

GAHC010020082019



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

Case No. : WP(C)/666/2019

ALTAF HUSSAIN
S/O. LT. USTAR ALI, 2ND ASSTT. TEACHER, AMAITILLA LOWER PRIMARY
SCHOOL, UNDER BADARPUR EDUCATIONAL BLOCK, R/O. VILL.
AMAITILLA, P.O. ANGLAR BAZAR, P.S. BADARPUR, DIST. KARIMGANJ,
ASSAM-788806.

VERSUS

THE STATE OF ASSAM AND 7 ORS.
REP. BY THE SECRETARY TO THE GOVT. OF ASSAM, DEPTT. OF
EDUCATION (ELEMENTARY), ASSAM (CIVIL) SECRETARIAT, BLOCK-C,
DISPUR, GUWAHATI, ASSAM-781006.

2:THE DIRECTOR OF ELEMENTARY EDUCATION

ASSAM
KAHILIPARA
GUWAHATI
ASSAM-781019.

3:THE DISTRICT ELEMENTARY EDUCATION OFFICER

KARIMGANJ
DIST. KARIMGANJ
ASSAM.

4:THE DY. INSPECTOR OF SCHOOLS

KARIMGANJ
DIST. KARIMGANJ
ASSAM.

5:THE BLOCK ELEMENTARY EDUCATION OFFICER

BADARPUR EDUCATIONAL BLOCK
BADARPUR
DIST. KARIMGANJ
ASSAM-788701.

6:THE HEAD TEACHER

AMAITILLA LOWER PRIMARY SCHOOL
UNDER BADARPUR EDUCATIONAL BLOCK
VILL. AMAITILLA
P.O. ANGLAR BAZAR
P.S. BADARPUR
DIST. KARIMGANJ
ASSAM-788806.

7:PRESIDENT

SCHOOL MANAGEMENT COMMITTEE
AMAITILLA LOWER PRIMARY SCHOOL
UNDER BADARPUR EDUCATIONAL BLOCK
VILL. AMAITILLA
P.O. ANGLAR BAZAR
P.S. BADARPUR
DIST. KARIMGANJ
ASSAM-788806.

8:MD. SHAHIBUR RAHMAN

S/O. ISMAIL ALI
R/O. VILL. PRASHARPUR
P.O. MANIKGANJ
(FAKIR BAZAR)
P.S. AND DIST. KARIMGANJ
ASSAM-788712

Advocate for the Petitioner : MR. A K DUTTA, MR. B PURKAYASTHA

Advocate for the Respondent : SC, ELEM. EDU, FOR CAVEATOR,MR. J M SULAIMAN,MR H R A CHOUDHURY,MR. S SUTRADHAR,MR H R CHOUDHURY

**BEFORE
HONOURABLE MR. JUSTICE KARDAK ETE**

JUDGMENT**Date : 06-06-2025**

Heard Mr. B.D. Das, learned senior counsel assisted by Mr. B. Purkayastha, learned counsel for the petitioner. Also heard Mr. A. Phukan, learned Standing counsel, Elementary Education Department for the State respondents and Mr. H.R.A. Choudhury, learned senior counsel assisted by Mr. H.R. Choudhury, learned counsel for the respondent No. 8.

2. By instituting this writ petition, the petitioner has assailed the order dated 15.11.2018, passed by the Commissioner & Secretary to the Govt. of Assam, Elementary Education Department, whereby, the cancellation of provincialisation order dated 11.05.2015 in respect of the respondent No.8 namely, Shahibur Rahman, is revoked and the petitioner is removed from service as Assistant Teacher of Araitilla L.P. School under Karimganj District on the ground that the school management committee of the said school had terminated the service of the respondent No.8 vide resolution dated 27.04.2013, which is, in violation of the Section 6 of the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011, (in short, Act of 2011) as after the provincialisation of an Educational Institution, the SMC loses its power to take any action against the teachers of provincialized school.

3. The facts of the case, in brief are that the petitioner was initially appointed as Assistant Teacher of Araitilla L.P. School in the district of Karimganj on 10.02.2005 by the School Managing Committee (hereinafter "SMC" in short) and he continued in the said post without any break. The said school, on having been fulfilled the criteria for provincialisation of the services of its employees, has been brought under provincialisation, and accordingly, the services of the working employees have been regularized w.e.f. 01.01.2013.

4. The respondent No.8 was appointed as Assistant Teacher of the said school on 15.03.1994. However, when the respondent No.8 was found to be habitual absentee, the SMC adopted a resolution on 27.04.2013 and terminated his service, thereby, upgraded the petitioner to the post of second Assistant Teacher. It is contended that the Head Master of the school, having been regularized and the petitioner having been upgraded to the post of second Assistant Teacher, the petitioner is entitled to be regularized/provincialized his services as Assistant Teacher for the post of second Assistant Teacher. Though the District Scrutiny Committee, Karimganj, recommended the provincialisation of the service of the petitioner, the Director of Elementary Education by an order dated 21.01.2014 has provincialized the service of the respondent No.8. Aggrieved of the said provincialisation of the service of the respondent No.8, the petitioner approached the Court being WP(C) 1086/2014, which came to be disposed of by an order dated 17.03.2015, by which, the said writ petition was allowed, thereby, setting aside the order dated 21.01.2014 provincialising the service of the respondent No.8 as an Assistant Teacher of the said school and held that the respondent authority shall consider the petitioner for provincialisation of his service against the said post of second Assistant Teacher.

5. The respondent No.8 filed an appeal being WA 116/2015 against the order dated 17.03.2015 and the same came to be disposed of on 11.07.2016 by the Division Bench, which is reproduced herein below:-

“5. We find that the termination order of 27.4.2013 is challenged by Shahibu Rahman through the WP(C) NO.4492/2015 and that case is pending consideration of the Writ Court. In the meantime, on account of the status quo order passed by the Division Bench on 23.6.2015, although consequential order was passed for provincializing the service of Altaf Hussain in the Amaitilla L.P. School under the Assam Venture Educational Institutions (Provincialization of Services) Act, 2011, the salary of the provincialized junior teacher has not been disbursed so far. Therefore the I.A.(Civil) NO.329/2016 is filed by the respondent (writ petitioner) for recall of the status quo order passed by the Division Bench.

6. At the stage when the writ petition came to be allowed on 17.3.2015, the counter affidavit of 7th respondent was yet to be filed. Therefore the Court was not apprised of the report given on 15.11.2013, wherein the BEEO, Badarpur had indicated after verification of the records that, Shahibur Rahman has been regularly working as an Assistant Teacher of the Amaidilla L.P. School since 15.8.1994 and his name was included in all official correspondences and he received his share of the grant-in-aid sanctioned for the school for the 2010-2011. The report of the BEEO further indicates that the Head Teacher is manipulating the school records to appoint his younger brother Altaf Hussain, by replacing the older teacher Shahibur Rahman, through forging of documents. But Mr. J.I. Borbhuiya on the other hand submits that the inquiry conducted by the District Elementary Officer supports the claim of the writ petitioner.

7. The claim for provincialization in a venture school is to be considered on the basis of length of service and if the Assistant Teacher appointed on 15.8.1994 is serving with sincerity, he deserves to be provincialized. On the other hand, it also has to be verified whether the school records were manipulated to wrongly show that the older teacher was irregular in his duties as is reflected in the proceeding of the SMC.

8. Confronted with the above factual controversy, it is submitted by the departmental lawyer that direction be issued to a senior officer of the Education Department to verify and decide who amongst the two claimants, is entitled for the benefit of provincialization. This submission of the departmental lawyer is acceptable to the learned Counsel for the two contesting litigants.

9. In the above circumstances, the Commissioner & Secretary to the department of Elementary Education is directed to decide whether Shahibur Rahman as the eldest serving teacher of the Amaidilla L.P. School deserves to be provincialized or whether his service was rightly terminated by the SMC for his alleged irregular attendance. Depending upon the outcome of the verification exercise, provincialization of the deserving teacher will be made. The two contesting claimants must be afforded due opportunity to project their respective version before a final decision is taken by the Commissioner. The ordered exercise should be completed expeditiously and preferably within 3 months of receipt of intimation. The claim to provincialization and salary would abide by the final decision of the Commissioner. It is ordered accordingly.”

6. Pursuant to order dated 11.07.2016 passed by the Division Bench, the Commissioner and Secretary to the Govt. of Assam, Elementary Education Department has considered the grievances of the petitioner and the respondent No.8. The impugned order dated 15.11.2018 is reproduced herein below:-

“GOVERNMENT OF ASSAM
ELEMENTARY EDUCATION DEPARTMENT
Dispur, Guwahati-6

No.PMA.438/2016/217

Dated Dispur, the 15th November, 2018

ORDER

Read: The Hon'ble High Court order dated 11-07-2016 passed in WA No. 116/2015 with WP(C) No. 1086/2014 in the matter of provincialization of services of an Assistant Teacher in Amaidilla L.P. School under Karimganj District. The operative part of the Judgement and Order dated 11-07-2016, passed by the Hon'ble High Court passed in Case No. WA. 116/2015 with WP(C) No. 1086/2014 is reproduced below:

Para 9: "The Commissioner & Secretary to the Department of Elementary Education is directed to decide whether Shahibur Rahman as the eldest serving teacher of the Amaidilla L.P. School deserves to be provincialized or whether his service was rightly terminated by the SMC for his alleged irregular attendance. Depending upon the outcome of the verification exercise, provincialization of the deserving teacher will be made. The two contesting claimants must be afforded due opportunity to project their respective version before a final decision is taken by the Commissioner. The ordered exercise should be completed expeditiously and preferably within 3 months of receipt of intimation. The claim to provincialiation and salary would abide by the final decision of the Commissioner."

Also read: The Hon'ble High Court order dated 17/03/2015 passed in WP(C) No. 1086/2014 and also perused the documents/ records received from the Director of Elementary Education, Assam, the DEEO, Karimganj, the Head Teacher cum Secretary, Amaidilla L.P. School in connection with the matter.

Findings: It appears from the records and reports that the Amaidilla L.P School was provincialised w.e.f. 01/01/2013 vide DEE's order No.EPD.44/2013/34, keeping the post of 2nd Assistant Teacher vacant. Further, the service of the appellant petitioner, Shahibur Rahman was provincialised as Asstt. Teacher at Amaidilla LP School vide order No. EPD/44/2013/80 dated 21/01/2014. Subsequently, the said provincialisation order was quashed in compliance of the Hon'ble High Court order dated 17/03/2015 passed in

WP(C)No.1086/2014 and services of Altaf Hussain was provincialised as Asstt. Teacher of the school vide order No. EPD/H/46/2014/258 dated 11/05/2015.

It may be noted that the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011 was notified on 5th September, 2011 (in Assam Gazette). The SMC of the Amaitilla LP School had terminated the services of Shri Shahibur Rahman vide Resolution dated 27/04/2013 which is violation of the provisions under Section- 6 of the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011. After provincialisation of an Educational Institution, the SMC concerned loses its power to take any action against the teachers of a provincialised school.

Order: In view of the above findings the orders issued by the Directorate of Elementary Education, Assam vide Memo No. EPD/H/46/2014/257 dated 11/05/2015 quashing the provincialisation order in respect of Shri Shahibur Rahman is hereby revoked. The Director of Elementary Education, Assam will issue necessary order for release of salary in respect of Shri Shahibur Rahman by observing the required formalities. At the same time Shri Altaf Hussain, Asstt. Teacher stands removed from service, as the extant Rules do not allow three Teachers in L.P. School.

This is issued in compliance of the Hon'ble High Court order dated 11.07.2016 passed in WA No.116/2015 with WP(C) 1086/2014.

Sd./ Preetom Saikia, IAS

Commissioner & Secretary to the Govt. of Assam Elementary Education Department

Dated Dispur, the 15th November, 2018

Memo No. PMA.438/2016/217-A"

7. Mr. B.D. Das, learned senior counsel for the petitioner submits that the

Amitilla L.P. School and its employees have been provincialized vide order dated 27.09.2013 under the Act of 2011 as amended in 2012 and the service of the respondent No.8 was terminated after due proceedings by the SMC on 27.04.2013. Therefore, the SMC of the Amitilla L.P. School have the power and authority to take any action against the teacher of the said school as the said school was not provincialized back then. The only ground of revoking the cancellation of the provincialisation order dated 11.05.2015 in respect of respondent No.8 is to the effect that the SMC has no power to take any action against the respondent No.8 as well as removal of the petitioner from the post of Assistant Teacher vide impugned order dated 15.11.2018, which is stated to be in violation of Section 6 of the Act of 2011, is not sustainable for reason that the SMC has terminated the service of the respondent No.8 on 27.04.2013 whereas, the provincialisation order is on 27.09.2013. Such reason, therefore, is palpably erroneous and illegal as such, the impugned order may be set aside and quashed and may direct the respondent authorities to allow the petitioner to continue as Assistant Teacher in the said school.

8. Mr. B.D. Das, learned senior counsel, submits that since the order of provincialisation is on 27.09.2013 and the termination of the service of the respondent No.8 was on 27.04.2013, i.e., before the provincialisation order was issued, the order shall come into effect from the date of provincialisation i.e. 27.09.2013, although the provincialisation is w.e.f. 01.01.2013 as the order would not have any effect unless it is communicated.

9. Mr. B.D. Das, learned senior counsel, in support of his submissions, has placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Bipromasz Bipron Trading SA vs Bharat Electronics Limited (BEL)*** reported in (2012) 6 SCC 384.

10. Mr. A. Phukan, learned Standing Counsel, Elementary Education Department submits that although the SMC has taken a resolution on 10.11.2012, then 10.12.2012, 15.01.2013, 12.03.2013, the respondent No.8 was terminated from the post of Assistant Teacher of the said school on 27.04.2013. The school as well as its employees were provincialized w.e.f. 01.01.2013 vide order 27.09.2013, the SMC would not have any power and authority to take any actions against the employees of the said school. The SMC having been divested of their powers and authority after the provincialisation of the said school vide provincialisation order 27.09.2013 w.e.f. 01.01.2013, the action of termination is *non est* and having considered that the respondent No.8 was appointed as Assistant Teacher in the year 1994 in the second post of Assistant Teacher, the service of the respondent No.8 has been provincialized. The respondent authorities having found that the cancellation of the order of provincialisation of the service of the respondent No.8 was being made erroneously and without considering the said termination of the service of the respondent No.8 by the SMC, is in violation of Section 6 of the Act of 2011, the impugned order dated 15.11.2018 has been issued in compliance of the order of the Division Bench with reasons.

11. Mr. H.R.A. Choudhury, learned senior counsel for the respondent No.8, while referring to the various documents submits that admittedly the respondent No.8 is senior to the petitioner as he has been appointed in the year 1994 and the petitioner has been appointed as third Assistant Teacher in the said school in the year 2005. He vehemently argued that records clearly revealed that no termination order was issued by the competent authority except certain resolutions to terminate without there being any consequential order of termination. Therefore, the provincialisation of the service of the respondent No.8 is legal and in accordance with the provisions of the Act of 2011.

12. Mr. H.R.A. Choudhury, learned senior counsel submits that the Division Bench

has held that the Court was not apprised of the report given on 15.11.2013, wherein, the BEEO, Badarpur had indicated after verification of the records that the respondent No.8 has been regularly working as an Assistant Teacher of the Amaidilla L.P. School since 15.08.1994 and his name was included in all the official correspondences and he received his share of grant-in-aid sanctioned for the school for the year 2010-11. It has also held that the BEEO further indicates that Head Teacher is manipulating the school records to appoint his younger brother i.e. (the petitioner herein) by replacing the older teacher, i.e (respondent No.8 herein), through forging of documents. It further has held that the claim for provincialisation in a venture school is to be considered on the basis of length of service and if the Assistant Teacher appointed on 15.08.1994, is serving with sincerity, he deserves to be provincialized. On the other hand, it also has to be verified whether the school records were manipulated to wrongly show that the older teacher was irregular in his duties as is reflected in the proceedings of the SMC.

13. Accordingly, he submits that the Hon'ble Division Bench has directed the respondent authorities particularly, the Commissioner and Secretary to the Govt. of Assam, Department of Elementary Education to decide whether the respondent No.8 as the elder serving teacher of the Amaidilla L.P. School deserves to be provincialized or whether his services was rightly terminated by the SMC for his irregular attendance, depending upon the verification exercise, the provincialisation of the deserving teacher will be made.

14. He submits that the respondent authorities have not taken into consideration of the fact of appointment of the respondent No.8 in the year 1994, who is admittedly the eldest serving teacher and no effort appears to have been made to find out whether the respondent No.8 has sincerely continued to serve in the said school. However, it is clear from the impugned order dated 15.11.2018, that the

termination having been made after coming into force of the order dated 27.09.2013 i.e. w.e.f. 01.01.2013, the resolution to terminate the respondent No.8 having been found to be without power and authority by the SMC, the revocation of the cancellation of the provincialisation order dated 11.05.2015 in respect of the respondent No.8 on the ground of violation of Section 6 of the Act of 2011 is absolutely fair and reasonable.

15. Due consideration has been extended to the rival submissions of the learned counsel for the parties and also perused the materials available on record.

16. The petitioner was appointed as 3rd Assistant Teacher by the SMC of Amaidilla L.P. School, Karimganj vide resolution dated 10.02.2005 and accordingly, he joined on the same day. On the other hand, the respondent No.8 was appointed as 2nd Assistant teacher in the said school on 15.03.1994. Vide order dated 27.09.2013, the said school has been provincialized w.e.f. 01.01.2013. The service of the respondent No.8 was provincialized vide order dated 21.01.2014. After the order dated 17.03.2015 in WP(C) 1086/2014, wherein, provincialisation of the service of the petitioner was set aside by this Court, the service of the petitioner was provincialized vide order dated 11.05.2015.

17. On the appeal against the aforesaid order dated 17.03.2015 passed by the Coordinate Bench of this Court in the writ petition (supra), the Division Bench vide order dated 11.07.2016 in writ appeal (supra) has directed the Commissioner & Secretary to the Department of Elementary Education, to decide whether Shahibur Rahman as the eldest serving teacher of the Amaidilla L.P. School deserves to be provincialized or whether his service was rightly terminated by the SMC for his alleged irregular attendance. Depending upon the outcome of the verification exercise, provincialization of the deserving teacher will be made. The two contesting claimants must be afforded due opportunity to project their respective

version before a final decision is taken by the Commissioner.

18. Records reveals that the vide resolutions dated 10.11.2012, 10.12.2012, 15.01.2013, 12.03.2013 the SMC has decided to terminate the service of the respondent No.8 on being found irregular in his duty and ultimately by resolution 27.04.2013, has terminated the service of the respondent No.8. It is also revealed that the report of the BEEO, Badarpur indicates certain allegations against the Head Master, who happened to be the brother of the petitioner, of forging of documents. The records also reveal that the respondent No.8 was irregular in his duty as Assistant Teacher in the said school.

19. Perusal of the impugned order as recorded above clearly shows that the revocation of the order dated 11.05.2015 cancelling the provincialisation order in respects of the respondent No.8 and the removal of the petitioner as Assistant Teacher of the said school is on the ground that the SMC of the said school had terminated the service of the respondent No.8 vide resolution dated 27.04.2013 in violation of the Section 6 of the Act of 2011 as after provincialisation of an Educational Institution, the SMC loses its power to take any action against the teacher of the provincialized school. It appears that the Commissioner & Secretary to the Govt. of Assam, Elementary Education Department, has not taken into consideration other relevant aspect, but heavily rest his decision on the purported violation of Section 6 of the Act of 2011.

20. Perusal of Section 6 of the Act of 2011 shows that the Superintendence and control of Educational Institution where services of the employees are provincialized shall be from the date of the publication of the notification under Sub section 4 of the Section 10 within the purview of the Act shall vests on the State Government.

21. Section 10(4) provides that District Scrutiny Committee shall forward the

verification of the list of eligible teachers school wise in accordance with the number of posts specified in the schedule appended to this Act, to the concerned director who shall after making further scrutiny as may be required shall forward the same to the concerned department of the State Government for consideration and for issuing notification in respects of eligible institution and employees eligible for getting their services provincialized.

22. Undisputably, the Amaidilla L.P. School has been provincialized keeping the post of second Assistant Teacher vacant vide order dated 27.09.2013 w.e.f. 01.01.2013. The service of the respondent No.8 was provincialized vide order dated 21.01.2014 whereas, his service was already been terminated by SMC on 27.04.2013 i.e. before the issuance of the notification provincializing the said school on 27.09.2013. Thus, the Superintendence and control of the said school would vest on the State Government from the date of publication of notification dated 27.09.2013 although the provincialisation is w.e.f. 01.01.2013. Therefore, in my view, the SMC had the power and authority on 27.04.2013 when the service of the petitioner was terminated on the basis of its resolutions.

23. It is well settled proposition of law that an official order takes effect only when it is served on the person effected. In this context, a reference may be made to the decision of the Hon'ble Supreme Court in the case of **Bachhittar Singh – vs State of Punjab** reported in **AIR 1963 SC 395** wherein, it has held that it is of the essence that the order has to be communicated to the person who would be effected by the order before the State and that person can be bound by that order until the order is communicated to the person effected by it. Therefore till its communication the order cannot be regarded as anything more than provisional in character. As relied upon by the learned counsel for the petitioner, the above case has been referred and considered in the case of **Bipromasz Bipron Trading** (supra).

24. In the present case, as noted herein above, the provincialisation order having been issued vide order dated 27.09.2013 although w.e.f. 01.01.2013 and the resolution for termination of the service of the respondent No.8 has been issued on 27.04.2013, it cannot be said that the action initiated or taken before the issuance of notification of the provincialisation order by the SMC is without any power and authority or is in violation of Section 6 of the Act of 2011.

25. In view of the discussions made hereinabove, I am of the considered view that the Commissioner & Secretary to the Govt. of Assam Elementary Education Department by issuing the impugned order dated 15.11.2018 revoking the cancellation of provincialisation order dated 11.05.2015 in respect of the respondent No.8 namely Shahibur Rahman and removal of the petitioner from the service has been arrived on a erroneous interpretation of the provisions of law. Thus, same is unsustainable. The impugned order dated 15.11.2018 is, accordingly, set aside and quashed.

26. Writ petition stands allowed and disposed of. No order as to costs.

JUDGE

Comparing Assistant