

(2016) 09 GAU CK 0030
In the Gauhati High Court
Case No : WP(C) No. 3190 of 2012

Shri Chandan Kumar Neog

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 23-09-2016

Acts Referred:

Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011 —
Section 10(4), Section 4(2)
Constitution of India, 1950 — Article 254

Citation : (2016) 6 GauLJ 537 : (2016) 5 GauLT 296 : (2017) 1 NEJ 356

Hon'ble Judges : Mr. Hrishikesh Roy and Mr. Paron Kumar Phukan, JJ.

Bench : Division Bench

Advocate : Mr. D. Saikia, Addl. AG, Assam, GA, Assam, SC, Education, for the Respondent; Mr. N. Dutta, Mr. R.P. Sarmah, Mr. M.R. Adhikari, Mr. N.N. Upadhyay, Mr. A. Saikia and Mr. P.K. Bordoloi, Advocates, for the Petitioner

Final Decision : Allowed

Judgement

Hrishikesh Roy, J. - Heard Mr. N. Dutta, the learned Senior Counsel appearing for the WP(C) No.3190/2012, WP(C) No.5105/2012, WP(C) No.5825/2012, WP(C) No.394/2013, WP(C) No.780/2013 and WP(C) No.1734/2013. The learned Counsel Mr. B. Chakraborty argues for the petitioners in WP(C) No.2050/2014, WP(C) No.268/2015 and WP(C) No.269/2015. The learned Senior Counsel Mr. B. Banerjee represents the petitioners in WP(C) No.3784/2014. Mr. P. Mahanta, the learned advocate appears for the petitioners in the WP(C) No.6073/2013 and WP(C) No.6075/2013. The petitioners in the WP(C) No.780/2013 are the excess teachers of M.E. Schools and on their behalf Mr. S.S. Goswami makes submission.

The L.P. School teachers have filed the WP(C) No.6861/2014 and other cases and the learned lawyer Ms. D. Borgohain makes elaborate arguments on their behalf by referring to various judicial pronouncements. The learned advocates Mr. M.U. Mandal, Mr. A.M. Borbhuiyan, Mr. K. Sarma, Mr. H. Ali and Mr. R.M. Choudhury and the learned lawyers in the other cases have adopted the same submission

for their respective cases.

2. The petitioners in these cases in substance, challenge the legal validity of the Assam Venture Educational Institutions (Provincialization of Services) Act, 2011 (hereinafter referred to as "the Provincialization Act,") and more particularly the Section 4(2) and Section 10(4) as also the Schedule appended, whereby the State has fixed the cap on maximum number of employees, whose services can be provincialized in the concerned category of Venture Institution. It is further provided that where the number of serving employees exceeds the numbers as specified in the Schedule, the provincialization shall be on the basis of seniority and the State shall not have any liability with regard to the excess employees. Under Sub-Section (4) of Section (10) of the Provincialization Act, 2011, the school wise recommendation for provincialization to the permitted number of posts specified in the Schedule can be made by the District Scrutiny Committee and the excess teachers challenge the legality of this provision.

3. The Provincialization Act, 2011 was enacted with the twin purpose of provincializing the services of the staff of the Venture Educational Institutions and also to restrict further establishment of such institutions in Assam. The "employees" is defined under Section 2(h) to mean all the serving staff, who were appointed before 1.1.2011. Under the eligibility criteria specified in Section 3, only those venture institutions who received permission, recognition, affiliation or concurrence, as the case may be, from the competent authority before 1.1.2006, will be eligible for being considered for provincialization of their staff. Some of the petitioners espousing the cause of primary education for children contend that restriction on further establishment of venture schools will, in given circumstances, undermine the obligation under Article 21A of the Constitution.

Petitioners' Submission

4. Leading the arguments from the petitioners side, the learned Senior Counsel Mr. N. Dutta submits that the cap on the number of teaching staff is not stipulated on a rational basis and he contends that when the teacher ? pupil ratio is disregarded as is the case here, staff shortage will affect the venture institution.

He reads the statement of objects and reasons specified during introduction of the Bill leading to the Provincialization Act to submit that the Government intended to provincialize the service of teaching and non-teaching staff, in a phased manner to give relief to the employees and also to take over the management of such institution by the Government, in order to impart quality education. But this objective is unlikely to be achieved without providing for the needed staff, bearing in mind the requirement of the concerned category of institutions.

5. The Senior Counsel submits that only those educational institutions are eligible for provincialization, which have fulfilled the eligibility criteria specified under Section 3 of the Provincialization Act and in that context, the concurrence and

recognition of the institution prior to 1.1.2006 by the competent body, is highlighted by Mr. Dutta. The conditions for concurrence/recognition for the venture institutions are prescribed for different category of institutions under, inter-alia, the Assam Non-Governmental College Management Rules, 2001 for colleges; Assam Higher Secondary Education Act, 1984; the Regulation for Recognition of Higher Secondary and the Junior College (1989) and Regulation for Recognition of High Schools, High Madrassas, 1988 and other such laws and Mr. Dutta argues that the concerned enactments are legislations by incorporation and these are most relevant for implementation of the Provincialization Act. Since conditions for permission/recognition/concurrence are specified by those legislations, the stipulation therein touch on the eligibility of the venture institutions and therefore it is argued that all serving teachers and staff in the eligible venture institutions, should be provincialized and there can be no basis to place any cap on the numbers to be provincialized.

6. The condition for according permission to start High School/High Madrassas are prescribed under the SEBA Regulation and apart from infrastructural requirements, prescription of teaching staff for various categories depending upon the curriculum need of the institutions are specified, for each venture High Schools or High Madrassas. The Sr. Counsel submits that the teaching staff specified for recognition of an institution is sacrosanct and the provincialization of lesser staff permitted by the Schedule to the Provincialization Act can't be allowed as it will undermine the mandate of the SEBA Regulation which is applicable here as a legislations by incorporation.

7. Mr. Dutta submits that employees of all eligible venture institutions shall be deemed to have been provincialized on the date of coming into force of the Provincialization Act provided the concerned institution imparted education for a period of at least 7 years from the date of affiliation/recognition/concurrence/permission, on the date of the Act. But those institutions who have not completed 7 years from the date of recognition have a 2nd chance, under the proviso to Section 4(1) itself and the staff of these, yet to mature category of institutions, are to be provincialized as and when, the concerned educational institutions completes 7 years in the field, from the applicable date of recognition. But inexplicably and incongruously, while provincialization under Sub-Section (1) of Section 4 is not capped by any specific numbers, the provincialization under Sub-Section (2) of Section 4 is curtailed by the Schedule to the Provincialization Act.

8. When the State has absolved itself of any future liability with regard to the resultant excess category employee, Mr. Dutta argues that in respect of venture institutions imparting education to Middle School level students, the absolvment by the state from the liability for the so called excess employees, is on the face of it, repugnant to the provisions of the Right to Education Act (hereinafter referred to "the RTE Act"). The petitioners contend that seniority can't be a criteria for consideration of provincialization as the reference to the respective

category in sub-section (2) of Section 4, will be rendered meaningless if teachers who are needed for specific subjects are discarded on the basis of seniority. Since the curriculum and the subject requirement are specified, provincialization of the Senior Teachers who may not have the competence to cover all the subjects required to be taught, will cause prejudice to the school and the pupil and therefore, the rationality of the stipulation is questioned by Mr. Dutta.

9. The Sr. Counsel submits that the cap on the number of teachers to be provincialized is not guided by any rational criteria and the same should be declared to be arbitrary. He reads the respective definitions of the Venture Degree College, [Section 2(o)], Venture High School [Section 2(p)], Venture Higher Secondary School [Section 2(q)], Venture ME School [Section 2(r)] to project that each of these venture institutions are required to secure permission/recognition from the competent authority, on or before 1.1.2006 and unless recognised by the cut-off date by the competent body, the staff of these category of institutions do not become eligible for provincialization. The Venture Primary School is however defined differently under Section 2(s) and the definition doesn't speak of recognition of this category of institution. All that is stated is that the Venture Primary School should have been established by the people of the locality prior to 1.1.2006. Therefore the cut-off date of the primary school is relatable to the date of establishment and not to the date of permission/recognition for the other category of institutions.

10. Mr. N. Dutta, the learned Senior Counsel submits that the classification of the staff on the basis of seniority for the purpose of the Provincialization Act is not founded on an intelligible differentia and the differentia on seniority do not have a rational relationship to the objective sought to be achieved by the Provincialization Act. He argues that there is no rational basis for grouping together the senior teachers for provincialization and excluding the junior teachers who may however have a better claim, on account of the curriculum requirement. Therefore such artificial classification is contended to be discriminatory and violative of Article 14 of the Constitution. In support of his contention, the Sr. Counsel cites *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar* reported in AIR 1958 SC 538.

11. The petitioners contend that if employment planning is the State's objective in stipulating the cap, the State policy must nevertheless be shown to be a rational one, to meet the Government goal but in the present case, the Provincialization Act fails to demonstrate that it is rational or reasonable (see *K. Nagaraj v. State of Andhra Pradesh*).

12. Since the pupil - teacher ratio is stipulated as 1:3 under the RTE Act, Mr. Dutta submits that the cap placed on the number of staff to be provincialized in primary schools is repugnant to the Central Act and to the extent of repugnancy, the State Act must be declared to be void.

13. The learned Counsel Mr. B. Chakraborty refers to the impact of the

Provincialisation Act on the venture colleges and submits that when maximum number of teaching staff to be provincialized is stipulated without reference to the strength of students, the better performing colleges with more students intake will be prejudiced whereas poorly performing colleges with fewer students will be able to secure provincialization of all (deserving and undeserving) serving teachers, although the under-performing venture college staff, may not merit such benefit.

14. As appointment in colleges are made only through advertisement with due concurrence of the authorities, the stipulation of maximum number of teaching staff to be provincialized in a college with large student strength which deserves more teacher, is contended to be contrary and not in the interest of the students.

15. The stipulation of the cut-off date of appointments prior to 1.1.2001 is contended to be illogical as there can be no rational basis to distinguish those who were appointed before and after the cut-off date, as both categories render the same service in the respective institutions. Therefore it is argued that all serving employee on the date of enactment of the Provincialization Act, 2011, should be considered eligible for provincialization.

16. Mr. P. Mahanta, the learned Counsel who represents the excess teachers of Junior Colleges submit that previously, under the Assam Junior Colleges (Provincialization) Act, 2012, as many as 53 junior colleges were provincialized without stipulation of any maximum number of employees to be provincialized and therefore it is argued that fixing the outer limit for the one time exercise of provincialization, is prejudicial and should not be allowed.

17. Projecting the peculiar situation relating to the Classical Teachers and PIL Subject Teachers, Mr. B. Banerjee, the learned Senior Counsel submits that, as per the original Schedule of the Provincialization Act, 2011, two posts of Classical Subject Teachers (Sanskrit, Persian and Arabic) were permitted to be provincialized but on account of the amendment incorporated in the Schedule w.e.f. 23.8.2012, the provincialization of only one Classical Subject Teacher is envisaged along with one MIL Teacher for Assamese. While provision for a single Classical Teacher plus one Assamese language Teacher may be all right for the Brahmaputra valley where schools mostly follow the Assamese medium, the WP(C) 3190/2012 & 40 others. Page 34 of 46 situation is impractical in Barak Valley, where Bengali is the medium of choice and most schools do not have a single student opting for the Assamese subject as MIL. Hence the recurring feature of the schools in Barak Valley is that provincialized teacher in Assamese is unnecessarily sanctioned whereas the need of the school is for the 2nd classical language teacher. Thus the stipulation of maximum number for the category is contended to be ignoring the reality of the requirement of the Barak Valley schools.

18. Apart from the common grounds applicable for all categories of venture educational institutions, the excess teachers of the elementary education Schools

have posed an important constitutional question. The elementary schools are imparting education to children of the age of 6 - 14 years, who are covered under the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as "the RTE Act"). The right to education to all children is now made into a Fundamental Right under Article 21A through the Constitution (Eighty-Sixth Amendment) Act, 2002. Representing this segment, Mr. S.S. Goswami, the learned Counsel cites the *Society for Unaided Private Schools of Rajasthan v. Union of India* and another reported in (2012) 6 SCC 1 to project that the 2009 Act is enacted to provide each child the facility of elementary education, in a neighbourhood school, through provision of equal opportunity to all. Proceeding on this track, the counsel submits that the elementary schools which were established in remote locations where state facility for education is unavailable, the teachers of those far-away schools have served not only the constitutional goals but also social needs. Therefore he argues that they should not be declared to be redundant and excess when the country's children even in the remotest place are guaranteed the Fundamental Right of free and compulsory elementary education in their neighbourhood school.

19. As the Provincialization Act, 2011 is conceptualized as a one-time measure and the State has absolved itself in future from any liability for the excess staff, the petitioners submit that this is extremely prejudicial for the long serving teachers, many of whom are the founder teachers of the respective institutions. The Counsel argues that the 1st proviso to Section 4(2) is illogical as the enactment doesn't take into account the natural vacancies which would occur through retirement/death of the provincialized teachers and the possibility of provincializing the left over teachers in those future vacancies. To put it differently, if the institution is expected to continue, the staff strength can't diminish and replacement of the retired or incapacitated staff is inevitable to keep the institution functional.

20.1 Since education is covered in the Concurrent List of the Seventh Schedule, Ms. D. Borgohain, the learned Counsel contends that as per the provisions contained in Section 25 of the RTE Act read with the Schedule, within three years of the commencement of the Act, the appropriate Government and the local authority shall ensure that Pupil-Teacher Ratio as specified in the Schedule is maintained in each school. The "appropriate Government" as defined in Section 2(a)(ii) in relation to school established within the territory of the State is the State Government. As per the Schedule to the RTE Act, the Pupil-Teacher Ratio for classes from 1st class to 5th class are as follows:

Up to 60 students Number of teachers should be 2

Between 61 to 90 Number of teachers should be 3

Between 91 to 120 Number of teachers should be 4

Between 121 to 200 Number of teachers should be 5

Above 200 children Pupil-Teacher Ratio
(excluding Head Teacher)

shall not exceed 40

20.2 Education is a subject under Entry 25 of the Concurrent List contained in the 7th Schedule of the Constitution and both the RTE Act as well as the Provincialisation Act of 2011 have been enacted under the said entry. Under Article 254(1) of the Constitution, any provision of law made by the Legislature of a State if repugnant to any provision of a law made by the Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of the State shall, to the extent of the repugnancy, be void. However, Article 254(2) contains an exception in as much as, if the State Act has received the assent of the President of India, then the State legislation will prevail.

20.3 In the instant case, it is the admitted position that the State Act has not received the assent of the President of India. As such it is argued by Ms. Borgohain that the State Act to the extent of repugnancy is void. In other words Section 4(2) read with the Schedule to the Provincialisation Act is liable to be declared void under Article 254(1).

21. The counsel for the petitioner has relied on *Vijay Kumar Sharma v. State of Karnataka* reported in (1990) 2 SCC 562 to explain the meaning and test of repugnancy with regard to Article 254 of the Constitution of India. The judgment in paragraph 88 enumerates the various ways in which repugnancy may arise:

"???doctrine of repugnancy or inconsistency under Article 254 of the Constitution would arise only when the Act or provision/provisions in an Act made by the Parliament and by a State Legislature on the same matter must relate to the Concurrent List III of Seventh Schedule to the Constitution; must occupy the same field and must be repugnant to each other;

In considering repugnance under Article 254 the question of legislative competence of a State Legislature does not arise since the Parliament and the Legislature of a State have undoubted power and jurisdiction to make law on a subject, i.e. in respect of that matter. In other words, same matter enumerated in the Concurrent List has occupied the field.

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It matters little whether the Act/Provision or Provisions in an Act falls under one or other entry or entries in the Concurrent List. The substance of the "same matter occupying the same field by both the pieces of the legislation is material" and not the form. The words "that matter" connotes identity of "the matter" and not their proximity. The circumstances or motive to make the Act/Provision or

Provisions in both the pieces of legislation are irrelevant.

The repugnancy to be found is the repugnancy of Act/provision/Provisions of the two laws and not the predominant object of the subject matter of the two laws.

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Occupying the same field; operational incompatibility; irreconcilability or actual collision in their operation in the same territory by the Act/provision or provisions of the Act made by the Parliament and their counter parts in a State law are some of the true tests;

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Applying the above tests Ms. Borgohain argues that the provision under challenge is totally repugnant to Section 25 read with the Schedule to the RTE Act.

22. The petitioners contend that recognition of a L.P. School is a mandatory clause under the RTE Act as well as the Assam Right of Children to Free and Compulsory Education Rules, 2011 (hereinafter referred to as the "2011 Rules"). Section 18 of the RTE Act provides that no school to be established without obtaining certificate of recognition. The proviso to Section 18(2) provides that no such recognition shall be granted to a school unless it fulfils norms and standards specified under Section 19. Further Section 18(3) provides that on contravention of the conditions of recognition, the prescribed authority shall by order in writing, withdraw recognition. Section 19 of the Act provides that no school shall be established, or recognised under Section 18, unless it fulfils the norms and standards specified in the Schedule. In other words, adherence to the pupil-teacher ratio prescribed in the Schedule to the RTE Act is a mandatory condition for grant of recognition. Also contravention of any of the conditions of recognition will invite withdrawal of recognition.

23. The 2011 Rules provides for furtherance of the aforesaid provisions relating to recognition and withdrawal of recognition. Rule 11 lays down the conditions for recognition of schools for the purposes of Section 18 of the RTE Act. Rule 12 provides for withdrawal of recognition to schools for the purposes of Section 18(2) of the RTE Act. Where the District Elementary Education Officer on his own motion or on any representation received from any person, has reason to believe to be recorded in writing, that a school recognised under Rule 11, has violated one or more of the conditions for grant of recognition or has failed to fulfil the norms and standards prescribed in the Schedule, a notice shall be issued to such school specifying the violation of the condition of grant of recognition and seek its explanation and if such explanation is not found to be satisfactory or no explanation is received within the stipulated time period, the District Elementary Education Officer may cause an inspection of the school, to be conducted by a Committee of three or five member which shall make due inquiry and submit its report, along with its recommendations for continuation of recognition or its

withdrawal to the District Level Board and the Board shall consider and give recognition on the report of the District Elementary Education Officer. Thus the State Rules also provides for de-recognition in case of violation of the Schedule to the RTE Act.

24. Rule 18 of the 2011 Rules provides for salary and allowances and conditions of service of teachers for the purpose of Section 23(3) of the RTE Act. Rule 18(1) provides that the Government, Autonomous Council or the local authority as the case may be, shall notify terms and conditions of service and salary and allowances of teachers in order to create a professional and permanent cadre of teachers. Rule 18(2)(b) provides that in particular and without prejudice to sub-rule (1), the terms and conditions of service shall take into account provisions enabling long term stake of teachers in teaching profession. Thus the 2011 Rules framed under the RTE Act provides for security of service in case of the teachers of the recognised schools functioning to implement the RTE Act. However, the Provincialisation Act seeks to do away with the services of the teachers in absence of whom, the schools would not be granted recognition under the RTE Act and the 2011 Rules framed thereunder.

25. Section 4(2) read with the Schedule to the Provincialisation Act while provincializing the services of just two senior most teachers in case of a L.P. School and leave out the other teachers and this according to the petitioners has discriminated amongst the teachers in the school thus violating Article 14 of the Constitution of India. In this context, the petitioners have relied on Subramaniam Swamy v. CBI reported in (2014) 8 SCC 682 and also on Air India Statutory Corporation v. United Labour Union reported in (1997) 9 SCC 377, wherein the Hon"ble Court has held that "?????.thought, right to employment cannot, as a right, be claimed but after the appointment to a post or an office, be it under the State, its agency instrumentality, jurisdic person or private interpreneur it is required to be dealt with as per public element and to act in public interest assuring equality, which is a genus of Article 14 and all other concomitant rights emanating therefrom are species to make their right to life and dignity of person real and meaningful." In that case, the Apex Court was examining the consequence that ensues on abolition of contract labour. It has been held that on abolition of the contract labour system, by necessary implication, the principal employer is under statutory obligation to absorb the contract labour.

26. Ms. D. Borgohain, the learned lawyer submits that under Article 21A the State has the responsibility to provide free and compulsory education to all children of the age of 6 to 14 years but this constitutional obligation is definitely not on private unaided educational institutions or the venture schools functioning in the State. Further Article 45 of the Constitution provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. On this basis, the counsel speaks of the necessity of these schools in the constitutional context.

27. Representing one of the challengers, Mr. M.U. Mandal, the learned counsel

submits that when Right to Education upto fourteen years is a Fundamental Right under Article 21A, the restriction on further establishment of venture institutions at primary level, would violate the constitutional mandate since the reach of the existing schools have left untouched several far flung and inaccessible areas and children in those remote places will be denied access to education in violation of their constitutional rights.

28. Referring to the definition of Venture Primary School under Section 2(s) of the Provincialisation Act, the learned advocate Mr. A.M. Borbhuiyan question the logic of insisting on coverage of the school in DISE data as an eligibility criterion since a particular school for bad or good reason, may not be covered under the DISE data prepared by the departmental authorities. Hence this is contended to be an arbitrary stipulation.

29. The learned advocates Mr. K. Sarma, Mr. R.M. Choudhury, Mr. A.M. Borbhuiya, Mr. H. Ali and other lawyers have adopted the arguments of the lead lawyers in this group.

Respondents' Stand

30. On the other hand, Mr. D. Saikia, the learned Addl. Advocate General surprised everyone by declaring that the Government is in agreement with most of the submissions of the petitioners in these cases. Thus on 20.09.2016, the submission of the learned Addl. Advocate General was recorded as under.

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The learned Addl. Advocate General Mr. D. Saikia began his counter submission today by indicating that the State is sailing with the writ petitioners in these cases. The respondents have noticed that the Provincialisation Act in its present manifestation is unworkable and is causing multiple difficulties for the State and therefore the Government is proposing to re-visit the statute to cater to the educational requirement of the students bearing in mind, the fiscal capacity of the State. The Govt. lawyer submits that multiple schools in close proximity, without the required land and infrastructure are clamouring for provincialisation and the State is already fastened with a huge salary burden for about 57,000 staff of venture schools, who were provincialized under the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011. But in the process, the schools which are deserving and staff which are needed for meeting the curriculum requirement, are left out and therefore the State has decided to re-visit the enactment under challenge.

Since the eligibility requirement of the teaching staff specified by the Central Regulation, are not followed in the State enactment, the Government has noticed that the Provincialisation Act is repugnant to, inter alia, the Right to Children to Free and Compulsory Education Act; the National Council for Teachers Education Act, 1993 and also the UGC Regulations on Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges

and Measures for the Maintenance of Standards in Higher Education, 2010.

That apart, the State Act has led to provincialisation of over 15000 general category staff of the venture institutions and this has resulted in deprivation of the reserve category aspirants who are entitled to the benefits under the Assam Scheduled Caste and Scheduled Tribe (Reservations of Vacancies in Services and Posts) Act, 1978. In order to illustrate the point, Mr. Saikia submits that while one recruitment exercise was recently started for about 12000 posts of primary school teachers, on account of the overwhelming number of general category persons provincialized under the State Act, that recruitment process for all practical purpose has to cater to the demand of the reserve category aspirants only. Thus, most of the advertised posts will be needed to clear the backlogs vacancies leaving aside only about 700 posts, for the general category candidates.

Noticing the anomalous effect of the Provincialisation Act, the State has already decided at the executive level to either repeal the Act or to reshape it to make it consistent, with all legal and constitutional requirements. Therefore in order to reflect this stand of the Government, the learned Addl. Advocate General prays for time to file the necessary affidavit from the respondents" side.

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31. Following the above stand taken on the previous date, the Secretary to the Govt. of Assam, Secondary Education Department has filed an additional affidavit on 22.09.2016 and this affidavit is read out by Mr. Saikia to declare that the Government has realised that the Provincialisation Act as amended is inconsistent with the RTE Act and also the norms prescribed by the National Council for Teachers" Education, UGC and other authorities, regulating the appointment of teachers and lecturers. Therefore, Mr. Saikia submits that the Government itself taken a decision to re-visit the Provincialisation Act to either repeal it or make comprehensive amendments to make it conform to the constitutional requirement and meet the objective of the Government.

State Affidavit

32. As the latest affidavit of the Government has a strong bearing on the litigation, the relevant portions thereof are extracted for ready reference:-

".....

2. It is glaring to note that certain provisions of the AVEI(PS) Act, and as amended in 2012 and 2013 are found to be not in consistency with the provisions of RTE Act, 2009 of Central Government particularly those related to the serving the interest of children"s education vis-a-vis cost to State Exchequer. These aspects would cover the number of teaching and non-teaching staff proposed to be provincialised and infrastructure development cost which in turn basically depend on number of schools to be run by the State Government.

3. As regard the number of teachers, PTR is the basis and the schedule (see sections 19 and 25) norms and standard for a school of RTE Act, 2009 provides that there should be two teachers up to 60 students in class 1 to V, it means PTR is 1:30, whereas the section 3(ii) of AVEI(PS) Act, 2011 and as amended in 2012 and 2013 provides for 1:25 PTR. This provision has led to provincialisation of services of a large number of teachers which has already put a huge financial stress on the resources.

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7. In the event of provincialisation without the stipulated infrastructure, it would shift enormous financial burden and onus on the State Govt. As per RTE Act, 2009 and in such cases Central Government will not support the State Govt. with funds since PTR is far lower than the stipulation fixed by RTE Act, 2009.

8. As regards other than Elementary Education, such principles have either not diligently stipulated or ignored while provincialising the services of the teaching and non teaching staff of secondary and college level institutions. There are no reports or maintaining the proper norms for enrolment, for building and amenities in the institutions and for the distance to be maintained between two institutions etc. Thus, the scarce resources are not gainfully put to use.

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13. On examination of each amendment it is observed that ?

(a) The financial implications provided in the Cabinet Memorandum at the time of the enactment of the Act, 2011 was only Rs. 1144 crores. While at the current level of provincialisation itself the total financial outgo to the salaries alone appear to be Rs. 8000 crores. Again, in the current proposal, the financial impact was shown as Rs. 120.44 crores for all the amended provisions. These anomalies were either due to non-application of mind to such serious issues or deliberately suppressing the facts that the concerned officers in the department which throw the state public finances out of gear. This matter needed serious consideration.

(b) As regards Section 2 (P), it was not clear that by availing the provisions to give effectiveness to the Act, services of how many new schools, number of employees etc. would be provincialised and what would be its financial implications. It was also not known whether such future proposals were to be borne.

(c) Vide Amendment of Section 3-3(I) for clause (ii), it may be stated that the section 6(i) of the sixth schedule of the Constitution of India provides that primary education is an inherent subject of the District Council and hence, any intervention of the State Government on this matter was ultra vires to the statutory provision of the Constitution. In case of High School, Junior College and Degree College, on the proposed substitution of the clause, it could not be

ascertained from the proposal, how many institutions and employees would be covered, as and what would be the financial implication for such provision to be implemented.

14. Further, the provincialisation process itself appeared to be against the constitutional provisions of reservation to SC and ST. Secondly, provincialisation of services would be required to be examined in the spirit of Uma Devi's case in Supreme Court.

15. ?????????????

3. That the deponent further begs to state that though the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011, have been amended on many occasions but the provisions of the same are not in consistent with the provisions laid down under the Right of Children to Free and Compulsory Education Act, 2009 (In short, RTE Act, 2009). In exercise of the powers conferred by section 38 of the Right of Children to Free and Compulsory Education Act, 2009, the Governor of Assam framed Rules which is known as Assam Right of Children to Free and Compulsory Education Rules, 2011, published in the Gazette Notification dated 03.11.2011. Rule 4 of the Assam Right of Children to Free and Compulsory Education Rules, 2011 prescribed the areas or limits for the purpose of section 6 of the RTE Act, 2009 as a school has to be established by the Government, the Autonomous Council or the local authority as the case may be, in respect of children in classes I-V, (i) a school shall be established within a walking distance of 1 Km of the neighbourhood; (ii) In respect of children in classes VI-VIII, a school shall be established within a distance of 3 Kms of the neighbourhood. But the aforesaid provisions are not incorporated in the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011. The Pupil Teacher Ratio under section 25 and the schedule appended under the RTE Act, 2009 are also not followed while amending certain provisions of the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011.

4. That the deponent begs to state that in exercise of the powers conferred by sub-section of section 23 of the RTE Act, 2009 and in pursuance of Notification No. S.O. 750 (E) dated 31.03.2002 issued by the Department of Social Education and Literacy, Ministry of Human Resource Development, Government of India, the National Council for Teacher Education (NCTE) laid down minimum qualification for a person to be eligible for appointment as a teacher in class I to VIII in a school referred to and clause (n) of Section 2 of the RTE Act, 2009 and accordingly a notification has been issued by the NCTE on 23.08.2010.

The aforesaid qualification prescribed by the NCTE is also not followed in letter and spirit by the State of Assam while provincialising the services of teaching and non-teaching staff under the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011. Thus it appears that their exist large scale of repugnancy and conflict of the State Act viz. Assam Venture Educational

Institutions (Provincialisation of Services) Act, 2011, viz-a-viz Central Act, RTE Act 2009 and National Council for Teacher Education Act, 1993.

5. That the deponent further begs to state that the University Grants Commission under the UGC Act, 1956 prescribes certain regulations on minimum qualification for appointment of teachers and other academic staff in colleges for maintenance of standard in higher education on 30th June, 2010 but the aforesaid qualifications are also not complied with while provincialising the services of college teachers under the Higher Education Department. as such, the provincialisation Act, 2011, of the State is directly in violation of the University Grants Commission Regulation, which framed under University Grants Commission Act, 1956.

6. That the deponent begs to state that Section 3 of the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011 prescribed the eligibility criteria for selection of educational institutions for provincialisation of services of its employees after receiving required permission or recognition or affiliation or concurrence as the case may be from the respective competent authority i.e. SEBA, AHSEC and Universities etc. The Board of Secondary Education, Assam in exercise of powers conferred under section 24(1) and 2(f) of the Assam Secondary Education Act, 1961 has adopted regulations which are known as Regulations for Recognition of High Schools and High Madrassa, 1988.

Although the aforesaid Regulations, 1988 prescribed the qualification of teaching staff amongst others but same has not been followed while provincialising the services of employees under the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011. The aforesaid Act, 2011, is also silent regarding provincialisation of at least one female teacher in a Girls school and subject combination of two science teachers in High/High Madrassa Schools.

Further under the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011, there is no reservation of posts in services for the Scheduled Castes and Scheduled Tribes as per the Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) (Amendment) Act, 2012, and as a result high percentage of general candidates availed the benefit of provincialisation at the cost and deprivation of the Constitutionally reserved category candidates.

7. That the deponent begs to state that during Budget Speech of Finance Minister, 2016-17, the Finance Minister, Assam, has made the following observations regarding provincialisation of venture schools on 26.07.2016. They are as follows:-

31.11 ??????????..

31.12 Therefore, we will initiate a abroad-based consultation with all stakeholders before amending the Provincialisation Act. The proposed amendments to the Act would include provision for deprovincialisation of

underperformed and unperformed schools, the created posts will be abolished after the retirement of incumbent provincialised teacher and need to comply with the provision of Right to Education (RTE) and National Council of Teachers Education (NCTE).

.....

8. That in view of the above stated factual as well as legal provisions relating to the process of provincialisation of the teaching and non teaching staffs of the venture schools of Assam, the deponent most humbly and respectfully state that the Government of Assam is very consciously and sincerely undertaken an exercise to streamline the whole process of provincialisation by taking into account relevant constitutional and statutory requirements as well as ground realities and financial implications with an endeavour to evolve a objective and scientific method to grant benefits of provincialisation to the deserving persons with some WP(C) 3190/2012 & 40 others. Page 44 of 46 incentive based mechanism for greater benefit of all stakeholders without putting any unbearable burden on the State Exchequer. In order to achieve such goal and objective, the Department will prepare a White paper on the complete exercise of provincialisation undertaken pursuant to enactment of the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011, amended in 2012 and 2013, and upon appropriate deliberation on the same, would bring necessary amendments of provincialisation law and/or a bring fresh legislation as indicated in the Budget Speech of the Finance Minister dated 26.07.2016.

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Discussion & Conclusion

33. When the arguments of the petitioners are analysed, it is clear that the Provincialisation Act has many legal failings as it is not only discriminatory but is also repugnant to many aspects of the RTE and other Central Acts. Noticing the merit of the points raised by the petitioners, the Government in fact has conceded about the defects in the State Act. The Education Commissioner in his affidavit averred that the State has decided to bring in a fresh legislation to streamline the process of provincialisation by addressing the deficiencies in the present Act. In such circumstances, the Court can either strike down the offending legislation or target certain portions of the Provincialisation Act to make the State legislation conform to the constitutional and legal requirements.

34. But this litigation reveals the total non-application of mind and it is all pervading in the state enactment. The discriminatory impact of the Provincialisation Act is found to be glaring here. In order to avoid impermissible discrimination, the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from other left out of the group, and also the differentia must have a rational relation to the object sought to be achieved by the statute in question. The petitioners here project that the teachers whose services are provincialized and those who have

been left out are at par in all aspects. In most cases, both categories have been rendering service in the school since inception and are similarly qualified as well as rendering similar duties. There is nothing on the face of the statute or the surrounding circumstances to show any distinguishing factor. Also no rational relation of such differentia with the object of the Act is discernible from reading of the provision. In fact the object of the Act is to provincialise the services of teachers in venture educational institutions and prevent further growth of such institutions. However, the object of provincializing the services of the required teachers in the institutions established bona fide stands negated by the enactment in its present shape.

35. The venture schools which were set up bona fide on need basis, in our perception, do serve the students in remote places and it may not be wrong to say that due to the inability of the State to discharge its constitutional obligations, the venture educational institutions were allowed to function. We may also say that the State has been discharging its constitutional obligation through these venture educational institutions. In this backdrop, when the venture schools are taken over, the Government in a sense is taking steps towards discharging its constitutional obligations. However the action of the State in taking over such schools with only a given number of teachers, when the number is not commensurate with the prescribed requirements of the RTE Act (the law framed for implementation of Article 21A), the relevant prescription is absolutely arbitrary. The spirit of Article 21A stands defeated in our perception if the mechanism prescribed under the RTE Act is not conformed to encourage those bona fide elements who have aided the State in discharging its constitutional obligation.

36. It is also questionable whether the mode of entry into Government service facilitated by the Provincialisation Act can ignore the applicable reservation laws relating to SC/ST category, women and disabled groups. The role of the authorities in the field of education in the Sixth Schedule areas of Assam is also undermined by the 2011 Act.

37. The appointment of teachers in the venture institutions is not competition based and is opaque and therefore quality of education is bound to suffer if this is allowed to continue. This naturally will negatively impact the next generation of our State. Moreover, the norms and qualification prescribed by the competent authorities like the UGC, NCTE, SEBA, etc. is the major casualty in application of the Provincialisation Act.

38. When such substantial defects are perceived, in a given context, the court can strike down only the offending provisions. However when unconstitutionality is noticed in the major provisions starting from the Preamble to the Schedule of the Provincialisation Act, striking down the offending portion will practically decapitate the 2011 Act. In other words, the statute itself will become inoperable although the ultra vires declaration is limited to some segments of the Act.

39. Therefore, we feel that a piecemeal exercise will not serve the purpose. But at the same time, to suggest how the Provincialisation Act should be reshaped would be intruding into the domain of the legislature. Moreover amendment exercise might have to be preceded by a consultative process with all the stakeholders and this is surely the responsibility of the State. That apart it is certainly difficult to separate the bad from the good portion of the Provincialisation Act. Under these compulsions, being convinced with the arguments of the petitioners, we declare that the Assam Venture Educational Institutions (Provincialization of Services) Act, 2011 is constitutionally invalid. As the State has decided to bring in a fresh legislation, considering the likely time needed for the process, we direct the State to do their exercise as committed in the additional affidavit, expeditiously and preferably in the next 6(six) months. It is ordered accordingly.

40. With the above order, the cases stand allowed without any order on cost in the manner indicated.