



Case No. : WA/393/2022

VERSUS

5:THE COMMISSIONER AND SECRETARY TO THE GOVT.OF ASSAM
FINANCE DEPARTMENT
DISPUR
GUWAHATI- 781006

For the Appellant : Mr. U.K. Nair, Sr. Adv.
Mr. H.K. Das, Adv.

For the Respondents: Mr. P. Nayak, SC, Finance Department, Assam.

BEFORE

**HON'BLE THE CHIEF JUSTICE
THE HON'BLE MR. JUSTICE SUMAN SHYAM**

Date of hearing : 24/03/2023.

Date of judgement : 28/04/2023

JUDGEMENT AND ORDER (CAV)

Suman Shyam, J

1. This intra-court appeal is presented against the judgement and order dated 13/09/2022 passed by the learned Single Judge in WP(C) No. 152/2020, dismissing the writ petition filed by the petitioner thereby declining his prayer for issuance of a Writ of Mandamus to merge the post of Data Entry Operator (DEO) with the cadre of Junior Account Assistant (Jr. AA) in the General Administration Department (GAD), Government of Assam by making necessary amendments to the Assam Secretariat Subordinate Service Rules, 1963 (*herein after referred to as the Rules of 1963*).

2. The basic facts, necessary for disposal of this appeal, are as follows:- Pursuant to a process initiated for filling up one post of DEO in the General Administration (B) Department, Government of Assam, the appellant had participated and was eventually selected, pursuant where to, by the order dated 16/07/2010, he was appointed as a DEO in the pay scale of Rs. 5200 – 20,200 with Grade Pay of Rs. 2500/- per month plus other allowances, as admissible from time to time. The appellant had joined the post of DEO on 17/07/2010 and submitted his joining report on the same day. By the communication dated 28/01/2011, the Deputy Secretary to the Government of Assam, General Administration (B) Department, had informed the Accountant General, Assam, about the sanction of the Governor of Assam for creation of one post of DEO in the pay scale of Rs. 3490-90-4480-120-4600-EB-5200-175-6600-250-8100/- per month in the GAD, Assam, for the period till 28/02/2010 with effect from the date of filling up of the post. It was further intimated that the creation and sanction of the post had the concurrence of the Finance Department U.O. No. FPC(II)2176/10 dated 19/01/2011.

Thereafter, notification dated 02/07/2015 was issued conveying the sanction of the Governor of Assam for retention of the post of DEO in the General Administration (B) Department for a period of one year w.e.f. 01/03/2015 to 29/02/2016. Since the date of joining in the post of DEO on 16/07/2010, as aforesaid, the appellant has continued to serve in the said post till today without any break. The post of DEO carries the same pay scale as the post of Junior Administrative Assistant (Jr. A.A.) which is a cadre post under the Rules of 1963 and the works assigned to the appellant as DEO was also similar in nature as Jr.A.A. However, since the post of DEO was an ex-cadre post (single post), hence the appellant did not have any avenue of career progression. Not only that, the appellant was also denied the benefit of revision of pay scale/ increment in pay pursuant to pay revisions carried out from time to time in respect of similarly situated employees in the department. Situated thus, and realizing that he would not be entitled to any service benefit in future since the post held by him was an ex-cadre post, the appellant had submitted a memorandum dated 05/01/2016 before the Secretary to the Government of Assam, 7th Pay Commission, with a request to consider integration of the post of DEO into the Service Rules by merging it with the cadre of Jr. A.A. The matter was then placed before the 7th Assam Pay & Productivity Pay Commission, which had considered the prayer of the writ petitioner/appellant and vide note at Sl. No. 1.12(3) at Chapter 14, recommended merger of the single post of DEO with the cadre of Jr. AA. The Pay Commission had, however, advised that the seniority of the appellant, upon such merger, would be fixed as per the principles to be determined by the Personnel Department and that there should be no further creation of post of DEO under the GAD. The relevant portion of the recommendation of the 7th Assam Pay & Productivity Pay Commission pertaining to the request of the appellant is extracted herein below for ready reference :-

“(3) the Commission examined the case of Sri Pankaj Sarma, Data Entry Operator (DEO) in GAD. It appears that he is a graduate and was appointed on a post with a pay in PB-2 with GP of Rs. 3000. The Commission recommends that since Sri Sarma has the qualification of Jr. AA and therefore this single post of DEO should be merged with the cadre of Jr. A.A. fixing his seniority in accordance with the principles to be determine by the Personnel Department. However, there should be no further creation of post of DEO in GAD...”

3. By the notification dated 13/12/2016, the Government of Assam had constituted a two member Committee to examine the report of the 7th Pay and Productivity Commission and submit its report. The aforesaid Committee submitted its department wise report inter-alia opining that the case of the appellant be taken up with the Personnel Department. The recommendation of the Pay Anomaly Committee was accepted by the State Cabinet and the approval of the cabinet was notified in Official Gazette vide Notification dated 17/03/2017 issued by the Government of Assam, Finance Department. In the notification dated 17/03/2017, it was clearly mentioned, as against the item no. 39, that the Cabinet has approved the recommendation at Chapter-14 along with suggestion of the Commission and the matter was required to be processed by the Personnel Department. However, when no action was taken in the matter despite the recommendation of the Pay Commission as well as the approval of the State Cabinet, the appellant had submitted a representation dated 07/11/2017 before the respondent No 2 with a prayer to implement the recommendation of the Pay Commission as well as the Cabinet decision pertaining to the merger of the post of DEO with the cadre of Jr. AA.

4. Upon receipt of the representation submitted by the appellant, the Personnel (B) Department, Government of Assam, communicated its views by letter dated 02/01/2018 conveying its "No Objection" to the proposal for absorbing the post of DEO held by the appellant in the cadre of Jr. AA of Assam Secretariat Subordinate Service in relaxation/amendment of the Rules. In the communication dated 02/01/2018, the Personnel Department had also furnished proper justification in support of its aforesaid recommendation. However, notwithstanding the "No Objection" of the Personnel Department, the Administrative Department did not take any action to integrate the post of DEO with the cadre of Jr. AA, as a result of which, the appellant, as writ petitioner, had to approach this Court by filing WP(C) 2366/2018, which was disposed of by the learned Single Judge by order dated 30/05/2018, with a direction upon the respondents to consider the representation submitted by the appellant on 07/11/2017 in the light of the recommendations made by the 7th Pay Commission and to take appropriate decision in the matter and communicate the same to the appellant within a period of 60 days from the date of receipt of a certified copy

of the order. Despite the order dated 30/05/2018 passed by this court, the respondents did not take any step for implementation of the Court's order, as a result of which, Contempt Case (C) No. 393/2018 was filed.

5. During the pendency of the aforesaid Contempt Case, the Commissioner and Secretary to the Government of Assam, SAD had issued order dated 29/11/2018 rejecting the prayer made by the appellant for integrating the post of DEO with the cadre of Jr. AA on the ground that there was no provision in the Rules of 1963 (as amended) for merging the post of DEO with the cadre of Jr. AA of Assam Secretariat.

6. In the wake of the order dated 29/11/2018, Contempt Case (C) 393/2018 was closed by order dated 10/12/2018. The appellant had thereafter, preferred an appeal before the Chief Secretary to the Government of Assam i.e. the respondent No 1 on 11/01/2019 ventilating his grievance in the matter, which was also rejected by the impugned order dated 12/09/2019 primarily on two grounds. Firstly, that the Rules of 1963 do not contain any provision for conversion of a post and secondly, the Assam Secretariat Services Association and Assam Secretariat Computer Operators' Association had submitted representation dated 26/06/2019 and 24/07/2019 respectively, protesting against such a move. Being aggrieved by the impugned order dated 12/09/2019, the writ appellant had approached this Court for the second time by filing WP(C) No. 152/2020, which was dismissed by the learned Single Judge by the impugned judgement and order dated 13/09/2022. Hence this appeal.

7. By referring to the impugned judgement and order dated 13/09/2022, Mr. Nair, learned senior counsel for the appellant has argued that as a model employer, the State was duty bound to create avenues of promotion for every employee, but in this case the prayer of the appellant was rejected without any valid reason. Mr. Nair further submits that the 7th Pay Commission has not only recommended the case of the appellant but even the State Cabinet had approved the recommendation of the Pay Commission. Thereafter, the Personnel Department had also forwarded its "no objection" for implementation of the recommendations. Under the circumstances, the Administrative Department did not have the authority or jurisdiction under the law to reject the prayer of the appellant on the grounds mentioned in the order. According to Mr. Nair, the impugned order dated 12/09/2019 is *per se* illegal and violative of the Fundamental Rights of the petitioner as guaranteed under Articles

14 & 16 of the Constitution of India and hence, liable to be interfered with by this court. Therefore, the impugned judgement and order dated 13/09/2022 passed by the learned Single Judge suffers from manifest error in law and hence, is also liable to be set aside by this court.

8. Responding to the above arguments, Mr. P. Nayak, learned departmental counsel has argued that there is no provision in the Rules to en-cadre the post of DEO into the Rules of 1963 and, therefore, the appellant cannot claim any right, which can be enforced in this proceeding. By referring to the decision of the Hon'ble Supreme Court rendered in the case of ***State of Orissa and others Vs. Jagabandhu Panda*** reported in **(2013) 11 SCC 631**, Mr. Nayak has argued that recruitment to any cadre is governed by the provisions of the Rules and, therefore, the rigors of the Rules cannot be relaxed so as to allow merger of posts not included within the purview of the Service Rules. Mr. Nayak, therefore, submits that the learned Single Judge has rightly held that no direction can be issued to the respondents for merger of the single post of DEO in the cadre of Jr. AA as the same would amount to violation of the provisions of the Rules.

9. We have considered the arguments advanced by the learned counsel for both the sides and have also gone through the materials available on record.

10. There is no wrangle at the Bar that the appellant was initially appointed against the single post of DEO which was not a cadre post. Since the time of his joining as DEO in the month of July, 2010, the appellant has been continuously serving in the said post till today due to the orders of retention of the post issued from time to time. There is also no controversy about the fact that the post held by the appellant was created by the Government of Assam with the sanction of the Finance Department and the same also received the approval of the Governor of Assam. However, since it is an ex-cadre post, the petitioner neither had any avenue of promotion nor did he get the benefit of any pay revision. It was on such count, the appellant had submitted a representation before the authorities which was referred to the 7th Pay Anomaly Committee. The respondents' counsel has also not denied that the 7th Assam Pay and Productivity Commission had recommended the merger of the single post of DEO with the cadre of Jr. AA, by taking note of the fact that the appellant had the qualification for being appointed in the post of Jr. AA and he was also drawing the

same grade pay like the Jr. AA.

11. A perusal of the gazette notification dated 17/03/2017 leaves no room for doubt that the State Cabinet had approved the recommendations made by the 7th Pay Commission including the recommendation for merger of the post of DEO in the General Administration Department with the cadre of Jr.AA without any modification. Accordingly, instructions were also issued to the Administrative Department to take up the case of the appellant with the Personnel Department. Thereafter, the Personnel Department had conveyed its "No Objection" for integration of the post of DEO held by the appellant with that of Jr. AA by furnishing the following justification in support of its decision, which are quoted herein below :-

- “1. The incumbent is holding a post created procedurally and with the approval of the Finance Department.*
- 2. The post carries equivalent pay scales as that of the Jr. A.A. of Assam Secretariat.*
- 3. The entry qualification to the post is same as that of the Jr. AA of Secretariat with additional qualification of Computer diploma.*
- 4. His recruitment was done properly after advertisement of the post and following interview and computer test by the NIC.*
- 5. This single cadre post has no promotional avenues. The incumbents in the Jr. AA cadre who joined later than him have already been promoted to Sr.AA.*
- 6. There will be no difference in the Jr. AA cadre of Secretariat, if he is absorbed, rather the cadre will be strengthened with an additional post.*
- 7. Already several such cases have been absorbed.”*

12. The question that would, therefore, arise for consideration in the present appeal is as to whether, by ignoring the recommendation of the 7th Pay and Productivity Commission, the approval of the State Cabinet and the "NoC" of the Personnel Department, the Administrative Department could have rejected the prayer of the appellant ? To that extent, whether the learned Single Judge was justified in the eyes of law in passing the impugned judgement and order dated 13/09/2022 dismissing the writ petition filed by the appellant by observing that no direction could be issued to the respondents to amend the rules while up-

holding the impugned order dated 12.09.2019.

13. It is to be noted here-in that decision to integrate any post into any existing cadre lies in the realm of policy decision. Such a decision can be implemented only by way of amendment of the relevant Rules. The Rules of 1963 were framed under proviso to Article 309 of the Constitution of India and, therefore, the procedure laid down in the Constitution for amendment of the Rules would have to be followed scrupulously. In the case of **Ajay Kumar Das v State of Orissa and Others** reported in **(2011) 11 SCC 136**, it has been held that statutory Rules framed under Article 309 of the Constitution can be amended only by a rule or notification issued under Article 309 and not otherwise. Therefore, the post of DEO can be merged with the cadre of Jr.AA only by amending the Rules of 1963 and not other wise. Carrying out amendment to the Rules framed under proviso to Article 309 of the Constitution is essentially a legislative function of the State which is plenary in nature. It is not necessary that the Rules itself should contain any provision permitting amendment of the same. Therefore, the argument that there was no provision in the Rules of 1963 permitting merger of the post of DEO with the cadre of Jr.AA is found to be wholly un-tenable in the eye of law.

14. The sanctity of the decisions of the cabinet on policy matters and the obligation of the administrative departments to carry out such decisions was dealt with by a Division Bench of this Court in the case of **Union of India and others Vs. Shree Ganapati Rolling Mills (P) Ltd. and others** reported in **(2006) 3 GLR 586** . By referring to the decision of the Supreme Court in the case of **Rai Sahib Ram Jawaya Kapur & Ors v The State of Punjab** reported in **AIR 1955 SC 549** it was held that the Cabinet enjoys virtual control of both legislative and executive functions and the Ministers constituting the Cabinet act on the principles of collective responsibility. The observations made in paragraph 41 would be relevant in this case and therefore, are being reproduced herein below for ready reference :-

“41. The Cabinet being a general controlling body is constitutionally entrusted with the duty of formulating national policy whose decisions are binding on all governmental departments. The decisions so taken by the Cabinet are bound to be implemented by each and every wing of the Government, as it is not open to any individual department either to modify or act contrary to the decisions so taken by the Cabinet every department is bound by the collective decisions taken by the Cabinet. The Cabinet is an integral one which

functions through various departments. It is on the basis of the documents submitted, and the result of the discussion amongst its Members, the Cabinet comes to a conclusion thereafter the decision is carried out by all the departments. The department concerned is required to issue appropriate notifications in order to effectuate the policy decision so taken by the Cabinet even if it involves drafting of a Legislation or framing of a rules as the case may be. Issuance of notification in exercise of the statutory functions in order to give effect to a broad policy decision of the Cabinet, are considered to be ministerial acts. It would be futile to contend that the policy decisions taken by the Cabinet would remain dead letter unless the concerned department moves in the matter and issue notification implementing the decisions. The argument if accepted may result in disastrous consequences and may cut at the very system of Constitutional Governance which we have given unto ourselves. Citizens cannot be made scape goats in the cross fire between the interdepartmental feuds or deadlocks."

15. From a careful reading of the aforesaid decision of this court it is evident that every decision of the State Cabinet would be binding upon the Administrative Departments. It is therefore, axiomatic that it would be the bounden duty of every Administrative Department to implement the decision of the Cabinet in letter and spirit.

16. In the instant case, on a proper examination of the grievance of the appellant, an expert body such as the 7th Assam Pay and Productivity Pay Commission had recommended the merger of the post of DEO with the cadre of Jr.AA. The recommendation of the Pay Commission received the approval of the State Cabinet, whereafter, the Personnel Department had conveyed its "No Objection" to the proposal by furnishing proper justification. Under the circumstances, it was not open for the Administrative Department to express a contrary view in the matter and deprive of the appellant of the service benefits which would accrue to him under the Cabinet decision.

17. In so far as the objections raised by the Assam Secretariat Services Association and Assam Secretariat Computer Operators' Association is concerned, here also, we do not find any legal justification for declining the prayer of the appellant on such count for the simple reason that the 7th Pay Commission has itself provided that the procedure for determination of seniority of the appellant, upon merger of the post of DEO, will be laid down by the

Personnel Department and by the notification dated 02/01/2018, the Personnel Department has clarified that the seniority of the incumbent in the cadre would be with effect from the date of his absorption. Therefore, it cannot be said that any employee in the cadre of Jr. AA would be affected in any manner due to merger/integration of the post of DEO in the cadre of Jr. AA.

18. What would also be significant to note here-in that the recommendation of the 7th Assam Pay Commission pertaining to the request of the appellant and the subsequent approval of the same by the State Cabinet did give rise to a legitimate expectation on the part of the appellant that the benefit of such recommendation would be made available to him by carrying out necessary amendments to the Service Rules. Such legitimate expectation of the appellant could not have been denied by the respondents in an arbitrary manner. Having regard to the facts and circumstances of the case, we are of the considered opinion that the plea of the appellant was turned down by the respondent Nos 1 and 2 in a most arbitrary manner.

19. The learned Single Judge was of the opinion that since there was a direction on the Administrative Department to take up the matter with the Personnel Department hence, there was no finality in the decision for merger of the post of DEO. However, the fact remains that the matter was infact taken up with the Personnel Department which had conveyed its "No Objection" to the proposal. It was then left to the Administrative Department to issue appropriate Notification for amendment of the Rules which was not done in this case. By relying on the decision in the case of ***State of Uttaranchal v Sunil Kumar Vaish*** reported in ***(2011) 8 SCC 670***, the learned Single Judge has held that the recommendation made for merger of the post of DEO was nothing but mere noting in the file. However, for the reasons discussed here-in above, we are unable to agree with such finding recorded in the impugned judgement and order dated 13/09/2022. Rather, we are of the view that after the approval of the Cabinet to the recommendation of the Pay commission for merger of the post of DEO, the matter had attained finality and the Administrative Department was required to take follow up action for implementation of the said decision.

20. By referring to the decision in the case of ***State of West Bengal v Subash Kumar Chatterjee and Others*** reported in ***(2010) 11 SCC 694***, the learned Single Judge has

held that court cannot mandate the Government to accept the recommendation of the Pay Commission. But what can be seen from the materials on record is that the highest executive body in the State .i.e. the Cabinet had already accepted the recommendation of the Pay Commission. The only direction that was required to be issued in this case is for implementation of the Cabinet decision.

21. It may be correct to say that ordinarily, no direction can be issued by the writ court to amend the provisions of the Rules framed under Article 309 of the Constitution. However, what is to be noted here-in that the basic relief sought by the appellant in this case is for providing him with opportunity of career progression and the benefit of pay revisions which would not be possible unless the post held by him is integrated into the existing cadre. Denying promotional avenues as well as the benefit of pay revision to the appellant when other similarly situated employees working in the department such as Jr.AA are enjoying the same, would undoubtedly amount to infraction of the fundamental rights guaranteed to the appellant under Articles 14 and 16 of the Constitution of India. Implementation of the recommendation of the 7th Assam pay Commission, as approved by the State Cabinet, would therefore, redress the basic grievance of the appellant on such count. The respondents authorities were under a legal obligation to implement the mandate flowing from the Cabinet decision, more so, when the same relates to the question of protecting the fundamental rights of the citizen but in the present case, the respondents have evidently failed to discharge such duty. The direction that is called for in this case is for issuance of a writ of mandamus for enforcement of the fundamental rights guaranteed to the appellant under Articles 14 and 16 of the Constitution of India and not a direction simpliciter for amendment of the Rules. Amendment to the Rules would merely be a consequential action for implementation of the Cabinet decision. We are, therefore, of the un-hesitant opinion that a writ of mandamus would lie in the facts of the case so as to compel the respondents to discharge their constitutional and legal duty by giving effect to the decision of the 7th Assam Pay Commission, as approved State Cabinet.

22. For the reasons stated herein above, the impugned judgement and order dated 13/09/2022 passed by the learned Single Judge as well as the order dated 12/09/2019 are found to be unsustainable in the eye of law and are accordingly set aside. The respondents

are directed to take necessary steps for implementing the recommendation of the 7th Assam Pay & Productivity Pay Commission, as approved by the State Cabinet, by carrying out necessary amendments to the Rules of 1963 so as to integrate the post of DEO with the cadre of Jr. AA.

23. The aforesaid exercise be carried out and completed within a period of 3 (three) months from the date of receipt of a certified copy of this order.

24. With the above observations, this writ appeal stands disposed of.

There shall be no order as to costs.

JUDGE

CHIEF JUSTICE

Sukhamay

Comparing Assistant