaching Social Studies and therefore the impugned action giving her the benefit is liable to be interfered with. It is further submitted that though the respondent no. 9 appears to be senior to the petitioner from the date of joining the School, such seniority shall not be a relevant factor and it is the mandate of the Rules which will govern as per which there should be three Teachers/Tutors for the subjects of (1) Science and Mathematics, (2) Social Studies and (3) Languages. It is submitted that since the respondent no. 9 was not a teacher in the subject of Social Studies, her provincialisation could not have been made by considering her to be a teacher teaching the said subject.

**6.** Shri Mahmud, the learned counsel had referred to the order dated 15.02.2006 whereby the petitioner was appointed as an Assistant Teacher of the School which was, without any dispute, a venture school. Reference has been made to the School Information Schedule which is a part of the Data Collection Format under the District Information System of Education (DISE). It is pointed out that in the list of teachers, the respondent no. 9 has been stated to be a Head Teacher whereas the petitioner has been shown to be a teacher. It is submitted that the petitioner is all along teaching the subject of Social Studies. Reference has also been made to the Data Capture Format of 2017 which has been annexed as Annexure-8. In the list of teachers and instructors, so far as the respondent no. 9 is concerned, she has been depicted as a Head Teacher while the petitioner has been shown to be a teacher of

Social Studies.

**7.** Shri Mahmud has also referred to the application for provincialisation of services of Teachers/Tutors in Upper Primary School which has been annexed as Annexure-9. In the said application which has been made and forwarded by the respondent no. 9, an Appendix is there in which the respondent no. 9 while describing herself to be the Head Master has also stated that she teaches English and Social Science. The list however also contains the name of the petitioner as Assistant Teacher in the subject of Social Science and Art Education.

**8.** It is the contention of the petitioner that the respondent no. 9 was never a teacher of Social Studies and at the same time, there is no dispute to the fact that the petitioner was an Assistant Teacher in the subject of Social Studies. It is the case of the petitioner that in spite of the aforesaid facts and circumstances, vide the impugned notification dated 04.02.2021, the Department had published the list of candidates containing names of 3309 persons as tutors whose services were provincialised. In the said list, the name of the respondent no. 9 has been reflected against the Sl. No. 140 whereas the petitioner's name did not figure. It is submitted that the said provincialisation of the respondent no. 9 being in conflict with the statute, the same is liable to be interfered with.

**9.** *Per contra*, Shri P. K. Borah, the learned Standing Counsel, Elementary Education Department has submitted that affidavit-in-opposition has been filed on 10.05.2023. He submits that the exercise of provincialisation involves various steps and is not solely dependent on the recommendation of the Head Master of the School in question.

**10.** By referring to Section 13 (b) of the Act, Shri Borah, learned Standing Counsel submits that such exercise of provincialisation is first scrutinized by the District Scrutiny Committee and thereafter by the State Level Scrutiny Committee and it is

only thereafter that names for provincialisation are finalized and recommended. In the instant case, he submits that such exercise has been diligently done and by taking into consideration all the facts and circumstances, the name of the respondent no. 9 was recommended. By referring to the DISE DATA of 2017-2018 which has been annexed to the writ petition, the respondent no. 9 has been shown to be teaching Assamese as the main subject. The DISE DATA of 2009-2010 has also been referred to in which the respondent no. 9 has been shown to be teaching all subjects whereas the petitioner has been shown to be teaching Environmental Studies.

**11.** The learned Standing Counsel has also submitted that the statute in question has an in built mechanism for redressal of grievance in the form of Section 14 which provides for preferring an appeal against any recommendation of the District Scrutiny Committee and this remedy has not been availed of. He further submits that since the respondent no. 9 teaches all the subjects and is senior to the petitioner, there is no illegality or irregularity in recommending the name of the respondent no. 9 whose services have been duly provincialised. He clarifies that it is only the services of the incumbents which are provincialised and not the School and after giving the benefit of such provincialisation, the respondent no. 9 with another candidate has been placed in the 1506 No. Paschim Baniapara L. P. School in the district of Barpeta. He further submits that the very fact that it is only in respect of two candidates whose provincialisation has been recommended goes on to demonstrate that there is an application of mind as one candidate was not given such benefit. Shri Borah, the learned Standing Counsel has placed before this Court an order dated 17.08.2022 passed by the Hon'ble Division Bench of this Court in WA No. 228/2022 (Taj Uddin Ahmed Vs State of Assam & Ors) in which the decision of the learned Single Judge remanding a matter to the Appellate Authority in a dispute of the present nature has not been interfered with.

**12.** Shri M. A. Sheikh, learned counsel who has appeared for the private respondents

has submitted that Section 3 (1)(xi) lays down the provision for provincialisation of the service and in this case, such provision has been duly followed. He submits that respondent no. 9 is a Graduate and it is not to dispute that she is senior to the petitioner by more than 10 months. By referring to the affidavit-in-opposition filed by the private respondents dated 30.09.2021, he submits that it is the clear case of the respondent no. 9 that apart from holding the post of Head Mistress of the venture school, she was teaching Social Studies. In this connection, reference has been made to the averments made in paragraphs 5 & 8 of the said affidavit-in-opposition.

**13.** The learned counsel for the private respondents has also drawn the attention of this Court to the prayer in the writ petition and has submitted that while there is a prayer to set aside the recommendation of the District Scrutiny Committee as well as the order of provincialisation of the respondent no. 9, those have not been annexed and therefore the challenge is not maintainable. He has further submitted that the prayer to provincialise the service of the petitioner may not be granted by Writ Court as such provincialisation involves scrutiny of records and are factual in nature and such matters cannot be the subject of adjudication of a Writ Court. It is also submitted that the District Scrutiny Committee took into consideration all the materials on record and thereafter had made the recommendation.

**14.** Shri Sheikh, the learned counsel has also endorsed the submission of the Department by submitting that Section 14 of the Act provides for an appeal and since questions of facts which are disputed are involved, the proper procedure is to file an appeal which the petitioner has not done. He submits that on the point of availability of an alternative remedy itself, this Writ Petition is liable to be dismissed. Shri Sheikh, the learned counsel has also placed before this Court an order dated 02.02.2021 passed by this Court in WP(C) No. 354/2021 (Gulzar Hussain Vs State of Assam & Ors). He submits that in the said case, the party was directed to prefer an appeal.

**15.** Shri Mahmud, the learned counsel for the petitioner in his rejoinder has submitted that affidavit-in-reply has been filed to the affidavit-in-opposition of the private respondents in which the claim of the private respondent has been denied. He further submits that the objection raised are technical in nature and technicalities should not come into the way of delivery of substantial justice. It is also submitted that the question of provincialisation of the services of the Head Teacher would come only when the number of students is more than 100 and in the instant case that condition was not fulfilled and the provincialisation of the services of the respondent no. 9 was not as a Head Mistress but as an Assistant Teacher in the subject of Social Studies.

**16.** The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully examined.

**17.** The case, as projected by the petitioner which has been observed above is that she has been teaching Social Studies in the School which is one of the subject mentioned in a Section 3 (1) (xi) and therefore entitled to be considered for provincialisation. On the other hand, the respondent no. 9 was the Head Mistress.

**18.** The materials on record would show that the respondent no. 9 was in fact also serving as the Head Mistress of the School which is an in-house arrangement in a venture school. However, the materials placed before this Court would also reveal that the said respondent no. 9 was teaching all subjects. This Court has however noticed that at different periods, there has been some inconsistency in the subject mentioned but it is the categorical case of the respondent no. 9, as would reveal from the averments made in paragraph-8 of the affidavit-in-opposition that she was teaching Social Studies. Though an affidavit-in-reply has been filed by the petitioner on 26.11.2021, there is no rebutted to the said averments. This Court has also noticed

that paragraph 8 of the affidavit-in-opposition of the respondent no. 9 has been properly verified as being true to her knowledge. For ready reference, the relevant parts of the pleadings are extracted herein below paragraph-8 of the affidavit-in-opposition reads as follows:-

“8. ...

*Both the Deponent and the Writ Petitioner were teaching Social Science in the School but as the Deponent was senior to the Writ petitioner by 10 month 15 days so the District Scrutiny Committee was pleased to recommend the name of the Deponent instead of the writ petitioner. The deponent is senior to the writ petitioner as per available records (reference Page-45 of the writ petition). Sec. 3(xi) of the said Act of 2017 it is mention that there should be 3 teachers or Tutors, at least 1 teacher each for (a) Science & Mathematics (b) Social Studies and (c) Languages. Here in the said provision of law there is no mention of Assistant Teacher or Head Teacher. The deponent teaching Social Science and the writ petitioner also teaching Social Science as the District Scrutiny Committee found the deponent is senior to the writ petitioner, so, her name was recommended...”*

**19.** Paragraph 5 of the rejoinder affidavit of the petitioner reads as follows:-

“5. That with regard to the statements made in Paras 8, 9 and 10 of the affidavit-in-opposition, the deponent begs to state that as per Section 3(1) (xi) of Assam Education (Provincialisation of Services of Teachers and Re-organization of Educational Institutions) Act, 2017, it is provided that there shall be minimum 3 teachers/tutors at least one teachers each for (a) Science and Mathematics, (b) Social Studies and (c) Languages. In that view, 2 Assistant Teachers are provided in the Act of 2017 out of which one teacher is a Social Science teacher and admittedly the deponent had been working in that post. The Head mistress for her own interest cannot change the provisions of law citing that the deponent is the junior amongst other teachers. In the Act, there is no mention of junior or senior teacher; rather the cadre of the post of mentioned as Assistant Teacher. On the other hand, there is remedy for the respondent NO. 9 as provided in the SCHEDULE/NORMS AND STANDARD FOR A SCHOOL in 1(b)(2) incorporated inn the ‘Right of Children to Free and Compulsory Education Act, 2009’ wherein it is provided that there would be one teacher for every 35 children and in provision 1(b)(3) it is further provided if the admission of children is above 100, there would be a full time teacher. The Respondent No. 9 expresses that since the day of establishment of Madrassa there were no children admitted above 100 till date, as such, she presumed that in future also there is no possibility of admission of children above 100 in the school. Under such circumstances, the service of the respondent No. 9 will never be provincialised as a teacher. Now, to fit her in a suitable position, she

has shown her both as English and Social Science Teacher, whereby created the question of seniority between the respondent no. 9 and the deponent and succeeded herself to be provincialised as a Social Science teacher of the Madrassa in convenience with the District Elementary Education Officer, Barpeta. As such, the appointment letter, dated 05.02.2021 issued in favour of Respondent No. 9 is illegal and liable to be set aside."

**20.** Though the petitioner has emphasized that the benefit of provincialisation should not have been given to the respondent No. 9 and rather should have been given to the petitioner, such contention is not only disputed but there are materials to show that a different conclusion is also possible to be arrived at. The records pertaining to scrutiny of the cases of the petitioner *vis-à-vis* that of the respondent no. 9 however has not been placed before this Court. Under those facts and circumstances, this Court is of the opinion that since questions of fact, which are disputed in nature are involved, coupled with the fact that the statute provides for an appeal, interest of justice should be served if the petitioner is directed to approach the Appellate Authority by preferring an appeal as provided under Section 14 of the Act. This Court is also fortified in drawing the said opinion as there are materials placed before this Court including categorical and uncontroverted averments made by the respondent no. 9 denying the case of the petitioner and there is also a presumption that the exercise conducted by the District Scrutiny Committee and the State Level Scrutiny Committee have been done with due care and attention.

**21.** So far as the decision of ***Gulzar Hussain*** (supra) placed on record, by Shri Sheikh, learned counsel a perusal of the said decision would reveal that before passing the order the remand, the writ petition was itself held to be not maintainable and therefore this Court is of the opinion that the said decision may not be applicable.

**22.** So far as the decision relied upon by the Department is concerned, of ***Taj Uddin*** (supra) this Court has noticed that the Hon'ble Division Bench has endorsed the view of the learned Single Judge in remanding the matter to the Appellate

Authority. Even in this case, under the aforesaid facts and circumstances, this Court has already recorded a finding that interest of justice would be served if the matter is taken up before the Appellate Authority in accordance with law.

**23.** Under the aforesaid facts and circumstances, this Court while not interfering with the impugned action is however of the opinion that liberty be granted to the petitioner to file an appeal as provided under the Act of 2017.

**24.** It is needless to state that since this proceeding was pending before this Court, the appeal is not liable to be dismissed on the ground of any delay and is to be adjudicated on merits. While doing so, the Appellate Authority is required to give both the affected parties an opportunity of hearing.

**25.** The appeal may be filed within a period of 3 (three) weeks from today and any event of filing of the same, the Appellate Authority may take up the same for consideration and dispose the same expeditiously a preferable within a period of 3 (three) months from the date of receipt of such appeal. Such consideration and disposal be made strictly in accordance with law and without being influenced by any observation made in this order.

**26.** Writ Petition stands disposed of.

**27.** No order as to cost.

**JUDGE**

**Comparing Assistant**