

GAHC010167682023



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

Case No. : WA/336/2023

THE STATE OF ASSAM AND 2 ORS
REPRESENTED BY THE ADDITIONAL CHIEF SECRETARY TO THE GOVT.
OF ASSAM, EDUCATION DEPARTMENT, DISPUR GUWAHATI 781006.
KAMRUP(M) ASSAM

2: THE PRINCIPAL SECRETARY
TO THE GOVT. OF ASSAM
EDUCATION DEPARTMENT
DISPUR GUWAHATI 781006

3: THE DIRECTOR OF HIGHER EDUCATION ASSAM

KAHILIPARA
GUWAHATI 781019
KAMRUP (M) ASSAM

VERSUS

DR NIRABKUMAR SARMAH
S/O LATE JYOTISH CHANDRA SARMAH,
PRINCIPAL RESIDENCE DIPHU GOVERNMENT COLLEGE DIPHU PO DIPHU
GOVERNMENT COLLEGE DISTRICT KARBI ANGLONG ASSAM 782462

2: THE KARBI ANGLONG AUTONOMOUS COUNCIL
PO DIPHU
DIST KARBI ANGLONG
ASSAM
782460 REPRESENTED BY ITS PRINCIPAL SECRETARY

3: SRI TULIRAM RONGHANG
CHIEF EXECUTIVE MEMBER

KARBI ANGLONG AUTONOMOUS COUNCIL
LPO DIPHU KARBI ANGLONG

ASSAM
783460

4:MR. ABDUL MOTIN
ASSOCIATE PROFESSOR
DEPARTMENT OF POLITICAL SCIENCE
DIPHU GOVERNMENT COLLEGE
DIPHU
PO DIPHU DIST KARBI ANGLONG
ASSAM 78246

Advocate for the Petitioner : MR S DAS, MR D SAIKIA(ADV. GEN, ASSAM),SC, HIGHER
EDU,MR. K GOGOI

Advocate for the Respondent : SC, K A A C, MR N KALITA (R-1),MR. D DAS SR. ADV (R-1),MR.
H ALI (r-4),MR. I A HAZARIKA (r-4),FOR CAVEATOR,MR. M MAHANTA ,MR A KALITA

**BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MR. JUSTICE SUMAN SHYAM**

Date of hearing : **27.08.2024**

Date of judgment : **02.09.2024**

JUDGMENT & ORDER (CAV)

(Suman Shyam,J)

The present Writ Appeal has been preferred by the State of Assam and 2 senior officials of the State, assailing the judgment and order dated 28.06.2023 passed by the learned Single Judge in WP(C) No.5400/2021 instituted by the respondent No.1 (writ petitioner) allowing the Writ Petition by setting aside the Notification dated 24.09.2021 by means of which, the services of the respondent No.1 was attached with the Directorate of Higher Education, Assam as an Officer on Special Duty (OSD). The facts and circumstances of the case, giving rise to filing of this appeal, shorn of

unnecessary details, may be noticed herein below.

2. On 30.07.2011 the Deputy Secretary to the Assam Public Service Commission (herein after referred to as the APSC) had issued Advertisement Notice No.03/2011 inviting applications *inter-alia* for filling up one post of Principal in the Diphu Government College, Diphu, which comes under the Education (Higher) Department of the Government of Assam. The respondent No.1 (writ petitioner), who was serving as a Lecturer in the Department of Chemistry in the Diphu Government College, Diphu at the relevant time, had submitted his candidature for the post of Principal of the Diphu Government College. Upon completion of the selection process the respondent No.1 (writ petitioner) emerged as the successful candidate. As such, by the Notification dated 13.01.2012 issued by the Commissioner and Secretary to the Government of Assam, Higher Education Department, the respondent No.1 was appointed in the post of Principal of Diphu Government College, Diphu on being recommended by the APSC. It appears that the appointment of the respondent No.1 in the post of Principal of Diphu Government College was called into question by an organization viz., Assam Enviro Legal Protection Society, by instituting PIL No.61/2012 before this Court *inter-alia* on the ground that the respondent No.1 did not have the eligibility for being appointed in the post of Principal of Diphu Government College. The PIL was, however, dismissed by this Court by order dated 24.09.2012. While the respondent No.1 was serving as Principal of the Diphu Government College, a number of allegations of misdemeanor/ misconduct came to be made against him as a result of which, by the order dated 20.08.2013 issued by the Principal Secretary, Karbi Anglong Autonomous Council (KAAC), the respondent No.1 was placed under

suspension pending drawal of disciplinary proceeding. The aforesaid order of suspension was, however, interfered by this Court by judgment and order dated 09.12.2013 passed in WP(C) No.6281/2013 primarily on the ground that since the respondent No.1 was an employee of the Government of Assam under the Higher Education Department, the Principal Secretary, KAAC did not have any authority or jurisdiction under the law to issue the order of suspension. Be that as it may, subsequently, by the order dated 07.06.2014 issued by the Principal Secretary, KAAC, the respondent No.1 was released from the post of Principal, Diphu Government College in the wake of vehement protests being made by the faculty members, students and the members of the public opposing the continuance of the respondent No.1 in the post of Principal of the College. The order dated 07.06.2014 was challenged by the respondent No.1 before this Court by filing WP(C) No.3062/2014 and by an interim order dated 20.06.2014 this Court had suspended the operation of the order dated 07.06.2014, thus, allowing the respondent No.1 to function as the Principal of Diphu Government College. While the respondent No.1 was continuing as such, the Principal Secretary to the Government of Assam, Education Department had issued the impugned order dated 24.09.2021 whereby, the respondent No.1 was attached as OSD in the Directorate of Higher Education, Assam, Kahilipara, Guwahati and one Sri Abdul Matin, Associate Professor and the seniormost faculty member in the Department of Commerce was allowed to hold the charge of Principal of Diphu Government College. In the Notification dated 24.09.2021 it was, however, made clear that the respondent No.1 shall continue to draw his pay and allowances etc. from the Diphu Government College, Diphu as

usual. The order dated 24.09.2021 was challenged by the respondent No.1 as writ petitioner in WP(C) No.5400/2021 which was allowed by the learned Single Judge by the impugned judgment and order dated 28.06.2023. Hence, this appeal.

3. It appears from the materials available on record that on 12.10.2023 this Court had passed an interim order in Writ Appeal No.336/2023 i.e. the present proceeding, suspending the operation of the judgment and order dated 28.06.2023 passed by the learned Single Judge in WP(C) No.5400/2021 till disposal of the Writ Appeal. The respondent No.1 had assailed the order dated 12.10.2023 by filing Special Leave to Appeal (C) No.23970/2023 before the Hon'ble Supreme Court but on 20.10.2023, the Special Leave Petition was dismissed as not pressed. In view of the above, the interim order dated 12.10.2023 is continuing to hold the field till date.

4. Assailing the impugned judgment and order dated 28.06.2023 passed by the learned Single Judge, Mr. D. Saikia, learned Advocate General, Assam has argued that the present is not a case of transfer of the respondent No.1 nor is it a case involving violation of the conditions of service of the respondent No.1. According to Mr. Saikia, taking note of the prevailing situation in the Diphu Government College and in order to ensure better academic atmosphere in the College and also in the exigencies of public service, the respondent No.1 had to be attached to the office of the Director of Higher Education as an OSD, purely in public interest. Mr. Saikia has argued that considering the academic expertise of the respondent No.1, the Government has decided to avail his services in the matter of implementation of National Education Policy (NEP) and to that end, several important duties and

responsibilities have been entrusted upon the respondent No.1 as OSD attached to the office of the Director of Higher Education. By placing reliance on a decision of the Supreme Court of India in the case of **Ramadhar Pandey Vs. State of U.P. and others** reported in **1993 Supp (3) SCC 35** Mr. Saikia has, therefore, argued that attachment of an employee of the department to an ex-cadre post in public interest is permissible under the law, more so when such a measure does not infringe upon the fundamental or legal right of the employee.

5. Opposing the above contention advanced by the learned Advocate General, Assam, Mr. D. Das, learned senior counsel assisted by Mr. Anjan Kalita, learned counsel appearing for the respondent No.1 has vehemently argued that this is not a case of attachment simpliciter against an ex-cadre post but the respondent No.1 has been sent on deputation to an ex-cadre post, that too, without obtaining his consent. According to Mr. Das, the State had initially projected before the Court that it is a case of transfer but subsequently, realizing the legal hurdles that may arise in the matter, they have now shifted their stand to contend that it is a case of attachment. Contending that law does not permit attachment of an employee as an OSD in an ex-cadre post, Mr. Das submits that the respondent No.1, having been appointed as the Principal of the Diphu Government College, which is a single cadre post, there was no scope for furnishing the respondent No.1 to an ex-cadre post in view of the amendments made to the Assam Education Service Rules, 1982 (for short, Rules of 1982) with effect from 15.09.2009. As such, the appellants did not have any authority to transfer the respondent No.1 or to send him on deputation to an ex-cadre post that too, without obtaining his consent.

6. Elaborating on the aforesaid submissions made on behalf of the respondent No.1, Mr. Anjan Kalita, learned counsel has placed heavy reliance on a decision of this Court rendered in the case of **Bijendra Pratap Singh Vs. State of Arunachal Pradesh and others** reported in **2004 (Supp) GLT 827** to contend that OSD is an ex-cadre post and therefore, transfer of a person to such ex-cadre post can only be done on deputation, which cannot be done without obtaining the consent of the employee.

7. We have considered the arguments made at the Bar and have also gone through the materials available on record.

8. The facts and circumstances of the case, till the stage of selection and appointment of the respondent No.1 in the post of Principal of Diphu Government College, Diphu on the strength of the Notification dated 13.01.2012, is more or less admitted. The controversy involved in this proceeding revolves around facts and circumstances of the case which had arisen after the respondent No.1 had taken over as the Principal of Diphu College. In the counter-affidavit filed on behalf of the respondent No.4 i.e. Karbi Anglong Autonomous Council (KAAC), several instances have been narrated so as to indicate the manner in which, the academic atmosphere in the Diphu Government College had worsened day by day due to the manner in which the respondent No.1 was handling the affairs of the College as its Principal. According to the KAAC authority, due to the misdemeanour of the respondent No.1, there was widespread resentment amongst the teachers, students and the members of the public. Although these averments are disputed by the

respondent No.1, yet, from the statements made in paragraphs 7 to 15 of the counter-affidavit it appears that there were serious allegations of misconduct/misbehavior on the part of the respondent No.1 towards his colleagues and students which had allegedly given rise to unpleasant situation thus vitiated the academic ambience within the College. It was on account of such events that there was an attempt to place the respondent No.1 under suspension pending drawal of disciplinary proceedings. However, the order of suspension was not found to be sustainable by this Court, albeit on a technical ground. Be that as it may, it is in the backdrop of the abovenoted fact situations, the Government of Assam, in the Higher Education Department had issued the impugned Notification dated 24.09.2021 posting the respondent No.1 as OSD in the office of the Director of Higher Education, Assam. The question that would, therefore, arise for consideration in this case is as to whether, assigning duties to the respondent No.1 by attaching him to an *ex-cadre* post was permissible under the law? The learned Single Judge has answered the said question in favour of the respondent No.1 by holding that attaching an employee to an *ex-cadre* post would amount to sending him on deputation and therefore, such a recourse would be impermissible if made without obtaining the consent of the employee.

9. It is to be noted herein that as the Principal of the Diphu Government College, the conditions of service of the respondent No.1 is governed under the Rules of 1982. Even after the issuance of the impugned notification dated 24.09.2021 the respondent No.1 continued not only to hold the substantive post of Principal but his service also continued to be governed under the Service Rules of 1982. As a matter of

fact, no other person has been appointed permanently in the post of Principal of Diphu Government College. That apart, the services of the respondent No.1 as OSD is also being utilized by the Government of Assam, Higher Education Department. The office of the Director of Higher Education Department forms part of the establishment of the Education Department in Assam. Therefore, the fact that the services of the respondent No.1 has been attached to the office of the Director of Higher Education, Assam, in our opinion, would not amount to sending the respondent No.1 on deputation or on transfer from one department to another, as has been contended by the learned counsel for the respondent No.1.

10. Transfer on deputation, it must be borne in mind, would envisage the involvement of a borrowing department and a lending department. Sending an employee on deputation would be possible only when the relevant Rules permits so. When an employee is sent on deputation from one organization to another, his service conditions may be governed by a different set of Rules during the period of deputation in as much as, he or she may also become the member of a different service and continue to remain so until repatriation. As such, it will be upto the employee to accept or not to accept the terms and conditions of such deputation transfer. It is in such circumstances, it would be mandatory for the authorities to obtain the consent of the employee before sending him on deputation. The said Rule, however, would not have any bearing when the employee is allowed to serve in the parent department but merely attached to another post, be it a cadre post or an ex-cadre post.

11. In the present case, as noted above, the respondent No.1 has not been shifted from one organization to another nor is there any violation of the terms and conditions of his service as assured under the Rules of 1982. By the impugned order dated 24.09.2021 merely a new assignment, within the same department, has been entrusted on the respondent No.1. It is not the allegation of the writ petitioner/respondent No.1 that due to the impugned order dated 24.09.2021 there has been any reduction of his salary or other emoluments drawn as the Principal of Diphu Government College. If that be so, it is apparent that the impugned order dated 24.09.2021 did not infringe upon any right of the respondent No.1 as guaranteed to him under his order of appointment or the Rules of 1982.

12. Coming to the question of perceived lowering of status and/or privilege attached to the post of OSD as compared to the post of Principal, it is to be borne in mind that as long as the terms and conditions of service of an employee is not altered to his detriment, no employee can claim to have a vested right to serve in a particular post of his or her choice within the department. In the present case, there is nothing to show that the impugned order dated 24.09.2021 had been issued in violation of any of the provisions of the Rules of 1982 or with a *malafide* intent to cause loss and injury to the respondent No.1. On the contrary, it appears that in the wake of unrest in the Diphu Government College and the series of complaints received against the respondent No.1, which had a damaging impact on the overall academic atmosphere of the Diphu Government College, the authorities had decided to assign different nature of duties to the respondent No.1 without, however, altering the terms and conditions of his service. Such a recourse was apparently

adopted primarily to redeem the situation in Diphu College.

13. According to the learned Advocate General, Assam, the order dated 24.09.2021 was a stop gap arrangement made in the exigencies of public interest. Since the respondent No.1 was assigned duty in a post equivalent to the post of Principal and within his parent department and that no other person has been regularly appointed in the post of Principal of Diphu Government College, we are of the view that there was no necessity for the State to obtain the consent of respondent No.1 before issuing the order dated 24.09.2021. If that be so, we are also of the opinion that the impugned order dated 24.09.2021 is not liable to be struck down by this Court merely on the ground that the same was issued without obtaining the prior consent of the respondent No.1.

14. For the reason indicated above, we are also of the view that this is not a case of deputation transfer but a clear case of re-assignment of duties to a Government employee within the parent department without altering his conditions of service. Such a recourse, in our view, was permissible under the law since the service of the respondent No.1 is still being utilised by the same department in which he was appointed and there is nothing in the Rules of 1982 which prohibits the same.

15. It is no doubt correct that in the wake of the allegations made against the respondent No.1 it was open for the departmental authorities to initiate departmental proceedings against the respondent No.1 and if the charges were found to be established, impose penalty upon him. However, instead of taking recourse to such an option, the departmental authorities have decided to utilize the service of the

respondent No.1 by giving him a different assignment and at the same time redeeming the academic atmosphere of the Diphu Government College by making temporary alternative arrangements. Such a recourse, in our considered opinion, was not only permissible under the law but was also wholly justified in the facts and circumstances of the case.

16. In the case of **Bijendra Pratap Singh** (*supra*) relied upon by the learned counsel for the respondent No.1, the core controversy was pertaining to the claim of *inter-se* seniority between the writ petitioner and the respondent No.3 therein. In that case the respondent No.3, who was holding the substantive post of Superintending Engineer in the Power Department and was junior to the writ petitioner, was allowed to hold the post of Chief Engineer while the writ petitioner was sent on deputation as OSD in the Arunachal Pradesh State Electricity Regulatory Commission (APSERC) against a post which was lower in status. The writ petitioner therein was sent on deputation in another organization and to an *ex-cadre* post, that too, without obtaining his consent. It was in such fact situation that the learned Single Judge had observed that an employee cannot be sent to an *ex-cadre* post without his or her consent. It was observed that transfer of a person to an *ex-cadre* post can only be done on deputation and if he has to be sent on deputation, his consent is required to be obtained. However, in the case in hand, as has been noted above, there is no transfer of the respondent No.1 on deputation to another organization. An employee cannot be considered to have been sent on deputation merely because he or she has been asked to discharge a different nature of duty within the same department but against an *ex-cadre* post. Therefore, the *ratio* laid down in the case of **Bijendra**

Pratap Singh (*supra*), in our opinion, would have no bearing in the facts and circumstances of the present case. As long as the action taken by the authorities is within the permissible limits of the Service Rules, some free play in the joint must be recognized in favour of the administrative department so as to enable it to tide over contingencies such as the one involved in the present proceeding.

17. For the reasons stated herein above, we are of the view that the impugned judgment and order dated 28.06.2023 is unsustainable in the eyes of law. The same is accordingly set aside.

The Writ Appeal stands allowed.

Parties to bear their own cost.

JUDGE

CHIEF JUSTICE

T U Choudhury/Sr.PS

Comparing Assistant