

GAHC010195842018



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

**Case No. : WP(C)/6236/2018**

RASHMI RAKHA DEVI  
W/O- SRI UTPAL KUMAR MISHRA, R/O- BIRUBARI PROFESSOR COLONY,  
GHY- 16, DIST- KAMRUP(M), ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS  
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF ASSAM,  
SECONDARY EDUCATION DEPTT, DISPUR, GUWAHATI- 6

2:THE DIRECTOR OF SECONDARY EDUCATION  
KAHILIPARA  
GHY- 19

3:THE INSPECTOR OF SCHOOLS  
KAMRUP DISTRICT CIRCLE  
PANBAZAR  
GHY- 0

**Advocate for the Petitioner** : MR H TALUKDAR, MS A M DCOSTA,MR. S HAZARIKA,MR. A  
K BARUAH,MS M DEKA

**Advocate for the Respondent** : SC, SEC. EDU.,

**B E F O R E**

**HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI**

Advocate for the petitioner : Shri AK Baruah  
Advocate for the respondents : Shri NJ Khataniar, SC-Sec. Edu.

Date of hearing : **19.09.2024**

Date of Judgment : **26.09.2024**

**JUDGMENT & ORDER**

The instant writ petition has been instituted on the aspect of provincialization of the service of the petitioner as Science Teacher in the Madhab Das High School, Guwahati.

2. As per the facts projected, the petitioner was appointed as an Assistant Teacher of the aforesaid School on 07.08.2010. At that stage, it was a venture School. Subsequently, on 25.07.2011, the appointment of the petitioner was approved by the Inspector of Schools, Kamrup. Subsequently, vide an order dated 26.07.2013, the School was provincialized along with 8 nos. of incumbents as per the Assam Venture Educations (Provincialisation of Services) Act of 2011 (hereinafter Act of 2011). However, the service of the petitioner was left out. The petitioner had accordingly sought information under the Right to Information Act and on such query, she had learnt that in a Committee Meeting of the Department held on 01.11.2014, it was found that the petitioner was eligible. In this regard, a communication dated 23.05.2016 was issued by the Director of Secondary Education to the Department whereby a proposal for provincialization of 242 nos. of Teachers was sent. However, in the meantime, the Act of 2011 was declared *ultra virus* by this Court, vide judgment dated 29.09.2016 passed in a series of cases, the lead case being ***Chandan Kumar Neog Vs. State of Assam*** reported in ***2016 (5) GLT 296***. It is the case of the petitioner that the aforesaid act of the Court in declaring the enactment as *ultra virus* would not affect the right of the petitioner for such provincialization, which was at a prior point of time.

3. I have heard Shri AK Baruah, learned counsel for the petitioner. I have also heard Shri NJ Khataniar, learned Standing Counsel, Secondary Education

Department.

4. Shri Baruah, the learned counsel for the petitioner, has referred to the provision of Section 4 (1) of the Act on the aspect of deemed provincialization. It is submitted that if an incumbent meets the eligibility requirement, the services of such incumbent would be deemed to be provincialized. In this connection, the learned counsel has relied upon the judgment of ***Dilip Das Vs. State of Assam*** reported in ***2019 (2) GLT 135***. In the same judgment, the incumbent was given the benefit of deemed provincialization under Section 4 (1) of the Act.

5. By drawing the attention of this Court to the minutes of meeting dated 01.11.2014, he has submitted that amongst the list of incumbents, the name of the petitioner had figured. He has also relied upon an order dated 14.07.2021 passed by this Court in WP(C)/2426/2021, ***[Bilayet Hussain Vs. State of Assam]*** and also an order dated 17.12.2019 passed in WP(C)/9306/2019 ***[Dilip Kumar Talukdar Vs. State of Assam]*** wherein the earlier judgment of ***Dilip Das*** (supra) has been followed. Reference has also been made to an order dated 22.01.2019 passed in WP(C)/3499/2014 ***[Sailendra Nath Sharma Vs. State of Assam]***.

6. On the aspect of the doctrine of precedents, the learned counsel has relied upon the case of ***Mary Pushpam Vs. Telvi Curusumary and Ors.*** reported in ***(2024) 3 SCC 224***.

7. *Per contra*, Shri Khataniar, learned Standing Counsel for the Department has submitted that after declaration of the Act of 2011 as *ultra virus*, there is no scope for provincialization of the services of the petitioner. It is submitted that after such declaration, a new Act has been brought into force, namely, the

Assam Education (Provincialisation of Services of Teachers and Re-Organization of Educational Institutions) Act, 2017. It is submitted that the case of the petitioner was indeed considered under the new Act of 2017 and upon such consideration, she was not found to be eligible.

8. By drawing the attention of this Court to the affidavit-in-opposition filed on 21.04.2023, the learned Standing Counsel has submitted that on field verification, it was found that the enrollment of students in the particular discipline was only 30. He has also submitted that as Science Teachers, already two posts were provincialized and for provincializing a 3<sup>rd</sup> post, the enrollment has to be more than 150. On the aspect of the case law cited, the learned Standing Counsel for the Department has submitted that Hon'ble Division Bench of this Court, vide order dated 30.10.2019, passed in WA/283/2019 [**Smti. Purnabati Brahma Vs. State of Assam**], has clearly laid down that the Act having been declared *ultra virus*, vide the judgment passed in 23.09.2016 in **Chandan Kumar Neog** (supra), further consideration is not permissible for provincialization of service. It has been clarified that the power of prospective overruling is only vested with the Hon'ble Supreme Court and not with the High Courts. He has also clarified that so far as the case of **Dilip Das** (supra) is concerned, there is a chequered history inasmuch as, initially there was a seniority dispute between Dilip Das and one Tarun Nath, who had filed WP(C)/2908/2013, in which there was an interim order. The said interim order was later vacated, whereafter Dilip Das had filed the new writ petition and under that context, the order was passed, which has been reported in **2019 (2) GLT 135**. The learned Standing Counsel for the Department has submitted that the Act of 2011 being struck down, no right could have been accrued to the petitioner. He has also relied upon the case of **Nirupama Baro Vs. State of**

***Assam*** reported in **2023 (4) GLT 503**.

9. The learned Standing Counsel accordingly submits that no relief can be granted to the petitioner and the writ petition is liable to be dismissed.

10. The rival contentions advanced by learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully perused.

11. The claim of the writ petitioner is mainly based on the aspect of deemed provincialisation under Section 4(1) of the Act of 2011. The aspect of deemed provincialisation, which was taken into consideration by this Court in the case of ***Dilip Das*** (supra) and followed by other cases, were on the premises that the incumbent has to be within the numbers specified in the Schedule. Apart from the aspect of the Act of 2011 being declared *ultra virus*, which would go to the root of such enactment, it is seen that the Schedule envisages certain numbers of Teachers vis-à-vis the enrolment. It is seen that for the nature of School involved in this petition, the minimum enrolment for a 3<sup>rd</sup> Teacher in Science was 150. From the affidavit-in-opposition filed by the Department on 21.04.2023, it transpires that even an inspection was done as per which the enrolment was only 30.

12. That apart, the Hon'ble Division Bench in the case of ***Smti. Purnabati Brahma*** (supra), in clear terms, has laid down that after the Act of 2011 has been struck down as constitutionally invalid and in a review of the said judgment, it has been clarified that the doctrine of prospective overruling would not apply as the said power is vested only with the Supreme Court, it would not be legal or proper to direct consideration for provincialisation under the said Act. The Hon'ble Division Bench had also taken into account the subsequent

enactment of 2017 which is presently holding the field. For ready reference, the relevant observations of the Hon'ble Division Bench are extracted hereinbelow:.

*“9. The case as projected by learned counsel for appellant to the effect that the appellant was vested with rights under the Act of 2011 on the date when judgment was rendered in Chandan Kumar Neog (supra), cannot be accepted. The very fact that the services of the petitioner had not been provincialised and therefore, the writ petition was filed, makes it clear that the case of the petitioner would not be covered within the four corners of the decision rendered on the review petition. Admittedly, the petitioner was not getting salary as provincialised employee. Therefore, it would be a fallacy in law and facts to consider that right had already been vested in the writ petitioner under the Act of 2011, which admittedly has been struck down as constitutionally invalid. The Review Court has held that doctrine of prospective overruling would not apply as the said power is vested only with the Supreme Court of India. It is in such circumstances it has been provided in Para 19(supra) of judgment rendered by the Review court that "the rights of the employees who have been benefited under the struck down statute can be taken care of by giving retrospective effect to the proposed legislation, if the legislature so decides. Till then it is ordered that the services of the provincialised category and their status as govt. employees shall not be disturbed and they will continue to receive all the benefits which they are getting under the Provincialisation Act, 2011, since struck down by the judgment under Review.” 10.*

*We are conscious of the fact that subsequently the Assam Education (Provincialisation of Services of Teachers and Re-Organisation of Educational Institutions) Act, 2017 (for short, the Act of 2017) was brought in place w.e.f. 11th April, 2017. In the impugned order passed by learned Single Judge, it has been said that no writ of mandamus can be issued in view of the fact that the Act of 2011 is not in force. However, liberty was given to the writ petitioner (appellant) to approach appropriate Educational Tribunal for consideration of her case for provincialisation as per law in force. The respondents from the Education department were also asked to consider the case of the writ petitioner for provincialisation under the Act of 2017, if she is entitled for the same in terms of provisions of the Act of 2017.”*

13. From a reading of the aforesaid judgment which was on an appeal against an order declining the prayer for provincialisation, this Court is of the considered opinion that a contra view is not permissible in law.

14. As regards the case laws cited, those would not have any relevance in view of the order of the Hon'ble Division Bench in the case of **Smti. Purnabati Brahma** (supra) and cannot be treated as binding precedent.

15. In view of the above, this Court is of the opinion that no case for grant of any relief is made out and accordingly the writ petition is dismissed.

**JUDGE**

**Comparing Assistant**