

**(1994) 03 GAU CK 0009**

**Gauhati High Court**

**Case No:** Civil Rule No. 36 (SH) of 1993/619 of 1993

Anjali Sarmah

APPELLANT

Vs

State of Meghalaya and Ors.

RESPONDENT

**Date of Decision:** March 3, 1994

**Citation:** (1994) 1 GLJ 344

**Hon'ble Judges:** D.N.Baruah, J

**Bench:** Single Bench

**Advocate:** G.N.Das, G.K.Bhattacharyya, A.Sharma, A.R.Paul Majumdar, K.P.Pathak, V.K.Jindal, J.P.Bhattacharjee, Advocates appearing for Parties

### **Judgement**

1. In this writ application the petitioner has challenged the Annexure 4 order dated 18.12.92 issued by the third respondent terminating the services of the petitioner and also praying for appropriate writ or direction to implement the Annexure 6 order dated 5.1.93 issued by the Inspector of Schools, East Khasi Hills District, Shillong, the second respondent.

2. The short fact of the petitioner's case is that she obtained Master degree in Assamese and she served in leave vacancy in Laitumkhra Sisu Bidyalaya for a period from March, 1984 to April, 1986. Thereafter, she was out of job. A post of graduate teacher fell vacant in Laitumkhrah Assamese High School. Petitioner on coming to know about it submitted an application dated 17.9.92 (Annexure 1) to the second respondent giving particulars of her educational qualification, past experience,, etc. This application was forwarded by the Secretary, LajtumJchrah Assamese High School making the following endorsement :

"Forwarded to the Inspector of Schools, East Khasi Hills District. Shillong for favour of necessary action the applicant may be allowed to officiate as Assistant teacher against the vacant post. This has the approval of the school Managing Committee."

By Annexure 2 order dated 2.12.92 the second respondent approved the appointment of the petitioner as Assistant Teacher, Laitumkhrah Assamese High

School, Shillong in the scale of pay mentioned there in. The appointment of the petitioner being approved by the second respondent, the Secretary of the School by order dated 15.12.92 (Annexure 3) appointed the petitioner with effect from the date of her joining, An advertisement was published by the Secretary of the School in The Shillong Times" in its issue dated 12.11.92 for a post of Assistant Teacher. In the said advertisement it was specifically mentioned that preference would be given to the experienced teacher. The petitioner passed MA examination and had teaching experience by serving as a teacher for a period of more than 2 years in the said Sisu Bidyalaya. On 18.12.92 an interview was held for selection of candidates for appointment of Assistant Teacher against the vacancy. Petitioner along with others appeared in the said interview. By Annexure4 order dated 18.12.92 ie the date on which the interview was held the appointment of the petitioner was terminated with effect from 19.12.92. At the time of issuance of the said order no person was selected. Several complaints were made before the second respondent regarding selection of candidate for appointment as Assistant Teacher in the post in which the petitioner had been serving on the basis of Annexure 2 order. By Annexure 5 order dated 22.12.92 the second respondent informed the third respondent that according to Rules, appointment could not be made by the Managing Committee without prior approval by the Inspector of Schools and any appointment made by the Managing Committee without such approval should be treated as cancelled. He also informed the third respondent that he had received complaints against the conduct of test by the Managing Committee and asked the third respondent for sending applications of all candidates with their certificates, etc to him. By Annexure 6 letter dated 5.1.93 the second respondent informed the third respondent that termination of appointment of the petitioner was highly irregular and contrary to the provisions of rule and circular issued by Government, inasmuch as no prior approval was taken before termination of her service. The second respondent further instructed the third respondent to cancel the order of termination and allow the petitioner to continue in her service. The school remained closed for winter vacation from December, 1992 to 23.2.93 and as the petitioner was not aware of any order of termination she reported for duty on the date of reopening of the school. The Headmistress (fourth respondent), however, did not allow the petitioner to resume her duty. Having been refused to resume duty, she approached the second respondent and in his office the petitioner could come to know about her termination from service. The petitioner was given a copy of the Annexure 6 letter dated 5.1.93 and she was directed by the Inspector of Schools to resume her duty in the school. However, till the date of filing of this writ petition the petitioner was not allowed to resume her duty. As the petitioner was not allowed to resume her duty as per Annexure 6 letter the petitioner on 25.2.91 submitted a representation to the fourth respondent referring the Annexure 6 letter Issued by the second respondent and requested her to allow her (petitioner) to join duty. The fourth respondent did not pay any heed to it. According to the petitioner the manner in which the interview was held by the Managing Committee (fifth respondent) reflected malicious and

biased attitude towards the petitioner. It was also not in accordance with the advertisement and, therefore, the action of the Managing Committee was illegal in appointing Arpana Saikia and terminating the services of the petitioner without prior approval of the second respondent. The termination order (Annexure 4) being illegal for not obtaining prior approval, the petitioner was deemed to be in service and during her service, the appointment given to Arpana Saikia by the Managing Committee and subsequent approval given by the second respondent was illegal, without jurisdiction and contrary to the provisions of law. Hence the present petition.

3. This petition was moved before this Court on 23.3. v3. On that day a notice of motion was issued and the fifth respondent was directed to allow the petitioner to officiate as Assistant Teacher of Laitumkhrah school until further order. By the said order liberty was given to the fifth respondent to pray for cancellation, modification or alteration of the interim order passed. An application was filed for vacating the interim order dated 23.3.93 and this matter came up on 28.5.93 before this Court. On that day the interim order was not vacated. However, this Court decided to hear the entire matter. Accordingly, the matter was heard by this Court.

4, On behalf of respondents 3, 4 and 5, the third respondent filed an affidavit in opposition on 22.5.93 and further affidavit on 14.8.93, The petitioner also filed a reply affidavit on 4.8.93. In the affidavit in opposition the said respondents have submitted that the writ petition was not maintainable and that there was no violation of any rights. Besides, the said respondents have stated that on 17.9.92 the writ petitioner brought an application addressed to the second respondent praying for appointment. This application was "routinely forwarded" by the President and Secretary of the Managing Committee on 21.9.92. Approval was given by the second respondent and on the basis of the said approval the petitioner was appointed. The respondents further have stated that by a resolution adopted in a meeting of the Managing Committee held on 10.11.92 the Committee decided to advertise the post in "The Shillong Times" and accordingly, the post was advertised in the said paper on 12.11.92. As per the said advertisement (Annexure 3 to the affidavit in opposition) preference was to be given to an experienced teacher strong in English and Mathematics and having Assamese at least upto Pre University. 4P candidates including the petitioner had submitted applications to the third respondent and on careful scrutiny by the members of the Managing Committee the applications of only 14 candidates including the petitioner were found to be in order. The Committee further decided to call for written and viva voce interview. On 18.12.92 written and viva voce tests had been taken for all the 14 candidates for final selection and the marks both for written and oral tests were given. It has been further stated in the said affidavit in opposition that though the second respondent approved the proposal of the Managing Committee for appointment of the writ petitioner subject to strict observance of Rules, the Managing Committee could not give effect to the said approval in view of the fact that the post in question had

already been advertised as per the instructions of second respondent vide Annexure 1 to the affidavit in opposition. The said respondents have also stated that the appointment of the writ petitioner was purely on temporary basis on the condition that in the event of her failure to qualify in the test, her appointment would be terminated. This temporary appointment was accepted by the writ petitioner and accordingly, she joined duty on the date of appointment. According to the said respondents as per the advertisement preference was not only to be given to the experienced teachers but also to the teachers strong in English and Mathematics. As the writ petitioner could not do well in the written and oral interview and miserly failed both in Mathematics and English, her services were terminated.

In the said affidavit in opposition the said respondents have further stated that no prior approval was necessary to terminate the services of the conditional ad hoc appointment and in any event if approval was required, it was given by the second respondent by Annexure 7 (to the affidavit in opposition) letter dated 8.12.92. The said respondents denied the allegation that there was any mala fide intention to terminate her services and appoint another person. According to them the written and oral tests had been conducted by the Selection Board constituted by the Managing Committee and in that tests the petitioner miserably failed. Besides, the second respondent by order dated 12.3.93 (Annexure 10 to the affidavit in opposition) approved the appointment of Arpana Saiisia with a direction to terminate the services of the writ petitioner. In view of that the petitioner was not allowed to resume her duty and her representation dated 25.2.93 (Annexure 7) could not be considered. Besides, aforesaid Annexure 10 letter dated 12.3.93 put an end to the earlier letter of the second respondent dated 22.12.92 (Annexure 5). Therefore, according to these respondents the action taken by them in appointing Arpana Saiicia was just, proper and in strict compliance with the provisions of law and, therefore, no interference is called for.

In the further affidavit these respondents have reiterated the statements made in the affidavit in opposition. Besides, they have annexed few more Annexures, namely, Annexures 15 to 17.

Petitioner also has filed a reply affidavit reiterating her stand. She has further stated that without prior approval of the second respondent neither appointment nor termination could take place as per circular issued by the Joint Director of Public Instruction (Annexure 8 to the reply affidavit).

5. I have heard Mr. AR Paul Mazumdar, learned counsel for the petitioner, Mr. A. Sarma, learned Government Advocate and Mr. VK Jindal, learned counsel on behalf of respondents 3 to 5.

6. Learned counsel for the petitioner submitted that the petitioner gave Annexure 1 application to the second respondent and the same was forwarded by the Secretary of the school. While forwarding the said application the Secretary of the school

requested the second respondent to give appointment. The Secretary further informed the second respondent that this had the approval of the Managing Committee. On the basis of the said application the second respondent passed the Annexure 2 order approving the appointment of the petitioner in the school, subject to strict observance of Government Education Department Rules and orders and fulfillment of the conditions required for a sanctioned post. On the basis of the said order the petitioner was appointed by Annexure 3 order. Therefore, without prior approval, the appointment of the petitioner cannot be cancelled and without canceling the appointment there could not have been any fresh appointment. The learned counsel further submitted that as per the Meghalaya School Education Act, 1981, for appointment and termination of an employee prior approval of the Inspector of Schools is necessary. Therefore, without prior approval of the second respondent the appointment of the petitioner cannot be terminated. But in the instant case the school authority had done so and made a fresh appointment in her place on the basis of written and oral examinations. The learned counsel also submitted that the appointment was given to said Arpana Saikia contrary to Annexure 3 advertisement inasmuch as the advertisement did not refer to any examination oral or written. As per the said advertisement preference was to be given to an experienced teacher strong in English and Mathematics and having Assamese at least upto PreUniversity level. Further, candidates having teachers' training were to be considered as added qualification. The written and oral tests were taken contrary to the advertisement. Therefore the termination of the petitioner by the school authority without prior approval of the second respondent and subsequent approval given to the appointment of Arpana Saikia was contrary to the provisions of Rules, without jurisdiction and liable to be set aside and quashed.

7. Mr. VK Jindal, learned counsel for the third, fourth and fifth respondents, on the other hand, submitted that the petition was not maintainable in view of the fact that on the date of filing of the writ petition Arpana Saikia was appointed and she had joined her duties prior to the filing of the writ petition, but without making Arpana Saikia a party, her appointment could not be cancelled. Learned counsel further submitted that the petitioner had no right to be appointed and she had at best the right of consideration of her appointment. The Managing Committee having considered her case, the petitioner could not challenge Annexure 4 and 6. Besides, she could not also challenge the legality of the examination inasmuch as she appeared in the examination. Moreover, approval given by the second respondent in respect of appointment of Arpana Saikia having not been challenged, the petition was liable to be rejected summarily. Learned Government Advocate placed the record.

8. On the basis of the rival contentions of the parties it is to be seen whether the action of the respondents is in accordance with the provisions of the Rules and it can sustain in law.

9. I have perused the record submitted by the learned Government Advocate and the affidavit in opposition and reply affidavit filed by respondents 3, 4 and 5 and the petitioner respectively.

10. The Meghalaya School Education Act was enacted in 1981. This Act was enacted to provide better organisation, management and development of school education in the State of Meghalaya and for matters connected therewith or incidental thereto. Chapter IV of the said Act refers to the terms and conditions of service of employees of recognised private schools. Section 9 empowers the Government to make rules regulating the minimum qualifications for recruitment and the conditions of service of employees of recognised schools. Under subsection (2) of section 9, no employee of a recognised private school shall be dismissed, removed or reduced in rank nor shall his service be otherwise terminated except with the prior approval of the competent authority. Besides, the Joint Director of Public Instructions Meghalaya, Shillong issued a circular bearing number EG/I/MISC1 48/91186 dated 29.10.92 (Annexure 8 to the reply affidavit filed by the petitioner) whereby he informed the Inspector of Schools and others to instruct all the schools that both appointment and termination of teachers and employees of deficit schools cannot take place in any school without prior approval of the Inspectors and Deputy Inspector of Schools. Admittedly, in the instant case the services of the petitioner were terminated without prior approval of the second respondent who was the competent authority for appointment and termination. In view of the above, the termination of the petitioner is not in accordance with the provisions of law and, therefore, in my opinion, the school authority had no jurisdiction to terminate her services.

11. On the second point urged by the petitioner regarding selection of a teacher for appointment to the post in pursuance of Annexure 3 advertisement, it is to be seen whether the selection made in pursuance of the advertisement can sustain in law. The aforesaid advertisement mentions that preference would be given to the experienced teacher strong in English and Mathematics. Preference would also be given to the candidates having teachers training. However, the advertisement does not refer to any written and oral tests.

12. Form the record it appears that after receipt of the applications pursuant to the Annexure 3 advertisement, the applications were scrutinized by the members of the Managing Committee and 14 applications were found valid. Thereafter, written and oral tests were conducted and result was declared. On the basis of the said result Smti Arpana Saikia was selected. Accordingly, appointment letter was issued on 20.3.93 with the prior approval of the Inspector of Schools, and she joined on 24.3.93. From the record it also appears that the appointment of Arpana Saikia was given on the basis of written and oral tests only. However, Annexure 3 does not indicate regarding holding of written and oral tests. These tests had been conducted on the basis of subsequent decision of the Managing Committee as will appear from

the record.

The candidates who applied for the post acquired vested right for being considered for selection in strict compliance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. A candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his/her right crystallises on the date of publication of the advertisement. (See State of Gujarat & another vs. Patel Naranbbai iNathubai, AIR 1990 SC 1232).

13. Petitioner could not do well both in English and Mathematics in the written test. On the other hand, Managing Committee found Arpana Saikia qualified the test and fulfilled all the conditions required as per the advertisement. I have perused the application of Arpana Saikia which is on record. I find she has all the qualifications as per the Annexure 3 advertisement. She also faced well in the test examinations. However, the test examinations both oral and written were not mentioned in the Annexure 3 advertisement. But the selection of the candidate by the Managing Committee and the order dated 20.3.93 giving appointment to Arpana Saikia have not been challenged. She has also not been made party Even the third, fourth and fifth respondents in their affidavit in opposition categorically stated that Arpana Saikia was appointed in pursuance of the advertisement and the approval was given long before the filing of the writ petition. Therefore, it will not be expedient for this Court to pass any adverse order against said Arpana Saikia who has since joined the service on the basis of selection made by the Managing Committee. But then the Court cannot ignore another aspect of the matter that the termination of the petitioner was not made in accordance with the provisions of law as referred to herein before. As the termination of the petitioner is illegal and not in accordance with the provisions of law, she is deemed to be in service. This is incongruous position. On the one hand, termination of petitioner is contrary to the provisions of law and cannot sustain in law but on the other hand, appointment of Arpana Saikia cannot be set aside in view of the observations made above.

14. All these irregularities in terminating the services of petitioner and giving appointment to Arpana Saikia occurred because of wrong handling of the matter both by the Managing Committee and by the second respondent. As stated above, in one hand the order of termination of petitioner being illegal she is deemed to be in service and on the other hand the appointment of Arpana Saikia cannot be set aside on the grounds stated above. It is the duty of the respondents to regularise the services of both the teachers.

15. In view of the above, I dispose of this writ petition holding that the petitioner is still in service and she shall continue in her service. Similarly, Arpana Saikia shall also continue her service. Therefore, I direct the respondents 1 and 2 to find out ways and means for absorbing both the petitioner and said Smt S Arpana Saikia, if possible in the same school. Respondents 3 to 5 is also directed to make all

endeavor for absorbing the said two teachers in the school.

16. Learned counsel for the petitioner informed that in spite of this Court's order the petitioner had not been paid her salary. This is a very sad state of affairs. Therefore, I direct that the respondents shall make immediate arrangement for payment of her salary as expeditiously as possible, at any rate within a period of one month from today.