

**(1998) 05 GAU CK 0005**

**Gauhati High Court**

**Case No:** Civil Rule No. 2698 of 1997

Tahera Khatun

APPELLANT

Vs

State of Assam and Others

RESPONDENT

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**Date of Decision:** May 14, 1998

**Acts Referred:**

- Constitution of India, 1950 - Article 226

**Citation:** (1998) 2 GLT 404

**Hon'ble Judges:** V.D. Gyani, J

**Bench:** Single Bench

**Advocate:** M.H. Choudhury and N. Dutta, for the Appellant; Y.K. Phukan, D. Das, H.K. Mahanta and K.D. Das, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

V.D. Gyani, J.

By this petition under Article 226 of the Constitution, the Petitioner seeks to challenge the appointment order dated 29.5.97, Annexure-G, issued by the Director of Secondary Education, Assam, Respondent No. 2, appointing Respondent No. 7 as Subject Teacher, Assamese, and also the appointment of Respondent No. 6, by similar order issued on the same date. The Petitioner while praying for a writ of certiorari has also prayed for a writ of Mandamus directing the Respondent authorities to regularise Petitioner's service as Assamese Subject Teacher in the T.N.D. Girls' Madrasa H.S. School.

2. By an interim order dated 9.7.97 passed by a learned Single Judge of this Court the impugned order dated 29.5.97, Annexure-G, was suspended until further order, hence Misc. Case No. 985/97 by Shahjahan Ali (Respondent No. 7) and yet Misc. Case 96/98 praying for vacating the above interim order, and the subsequent order 5.12.97, thereby further extending the operation of the interim order.

3. The writ Petitioner applied for the post of Assamese Subject Teacher in pursuance to an advertisement dated 1.4.95, Annexure-B, She was so appointed vide order dated 21.8.95, Annexure-D, which was issued in compliance of Managing Committee's resolution dated 20.8.95, Annexure-C. She joined as well as second teacher, as reflected in the detailed particulars of teaching and non-teaching staff of the School, Annexure- 7, as forwarded to Respondent Nos. 2 and 3 for according approval, which was pending till filling of the present petition.

4. In the meantime, Respondent No, 7 approached this Court with a writ petition being Civil Rule No. 672/96, in which Rule was issued on 13.2.96. The Respondent No. 2 on 29.5.96 issued order appointing Respondent No. 7 as subject teacher in Assamese Annexure-G, which is die subject matter of challenge in this petition.

5. Petitioner's case is that she should have been approved being a female candidate as the advertisement, Annexure-B, itself provided for preference to female candidate and she was the only female candidate, having secured the highest marks 47.4% as compared to other candidates. Respondent No. 7 has secured 45% of marks at the M.A. examination. The impugned order has been denounced as arbitrary, unfair and illegal.

6. Respondent No. 7 has also filed a writ petition being Civil Rule No. 672/96, it was also directed to be listed along with this petition vide order dt. 16.6.97. What happened thereafter is a matter of record. The petition filed by Respondent No. 7 was not listed along with this petition. On 2.7.97 notice by registered post was issued and served on Respondent No. 7 on 17.7.97. The anxiety to obtain stay against the appointment order brought the writ Petitioner before the Court praying for an interim order but before this Respondent could make his appearance in the case, an interim order suspending the operation of the impugned order dated 29.5.97 (Annexure-G) was passed. Respondent No. 7 joined the post on 31.5.97 and since then he has been working. However, due to the aforementioned interim order dated 9.7.97 (Annexure-1), the payment of his salaries has been stopped by the Principal of the School (Respondent No. 4) without issuing any written order to that effect. According to him the writ Petitioner has suppressed material facts of the case with a view to tilt the balance in her favour. His case is that the Director of Secondary Education, Assam, by his/her order bearing No. PC/SEC/124/92/92 dated 29.7.93 granted permission to open Higher Secondary Classes at Titapani Naba Diganta Girls" Madrassa High School, hereinafter referred to as TND Girls" Madrassa H.S. School for upgradation of the same to a Higher Secondary School. Pursuant to the said order dated 29.7.93, the Higher Secondary Classes were opened at the said school with the help of public donation. The applicant was appointed as Subject Teacher in Assamese of the said TND Girls" Madrassa H.S. School with effect from 2.11.93 by the Managing Committee of the school. He has further pleaded that since the process of upgradation was at its initial stage in 1993, the Managing Committee did not issue any formal appointment letter. He joined on

2.11.93 as subject teacher in Assamese in the said school on honorary basis. However, though he was not issued any formal appointment letter, the letter appointing him as Invigilator at Langla Higher Secondary Examination Centre, the certificate dated 28.8.94 issued by the Officer- in-Charge of the said Langla Higher Secondary Examination Centre, the attendance register of the teaching staffs of the school and the list of subject teachers of the school in question speak about his appointment. (See Annexures-2,3,4 and 5 in Misc, Case 96/98). On 25.8.94 the Principal, Respondent No. 4, submitted a proforma showing particulars of the school in question to the Director of Secondary Education, Assam and the Board of Higher Secondary Education Council, Bamunimaidam, Guwahati. On perusal of the aforesaid proforma dated 25.8.94, Respondent No. 7 found that his name did not appear in the list of staff (teachers) of the school in question. The Principal (Respondent No. 4) had dropped his name deliberately from the aforesaid proforma and showed the name of one Md. Tota Miah in his place with a view to deprive him of the post of subject teacher in Assamese. The Principal had done this in a clandestine manner and the fact of having dropped, his name from the said proforma Annexure-6 came to his knowledge after the submission of the same to the respective offices.

7. The Respondent No. 7 having sensed that the Principal, Respondent No. 4, was determined to delete the name from the proforma, Annexure-6, as originally submitted, he approached the Deputy Commissioner, Barpeta requesting him for an enquiry. It was accordingly conducted by Circle Officer, Kalgachia as directed by the Deputy Commissioner, Barpeta. Circle Officer submitted his report. Some of his findings are- (a) Shahjahan Ali's name appeared in SI. No. 4 in the list of teachers submitted to the Director on 12.2.94. But in the subsequent list dated 25.8.94 it was deleted. He was shown as Subject Teacher of Assamese in the list submitted on 12.2.94. The Respondent has filed this enquiry report dated 24.2.95 as Annexure-7 in Misc. Case No. 96/98. On the basis of the above report, the Principal, Respondent No. 4 was directed to remove the name of one Tota Miah as subject Teacher in Assamese and include the name of the Respondent No. 7 in the final list of subject Teacher and submitted the same to the Director as per letter dated 23.3.95 filed as Annexure-8 by the Respondent No 7. Despite this communication, the Respondent No. 4 did not fully comply with the direction. While name of Tota Miah and Md. Abdul Bari was removed, nothing was done to include the name of Respondent No. 7 in the Final List. A fresh direction was therefore issued on 7.4.95 (Annexure-9) to the Principal to take necessary steps for appointment of Respondent No. 7 if not already appointed and furnish a report immediately. The Principal, Respondent No, 4, appeared to be quite adamant, he was sitting over the matter ignoring the directions as contained in the order dated 23.3.95 and 7.4.95, Annexures-8 and 9 respectively. The Respondent No. 7 had therefore again to approach the Deputy Commissioner, Barpeta to take necessary action in the matter. Accordingly, the Deputy Commissioner by his letter dated 21.4.95 (Annexure-10) straightway wrote to

the Director of Secondary Education. A copy of the Enquiry Report dated 24.4.95, Annex- ure-7 was also sent.

8. As a result of the above communication, the Education (Planning) Department, directed the Inspector of Schools, Barpeta, Respondent No. 3 to submit required particulars regarding upgradation of the school in question along with the names of incumbents showing their date of joining. The Principal, on receipt of the above letter submitted particulars of teaching and non-teaching staff on 9.12.95. The Respondent No. 7 was shown as third subject Teacher in Assamese at SI. No. 5 showing his date of joining service as 21.8.95. The writ Petitioner and one Abdul Basad Respondent No. 6 were shown above Respondent No. 7 in the Chart of particulars dt. 9.12.95, Annexure-12, as filed by the Respondent No. 7, whose case is that although he was senior, he was deliberately shown below the writ Petitioner and Respondent No. 6. He has further added that neither the writ Petitioner nor the Respondent No. 6 had even completed their M.A. Degree course when the Respondent No. 7 had joined the school in question. There is yet another disturbing aspect which cannot be lost sight off. The Respondent No. 7 at the insistence of the Managing Committee of the school had to part with a sum of Rs. 10,000/- as donation, a fact which has surfaced in the enquiry conducted by the Circle Officer as per Annexure-7.

According to him showing his name below the writ Petitioner and Respondent No. 6 was obviously mala fide. He also filed a Writ petition as already noted above being Civil Rule No . 672/96. In view of the Rule issued in Civil Rule No. 672/96, the Respondent No. 7 approached the authorities with a request to enquire into the whole episode and take necessary action in the matter of regularisation/Provincialisation of services. The Joint Secretary, Department of Education by his order dated 18.6.96, Annexure-13 directed the Inspector of Schools to furnish actual date of joining of Subject Teacher in Assamese in the school in question. Pursuant to the said order the Inspector of Schools, the Respondent No. 3 by his letter dated 9.7.96, Annexure-14 submitted his report which clearly states that the Respondent No. 7 had honorarily served from 2..11.93 to 31.3.94 without getting any appointment letter from the Managing Committee. While the writ Petitioner's date of joining service was shown as 21.8.95 and that of Abdul Basad as 20th February, 1994. By letter dt. 19.9.96, Annexure-16, the Education Department on examination of the whole case and the material and documents on record approved the names of the Respondent Nos. 6 and 7 as Subject Teacher in Assamese. On the basis of this letter, Annexure -16, the Director of Secondary Education appointed the Respondent No. 7 as subject Teacher in Assamese at the School in question by order dated 29.5.97, Annexure-G, as filed by the writ Petitioner and Annexure-17 as filed by the Respondent No. 7. It is this order which is the subject matter of challenge. The writ Petitioner has based her claim mainly on the grounds (i) that she had secured the highest percentage of marks as compared to other candidates Respondent Nos. 6 and 7 and (ii) the advertisement

dated 1.4.95, Amixture-B/1 itself provided for preference being given to the female candidate, but so far as seniority in service is concerned she joined the school on 21.5.95 (vide Annexure-7) while Respondent No. 6 Md. Abdul Basad joined service on 20.2.94 and Respondent No. 7 Md. Sahjahan Ali Ahmed was appointed as subject teacher in Assamese on 2.11.93. apparently he is the senior most amongst the three, It may be noted here that the writ Petitioner had not even passed her M.A. when Respondent No. 7 joined the service on 2.11.93.

9. The Principal-cum-Secretary and the Managing Committee of the School have been impleaded as Respondent Nos. 4 and 5 respectively. Despite issuance of notices, they have not chosen to enter appearance although serious allegations of malafide have been made against them by Respondent No. 7, be it added that these allegations are substantially supported, by documents and record filed by him. The Enquiry Report dated 24.2.95 (Annexure-6) as submitted by the Circle Officer to the Deputy Commissioner, Barpeta. Some of the important findings having a material bearing on the case are-

Grounds of enquiry :

(1) Shahjahan Ali the petitioner, alleges that he has been deprived of his claim as a Subject Teacher in Assamese by the Managing Committee after excluding his name in the final list of teachers submitted to the Govt. for appointment in subsequent upgradation and provincialisation the High Madrassa into Higher Secondary School.

(2) Non-inclusion of his name as a teacher in the proceedings of meetings/resolutions taken by the Managing Committee in the records of the proceedings Book maintained by the Committee as well as/in the attendance register of Teachers by the Principal.

(3) Inclusion of his name in the teachers list submitted to the Directorate of Secondary Education, Assam for seeking permission to start Higher Secondary Classes.

(4) The Petitioner also alleges that the Principal has produced a duplicate Attendance Register of Teachers to the Inspector of Schools, Barpeta to prove that the Petitioner was not a teacher in his school.

Findings :

(a) Regarding allegation No. 1, records of official correspondence have been verified and found that Sahjahan Ali's (the Petitioner) name appears vide 51 No. 4 in the list of teachers submitted to the Director of Secondary Education, Assam, Kahilipara by the Principal, TND Girls' Madrassa H.S. School dated 12.2.94. However, his name does not appear in the latest list of teachers submitted to the Directorate by the Principal dated 25.8.94.

(b) About allegation No. 2, the Petitioner's name does not appear either in the records of proceedings of meetings /resolutions taken by the Managing Committee nor in the teacher's Attendance Register maintained by the Principal.

(c) On point No. 3, the Petitioner's claim is found true as his name appears in-the list of teachers submitted to the Director, Secondary Education, Assam by the Principal dated 12.2.94 showing as subject teacher of Assamese.

(d) Regarding allegation No. 4, the attendance Register produced before me stated to be the one produced before the Inspector of Schools, Barpeta has been verified but could not be ascertained whether this was a duplicate one or not. However, in the Register, the Petitioner's name does not appear.

#### Additional Findings:

(i) Shahjahan Ali Ahmed, the Petitioner stated that he joined as subject teacher of Assamese on 2.11.93 but could not produce any appointment letter from the Managing Committee or the Principal. However, it is a fact that he joined as a teacher which is evident from his detailment as Invigilator for Higher Secondary First year Final Examinations, 1994 by the Principal ,TND Girls" Madrassa H.S. School dated 4.4.94. He was appointed as an Invigilator by the Ofificer-in-charge, Higher Secondary Exam. Centre, Langla vide Memo No. LHSS/HS/EXAM/CC/94 dtd 20.4.94. Moreover, on verification of resolution taken in a meeting of Managing Committee held on 4.8.93 one Abdul Based was allowed to take classes of Assamese though he was not qualified. After this resolution, the Managing Committee held on 20.12.93,10.6.94 and 2.7.94. But regarding appointment of Shahjahan Ali, the Petitioner, who is a qualified candidate did not appear jp their subsequent sittings though he was already allowed to take classes w.e.f 2.11.93.

(ii) On further enquiry, it has revealed that Shahjahan Ali Ahmed was allowed to join by a verbal resolution of the Managing Committee on payment of Rs. 10,000.00( ten thousand ) only as donation which was duly paid and accepted by the Managing Committee. This fact of receiving donation has been agreed by all members of Managing Committee present at the time of enquiry. In fact, this is a normal practice by the Managing Committee of Venture Schools to take donation from applicant teachers which is highly illegal and at time lead to legal disputes between the Managing Committee and the applicant candidate as in the present case.

(iii) There are 3 Nos. of Teachers in Assamese subject as per records. Out of these 3 Nos. of teachers (i) Tota Miah is an Asstt. Teacher, of TND Girls M.E. Madrassa (Provincialised) (ii) Abdul Based, who was not qualified at the time of his joining and (iii) Shahjahan Ali Ahmed, the Petitioner. On verification of records of eligibility, only Shahjahan Ali Ahmed was qualified as per Govt. norms. In case of Tota Miah, though he is qualified one, he should not have been permitted to join (as he is an Asstt. Teacher of a provincialised school) without obtaining the permission from the concerned authority for rendering honourary service to the cause of the Institution.

Whereas his name appears in the final list of teachers shown subjectwise that has been submitted to the Govt. after depriving the only qualified candidates viz. Shahjahan Ali Ahmed, the Petitioner. (emphasis supplied).

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(v) Regarding non-inclusion of name of Shahjahan AH as subject teacher in the records of proceedings/resolutions it appears to be a deliberate omission to deprive him from his candidature by the member of Managing Committee. It also appears that, decision regarding appointment of teachers mainly depend on the choice of the President and the Principal and Secretary on fulfilment of their interest, not on principle or majority decision of the members of the Managing Committee. (emphasis supplied).

(3) An explanation may be called from the Principal, TND Girls" Madrassa Higher Secondary School for furnishing false particulars of in-eligible subject Teachers viz. Tota Miah (Assamese) and Abdul Baki (Arabic) as they are Asstt. Teachers of TND Girls" M.E. Madrassa (Provincialised) and also deliberately excluding the name of Shahjahan Ali Ahmed (Assamese) the Petitioner, though he was only the eligible candidate for Assamese subject and a serving teacher.

10. It is this Principal and the Managing Committee who are playing ducks and drakes with the Respondent Shahjahan Ali. It is the writ Petitioner who is the direct beneficiary of this game and it is she upon whom the Principal and the Managing Committee have showed their blessing. While the later have wilfully abstained, the writ Petitioner has not questioned or disputed the documents, particularly Annexure-6, filed by the Respondent No. 7.

11. The exercise of extra ordinary jurisdiction under Article 226 of the Constitution is in its essence, an equitable jurisdiction. Aim of equity is to promote honesty and not to frustrate the legitimate rights. As has been pointed out by the Supreme Court in [Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another](#), a Court of equity even exercising its equitable jurisdiction under Article 226 must act so as to prevent perpetration of legal fraud and the Court has own obligation to do justice by promotion of good faith as far as it lies within its power. Equity is always to defend law from crafty evasions. The person invoking equitable extra-ordinary jurisdiction under Article 226 of the Constitution cannot be allowed to retain unconscionable gain and must come with clean hands (see [The Ramjas Foundation and Others Vs. Union of India and Others](#), The equitable principle have an ethical quality which could not be allowed to be sacrificed on mere absence of the parties whose crafty shady dealings are sought to be taken advantage of by the writ Petitioner. The petition is liable to be dismissed and accordingly dismissed.

12. It is undoubtedly a case for imposition of cost, not so much on the writ Petitioner than the Principal and the Managing Committee, the Respondent Nos. 4 and 5, who have wilfully abstained despite service of notice, in any case deemed service of

notice, for obvious reasons, the Principal and the Managing Committee own an obligation to justify their action before the Court when called upon to do so. By remaining absent they do not help the cause of justice. It is their misdeed which has lead to filing of this writ petition and two other Miscellaneous cases taking huge toll of times of this Court. They are called upon to show cause as to why a cost of Rs. 10,000/- be not imposed. The cause must be shown within a month.

13. Show cause notice be issued on Respondent Nos. 4 and 5 and a separate Misc. Case be registered.