

**(2015) 08 GAU CK 0017**

**In the Gauhati High Court**

**Case No : W.P.(C) Nos. 1944, 3515 and 3826 of 2015**

Kabul Chandra Saikia and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

**Date of Decision : 31-08-2015**

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16, 309

**Citation : (2015) 5 GLT 75**

**Hon'ble Judges : Ujjal Bhuyan, J.**

**Bench : Single Bench**

**Advocate :** A.C. Borbora, R. Borbora, M. Smith, B.D. Konwar, J. Konwar, R. Kalita, J.M. Konwar, R. Saloi and S. Bhuyan, Advocates, for the Appellant; J.M.A. Choudhury, P. Pathak, S. Changkakati, A. Narzary, J. Saikia, S.T. Bokth, P. Katak, R. Begum, M. Gogoi, K. Agarwal, R.J. Barua, K.N. Choudhury, R. Dubey, R. Deka, A.B. Kayastha, G.A., P. Roy, Addl. A.G., C. Baruah, Advocate and SC, for the Respondent

**Final Decision : Disposed Off**

## Judgement

Ujjal Bhuyan, J.—The three cases were heard together on 13.08.2015 and today is fixed for delivery of judgment. Heard Mr. A.C. Borbora, learned Sr. Counsel for the petitioner in WP(C) No. 1944/2015 and Mr. B.D. Konwar, learned Sr. Counsel for the petitioners in WP(C) Nos. 3515/2015 and 3826/2015. Also heard Mr. P. Roy, learned Addl. Advocate General, Assam and Mr. JMA Choudhury, learned Standing Counsel, Health Department. Mr. K. Agarwal, learned Sr. Counsel has appeared for respondent No. 3 whereas Mr. P. Pathak and Mr. K.N. Choudhury, both learned Sr. Counsel have appeared for respondent No. 4 in WP(C) No. 1944/2015. Mr. P. Katak, learned counsel has appeared for respondent No. 5 in WP(C) No. 1944/2015. Respondent No. 3 in WP(C) No. 1944/2015 is also the respondent No. 3 in the other two cases.

2. The litigation was initiated by filing of WP(C) No. 1944/2015. Initially, challenge was made to the transfer of the petitioner from Gauhati Medical

College and Hospital, Guwahati to Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta. In the course of the proceedings of WP(C) No. 1944/2015, a related issue of considerable importance, namely, filling up of the post of Director of Medical Education (DME), Assam surfaced and taken note of by the Court whereafter the other two writ petitions came to be filed.

3. At the outset, the factual narration and the orders passed by the Court from time to time may be briefly noticed.

4. Since WP(C) No. 1944/2015 was filed prior in point of time and is the leading case, reference may be made to the facts of the said case.

5. Petitioner is serving as Principal of Gauhati Medical College and Hospital. According to the petitioner, following extension of service of senior faculty members upto the age of 65 years in the medical colleges, he is continuing in service beyond the age of 62 years. Presently, he is on the verge of superannuation as he has hardly about 5 months left to retire.

6. Four notifications, all dated 1.4.2015, were issued by the Deputy Secretary to the Govt., of Assam, Health and Family Welfare Department. By notification No. HLB.76/2015/13, respondent No. 3, then serving as Principal-cum-Chief Superintendent, Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta was transferred to and posted as Principal-cum-Chief Superintendent at Assam Medical College and Hospital, Dibrugarh with effect from the date of taking over charge vice respondent No. 4 i.e. Prof. (Dr.) Atindra Kr. Adhikari, who was holding the post of Principal-cum-Chief Superintendent, Assam Medical College and Hospital Dibrugarh. In the second part of the said notification, it was stated that respondent No. 3 will hold current charge of Director of Medical Education, Assam vice Prof. (Dr) Dhruba Jyoti Borah, Director of Medical Education, Assam and Principal-Cum-Chief Superintendent, Assam Hills Medical College and Research Institute, Diphu relieved vide notification No. HLB.76/2015/14 dated 01.04.2015. Vide notification No. HLB.76/2015/15, petitioner was transferred in the same capacity and posted as Principal-cum-Chief Superintendent at Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta with effect from the date of taking over charge vice respondent No. 3 i.e. Prof. (Dr) Bhabani Prasad Chakravarty, transferred as above. By another notification bearing No. HLB.76/2015/16, respondent No. 4 was transferred to and posted as Principal-cum-Chief Superintendent at Gauhati Medical College and Hospital with effect from the date of taking over charge vice the petitioner i.e. Prof. (Dr.) Kabul Ch. Saikia transferred as above. By the 4th notification No. HLB.76/2015/17 Prof. (Dr.) Ratan Kumar Kotoki (respondent No. 5) of Assam Medical College and Hospital, Dibrugarh was posted as in-charge Principal-Cum-Chief Superintendent, Assam Medical College and Hospital, Dibrugarh with all financial powers with effect from the date of taking over charge vice respondent No. 4 i.e. Prof. (Dr.) Atindra Kr. Adhikari transferred as above.

7. Aggrieved by his transfer from Gauhati Medical College and Hospital, Guwahati

to Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta at the fag end of his service career, petitioner has instituted the present proceeding.

8. On 02.04.2015, this Court had passed the following order:--

"Petitioner is the Principal-cum-Chief Superintendent of Gauhati Medical College & Hospital (GMCH). He is aggrieved by the impugned notification No. HLB.76/2015/15, dated 01.04.2015, transferring and posting him in the same capacity as Principal-Cum-Chief Superintendent of Fakhruddin Ali Ahmed Medical College & Hospital, Barpeta.

Learned Senior Counsel for the petitioner has referred to similar notifications issued on the same date in respect of respondent Nos. 3 and 4. He submits that respondent No. 3, who is the Principal-cum-Chief Superintendent of Fakhruddin Ali Ahmed Medical College & Hospital, Barpeta, is being transferred to Assam Medical College & Hospital, Dibrugarh, as Principal-cum-Chief Superintendent, but in addition, he has also been given current charge of Director of Medical Education, Assam. Respondent No. 4, who is presently the Principal at Dibrugarh, is being transferred to Guwahati. Respondent No. 5 is being posted as in-charge Principal at Dibrugarh. He submits that the entire exercise has been carried out to make the respondent No. 3 the Director of Medical Education without going through regular selection. Learned Senior Counsel has referred to the provisions of Assam Medical Education Service Rules, 2008, particularly Rule-3 and Schedule-I thereof, to contend that the post of Director of Medical Education is above the post of Principal-Cum-Chief Superintendent. Without appointing the Director of Medical Education in accordance with the Rules, this procedure has been adopted to favour the respondent No. 3, which is not at all in conformity with the mandate of the Rules. Additionally, he submits that petitioner will superannuate from service in December, 2015, i.e., less than 9 (nine) months remaining. At the fag end of his service career, subjecting him to such a hasty transfer is not warranted. He finally submits that petitioner has not yet handed over charge at Guwahati.

Mr. Choudhury, learned Standing Counsel submits that it is a routine transfer and nothing more should be read into it. Petitioner is being transferred from Guwahati to Barpeta and no prejudice will be caused to him.

Mr. K. Agarwal, learned Senior Counsel for the respondent No. 3, submits that his client has already handed over charge at Barpeta and joined as Director of Medical Education.

Mr. P. Pathak, learned Senior Counsel for the respondent No. 4, however, submits that he does not have any instruction about handing over and taking over of charge by the respondent No. 4, but contends that no interference is warranted in such a routine transfer matter.

A perusal of the impugned notification issued on 01.04.2015 (Annexure-B) will show that the transfer of the petitioner to Barpeta will be effective from the date

of his taking over charge at Barpeta vice respondent No. 3, who has been transferred to Dibrugarh and also given the current charge of Director of Medical Education. Admittedly, petitioner has not taken over charge from respondent No. 3 at Barpeta. Therefore, the transfer order of the petitioner has not yet become effective. On the other hand, in less than 24 hours, respondent No. 3 has joined as Director of Medical Education, Assam, though he has not joined the office of the Principal-cum-Chief Superintendent, Assam Medical College & Hospital, Dibrugarh. Prima-facie, allowing the respondent No. 3 to discharge dual functions as Principal at Dibrugarh and as Director of Medical Education, Assam, at Guwahati, i.e., in two different stations at considerable distance apart, appears to be quite unusual. Another question which may arise for consideration is whether without taking over charge as Principal-cum-Chief Superintendent of Assam Medical College & Hospital at Dibrugarh, can respondent No. 3 take over current charge as Director of Medical Education, which appears to be an additional charge?

In view of above, Court would like to peruse the relevant file relating to the entire transfer exercise as seen above.

Let the learned Standing Counsel produce the relevant file on 08.04.2015.

Till then, impugned notification No. HLB. 76/2015/15 dated 01.04.2015 (Annexure-B), shall remain stayed."

9. On 08.04.2015, learned Standing Counsel produced the relevant file. The file was perused and thereafter the following order was passed on 10.04.2015:--

"On perusal of the file, it is seen that a departmental note was put up on 14.02.2015 stating that Dr. DJ Bora, DME had informed that he has been elected as President of Asom Sahitya Sabha and, therefore, he would like to be relieved from that post. The note further discloses that three applications were received from three faculty members submitting their candidature for the post of Director of Medical Education (DME).

From a perusal of the applications, it is seen that the applicants had stated that they had come to know from reliable source, that the post of DME was going to fall vacant within the next few days and therefore they had submitted the applications. There is nothing in the file to show that any advertisement was issued or that any invitation was extended by the Department inviting such applications."

On 26.03.2015 Minister of Health & Family Welfare, Govt., of Assam passed the following order in the note sheet:--

"Dr. Dhruba Jyoti Borah is relieved of the charges of Director, Medical Education and Dr. Bhabani Prasad Chakraborty, Principal FAAMC is appointed as Director, Medical Education.

Dr. KC Saikia, Principal, GMC is transferred and posted at FAAMC, Barpeta in the

same capacity and Dr. A. Adhikari, Principal, AMC is transferred and posted at GMC in the same capacity.

Dr. Ratan Kr. Kotoky, Professor of Medicine, AMC is appointed as Principal, AMC. Issue orders. Minister, H & FW."

From a reading of the above, it is clear that the departmental Minister had passed the order appointing respondent No. 3 as DME. In the second part of the said order, it was ordered that petitioner is transferred to Barpeta and respondent No. 4 is transferred from Dibrugarh to Guwahati. It was also ordered that respondent No. 5 is appointed as Principal of Assam Medical College & Hospital, Dibrugarh. Though modification of the above order was sought for by the Principal Secretary, the departmental Minister in his order dated 30.03.2015 in the note sheet reiterated his earlier order. Thereafter the note sheet indicates that the departmental authorities suggested that the post of DME is to be filled up by way of direct recruitment through the Assam Public Service Commission (APSC). In this connection, it was further suggested that respondent No. 3 can be allowed to be the in-charge DME only, and for that purpose, a substantive post was required for respondent No. 3 for the purpose of salary. Therefore, it was suggested that respondent No. 3 be transferred to Dibrugarh, since respondent No. 4 was proposed to be transferred to Guwahati.

It is in this background that the impugned order came to be issued.

Thus from a perusal of the file, a related issue of critical importance has surfaced, namely, filling up of the post of DME, since it was for the purpose of filling up of the said post that the impugned order came to be issued.

The Assam Medical Education Service Rules, 2008 has been framed in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. As per Rule 3, DME, the actual description of the post being Director of Medical Education, Planning & Research, is a Class-1 (Senior Grade) cadre which has been placed above the cadre of Principal-cum-Chief Superintendent of Medical Colleges/Addl. Director of Medical Education. As per Rule 5, recruitment to the post of Director is to be made by way of direct recruitment through the APSC by following the procedure. As per Rule 7, to be eligible for the post of Director, a candidate must be in the age group of 45 to 55 years. As per Schedule-III appended to the Rules, for holding the post of DME, a candidate should possess basic university medical qualification and 10 years of teaching experience as Professor/Associate Professor in a Medical College, out of which atleast 6 years should be as Professor or in a post of equivalent rank. The candidate should also have adequate number of publications to his/her credit.

Therefore, from the Rules, it is evident that the post of DME is required to be filled up by way of direct recruitment through the APSC from amongst the candidates having the eligibility criteria as mentioned in the Rules.

In such circumstances, confining the selection to only the three applicants, who

had submitted applications without any advertisement or invitation by the Department to the exclusion of all other eligible candidates, would not be justified.

To clear the above position, Court is of the view that the Principal Secretary to the Govt., of Assam, Health & Family Welfare Department should file an affidavit stating as to how the Department proposes to fill up the vacancy in the post of DME keeping in view the mandate of the Rules as noticed above. Let the said affidavit be filed within a period of 2 weeks from today.

Issue notice.

Notice may be issued to respondent Nos. 1 to 4 only at this stage.

Since the parties are already before the Court, no formal notice need be issued.

In the meanwhile, the interim order passed by this Court on 02.04.2015 shall continue until further order(s).

However, respondents may make arrangement to provide salary to the respondent No. 3, since he has admittedly joined the post of DME, though as noticed in the order dated 02.04.2015, the validity of such joining is questionable.

10. Thus it can be seen from the above that while examining the challenge of the petitioner to his transfer, the issue of filling up of the post of DME came to light which was noticed by this Court in the order dated 10.04.2015. From a reading of the order dated 10.04.2015 it transpires that holding of charge of the Office of DME by the respondent No. 3 was central to all the notifications issued contemporaneously. This Court also noticed the provisions of Assam Medical Education Service Rules, 2008 (2008 Rules) including those provisions relating to appointment of DME in the light of the facts noticed in the order dated 10.04.2015. Principal Secretary to the Govt., of Assam, Health and Family Welfare Department was directed to file an affidavit indicating as to how the Department proposed to fill up the vacancy in the post of DME having regard to the mandate of the 2008 Rules.

11. An affidavit was filed on behalf of respondent No. 1 on 29.04.2015. In the said affidavit it was pointed out that having regard to the eligibility criteria prescribed for the post of DME vis-a-vis the posts of Professor/Associate Professor, the latter would be in a disadvantageous position having regard to the minimum qualification, the age of superannuation and pay scale. For such disparity, the post of DME has not received attention from the eligible candidates. Therefore, the Department has been constrained to fill up the post of DME by way of stop-gap arrangement. It was further stated that necessary steps were being taken by the Government to amend the 2008 Rules for which some time would be required. Till the amendments are made and recruitment carried out as per the amended Rules, respondents should be permitted to continue with the present adhoc/stop-gap arrangement since the post of DME is the administrative

head of all the medical colleges and other health institutions of the State.

12. This Court expressed its displeasure over the contents of the affidavit filed and passed the following order on 05.05.2015:--

"A perusal of the affidavit indicates that the stand taken by the Principal Secretary is that the Assam Medical Education Service Rules, 2008 requires amendment as because Professors/Associate Professors would be in a disadvantageous position while applying for the post of Director of Medical Education in view of disparity in the superannuation age and pay scale between the said post and that of Professor. For such disparity, post of Director of Medical Education has not received attention from the eligible candidates as per the aforesaid Rules. Therefore, the Department has been constrained to fill up the said post by way of stop gap arrangement.

The affidavit filed does not indicate that any serious attention was given by the Principal Secretary to the order of this Court dated 10.04.2015. In view thereof and particularly in view of the stand taken in para 4 of the affidavit as noticed above, Court is of the view that filing of a supplementary affidavit is called for.

At this stage, it has been submitted at the Bar that since the year 2002, the post of Director of Medical Education has not been filled up on regular basis.

In view of above, the Principal Secretary should file a supplementary affidavit which should contain the following:--

- i) Since coming into force of the Assam Medical Education Service Rules, 2008, how many Directors of Medical Education have been appointed?
- ii) What was the procedure followed while making such appointments?
- iii) How many eligible candidates had applied for the post of Director of Medical Education after coming into force of the aforesaid Rules?
- iv) Whether vacancy arising in the post of Director of Medical Education was ever notified by way of advertisement etc.?
- v) How the post of Director of Medical Education has been filled up by way of stop gap arrangement?
- vii) Since 2008 how many times the post of Director of Medical Education has been filled up by way of stop gap arrangement and in what manner?

Let the supplementary affidavit be filed within 10 days from today."

13. Thereafter, the supplementary affidavit was filed on 28.05.2015. In response to various queries put up by the Court, it is stated that as per the 2008 Rules, the post of DME is required to be filled up by way of direct recruitment through APSC from amongst the candidates having the eligibility criteria as stipulated in the 2008 Rules. Since coming into force of the 2008 Rules, the following incumbents were appointed as DME, Assam:-1) Dr. Umesh Ch. Sarma, 2) Dr.

Devajit Hazarika, 3) Dr. Dhruba Jyoti Borah and 4) Dr. B.P. Chakraborty. Only Dr. Umesh Chandra Sarma was appointed through APSC. The others were appointed as incharge DME as per orders of the concerned Health Minister. On previous occasions, no applications were received from intending candidates for the post of DME. The last incumbent, i.e. Dr. Dhruba Jyoti Borah on being elected as President of Assam Sahitya Sabha expressed his desire to relinquish the post of DME. At this stage, the following three candidates submitted applications to the Government for the post of DME:-1) Dr. B.P. Chakravorty, Principal-cum-Chief Superintendent, Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta, 2) Dr. Debajit Hazarika, now Principal-cum-Chief Superintendent, Jorhat Medical College & Hospital, Jorhat and 3) Dr. Basanta Kumar Baishya, Professor and Head of the Department, Neurosurgery, Gauhati Medical College and Hospital, Guwahati. It is further stated that though in the past the post of DME was not advertised, henceforth it would be advertised for which purpose APSC would be moved.

14. In the meanwhile, respondent No. 4, Principal-cum-Chief Superintendent, Assam Medical College and Hospital, Dibrugarh has filed his counter affidavit. Though various statements have been made regarding performance of the petitioner, Court is of the view that reference to the same may not be necessary for the purpose of adjudication of the present dispute. Respondent No. 4 while refraining from making any comment on the issue of filling up of the post of DME as per the 2008 Rules, however contends that the impugned transfer of the petitioner is a routine administrative transfer and no case for interference is made out. Petitioner cannot claim as a matter of right to remain at the Gauhati Medical College and Hospital beyond the tenure period of three years. No right of the petitioner has been infringed by the impugned transfer order. It is contended that just because the impugned transfer has been made on the eve of superannuation of the petitioner the same cannot be a ground of interference. He has also made various statements about his performance as Principal-cum-Chief Superintendent of Assam Medical College and Hospital, Dibrugarh, where he has completed more than 3 years of service. Therefore, his transfer to Gauhati Medical College and Hospital is justified.

15. Respondent No. 3 has also filed his affidavit. It is stated that he had completed more than 3 years at Barpeta and therefore his transfer is justified. Contending that transfer of a Government servant is an incident of service, he submits that petitioner cannot claim as a matter of right to continue as Principal of Gauhati Medical College and Hospital till his superannuation. He has stated that since he would be holding the charge of DME, Dr. Ratan Kumar Kokoti (respondent No. 5) has been posted as the in-charge Principal-Cum-Chief Superintendent, Assam Medical College and Hospital. He, however, admits that recruitment to the post of DME is governed by the provisions of the 2008 Rules. Post of DME is required to be filled up through the APSC from amongst candidates having the eligibility criteria as stipulated in the 2008 Rules. Last direct recruitment to the post of DME was done through APSC way back in the

year 2003 and thereafter Government has not recruited any DME through APSC. Persons posted as DME were only allowed to hold additional charge of DME while they were substantively posted as Principal of Medical Colleges. He has also pointed out certain functional difficulties in the recruitment of DME as per the 2008 Rules considering the retirement age and pay structure of DME vis-a-vis Professor/Addl. Professor. He has stated about his personal difficulties for which he had submitted representations before the Government seeking transfer to Guwahati, firstly on 11.08.2014 and thereafter on 30.12.2014. In the latter representation, he mentioned that the post of DME was going to fall vacant and requested his consideration pursuant to which notification dated 01.04.2015 was issued allowing him to hold current charge of DME. He has stated that he joined the office of DME on 02.04.2015. In such circumstances, respondent No. 3 seeks dismissal of the writ petition.

16. Petitioner has filed reply affidavit reiterating the averments made in the writ petition.

17. While WP(C) No. 1944/2015 was being contested by the respondents, the other two writ petitions, namely, WP(C) Nos. 3515/2015 and 3826/2015 came to be filed. In both the writ petitions, prayer has been made to quash the notification No. HLV.76/2015/13 dated 01/04/2015 appointing respondent No. 3 as DME on in-charge basis. Further prayer made is to fill up the post of DME in accordance with the procedure laid down in the 2008 Rules. While the petitioner in WP(C) No. 3515/2015 is the Professor and Head of the Department of Physiology and Medical Superintendent of Tezpur Medical College, the petitioner in WP(C) No. 3826/2015 is serving as Professor and Head of Ophthalmology, Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta. While both of them contend that they have the eligibility under the 2008 Rules for the post of DME and claims prejudice because of non-filling up of the said post by adhering to the procedure laid down under the 2008 Rules, respondents more particularly respondent No. 3 would contend that the two petitioners are not eligible for holding the post of DME as both of them have crossed the upper age limit of 55 years for applying for the said post as prescribed under the 2008 Rules. Petitioner in WP(C) No. 3826/2015 has however stated that he being a candidate belonging to the schedule caste (SC) category he would be entitled to age relaxation as per provisions of 2008 Rules and therefore even now if the post of DME is advertised he would stand a fair chance of competing for the said post.

18. Mr. Borbora, learned Sr. Counsel for the petitioner in WP(C) No. 1944/2015 contends that it has been the tradition in the Medical Colleges of the State not to transfer out a serving Principal on the verge of superannuation. He submits that when the petitioner has only a couple of months left for superannuation, there can be no justification for transferring him to Barpeta. He submits that though he has challenged his transfer, the same is inextricably linked with all the notifications issued on the same date. The prime focus of the authority appears to be to ensure that respondent No. 3 is made the DME and for that purpose the

charade of transfer has been enacted. Referring to the physical impossibility of being the Principal of Assam Medical College and Hospital at Dibrugarh and simultaneously holding the Office of DME at Guwahati, he submits that to give effect to such an absurd proposition, Dr. Ratan Kumar Kokoti (respondent No. 5), a serving doctor at Dibrugarh, was sought to be made the in-charge Principal at Dibrugarh. Referring to the various order(s) passed by this Court he submits that holding of Office of DME by respondent No. 3 is an additional charge, the substantive charge being the office of Principal at Dibrugarh. Without taking over charge at Dibrugarh, respondent No. 3 had rushed to take over charge of DME which is legally unsustainable. He submits that in view of what has transpired in the course of the hearing particularly with reference to the filling up of the post of DME by respondent No. 3, the challenge made by him to his transfer order cannot be adjudicated de hors examination of the related issue of filling up of the post of DME as both the issues have got inter-twined.

19. Mr. B.D. Konwar, learned Sr. Counsel appearing for the other two petitioners submits that the 2008 Rules have been framed under the proviso to Article 309 of the Constitution. The 2008 Rules lay down the detailed procedure as to how the post of DME is required to be filled up. When rules are in force covering a particular subject, it is not open for the State to embark upon a procedure which is not sanctioned by the Rules holding the field. He submits that the manner in which the post of DME has been filled up particularly by respondent No. 3 is in complete violation of the provisions of the 2008 Rules and has no legal sanction. He submits that when the law requires a thing to be done in a particular way, it has to be done in the prescribed mode and any other manner would be unauthorized in law. He also submits that when eligible candidates are available, the post of DME is required to be advertised and filled up in accordance with the provisions of the 2008 Rules. Without undertaking the exercise as prescribed under the 2008 Rules, it is not open to the State to contend that the 2008 Rules suffers from infirmities in so far recruitment to the post of DME is concerned and requires amendment. In any case nobody has prevented the State from amending the 2008 Rules for all these years. He therefore submits that necessary direction may be issued to the respondents to fill up the post of DME in accordance with law and to strike down the appointment of respondent No. 3 as DME vide notification dated 01.04.2015.

20. Mr. P. Roy, learned Addl. Advocate General and earlier Mr. JMA Choudhury, learned Standing Counsel, Health Department submit that in so far filling up of the post of DME is concerned, the Health Department will now take appropriate steps in accordance with the provisions of the 2008 Rules. Further submission is that in so far amendment to the 2008 Rules is concerned, State may do the required exercise if amendment is considered necessary. Further submission is that appointment of respondent No. 3 as in-charge DME is only a temporary measure because the post of DME being very important cannot be left vacant. However, in so far transfer of the petitioner is concerned, intention of the Government is bona fide as it has been carried out as part of routine

administrative exigency. No prejudice has been caused to the petitioner by such transfer. There is no rule or prohibition that a Government servant cannot be transferred on the eve of his superannuation. No fundamental or legal right of the petitioner has been violated and therefore the writ petition is liable to be dismissed.

21. Mr. K. Agarwal, learned Sr. Counsel for respondent No. 3 in all the three cases while agreeing to the general consensus arrived at the Bar in the course of hearing that the post of DME is required to be filled up as per provisions of the 2008 Rules, however, submits that respondent No. 3 is not the only officer who has been appointed as in-charge DME. Prior to appointment of respondent No. 3 and after retirement of Dr. Umesh Ch. Sarma, the post of DME used to be filled up on in-charge basis as a stop-gap arrangement without making recruitment through the APSC. Therefore, singling out respondent No. 3 and impugning only his appointment appears to be motivated. Regarding transfer of the petitioner, he supports the stand taken by learned Addl. Advocate General and the departmental counsel by contending that there is no substance in the challenge made. He, however, submits that respondent No. 3 is now functioning as in-charge DME and following the order of this Court dated 10.04.2015, his substantive posting is being shown as Principal-cum-Chief Superintendent, Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta from where he is drawing his salary. In support of his submissions, Mr. Agarwal has placed reliance on the following decisions:--

Union of India and Others Vs. S.L. Abbas, ,

State of U.P. and Others Vs. Gobardhan Lal, .

22. Mr. Pathak, learned Sr. Counsel who had initially appeared on behalf of respondent No. 4 submitted that respondent No. 4 has completed his tenure at Dibrugarh and the Government has rightly transferred him to Guwahati on 01.04.2015 but he is unable to comply with the transfer order because of the interim order passed by this Court. He submits that law is well settled that transfer being an incident of service a Government servant cannot disobey a transfer order. He submits that the Government servant is first required to comply with the transfer order and only thereafter he can make a representation as to his grievance regarding transfer. On the issue of filling up of the post of DME, learned counsel submitted that respondent No. 4 would refrain from making any comment thereon since he is not a claimant for the post of DME. However, he submits that Court may pass appropriate order keeping in view the mandate of the 2008 Rules. In support of his submissions, Mr. Pathak has placed reliance on the following decisions of the Apex Court:--

State of U.P. and Others Vs. Siya Ram and Another,

State of U.P. and Others Vs. Gobardhan Lal,

, (2006) 9 SCC 583 (S.C. Saxena Vs. Union of India) .

Mr. K.N. Choudhury, learned Sr. Counsel also appearing for respondent No. 4 made similar submission.

23. Mr. P. Kataki, learned counsel has appeared for respondent No. 5 in WP(C) No. 1944/2015 and has supported the stand of the Government.

24. Submissions made by learned counsel for the parties have received the due and anxious consideration of the Court. Also perused the materials on record.

25. At the outset, since there is a broad consensus regarding filling up of the post of DME, the same may be taken up first. Detailed reference to the relevant provisions of the 2008 Rules has already been made in the orders dated 02.04.2015 and 10.04.2015 as extracted in the preceding part of this order. Summing up the various provisions of the 2008 Rules relevant to filling up of the post of DME, it can be said that DME is a Class-1 (senior grade) post at the top of the hierarchy being a single post cadre of the Assam Medical Education Service. Post of DME is required to be filled up by direct recruitment through the APSC by observing the procedure laid down in Rule 6(1) of the 2008 Rules. Eligibility criteria are mentioned in Rules 7 & 8 read with Schedule III to the 2008 Rules.

26. Therefore, from the above it is evident that the post of DME is required to be filled up as per provisions laid down under the 2008 Rules which is by way of direct recruitment through APSC. In the order dated 10.04.2015 it has already been noticed how respondent No. 3 was sought to be appointed by the departmental Minister. In his note dated 26.03.2015, Minister of Health and Family Welfare, Govt., of Assam ordered that the incumbent Dr. Dhruba Jyoti Borah was relieved of his charge of DME and in his place respondent No. 3 was appointed as DME. Thereafter, as per suggestion of the departmental authority, respondent No. 3 was allowed to be the in-charge DME and for that purpose a substantive post was required to enable respondent No. 3 to draw salary. It was therefore suggested that respondent No. 3 be transferred to Dibrugarh as Principal of Assam Medical College and Hospital since respondent No. 4 was proposed to be transferred to Guwahati. It is in this back drop that respondent No. 3 came to be appointed as in-charge DME.

27. This is certainly not the procedure prescribed for appointment of DME under the 2008 Rules. It is the cardinal rule of interpretation that if a statute provides for a thing to be done in a particular manner than it must be done in that manner alone and in no other manner. Apex Court has held that it is the basic principle of law long settled that if the manner of doing a particular thing is prescribed under any statute, the act must be done in that manner or not at all. This rule has been recognized as a salutary principle of administrative law and is being consistently applied by the Indian constitutional courts. The origin of this rule is traceable to the English decision in *Taylor Vs. Taylor* which was followed in *Nazir Ahmad vs. Emperor* AIR 1936 253 (Privy Council) where Lord Roche famously declared that where a power is given to do a certain thing in a certain

way, the thing must be done in that way or not at all. Here in this case, the 2008 Rules framed under the proviso to Article 309 of the Constitution covers the field relating to recruitment to the post of DME. Procedure for such recruitment is laid down therein. When the procedure is laid down any deviation therefrom is not permissible. Admittedly, after the retirement of Dr. Umesh Ch. Sarma, all appointments to the post of DME were made as stop-gap arrangement without following the procedure laid down in the 2008 Rules. It is not understood as to how the Department could have taken the stand at the initial stage of the proceeding that there may be difficulty in carrying out the recruitment as certain provisions of the 2008 Rules may require amendment when the said procedure was never followed. Of course, subsequently such stand was given up by the departmental counsel on the basis of the supplementary affidavit filed and it was submitted that the Department will take steps to fill up the post of DME in terms of the 2008 Rules.

28. While the stand taken is appreciated, there is one more aspect of the matter which has already drawn the attention of the Court as reflected in the order dated 10.04.2015. On a perusal of the record, it was found that three faculty members had submitted applications for the post of DME. All of them stated that they had come to know from "reliable source" that the post of DME was going to fall vacant shortly and therefore they had submitted their applications. This Court noted in the order dated 10.04.2015 that the record did not disclose issuance of any advertisement or that any invitation was extended by the Department inviting such applications. This Court therefore observed that confining the selection to only the three applicants who had submitted applications without any advertisement or invitation by the Department to the exclusion of all other eligible candidates would not be justified. In any case, in this age of transparency, why should an aspirant come to know about a vacancy in a public post through "reliable source", even if it is a case of stop-gap arrangement. And what is this "reliable source"? In the case of *Nazir Ahmad vs. Emperor* AIR 1936 253 (Privy Council) , the Hon"ble Supreme Court held that it is a settled legal proposition that no person can be appointed even on a temporary or ad-hoc basis without inviting applications from all eligible candidates. The Hon"ble Supreme Court emphasised that the equality clause enshrined in Articles 14 & 16 of the Constitution would require that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit. Relevant portion of the decision rendered in *Mamata Mohanty* (supra) is as under:--

"36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or adhoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the notice board, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A

person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

29. In the light of the above, appointment of respondent No. 3 as in-charge DME vide the order dated 01.04.2015 which is under challenge in WP(C) Nos. 3515 & 3826 of 2015 becomes wholly untenable and cannot be sustained. It is accordingly set aside and quashed. In view of the stand taken by the Department, respondents are directed to fill up the post of DME by following the procedure laid down in the 2008 Rules. This shall be done within a period of 3 (three) months" from the date of receipt of a certified copy of this order. Petitioners of WP(C) Nos. 3515 and 3826 of 2015 may apply for the said post if they are otherwise eligible.

30. Now, advertng to the challenge made in WP(C) No. 1944/2015, law is well settled regarding the limited scope of judicial review in matters of transfer and posting of Government servants. The decisions cited at the Bar by Mr. Pathak and by Mr. Agarwal lay down the well recognized legal proposition regarding limitation of a challenge to a transfer order. Since the law is well settled, it may not be necessary for a re-statement of the legal principles.

31. However, it has already been noticed by this Court that the issue of transfer of the petitioner got inter-twined with the posting of respondent No. 3 as DME. The record did not disclose any public interest or administrative exigency to justify the impugned exercise. Transfer and posting of Government servants is always guided by public interest and administrative exigency which is however not discernible in the present case. In the light of the above, Court is of the considered opinion that the matter may require reconsideration by the departmental authorities.

32. At this stage, submissions of learned counsel for the petitioner that petitioner is on the verge of superannuation and at the fag end of his service career, it is neither in the public interest nor in the administrative exigency to transfer him thereby dislocating his service and family life may require consideration on remand. In this connection, reference may be made to a decision of this Court rendered in the case of Nazir Ahmad vs. Emperor AIR 1936 253 (Privy Council) , wherein this Court had interfered with the transfer of a Government servant as it was passed about one and half years before his retirement by taking the view that no practical purpose would be served by asking the Government servant to proceed to his transferred place just for a period of 5/6 months.

33. Therefore, Principal Secretary to the Govt., of Assam is directed to reconsider the grievance of the petitioner relating to his transfer from Gauhati Medical College and Hospital, Guwahati to Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta by taking all relevant factors into consideration consistently

with the observations made above. Let the fresh exercise be carried out within a period of 30 (thirty) days from the date of receipt of a certified copy of this order.

34. Till such decision is taken, status quo as on today as regards posting of the petitioner as Principal-cum-Chief Superintendent, Gauhati Medical College and Hospital, Guwahati shall be maintained. All the writ petitions are accordingly disposed of.