

(2016) 09 GAU CK 0037
In the Gauhati High Court
Case No : WP(C) No. 3371 of 2016

Governing Body

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 30-09-2016

Acts Referred:

Citation : (2017) 1 GauLR 37 : (2017) 1 NEJ 125

Hon'ble Judges : M.R. Pathak, J.

Bench : Single Bench

Advocate : Mr. R.C. Saikia, Mr. S. Dutta, Ms. K. Saikia, Mr. D. Medhi and Ms. A. Bora Advocates, for the Petitioner in WP(C) No. 1706 of 2015; Mr. R.C. Saikia, Mr. S. Dutta, Ms. K. Saikia, Mr. D. Medhi and Ms. A. Bora, Advocates, for the Opposite Party No. 5 in Revi

Final Decision : Allowed

Judgement

M.R. Pathak, J. (CAV) - As per order dated 10.06.2016, WP(C) Nos. 3371/2016 has been listed with WP(C) No. 1706/2015 and Review Petition No. 64/2016 before this Court for consideration.

2. Above noted Writ Petitions as well as the Review Petition are inter-related as these pertain to the filling up of the post of Principal in Pragjyotish College, Guwahati-781009. The sanctioned post of Principal of Pragjyotish College, Guwahati (hereinafter referred to as "the College") is lying vacant since 01.02.2011 after retirement of its erstwhile regular Principal Dr. Dayananada Pathak from service on 31.01.2011 on attaining the age of superannuation.

3. The Director of Higher Education, Assam (the DHE, in short) by his letter No. G(B).CC.47/2011/75 dated 18.11.2011 informed the President of the Governing Body (GB, in short) of the College to initiate the recruitment process for filling up the post of Principal in said College in accordance with the prescribed procedure. Accordingly, an advertisement was published on 05.12.2011 in the English Daily - "Assam Tribune" by which, the then President of the GB of the College, one Dr.

N. N. Sharma, invited applications for the post of Principal of said College from the eligible candidates having requisite qualifications, norms and criterias as prescribed in the said advertisement specifying that applications should reach him within the time prescribed therein and in response to the said advertisement, the candidates applied for the said post of Principal of the College enclosing the necessary testimonials in support of their respective candidature.

4. As the selection process for the post of Principal of the College was not complete and was getting delayed, a candidate for the said post, namely Dr. Ranjan Kumar Bora on 17.03.2015 filed the above noted WP(C) No. 1706/2015 praying for necessary direction to the respondents to complete the selection process pursuant to said advertisement dated 05.12.2011, stating that because of the delay for said selection process, he would cross the upper age limit for the said post. In said WP(C) No. 1706/2015 (i) the Commissioner and Secretary, Higher Education Department, Assam, (ii) the Director of Higher Education, Assam, (iii) the Governing Body of Pragjyotish College represented by its Secretary and (iv) the Principal-in-Charge of Pragjyotish College are the party respondent Nos. 1 to 4 respectively and the Court on 01.04.2015 issued notice to all the respondents therein. Though the College authority, i.e. respondent Nos. 3 & 4 filed their affidavit in the matter on 26.11.2015 but the departmental respondents did not file any affidavit nor placed any instruction in the matter.

5. During pendency of said WP(C) No. 1706/2015, its petitioner Dr. Ranjan Kumar Bora on 09.12.2015 filed an interlocutory application being I.A. No. 2664/2015 in said WP(C) No. 1706/2015 for a direction prohibiting the respondents, more particularly the State respondents to fill up the vacant post of Principal in the College by bringing in another person from another college but instead fill up the said post by completing the selection process already initiated by the authorities of the College. When said I.A. was taken up for consideration on 01.03.2016, the college authority, through its counsel, submitted before the Court that it will complete the selection process for the said post of Principal within a period of three months, whereas the standing counsel for the Higher Education Department submitted that the State respondents have initiated a process for filling up of the post of Principal of the College by transferring a Principal from another provincialised college under the Directorate of Higher Education, Assam. After hearing the parties, this Court vide order dated 01.03.2016 allowed the said I.A. No. 2664/2015 arising out of WP(C) No. 1706/2015 and directed the state respondents not to fill up the post of Principal of the College by bringing or transferring another Principal from other Provincialised College under the DHE, until further order.

6. As per order dated 01.04.2016 passed by the Court in his Interlocutory Application, being I.A. No. 1277/2016 in WP(C) No. 1706/2015, one Dr. Suranjan Sarma, Principal M. K. College, Subha, Chenga, District-Barpeta impleaded himself as respondent No. 5 in said WP(C) No. 1706/2015 (Dr. Ranjan Kumar Bora v. State of Assam and others) and thereafter, on 11.05.2016 filed the above

noted Review Petition No. 64/2016 in said I.A. No. 2664/2015 arising out of WP(C) No. 1706/2015 for review of the order dated 01.03.2016 passed by this Court in the I.A. No. 2664/2015 stating that since for long 4 (four) years the college authority failed to complete the selection process for the post of Principal of Pragjyotish College and in the greater interest of said institution, the DHE vide his letter No. G(B)Misc.262/2015/35 dated 20.11.2015 have already withdrawn the permission that was accorded to the President of the GB of the College to advertise the post of its Principal vide his earlier letter No. G(B).CC.47/2011/75 dated 18.11.2011 and that as per the approval of the State Government in the Higher Education Department vide Order No. AHE.610/2015/4 dated 19.02.2016, the DHE vide order No. G(B)Misc.262/ 2015/43 dated 26.02.2016 transferred him from said M.K. College, Subha, Chenga, Barpeta and posted him as Principal, Pragjyotish College, Guwahati, District-Kamrup (M) against the existing vacancy with immediate effect and that the Standing Counsel of the Education Department failed to provide the aforesaid correct information before the Court for which the order dated 01.03.2016 was passed by this Court in the I.A. No. 2664/2015 and accordingly sought for review of the said order.

7. The Governing Body of Pragjyotish College, Guwahati-781009, represented by its President has filed the aforesaid WP(C) No. 3371/2016 stating that the College authority was not informed by the DHE about his letter No. G(B)Misc.262/2015/35 dated 20.11.2015 regarding withdrawal of the permission to advertise the post of the Principal of said College accorded vide letter No. G(B).CC.47/2011/75 dated 18.11.2011 about which the College authority came to know from the said Review Petition No. 64/2016 in said I.A. No. 2664/2015 arising out of WP(C) No. 1706/2015 only. In said WP(C) No. 3371/2016, the petitioner for the College averred that the impugned letter dated 20.11.2015 withdrawing the permission to advertise the post of Principal of Pragjyotish College has been issued by the DHE arbitrarily, in malafide exercise of power and in violation of the principles of natural justice without giving any opportunity of hearing to the college authority and as such, said impugned letter of the DHE dated 20.11.2015 not being sustainable in the eye of law needs to be set aside. The Governing Body of the College in said WP(C) No. 3371/2016 further prayed to allow the petitioner to complete the selection process for the post of Principal of the College as advertised and to appoint a Principal thereafter in it.

8. Heard Mr. Ram Chandra Saikia, learned counsel for the petitioner Dr. Ranjan Kumar Bora in WP(C) No. 1706/2015; Mr. Dilip Mazumdar, learned Senior Counsel, assisted by Mr. Syed Musfiquir Rahman, learned counsel on behalf of the petitioner Governing Body of Pragjyotish College in WP(C) No. 3371/2016 and Mr. Arup Kumar Sarma, learned counsel representing Dr. Suranjan Sarma, the Review Petitioner & the impleaded respondent No. 5 in WP(C) No. 1706/2015.

9. Also heard Mr. Manish Choudhury, learned Standing Counsel, Higher Education for the State respondents in the aforesaid Writ Petitions as well as the Review petition and Mr. Phanindra Jidung, the Director of Higher Education, Assam, who

is personally present before the Court.

10. Mr. R.C. Saikia, learned counsel for the petitioner Dr. Ranjan Kumar Bora in WP(C) No. 1706/2015 submitted that since the College has already advertised the post of Principal of Pragjyotish College on 05.12.2011 pursuant to which the petitioner applied; the respondent authorities should complete the process of selection and appointment of the selected candidate as regular Principal of the College at the earliest since the College authority in March 2016 itself submitted before the Court that it will complete the said process within three months. Mr. Saikia has placed reliance in the Division Bench Judgment of this Court in the case of Dr. Ajit Kumar Baruah v. State of Assam and others reported in 2014-6-GLR-390 : 2014 (3) GLT 382.

11. Mr. D. Mazumdar, learned Sr. counsel appearing for the petitioner the Governing Body of Pragjyotish College in WP(C) No. 3371/2016 stated that the College was initially under the deficit system of grants-in-aid and its Governing Body was governed by the Assam Aided College Management Rules, 1966. Subsequently, GB of the College was governed by the Assam Aided College Management Rules, 1976 and the Assam Non-Government College Management Rules, 2001 as and when those Rules came in to force. Mr. Mazumdar also stated that the College in question was later brought under provincialisation with effect from 01.12.2005 under the provisions of the Assam College Employees (Provincialisation) Act, 2005 and that GB of the College is now governed by the Assam Provincialised Colleges and the Non-Government College Management Rules, 2001.

12. It is submitted that after the letter of the DHE under No. G(B).CC.47/2011/75 dated 18.11.2011, the post of Principal of the college was advertised on 05.12.2011 that fell vacant on 31.01.2011 after retirement of its erstwhile regular Principal on superannuation, but due to reasons best known to the then President of the GB of the College, Dr. N.N. Sarma, who issued the said advertisement dated 05.12.2011, did not complete the said selection process for the advertised post of Principal of the College in spite of receiving applications from the intending candidates and took away the relevant file containing the application forms for the advertised post, which were in his personal custody. It is submitted that subsequently, the respondent authorities removed the said Dr. N.N. Sarma as President of GB of said College and appointed a new President of GB of said College.

13. As per the provisions of Rule 3 of the Assam Provincialised College and Non-Government College Management Rules, 2001, as amended, Governing body of a Provincialised College consists of one President; one Secretary; the Vice Principal of the College as Member-Ex-officio; two members to be nominated by the affiliating University concerned; three guardians of the students studying in the college as members, who are to be nominated by the Director, one of which shall be a lady; two teachers of the College as nominee from amongst themselves and one non-teaching staff nominee of the College from amongst the members from

the non teaching staff of the concerned College. From the affidavit-in-opposition of the College authority in WP(C) No. 1706/2015, Mr. Mazumdar placed before the Court that two Associate Professors of the College, namely, Atanu Kr. Chawdhury and Nirendra Nath Thakuria together filed a writ petition being WP(C) No. 1705/2014 being aggrieved with the recommendation of the Gauhati University nominating two University nominees to be GB of the College vide its letters dated 15.11.2013 and 03.01.2014 which was not in conformity with the criteria for considering proposal of colleges for nomination of Universities nominees to the GB of the college dated 14.02.2014 and this court while issuing notice to the respondents therein vide order dated 28.03.2014 passed in WP(C) No. 1705/2014, in the interim suspended the aforesaid two letters of Gauhati University dated 15.11.2013 and 03.01.2014.

14. It is stated that the Court after hearing the parties vide order 31.08.2015 allowed the said WP(C) No. 1705/2014, quashing those two impugned letters of the Registrar of the Gauhati University. Mr. Mazumdar submitted that the GB of the College was not complete as Gauhati University nominees to the GB of the college was pending adjudication before the Court till 31.08.2015 and as per provisions of Rule 5(1) of the Assam College Employees (Provincialisation) Rules 2010 the appointment of the Principal is to be made by direct selection to be selected by a Selection Committee, which is to be constituted by the GB of the College and the said Selection Committee is required to select a person on the basis of interview from amongst eligible candidates who applied in terms of the advertisement in the news papers and after such selection, the GB of the College is required to recommend the selected candidate to the DHE, who in turn is required to issue orders of appointment.

15. Mr. Mazumdar, Sr. Counsel for the College submitted that after the restraining order dated 01.03.2016 passed by the Court in IA 2664/2015, office of the college received a copy of an order dated 26.02.2016 from the DHE informing transfer of Dr. Suranjan Sarma, Principal of M.K. College, Chenga, Barpeta to the College and regarding his posting in the college in the same capacity against the existing vacancy of Dr. Dayananda Pathak, the erstwhile regular Principal of the College, who retired from service on 31.01.2011 on superannuation, with immediate effect and thereafter, on 11.3.2016, the office of the college received another letter dated 3.3.2016 from the Deputy Director of Higher Education, Assam directing the President of the College to comply with the order of the Court dated 01.03.2016 passed in the aforesaid IA 2664/2016. Mr. Mazumdar, learned senior counsel submitted that from the aforesaid letter dated 03.03.2016 of the Deputy DHE, it was assumed that the direction had been given to them to complete the selection process and accordingly, the College authority initiated the selection process for the post of Principal of the said college, but by a letter No. G(B)Misc/262/2015/51 dated 07.06.2015 informed the President of the College not to proceed with the selection process for the said post of Principal of College as the matter is sub-judiced in WP(C) No. 1706/2015. Mr. Mazumdar further stated that said Dr. Suranjan Sarma, Principal of M.K. College, Chenga

by his letter dated 01.03.2016, signed on 02.03.2016, sent by registered post from Guwahati GPO on 15.03.2016 informed the President of the College about his transfer to the College in question. However, Mr. Mazumdar submits that said Dr. Suranjan Sarma did not join the College as its Principal and clarified that the neither the President of the College nor the College authority received the impugned letter dated 20.11.2015 till the filing of the WP(C) 3371/2016. Mr. Mazumdar submitted that the WP(C) No. 1706/2015 came up for consideration before the Court on 15.6.2015, 30.11.2015, 08.12.2015, 23.12.2015 and 05.01.2016 and the IA 2664/2015 was came for consideration on 3.2.2016 and on those dates, the Court passed order in the proceedings, but the State respondents neither placed the impugned letter of the DHE dated 20.11.2015 before the Court nor informed the Court about the issuance of the same. It is pointed out that even on 01.03.2016 when the Court passed the order restraining the State respondents from transferring a Principal from another provincialised college to fill up the advertised vacant post of Principal in the college; the State respondents neither submitted nor placed a copy of the impugned letter dated 20.11.2015 of the DHE regarding his withdrawal of permission that was accorded by him on 18.11.2011 allowing the President to advertise the post of the Principal of the College and also not placed the alleged transfer order dated 26.02.2016 copy of the said communication before the Court. Mr. Mazumdar submitted that only when the counsel for the petitioner in WP(C) 1706/15 on receipt of the copy of the Review Petition filed by said Dr. Suranjan Sarma saw the said letter of the DHE dated 20.11.2015 in it and enquired from the counsel for the college authority, then only the petitioner could come to know about the impugned letter dated 20.11.2015, since the review petitioner did not serve any copy of the Review Petition to the counsel for the College authority while filing the same.

16. Mr. Mazumdar further submitted that Section 6 of the Assam College Employees (Provincialisation) Act, 2005 empowers the DHE to appoint both teaching and non-teaching staff in provincialised colleges on the basis of the selection and recommendation of the GB of the respective college in accordance with rules and procedures of the Government in force and as provided in Rule 5 (1) of the Assam College Employees Provincialisation Rules 2010. Further, Rule 18 of the Assam Provincialised Colleges and the Assam Non-Government College Management Rules, 2001 as amended, stipulates the duties of the GB and as per sub Rule 4 to Rule 18 of the said 2001 Rules, as amended, it is a duty of the GB to appoint persons in connection with the affairs of the College against the post or posts so sanctioned by the State Government with scrupulous compliance of the UGC guidelines and the State Government instruction and policies, where the DHE is only empowered to issue appointment orders after the selection and the recommendation of the GB of the college and that such power conferred upon GB of the College by said 2005 Act and 2001 and 2010 Rules cannot be taken away by the DHE unilaterally, like in the present case by issuing the impugned letter dated 20.11.2015 withdrawing the permission granted to the College to advertise

the post of Principal in mala fide exercise of his power to fill up the advertised post of Principal by transferring some other Principal from another provincialised college.

17. On the submission of Mr. Arup Kumar Sarma, learned counsel representing Dr. Suranjan Sarma, the respondent No. 5 in WP(C) No. 1706/2015 and the Petitioner in Review Petition No. 64/2016 in IA No. 2664/2015 arising out of said WP(C) No. 1706/2015 that though he has not been made a party in WP(C) No. 3371/2016, but he is vitally interested in the said proceeding since he represents the person, who had been transferred to hold the post of Principal in the College in question, he has been allowed to make submission, which has not been objected by the petitioners of both WP(C) Nos. 1706/2015 and 3371/2016.

18. Mr. A.K. Sarma submitted that on the recommendation of the selection committee of the College and the resolution dated 11.06.2012 of the Governing Body of Madhya Kamrup College, Subha, Chenga, District-Barpeta, the DHE, Assam vide order No. G(B)AC.185/2012/99 dated 13.06.2012 Dr. Suranjan Sarma, the impleaded respondent No. 5/Review petitioner was appointed as Principal in M.K. College where he is serving till date. Mr. Sarma also submitted that as the post of Principal in Pragjyotish College was lying vacant for long and in spite of issuing the advertisement for the said 4 (four) years back, the College authority failed to complete the selection process, considering the greater interest of said institution, the DHE vide order No. G(B)Misc.262/2015/35 dated 20.11.2015 withdrawn the permission for the advertisement for filling up the vacant post of Principal in the College that was accorded by him on 18.11.2011 and the State Government in the Higher Education Department vide Order No. AHE.610/2015/4 dated 19.02.2016 approved the proposal of the DHE issued under No. G(B)Misc.262/2015/35 dated 20.11.2015 for transfer of Dr. Suranjan Sarma to the vacant post of Principal of Pragjyotish College with immediate effect; pursuant to which the DHE vide No. G(B)Misc.262/2015/43 dated 26.02.2016 transferred said Dr. Sarma, Principal M.K. College, Subha, Chenga, Barpeta and posted him as Principal in Pragjyotish College, Guwahati, District-Kamrup(M) against the existing vacancy with immediate effect.

19. Mr. A.K. Sarma, learned counsel representing the Review Petitioner submitted that the Standing Counsel representing the State respondents in the Higher Education Department except making a statement that the respondent authorities initiated the process for filling up of the post of Principal of Pragjyotish College by transferring a Principal from another Provincialised College, failed to provide the correct information before the Court on 01.03.2016 in the IA No. 2664/2015 regarding withdrawal of the permission for advertisement to the post of principal of the College by DHE vide his letter dated 20.11.2015 and the subsequent transfer of the Review Petitioner issued by the DHE on 26.02.2016 and for such mis-representation, the Court on 01.03.2016 passed the restraining order in said IA No. 2664/2015 and therefore, the said order needs to be reviewed, as inadvertently, the counsel for the writ petitioner

as well as departmental counsel, did not bring the said facts to the notice of the Court and for the said reason, the Court was under the impression that the approval dated 18.11.2015 was still in force. Mr. Sarma in support of his argument for the Review Petitioner relied on the judgment of the Hon'ble Supreme Court in the case of BCCI & Another v. Netaji Cricket Club, reported in AIR 2005 SC 592.

20. Mr. Manish Choudhury, learned Standing Counsel, Higher Education on behalf of the official respondents produced the relevant records of the case as sought for. The DHE, Assam also appeared personally in the matter as directed by the Court.

21. It is submitted on behalf of the DHE that the authority of the Pragjyotish College was accorded permission way back on 18.11.2011 to advertise the post of Principal of the College and since then up to November, 2015 for more than four years, the College authority failed to complete the selection process for the said post and for not having a regular principal for a long period, both the academic as well as the administrative atmosphere of the college had been severely hampered and as such by the impugned order dated 20.11.2015, the DHE withdrew the permission that was granted by him earlier on 18.11.2011 to advertise the post of Principal of the College. However, on being enquired, the DHE, Assam submitted that in absence of regular principal in a College, it is always managed by an ad hoc arrangement through an in-charge Principal, who is generally the senior-most lecturer of the college. The DHE could not place before the Court regarding the availability of any report about such hampering of academic and administrative atmosphere in the College in absence of any regular Principal in it during the intervening period. Moreover, on being specifically asked, the DHE could not show any such notice ever issued to the President of the GB of the College or the College authority before issuing the impugned letter dated 20.11.2015 regarding withdrawal of the permission to advertise the post of Principal of the College.

22. With regard to transfer of Review petitioner/respondent No. 5 in WP(C) No. 1706/2015 Dr. Suranjan Sarma, Principal, M.K. College, Subha, Chenga, District-Barpeta to the vacant post of Principal in Pragjyotish College, Guwahati, District-Kamrup (M); Mr. Choudhury submitted that as provided under Section 3(c) of the Assam College Employees (Provincialisation) Act, 2005 as amended in 2012, all Principals of Provincialised Colleges forms an independent common cadre and the services of the Principals being transferable among the Colleges and the DHE being the appointing authority of Principal, he is empowered to make such transfer. Mr. Choudhury further stated that such transfer has been made after necessary proposal from the side of DHE and due approval of the State Government and accordingly, it is submitted that transfer of the Review petitioner to the vacant post of Principal in Pragjyotish College, Guwahati is in accordance with law. As per Mr. Choudhury, after the amendment in 2012, following the provisions of Section 3(c) of 2005 Act, transfer is the other mode of

appointment of Principal in provincialised Colleges in the State. Mr. Choudhury also submitted that impugned letter dated 20.11.2015 and other documents were sent to the College in due time and for that he placed two issue registers of the DHE to that extent.

23. The Assam College Employees (Provincialisation) Act, 2005 came into force with effect from 01.12.2005 and it was published in the Assam Gazette on 23.12.2005. By enacting the said 2005 Act, the State Government provincialised the services of employees, both teaching and non-teaching of the Non-Government Colleges in receipt of deficit grants-in-aid from the State Government who are appointed substantively against sanctioned post or has been in service on or after the 01.01.2005.

24. Section 2(a) of said 2005 Act, defines "College" and its reads as -

"College" means any Non-Government College in Assam in receipt of deficit grants-in-aid from the Government and imparting general education in Arts, Commerce or Science stream in Graduate level.

25. Section 2(f) of said 2005 Act defines "Provincialisation" and its reads as -

"Provincialisation" as taking the liabilities for meaning there by the Government of Assam took the liabilities for payment of salaries including dearness allowance, medical allowance, such other allowances as admissible to the Government employees of similar category and gratuity, pension, leave encashment, etc. as admissible, under the existing rules, to the employees of the State Government serving under the Government of Assam.

26. As per Section 2(g) of said 2005 Act "prescribed" means prescribed by rules made under the said Act.

27. Section 3 of 2005 Act, which was amended by the Assam College Employees (Provincialisation) (Amendment) Acts, 2010 and 2012, provides for "employees to be provincialised" and it reads as -

"3. Employees to be provincialised.- "Subject to the provisions of Article 30 and 309, all employees of the Colleges, save and except the employees who exercise option to continue in the existing terms and conditions of service under Clause (d) below, shall be deemed to have become the employees of the Government on and from the date on which the Colleges have been brought under the deficit system of grants-in-aid, on the following terms and conditions namely -

(a) all rules including the rules of conduct and discipline, which are applicable to the Government servants of corresponding grade similarly situated shall be applicable to the extent of their applicability is not contradictory to the provisions of this Act and the rules made thereunder;

(b) the existing employees will continue to receive their respective existing scales of pay and other allowances etc. as admissible to them under relevant rules and orders of the Government;

(c) the posts in each provincialised College shall constitute an independent cadre for each category of employees except the post of Principals of Colleges. All Principals of provincialised Colleges shall form an independent common cadre. Save and except the cadre of Principals, no inter cadre transfer from one College to another including mutual transfer shall be allowed. The services of the Principals shall be transferable among the Colleges;

(d) the existing employees who want to continue in the existing terms and conditions of service shall give an option in writing to the Director, Highest Education, Assam within a period of three months from the date of coming into force of this Act:

Provided that the option once exercised by an existing or retired employees may be withdrawn by him at any time if he wants to come under provincialisation under this Act, subject to the refund of the amount of Government's share of the Contributory Provident Fund with interest thereon up to the date of refund of Government's share of the Contributory Provident Fund with interest:

Provided further that the withdrawal of option shall be effective on the date of refund of the amount of the Government's share of the Contributory Provident Fund with interest thereon;

(e) any existing employee who does not exercise option under clause (d) shall be deemed to have opted for Provincialisation under the provisions of this Act;

(f) the employees of the Colleges provincialised after coming into force of this Act shall have no right of option under clause (d); and

(g) all existing employees who do not exercise option under clause (de) shall have to refund the State Governments share of the Contributory Provident Fund with interest within six months from the date of coming into force of this Act:

Provided that if any existing employee who fails to refund the State Governments share of Contributory Provident Fund with interest within the said stipulated period such employee shall be deemed to have been opted to remain under the existing terms and conditions of service applicable to them before Provincialisation.

28. Above noted Section 3(c) of the 2005 Act as amended by the Assam College Employees (Provincialisation) (Amendment) Act, 2012 came in to force with effect from 02.05.2012, the date when it was published in the Assam Gazette Extraordinary. The un-amended Section 3(c) of the 2005 Act, which was in force up to 01.05.2012 was as follows:

"3(c). The posts in each provincialised College shall constitute an independent cadre for each category of employees. No inter-cadre transfer from one college to another including mutual transfer shall be allowed."

29. Section 6 of the 2005 Act stipulates "Selection and appointment of employees" in provincialised Colleges and it reads as -

Section 6. "Selection and appointment of employees-

Appointments of both teaching and non-teaching posts in the Colleges shall be made by the Director of Higher Education, Assam on the basis of selection and recommendation of the Governing Body of the respective College in accordance with the Rules and Procedure of the Government in force:

Provided that some of the powers of the Appointing Authority may, however, be delegated to the Governing Body of the colleges as may be provided in the rules.

30. Section 12 of the 2005 Act confers power on the State Government to make rules for carrying out the purposes of the said Act, except for the purpose of payment of pension, which is governed by the Assam Services Pension Rules, 1969 and also prescribes the procedure how such rules are to be made operative.

31. The State Government in exercise of its powers conferred under aforesaid Section 12(1) and following the procedure prescribed under Section 12(2) of the 2005 Act, vide Notification No. B(2)H.12/2003/Pt.II/113 dated 15.11.2010 framed the Assam Colleges Employees (Provincialisation) Rules, 2010 and it came into force with effect from 22.11.2010, the date on which it was published in the Assam Gazette Extraordinary.

32. Rule 5 of said 2010 Rules provides for the Method of Recruitment and Sub-Rule 1 of said Rule 5 prescribes the manner of appointment to the post of Principal in provincialised College, which reads as follows:

"5(1). Appointment to the post of Principal shall be by direct selection. For this the Governing Body shall constitute a Selection Committee, which shall select a person on the basis of an interview from amongst eligible candidates who apply in response to an open advertisement in newspapers. The Governing Body shall recommend the candidate to the Director, who shall issue orders of appointment."

33. As per Rule 6 of the 2010 Rules the Governing Body of the College concerned is required to make assessment of the likely number of vacancies to be filled up by promotion/ direct recruitment in the next year in each cadre and determine which of those vacancies would go for reserved categories.

34. Rule 7 of the 2010 Rules lays down the provisions for Direct Recruitment and it reads as follows:

"7. Direct Recruitment. - (a) All appointment either by direct recruitment or by promotion shall be made by the Director on the basis of recommendations of the Governing Body based on the recommendations of the Selection Committee/ Departmental Promotion Committee duly constituted;

(b) The Director shall communicate his orders within thirty days.

(c) The Selection Committee may hold such test or interview for all posts as may be considered necessary. For the posts for which UGC has prescribed norms, no candidate shall be recruited without having the required norms.

(d) All fresh appointments shall be made on receipt of police verification report.

35. To regulate the management of Provincialised and Non-Government Colleges in the State the, State Government have enacted the Assam Provincialised Colleges and Assam Non-Government College Management Rules, 2001 as amended. As provided by Rule 2(f) of said 2001 Rules "Management" means the body or group of persons administering the affairs of a College imparting Higher education in the post senior Secondary courses, established and situated in Assam affiliated by any Central or State University of Assam and receive the concurrence of the State Government; including academic affairs as well as the affairs relating to the assets and liabilities of the College in fair manner within the framework of established financial and administrative principles of the State Government from time to time.

36. Rule 3 of said 2001 Rules prescribes the composition of Governing Body of such provincialised and non-Government Colleges. Rule 7 of said 2001 Rules stipulates the "accountability of the Governing Body of such Colleges and reads as follows:

"7. Accountability of the Governing Body.

- The Governing Body, constituted order Rule 3 shall be responsible for the proper financial management, including the un-keepment of the assets of the College and management of its academic affairs.

The Governing Body shall see that the teachers perform their duties in classes and examination and attend the college as per norms of the University Grants Commission. A self-appraisal report regarding performance from every teacher shall be obtained annually by the Governing Body and forward the same to the Director, Higher Education for perusal."

37. Rule 6 of said 2001 Rules provides for taking over the management of a College, which reads as follows:

"6. Taking over the management of a 25 College. - In the event of miss management of the affairs of a 26 College, the State Government may take over the control and management of the College for a period not exceeding six months, and make arrangement for the management of the college in such manner as may be considered necessary and the arrangement so made may be extended for such further period by the State Government as may be deemed necessary.

38. Moreover, as per the provisions of said 2001 Rules, the Governing Body of such Provincialised and Non-Government College is also authorised to deal with the discipline and conduct of the teaching and non-teaching staff of the College. Further, as per the provisions of Rule 18 of said 2001 Rules, the Governing Body of such College is required to obtain prior approval of the Director in certain matters, which reads as follows:

"18. Governing Body to obtain prior approval of the Director in certain matters. - The minutes of the proceeding of the Governing Body meeting shall be sent to the Director and the concerned affiliating University. Government shall be the Appellate Authority/Forum in case of grievances."

39. From the records of WP(C) No. 1705/2014 (Atananu Kr. Chawdhury and another v. Gauhati University and others) of which Mr. D. Mazumdar, learned Sr. Counsel for the petitioner College in WP(C) No. 3371/2016 stated about, it is seen that another Associate Professor of the College, Dr. Paramananda Mazumdar preferred WP(C) No. 6329/2011 challenging the advertisement for the post of Principal of the College dated 05.12.2011, involved in the present case and also Rule 8 of the Assam College Employees (Provincialised) Rule 2010 wherein the age for direct recruitment has been considered to be same as that of Government College in the corresponding Grade i.e. maximum age of 50 years consequently ousting the petitioner from offering his candidature to the said advertisement dated 05.12.2011. Though the Division Bench of this Court on 19.12.2011 admitted the said W.P(C) No. 6329/2011, in the interim directed the state respondents, without prejudice the rights and contention of the parties to permit the said petitioner to participate in the ongoing selection process, clarifying that said petitioner's performance and assessment therein, would, however, to be kept in a sealed cover to abide by the final outcome of the said proceeding. Said W.P(C) No. 6329/2011 was tagged with the connected analogues Writ Petitions i.e. W.P(C) No. 6287/2011 and other connected cases and the Court by order dated 02.02.2015 dismissed those analogues writ petitions as being the petitioner therein have already attained the age of superannuation. Following the aforesaid order dated 02.02.2015 passed in WP(C) No. 6287/2011, i.e. the analogous writ petition, said WP(C) No 6329/2011 was finally dismissed on 09.02.2015.

40. Again From the records of said WP(C) 1705/2014 (Atananu Kr. Chawdhury and another v. Gauhati University and others), it is also seen that the former President of the GB of the College Dr. Narendra Nath Sarma, who issued the advertisement for the post of Principal of the College and kept all the application forms submitted by the intending candidates for the said post in his custody, preferred a writ petition being WP(C) 5877/2013 against the shoe cause notice issued to him by the DHE vide No. G(B)GB.52/2004/45 dated 20.09.2013, by which said Mr. N. N. Sarma, President of GB of the College was asked to show cause notice as to why a disciplinary proceeding should not be initiated against him for failing to perform his duties as a President of the Governing Body of the Pragjyotish College, Guwahati and the said WP(C) 5877/2013 was disposed off by the Court on 24.02.2014 as the petitioner's reply to the said show cause was pending before the DHE, itself.

41. From the records of DHE's File No. G(B)Misc/262/2015, it is seen that on 01.04.2015 the Review Petitioner Dr. Suranjan Sarma, Principal, M.K. College, Chenga, submitted an application before the DHE, Assam in the letter pad of the

College, without any issue number, which is self explanatory and is as follows:

"OFFICE OF THE PRINCIPAL & SECRETARY MADHYA KAMRUP COLLEGE, SUBHA

No. MKC/....

Date.....

From: Dr. Suranjan Sarma

Principal & Secretary (DDO)

To

The Director of Higher Education, Govt. of Assam Kahilipara, Guwahati-19.

Subject: Prayer for transfer of Service.

Sir,

I have the honour to inform you that I have been serving in Madhya Kamrup College, Subha, P.O. Chenga, Barpeta, Assam as Principal since 18/06/2012. The college is situated almost 100 km. away from my own residence located in Kahilipara, Guwahati. With due honour, I wish to inform you that my two children are studying in Class-VIII and Class-IV respectively in Maharishi Vidya Mandir School, Barsajai, Guwahati. Also my wife is serving in Directorate of Forensic Science, Kahilipara. However, as my wife is suffering from some neurological problem, therefore, it becomes problematic for her to take the responsibility of schooling of the two children as well as the family. So, I request your honour to consider my case and transfer my service from M.K. College to Pragjyotish College, Guwahati (to my knowledge, the post of Principal of this college is lying vacant for a long period), which will help me to serve a college with more devotion and dedication.

Thanking you and with regards.

Yours faithfully

Sd/-Suranjan Sarma

1/4/2015

Principal MK College, Subha

P.O. Chenga, Dist.-Barpeta, Assam.

Copy to: 1. The Education Minister, Govt. of Assam, Dispur, Guwahati, Assam.

42. Said records of the case also reveals that wife of said Dr. Suranjan Sarma in June, 2015 submitted a representation before the concerned Departmental Minister, with a copy to the DHE for transfer of her husband to any College in and around Guwahati. Aforementioned letter of Dr. Suranjan Sarma contains various dates of October 2010 in the office of the DHE. The opening page and the

relevant notes of the DHE's File No. G(B)Misc/262/2015, wherein the impugned letter dated 20.11.2015 was issued are as follows:

"2016

CONTINUOUS NOTE SHEET

HIGHER EDUCATION DEPARTMENT

Department: College Establishment Branch (GB Branch) Office of the Director of Higher Education, Assam Kahilipara, Guwahati-781019

Dy.

File No.: G(B)Misc/262/2015

Subject:- Transfer of Dr. Suranjan Sarma Principal, M K College.

NOTES AND ORDERS

Regr.

SL 1 - 34C may kindly seen.

Dr. Suranjan Sarma, Principal, MK College has submitted a prayer petition with request DHE Assam to transfer his services from Principal MK College to Pragjyotish College Guwahati due to his family problem and as stated his application at SL 4C.

Dr. Rupali Bhattacharjyya, W/o. Dr. S. Sarma has also submitted a prayer petition to Hon"ble ME through DHE Assam at SL 3C may also be seen.

The details of vacant post of Principal of Pragjyotish College as show below:-

The post of Principal was lying vacant since 1.2.2011 vice Dr. D. Pathak retired on 31.1.2011.

The DHE Assam had accorded permission for advertisement of filling up of vacant post of Principal to President GB of Pragjyotish College vide No. G(B) Cc/47/2011/75, dated 18.11.2011 (Comn. letter).

From the Pre Page

On the basis of this office letter mentioned pre-page the President of GB of Pragjyotish College has advertised the filling up of vacant on the basis of this office letter mentioned pre-page the President of GB of Pragjyotish College has advertised the filling up of vacant post of Principal from qualified candidate in 2 dailies.

Thereafter 6 nos. of person has filed w/p separately before the Hon"ble GHC challenging the age limit 50 yrs.

Now, the Hon"ble GHC had dismissed the above 6 cases by Hon"ble GHC at SL 5-15C.

Now, the Hon''ble GHC had dismissed the above 6 cases by Hon''ble GHC at SL 5-15C.

But presently Dr. Ranjan Bora has filed a w/p before the Hon''ble GHC stating that delay of the selection of Principal of Pragjyotish College as he is crossing the 50 years of age. It is pointed out that Dr. Bora is the candidate of Principal of Pragjyotish College in WP(C) No. 1076/2015.

The Hon''ble GHC has passed an order at SL 32-34C.

From pre page

In this connection it may be mentioned here that since 1.2.2011 the college has been running by i/c Principal, as a result the Academic/Admn. atmosphere is hampered.

Submitted for n/orders.

Sd/- illegible

13/11/2015

DHE

13/11

File called for.

Perused note above.

The matter of appointment of the Principal of Pragjyotish College has been examined. That the permission for selection of the Principal was accorded in the year 2011. But the process of selection has not yet been completed till now even after a period of 4 years of time.

Now, as a result of not having regular Principal for a long period the academic administration of the institution has been immensely hampered and since the process of selection of the Principal has not been completed till now even after till now, the permission accorded for advt. etc. earlier is withdrawn and in the interest of public service and in the greater interest of the students community and as per the provision of transferring a principal from one college to another under the provincialisation rules, the prayer petition of Dr. Suranjan Sarma, Principal, MK College, Chenga may be forwarded to Govt. for needful action.

Sd/-Illegible

16/11

Regr.

DHE''s order above

2 drafts placed after 35-36C for kind proposal and approval of DHE, Assam.

Sd/- illegible

13/11/2015

Approved

Sd/-

20/11"

43. As per the State respondents the impugned letter under No. G(B)Misc.262/2015/35 dated 20.11.2015 was issued thereafter, which reads as follows:

"GOVERNMENT OF ASSAM

OFFICE OF THE DIRECTOR OF HIGHER EDUCATION, ASSAM KAHILIPARA,
GUWAHATI-19

No. G(B)Misc.262/2015/35

Dated Kahilipara, the 20-11-2015

From:

Sri P. Jidung, MA, M.Phil, LLB, AES

Director of Higher Education, Assam

Kahilipara, Guwahati-19

To

The President of Governing Body

Pragjyotish College, Guwahati,

District-Kamrup, Assam.

Sub:-

Selection of Principal of Pragjyotish College.

Ref.:-

Letter No. G(B) Misc.65/2009/203 dated 12-08-2011,

No. G(B)Misc. 65/2009/206 dated 12-09-2011 and

No. G(B)CC.47/2011/75, dated 18-11-2011.

Sir,

With reference to the subject cited above, I would like to state that long 4(four) years of time has been already passed but you have not completed the selection process of the Principal of Pragjyotish College, Guwahati. As a result of which the academic and administrative atmosphere of the college is immensely hampered and the same cannot be allowed to be continued in the greater interest of the

institution.

Sd/-Illegible

Director of Higher Education, Assam

Higher Education Department

44. The three letters under reference dated 12-8-2011, 12-9-2011 and 18-11-2011 in the impugned letter dated 20.11.2011 are as follows:

(i)

GOVERNMENT OF ASSAM

OFFICE OF THE DIRECTOR OF HIGHER EDUCATION, ASSAM KAHILIPARA,
GUWAHATI-19

No. G(B)Misc.65/2009/203

Dated Kahilipara, the 12-08-2011

From:

Sri P. Jidung, MA, M.Phil, LLB, AES

Director of Higher Education, Assam

Kahilipara, Guwahati-19

To:

The President of Governing Body,

BP Chaliha College/Mahavidyalaya,

P.O.- Nagarbera, Dist.-Kamrup.

Sub: Filling up of vacant post of Principals of Provincialised Colleges and guidelines for marking procedure for selection of Principal in Degree College thereof.

Ref: Govt. Notification (1) No. B(2)H.12/2003/Pt.II/113, dated 15-11-2010

(2) No. AHE.186/2011/9, dated 04-07-2011 and

(3) No. AHE.235/2011/21, dated 03-08-2011

Sir,

In inviting a reference to the letter on the subject cited above, I have the honour to state that there are some posts of Principals lying vacant in the Provincialised Degree colleges of Assam since last few years. Now, Govt. of Assam, Education (Higher) Department has decided to fill up the vacant post of Principal after maintaining due procedure as laid down in the Assam College Employees (Provincialisation) Rules, 2010 and Notification No.AHE.186/2011/9, dated 4th

July, 2011.

So, you are requested to fill up the vacant post of Principal of your college by observing all required procedures laid down in the UGC Regulations No.F.3-1/2009, dated 30th June, 2011.

Yours faithfully

Sd/-

Director of Higher Education, Assam,
Kahilipara, Guwahati-19.

(ii)

GOVERNMENT OF ASSAM

OFFICE OF THE DIRECTOR OF HIGHER EDUCATION, ASSAM KAHILIPARA,
GUWAHATI-19

No. G(B)Misc.65/2009/206

Dated Kahilipara, the 12-09-2011

From:

Sri P. Jidung, MA, M.Phil, LLB, AES
Director of Higher Education, Assam
Kahilipara, Guwahati-19

To:

The President of Governing Body,
Pragjyotish College/Mahavidyalaya,
P.O. - Bharalumukh, Dist.-Kamrup

Sub: Filling up of vacant post of Principals of Provincialised Colleges and guidelines for marking procedure for selection of Principals in degree colleges thereof.

Ref: G(B) Misc.65/2009/203 dated 12-08-2011.

Sir,

In inviting a reference to the subject cited above, I have the honour to state that 32 Nos. of Provincialised College authorities were requested to advertise the vacant posts of Principal under reference above. It has now been learnt that some Colleges authorities have invited applications for the posts of Principal indicating the upper age limit not more than 50 years of age on January, 2011. But, this Directorate has not mentioned any upper age limit in the letter No.

G(B)Misc. 65/2009/203, dated 12-08-2011.

You are, therefore, requested to issue corrigendum, if advertisement for the post of Principal was published mentioning wrongly the upper age limit to 50 years as on 01-01-2011 with an intimation to the undersigned.

Matter be treated as most urgent.

Yours faithfully

Sd/-

Director of Higher Education, Assam, Kahilipara, Guwahati-19.

(iii)

GOVERNMENT OF ASSAM

OFFICE OF THE DIRECTOR OF HIGHER EDUCATION, ASSAM

KAHILIPARA, GUWAHATI-19

No. G(B)CC.47/2011/75

Dated Kahilipara, the 18-11-2011

From:

Sri P. Jidung, MA, M.Phil, LLB, AES

Director of Higher Education, Assam

Kahilipara, Guwahati-19.

To:

The President of Governing Body,

College/Mahavidyalaya,

P.O.- Dist-

Sub: Filling up of vacant post of Principals of Provincialised Colleges and guidelines for marking procedure for selection of Principal in Degree College thereof.

Ref: Govt. Notification No.AHE.364/2011/20, dated 17-11-2011.

Sir,

In inviting a reference to the letter on the subject cited above, I have the honour to state that there are some posts of Principals lying vacant in the Provincialised Degree colleges of Assam since last few years. Now, Govt. of Assam, Education (Higher) Department has decided to fill up the vacant post of Principal after maintaining due procedure as laid down in the Assam College Employees (Provincialisation) Rules, 2010 and Notification No.AHE.186/2011/9, dated 4th

July, 2011.

So, you are requested to fill up the vacant post of Principal of your college by observing all required procedures laid down in the UGC Regulations No.F.3-1/2009, dated 30th June, 2011.

Yours faithfully

Sd/-

Director of Higher Education, Assam,
Kahilipara, Guwahati-19.

45. Mr. M. Choudhury, departmental counsel for the State respondents submitted that on 20.11.2015 itself the DHE forwarded the proposal to the government for transfer of the petitioner, which is also supported by Mr. A.K. Sarma, learned counsel for the review petitioner and the said letter reads as follows:

"GOVERNMENT OF ASSAM

OFFICE OF THE DIRECTOR OF HIGHER EDUCATION, ASSAM

KAHILIPARA, GUWAHATI-19

No.G(B)Misc/262/2015/36

Dated Kahilipara, the 20th Nov"2015

From:

Sri P. Jidung, MA, M.Phil, LLB, AES

Director of Higher Education, Assam

Kahilipara, Guwahati-19

To

The Commissioner and Secretary to the Govt. of Assam

Higher Education Department,

Dispur, Guwahati-6

Sub: Regarding transfer of Dr. Suranjan Sarma, Principal, MK College, Chenga, Barpeta to Pragjyotish College, Guwahati, Kamrup (M) against the vacant post of Principal of Pragjyotish College.

Sir,

In inviting a reference to the subject cited above, I have the honour to forward herewith a prayer petition received from Dr. Suranjan Sarma, Principal, M.K. College, Chenga Barpeta regarding his transfer from M.K. College, Chenga, Barpeta to Pragjyotish College, Guwahati, Kamrup (M) against the vacant post of

Principal of Pragjyotish College which is self-explanatory, annexed at Annexure-A.

It may be stated here that the post of Principal of Pragjyotish College, Guwahati has been lying vacant since 31.01.2011 after retirement of Dr. Dayananda Pathak on superannuation and it is most essential to fill up the vacant post of Principal of Pragjyotish College for smooth functioning and interest of the student community of the college.

In this connection, it may also be mentioned here that the vacant post of Principal of Pragjyotish College is to be filled up by way of selecting the candidate and or by transferring a suitable candidate from another college under the purview of existing rules in force.

Under the circumstances above, the Govt. may please look into the matter and issue necessary instruction in this regard.

An early Govt. order is solicited.

Yours faithfully

Sd/-

Director of Higher Education, Assam,

Kahilipara, Guwahati-19.

Memo No. G(B)Misc/262/2015/36-A

Copy to:

1. Dr. Suranjan Sarma, Principal, MK College, Chenga, Barpeta for information.

Director of Higher Education, Assam

Kahilipara, Guwahati-19."

46. From the above it is seen that only for the purpose of transfer of the Review Petitioner Dr. Suranjan Sarma, the relevant file was opened & processed. Moreover, from the said note it can be seen that the DHE was fully aware about the proceedings of said WP(C) No. 6329/2011 (Dr. Paramananda Mazumdar v. State of Assam and others) and its dismissal on 09.02.2015 as well as that of WP(C) No. 1706/2015 (Dr. Ranjan Kumar Bora v. State of Assam and others), which is pending. But, from the said note and impugned decision of the DHE, Assam, on the basis of which the State respondents contended that the impugned letter dated 20.11.2015 was issued by the DHE regarding withdrawal of permission to advertise the post of Principal of the College; it can be seen that there was no material before the DHE regarding hampering of academic and administrative atmosphere in the Pragjyotish College, Guwahati in absence of regular Principal in the said College and the records produced by the State respondents did not contain any such report against the Pragjyotish College authority. The DHE, who was present in the Court, when asked about it, failed to

show and produce any report regarding adverse/fault finding report of the College in question. Moreover, records of the case clearly reveals that before taking the impugned decision and before issuance of the impugned letter dated 20.11.2015, the authorities of the Pragjyotish College were neither served with any notice nor any opportunity of hearing were given to them. Had the College authority been given a chance by the DHE; it could have placed the reasons, if any, for not completing the selection process regarding the post of Principal in the said College, including the adjudication of the above noted proceedings pending before the Court, involving the College in question.

47. Further, the Court have also noticed that the opening note sheet of the relevant File No. G(B)Misc/262/2015 of the DHE, produced by the State respondents, is of the year "2016", whereas, the impugned letter No. G(B)Misc/262/2015/35 is of 20th November 2011. Moreover, from the said File No. G(B)Misc/262/2015, it is seen that at page-6 of the note sheet, the DHE on 27.02.2016 received some legal opinion regarding transfer of said Dr. Suranjan Sarma and on the same day i.e. on 27.02.2016 itself he sought for some more clarification. But, the next page of note sheet of the said File, at page-7, it is noticed that the said opinion and report given by concerned officials regarding transfer of said Dr. Suranjan Sarma to Pragjyotish College as its Principal was approved by the DHE himself and all of his other staff by putting the date as 26.02.2016, pursuant to which the DHE issued the transfer Order No. G(B)Misc.262/2015/43 dated 26.02.2016 transferring said Dr. Suranjan Sarma, Principal, M.K. College Chenga, District-Barpeta to the Pragjyotish College, Guwahati, posting him in the existing vacant post of Principal of said College. It is to be noted herein that in the State of Assam, for last many years, every second and fourth Saturday of the English calendar months are holidays and on those two days all State Government Offices remain closed and 27th February, 2016 being a fourth Saturday, it was not possible for the DHE to put up a note on such a holiday. Again, it was not possible for him to pass the transfer order prior to 27.02.2016, by giving the date as 26.02.2016.

48. From the issue Register of GB Branch of the Directorate of Higher Education produced by the state respondents, it is seen that though two letters regarding selection of Principal of Pragjyotish College dated 20.11.2015 had been shown to be issued on 26.11.2015, but it clearly reflects that those were without any valid addresses and were received by one "Lipi" on 27.11.2015 and on queries being made the respondent authorities did not clarify how said "Lipi" served the copies of those two letters upon the College authority and when. Similarly, from the issue Register of Post Branch of the Directorate of Higher Education, which is also produced by the departmental respondents, goes to show that on 27.11.2015 two letters, one to the President and the other to the Principal of Pragjyotish College were sent; but it clearly reflects that those were without any complete address and issue numbers. From all these it cannot be said that authority of Pragjyotish College was aware of the impugned letter of the DHE dated 20.11.2015, rather record reveals that President of the GB of the College

received the same on 18.06.2016 by putting her signature. Moreover, the State respondents did not produce the impugned letter dated 20.11.2015 before the Court in any of the proceedings, either in WP(C) No. 1706/2015 or in the connected IA No. 2664/2015 when the Court on 30.11.2015, 08.12.2015, 23.12.2015, 05.01.2016, 03.02.2016 and 01.03.2016 considered the matters and passed orders respectively and it is the private respondent, i.e. the Review Petitioner who annexed a copy of the same in his Review Petition No. 64/2016. The records of the case and the Registers, produced before the Court does not reflect that copy of the impugned letter No. G(B)Misc.262/2015/35 dated 20.11.2015 as well as the letter No. G(B)Misc.262/2015/43 dated 26.02.2016 issued by the DHE were forwarded to the Standing Counsel of the department, though in his Review Petition No. 64/2016 it is the main contention of the Review Petitioner, Dr. Suranjan Sarma, for review of the order dated 01.03.2016 passed in IA No. 2664/2015 in WP(C) No. 1706/2015 is that the Standing Counsel of the Department on 01.03.2016 in IA No. 2664/2015 failed to place those orders dated 20.11.2015 and 26.02.2016 before the Court, while considering the IA No. 2664/2015 in WP(C) No. 1706/2015 and because of their such misrepresentation, the Court on 01.03.2016 passed the order directing the State respondents not to fill up the vacant advertised post of Principal of Pragjyotish College by bringing in or transferring a Principal from another Provincialised College.

49. Moreover, the records, produced by the State respondents, also reveals that the State Government in the Higher Education Department vide its order No. AHE.56/2013/ Pt./1 dated 14.08.2013 directed the Governing Bodies of provincialised Colleges for appointment of regular Principal as per the provisions of the Assam College Employees (Provincialised) Rule, 2010 and requested the Governing Bodies to recommend the names of the selected candidates to the Director Higher Education, Assam for issuing necessary appointment order clarifying that the Director of Higher Education, Assam on receipt of such recommendation of the Selection Committee and the Governing Body shall scrutinize and examine the proposal and shall issue necessary appointment order as per the provisions of the Assam College Employees (Provincialised) Rule, 2010 and also clarified that said Office Order will come into force with immediate effect and until further order. A copy of said order of the Government dated 14.08.2013 is placed here for reference.

"GOVERNMENT OF ASSAM

HIGHER EDUCATION DEPARTMENT

DISPUR:: GUWAHATI-6

No. AHE. 56/2013/Pt./1

Dated Dispur the 14th August, 2013

OFFICE ORDER

It has been gathered that the Governing Bodies of number of Colleges in Assam, are experiencing extreme difficulties in administration of the Colleges for non-availability of full time Principals. Moreover, it is a fact that Assam Legislative Assembly has amended the Assam College Employees (Provincialised) Act, 2005 after which all the Principals of the provincialised Colleges in the State have been brought under a common cadre.

The Government of Assam is presently processing the matter for further amendment of the Act as per requirement wherever necessary. Keeping in view of the above fact and as an interim measure, the Govt. of Assam has decided to direct to the Governing Bodies for appointment of regular Principal as per provision of the Assam College Employees (Provincialised) Rule, 2010 and request the Governing Bodies to recommend the names of the selected candidates to the Director Higher Education, Assam for issuing necessary appointment order.

The Director of Higher Education, Assam on receipt of the recommendation of the Selection Committee and the Governing Body shall scrutinize and examine the proposal and issue necessary appointment order as per provision of the Assam College Employees (Provincialised) Rule, 2010.

The Office Order will come into force with immediate effect and until further order.

Sd/-Illegible

Commissioner & Secretary to the Govt. of Assam,
Higher Education Department.

Copy to:

1. OSD to Minister, Education Department, Dispur, Guwahati-6.
2. P.S. to the Commissioner & Secretary, Higher Education Department , Dispur, Guwahati-6
3. The Director Higher Education, Assam, Kahilipara, Guwahati-19 for information and necessary action.

By order etc.

Sd/- Illegible

Deputy Secretary to the Govt. of Assam
Higher Education Department

50. The three letters under reference in the letter dated 18.11.2011 that has been purportedly withdrawn by the impugned letter dated 20.11.2015, noted above in Para-43, it can be seen that it was the Government's decision to fill up the post of Principal in provincialised Colleges including the College in question. In his proposal dated 20.11.2015 to transfer the Review petitioner Dr. Suranjan

Sarma, Principal M.K. College, Chenga, Barpeta to Pragjyotish College, Guwahati, the Director is totally silent regarding the impugned letter dated 20.11.2015 by which he withdrew the permission that he accorded on 18.11.2011 to the President of Pragjyotish College, Guwahati to advertise the vacant post of Principal of said College, Guwahati. Those three referred letters of the letter dated 18.11.2011 and the Government order dated 14.08.2013 does not reflect regarding any condition put forward by the Government and/or DHE to complete the selection process of the post of Principal in the College in question within specified time; rather by those letters and order, respectively, the President of the GB of the College was requested to fill up the vacant post of Principal of the provincialised colleges concerned including the College in question by following and observing due and all required procedures laid down in the Assam College Employees (Provincialisation) Rules, 2010, Notification No. AHE.186/2011/9, dated 04.07.2011 and the UGC Regulations No.F.3-1/2009, dated 30.06.2011.

51. Mr. M. Choudhury, learned Standing Counsel for the Higher Education Department submitted that after the amendment of Section 3(c) of the 2005 Act with effect from 02.05.2012 and as the Principals of Provincialised Colleges are an independent common cadre, their inter cadre transfer from one college to another including mutual transfer is allowed and after such amendment service of Principals are transferable among the Colleges. Mr. Choudhury, therefore, contended that with effect from 02.05.2012 after the amendment of Section 3(c) of 2005 Act, Director can fill up a vacant post of Principal in a provincialised college by transferring another Principal of Provincialised College and that after such amendment; transfer of principal has also become a mode of appointment of principal in provincialised college. According to Mr. Choudhury, The DHE has rightly transferred the Review Petitioner Dr. Suranjan Sarma, Principal of M.K. College, Chenga, District-Barpeta to the Pragjyotish College, Guwahati and posted him in the existing vacant post of the Principal of the College, which is within his ambit of power. But, on being asked where is the power of the Director to withdraw the permission for advertisement granted to a provincialised college to fill up the post of Principal in the College, he could not state any.

52. In the case in hand the advertisement for the vacant post of Principal of the College was issued on 05.12.2011, where as the amendment of Section 3(c) of the 2005 Act as noted above came in to force on 02.05.2012, five months after the advertisement. From the provisions of Section 6 of the 2005 Act as well as Rules 5 and 7 of the 2010 Rules, it can be seen that only on the basis of selection and recommendation of the Selection Committee duly constituted by the Governing Body of the concerned provincialised college and on the recommendation of said Governing Body of the College in accordance with the Rules and Procedure of the Government and the norms prescribed by the UGC, the Director of Higher Education is required to make an appointment of the Principal in a provincialised college in the State.

53. Considered the Judgment of the Division Bench reported in 2014-6-GLR-390

(Dr. Ajit Kumar Baruah), (supra) cited by Mr. R.C. Saikia for the petitioner in WP(C) 1706/2015. Though Mr. A.K. Sarma, counsel for the Review Petitioner, Dr. Suranjan Sarma relied upon paragraphs 89 and 90 of the Judgment of the Hon''ble Apex Court reported in AIR 2005 SC 592 (BCCI & Another) (supra), in the given circumstances of the case, the same is not applicable in the present case. From the Review Petition No. 64/2016 in I.A. No. 2664/2015 arising out of WP(C) 1706/2015 it is seen that Review Petitioner Dr. Suranjan Sarma himself stated that he is presently serving as Principal of Madhya Kamrup College, Subha, Chenga, District-Barpeta.

54. In the case of Arun Kumar v. Union of India reported in (2007) 5 SCC- 580, the Hon''ble Supreme Court have held that Direct appointment as a source of recruitment is different from deputation/transfer in the method of recruitment. In the present case as provided in the 2005 Act and the 2010 Rules, the appointment to the post of Principal in a provincialised college is to be made by a direct selection, for which the Governing Body of the College in question requires to constitute a Selection Committee, which shall select a person on the basis of an interview from amongst eligible candidates who apply in response to an open advertisement in newspapers and thereafter the Governing Body of the College is required to recommend the said selected candidate to the Director, who in turn shall issue the order of appointment. The necessity to issue the advertisement for the post of Principal in newspapers is in compliance of the Article 16 of the Constitution of India, so that large numbers of eligible candidates can participative in the selection process so that the selection committee can select the best amongst the participant candidates.

55. Hon''ble Supreme Court in the case of N.T. Devin Katti v. Karnataka Public Service Commission, (1990) 3 SCC 157 have held that -

"..A candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right of being considered for selection in accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature."

56. In the said N.T. Devin Katti's case (supra) the Hon''ble Apex Court have also held that -

"Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing rules or government orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing rules and government orders. Candidates who apply, and undergo

written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication; if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant rules and orders"

57. A three Judges Bench of the Apex Court in the case of Oriental Metal Pressing Works (P) Ltd. v. Bhaskar Kashinath Thakoor, reported in AIR 1961 SC 573 : (1961) 3 SCR 329 have held that -

"An appointment to an office can be made only if the office is vacant... Transfer and appointment are clearly entirely different things. Even apart from considerations arising from the law of conveyance, which the High Court was unable to entertain in connection with the transfer of an office, a transfer from its very nature inevitably imports the passing of a thing from one to another; a transfer without the passing of the thing transferred, even when that thing is an office, cannot be conceived. An "appointment", on the other hand, has nothing to do with anything passing from one to another; it connotes the putting in of someone in a vacancy. The acts constituting a transfer and an appointment are therefore wholly dissimilar. It would be an unusual statute which by the use of a single word intended to prohibit at the same time, two wholly different acts. We do not think that a construction leading to such a result is permissible."

58. The scheme under the 2005 Act and 2010 Rules as amended envisages the appointment of a Principal in relation to a specific provincialised college. The appointment is in relation to that college and to no other. Different provincialised colleges are managed by their respecting Governing Bodies. As per the said Act and Rules, Principal of the concerned Provincialised College is to be appointed by direct selection as per Government Rules and procedure and UGC norms and guidelines on the basis of an interview (selection) from amongst eligible candidates who apply in response to an open advertisement in newspapers conducted by a Selection Committee to be constituted by the Governing Body of the said College and only on recommendation of the selected candidate by the concerned Governing Body. As such Principals of Provincialised Colleges are selected and recommended by different Selection Committees and Governing

Bodies for their respective colleges. It is to be kept in mind that the 2005 Act does not provide for any State-level selection and service to which such Principals of provincialised Colleges are appointed. From the copy of the Assam Gazette Extraordinary dated 02.05.2012, available with the records of the case produced by the State respondents it is seen that amendment of Section 3(c) of the 2005 Act came in to force at one and without any retrospective effect. Though after such amendment Principals of provincialised colleges have become an independent common cadre and their services are transferable among the colleges and had the State Legislature, intended such transfer of Principal of Provincialised colleges to an existing vacant post, it would have at the same time amended the Section 6 of said 2005 Act and the Rule 5 of the 2010 Rules and would not have stated that services of Principals of Provincialised Colleges are transferable among the colleges. As such when a Principal is appointed in respect of a particular Provincialised College and is thereafter transferred as a Principal of another Provincialised College against an existing vacant post of Principal in the other Provincialised College, a new appointment comes into an effect, because in such kind of transfer there would be nothing to pass from one to the other as already held by the Hon'ble Apex Court in the case of *Oriental Metal Pressing (supra)* a transfer without the passing of the thing transferred, even when that thing is an office, cannot be conceived.

59. From the above and the records of the case produced by the State respondents, it is seen that the DHE took the purported impugned decision and issued the impugned letter dated 20.11.2015 withdrawing the permission that he granted on 18.11.2011 to the then President of Pragjyotish College to advertise the post of Principal of College without any basis and substantive supporting report and in violation of the principle of natural justice, just to accommodate said Dr. Suranjan Sarma, the Review Petitioner to transfer him, at his own request, from M.K. College Chenga, District-Barpeta as Principal to Pragjyotish College, Guwahati. Such exercise of the power of the DHE in transferring said Dr. Suranjan Sarma, Principal, M.K. College Chenga, District-Barpeta to the vacant post of the Principal of Pragjyotish College, Guwahati is purely an abuse of the process of law and in malafide exercise of power.

60. From the facts and circumstances stated above, the Court found that the impugned letter No. G(B)Misc.262/2015/35 dated 20.11.2015 issued by the Director of Higher Education, Assam withdrawing the permission that was accorded by him to the President of the Governing Body of the Pragjyotish College, Guwahati on 18.11.2011 for advertisement for filling up the vacant post of Principal of the Pragjyotish College is hereby set aside and quashed. Consequently, the proposal of the Director of Higher Education, Assam under his letter No. G(B)Misc.262/2015/36 dated 20.11.2015, the letter No. AHE.610/2015/4 dated 19.2.2016 of the State Government in the Higher Education Department as well as the order No. G(B)Misc. 262/2015/43 dated 26.02.2016 transferring the Review Petitioner Dr. Suranjan Sarma, Principal of M.K. College, Subha, Chenga, district-Barpeta and posting him in the Pragjyotish

College, Guwahati district-Kamrup (M) in the same capacity against the existing vacancy arisen due to the retirement of Dr. Dayananda Pathak on superannuation are also set aside and quashed.

61. For the aforesaid reasons, the Review Petition No. 64/2016 in I.A. No. 2664/2015 arising out of WP(C) No. 1706/2015 being devoid of merit stands dismissed.

62. It is hereby directed that the Governing Body of Pragjyotish College, Guwahati shall complete the selection process for the post of regular Principal of said college initiated by the Advertisement dated 05.12.2011 on or before 30.11.2016 following the provisions of the Assam College Employees (Provincialisation) Act, 2005, Assam College Employees (Provincialisation) Rules, 2010 and other Government Rules & procedure and the UGC norms, circulars and guidelines for the said purpose as applicable on 05.12.2011 and further, the Governing Body of said Pragjyotish College by 05.12.2016 shall recommend the selected candidate, selected by the Selection Committee duly constituted by the Governing body of the College to the Director of Higher Education, Assam; who in turn shall issue the necessary order of appointment to the concerned selected and recommended candidate to the post of Principal of Pragjyotish College on or before 31.12.2016.

63. Both the writ petitions WP(C) No. 3371/2016 as well as WP(C) No. 1706/2015 are allowed to the extent above. No order as to costs.