
(2013) 12 GAU CK 0006
In the Gauhati High Court
Case No : Writ Petition (C) No. 5242 of 2006

Rebati Mohan Hazarika

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 04-12-2013

Acts Referred:

Citation : (2014) 1 GLD 526 : (2013) 5 GLT 708

Hon'ble Judges : Tinlianhang Vaiphei, J

Bench : Single Bench

Advocate : B.D. Das and Mr. H.K. Sarma, for the Appellant; B. Dutta, GA, for the Respondent

Final Decision : Allowed

Judgement

Tinlianhang Vaiphei, J.—The interesting question of law which confronts this Court for consideration in this writ petition is whether, on the facts and circumstances of this case, the petitioner, the Additional Director of Sericulture, Government of Assam, whose service has been placed under the administrative control of the Autonomous Council, Karbi Anglong ("KAAC" for short) and who has been placed under suspension and is subjected to disciplinary action by the Government of Assam, can be said to be transferred to KAAC on deputation, and subjected to a disciplinary proceeding, by the Government of Assam. The case of the petitioner is that as he is transferred on deputation to the KAAC, he cannot neither be placed under suspension nor can be subjected to the disciplinary control by the State Government as long as his deputation subsists. The undisputed facts, which are material disposal of this writ petition, may be noticed at the outset. By the notification dated 6.2.2003 issued by the Governor of Assam, the petitioner, who was Joint Director of Sericulture, Guwahati, was temporarily promoted to the newly up-graded post of Additional Director, Sericulture under Regulation 4(d) of APSC's (L/F) Regulation, 1951 and was placed under the administrative control of the KAAC for posting as Additional Director, Sericulture, Haflong. While working there, the Commissioner/Secretary

to the Government of Assam, Handloom, Textile & Sericulture Department (respondent 2) issued the letter dated 9.12.2005 requiring the petitioner to show cause as to why penalties prescribed in Rule 7 of the Assam Service (Disciplinary and Appeals) Rules, 1964 should not be inflicted upon him for appointing 4 persons against the post of Sericulture Demonstrator in KAAC from a select list dated 17.12.2003 without the approval of the State Government/Director of Sericulture, Assam thereby violating the norms laid down by the Finance Department, Government of Assam and for by-passing the State Level Empowered Committee in violation of the Standing Government instructions and for filing false affidavit in the High Court.

2. In response to the said show cause, the Principal Secretary of KAAC by his letter dated 29.12.2005 addressed to the respondent No. 2 clarified that KAAC alone, as the borrowing authority, had the power to initiate disciplinary action against the petitioner and that necessary action should be taken by the KAAC as the borrowing authority against any officers/staff placed under their administrative control as and when arose with intimation to the State Government as lending authority. This letter was replied by the respondent No. 2 in his letter dated 7.6.2005 by making it clear that (i) Sericulture was not entrusted to the KAAC; (ii) the services of the petitioner were not placed at the disposal of the KAAC to exercise disciplinary jurisdiction and (iii) the lending department never ceased to be the disciplinary authority of the petitioner. It may be noticed that on the instruction of the KAAC, the petitioner refused to submit his show cause. This prompted the respondent No. 2 to issue the order dated 26.7.2006 placing the petitioner under suspension. By the order dated 8.9.2006, the respondent No. 2 appointed an enquiry officer and a presenting officer and directed the enquiry officer to submit his report within 16.10.2006. The subsequent letters of the KAAC to the respondent No. 2 to review/revoke the suspension order of the petitioner did not evoke any positive response. Ultimately, the petitioner is constrained to file this writ petition seeking the intervention of this Court to annul both the suspension order and the disciplinary proceeding against him.

3. The writ petition is opposed by the State-respondents by filing their affidavit-in-opposition through the respondent No. 2. A number of contentions have been raised by the answering respondents, but the same need not be referred to in view of the fact that I propose to first decide on the question as to whether the placing of the services of the petitioner by the State-respondents under the administrative control of KAAC will amount to transfer on deputation. Suffice it to refer to the averments of the answering respondent made in this behalf at paragraph 8 of the affidavit, which reads thus:

8. That, as regards to the statement made in paragraph No. 7 of the writ petition, the deponent begs to state that the petitioner was promoted from the rank of Joint Director and posted in the newly upgraded post of Additional Director of Sericulture on 06.02.2003. He was not sent on deputation to foreign

services. The Government Notification No. H.T.S. 383/2002/9-A, dated 06.02.2003 had stipulated that the petitioner was neither lent nor sent on deputation, but his services were "placed under the administrative control of the Autonomous Council of Karbi Anglong". The petitioner was not placed at the disposal of the Karbi Anglong Autonomous Council except his service. As such, the petitioner cannot claim any immunity from the State Government for committing any misconduct by him which is grossly violative of existing legal and administrative prescriptions and when he acts against the interests of the State Government jeopardising the interest of the State. Accordingly the statutory powers the Appointing Authority, that is, the disciplinary powers do not cease to exist. Though the para. - G of the Officer memorandum No. H.A.D. 57/95/316, dated 31st December, 1996 has given the disciplinary powers to the KAAC, the disciplinary powers of the State Government do not excluded (sic) by it.

4. The contention of Mr. B.D. Das, the learned counsel for the petitioner, is that the impugned action of the State-respondents in initiating departmental proceeding against the petitioner in the teeth of objection raised by the KAAC is ex-facie arbitrary and suffers from the vice of non-application of mind and both the impugned suspension order and the departmental enquiry against the petitioner cannot, therefore, be sustained in law. He further submits that the impugned actions of respondent No. 2 is the result of misinterpretation of the provisions of Clause (G) of the Office memorandum dated 31.12.1996, which resulted in an erroneous view taken by the respondent authorities that the petitioner was never sent on deputation to KAAC. He, therefore, maintains that the impugned suspension order and the disciplinary proceeding against the petitioner are illegal, without any jurisdiction and are liable to be quashed. Refuting the contentions of the learned counsel for the petitioner, Mrs. B. Dutta, the learned Government Advocate appearing for the State-respondents, forcefully submits that the arrangement by which the petitioner has been placed under the administrative control of the KAAC cannot, by any stretch of imagination, be construed to be a transfer on deputation the petitioner was never deputed to the KAAC. According to the learned State counsel, the concept of deputation is entirely a different transaction as seen from the omission of this word in the notification dated 6.2.2003 issued by the respondent No. 2 and from the glaring fact therein that the deployment of the petitioner in the service of KAAC is subject to reversion without notice and without assigning any reason thereof. She, therefore, strenuously urges this Court to dismiss the writ petition which is devoid of merit.

5. In order to appreciate the controversy, I may straightaway reproduce the relevant portion of the Notification dated 6.2.2003 placing the petitioner under the administrative control of the KAAC, which is in the following terms:

* * *

No. H.T.S. 383/2002/9-A-Subject to reversion without notice and without assigning any reasons thereof Sri R.M. Hazarika, Joint Director, Sericulture,

Jorhat is temporarily promoted to the newly up-graded post of Additional Director, Sericulture, for the Autonomous Council, Karbi Anglong Diphu in the scale of pay Rs. 8750-325-11425-EB-400-13825/- P.M. plus other allowances as admissible under Rules from the date of taking over charge of the post under regulation 4(d) of APSC's (L/F) Regulation 1951. His services are placed under the administrative control of the Autonomous Council, Karbi Anglong, Diphu.

Sd/B. Dutta, IAS Commissioner & Secretary, Handloom Textile & Sericulture Deptt.

6. On careful examination of the Notification extracted above, it is worthy of notice that the term "deputation" is not mentioned at all. All that it said is that on his temporary promotion to the newly up-graded post of Additional Director, Sericulture for the KAAC, Diphu, the services of the petitioner were placed under the administrative control of the KAAC, Diphu while he was subject to reversion without notice and without assigning any reasons thereof. The question is whether such terms of assignment, irrespective of the use of the term "deputation", can still be understood to be a transfer on deputation. It may be noted that the petitioner was not only placed under the administrative control of the KAAC, but was also subject to reversion without notice and without assigning any reasons thereof. What is the concept of deputation; has come up for consideration before the Apex Court in the State of Punjab and Others Vs. Inder Singh and Others, The observations of the Apex Court in this context are found at paragraph 18 of the judgment, which reads thus:

18. The concept of "deputation" is well understood in service law and has a recognised meaning. "Deputation" has a different connotation in service law and the dictionary meaning of the word "deputation" is of no help. In simple words "deputation" means a service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the recruitment rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person concerned so deputed and he would, therefore, know his rights and privileges in the deputation post. The law on deputation and repatriation is quite settled as we have also seen in various judgments which we have referred to above. There is no escape for the respondents now to go back to their parent departments and working there as Constables or Head constables as the case may be.

7. Again, in Umapati Choudhary Vs. State of Bihar and Another, the Apex Court held that deputation can be apply described as an assignment of an employee (commonly referred to as the deputationist) of one department or cadre or even an organisation (commonly referred to as the parent department or lending

authority) to another department or cadre or organisation (commonly referred to as the borrowing authority). The necessity for sending on deputation arises in public interests to meet the exigencies of public service. The apex Court further held therein that the concept of deputation is consensual and involves voluntary decision of the employer to lend the services of his employee and a corresponding acceptance of such services by the borrowing employer and that it also involves the consent of the employee to go on deputation. At this stage, it will be instructive to refer to clause (E), (F), (G) and (H) of the Office Memorandum dated 31.12.1996 in respect of the administrative changes and modalities adopted for observance by the State Government and the KAAC for management of the subjects mentioned in the MOU dated 1.4.1995, which are as follows:

(E) The Council shall appoint a Principal Secretary of it in the rank of Commissioner & Secretary to the Government of Assam and for this purpose, the Government of Assam will place the services of the IAS Officers of Assam cadre of this rank at the disposal of the Council. The State Government will make available the services of two officers in the rank of Secretary to the Government of Assam (one of whom will be in the Technical Deptt.) for appointment as Secretaries of the Council. The State Government also will make available three Deputy Secretaries (one of whom will be from a Technical Department and remaining ones from Assam Civil Service for appointment as Deputy Secretaries of the Council). All these officers shall be on deputation from the State Government to the Council as per usual terms and conditions and their services shall be placed at the disposal of the Council with prior consultation with the Council.

(F) The Zonal Heads of Departments from Hill Areas shall be withdrawn by the State Government Officers in the rank of Additional Chief Engineer, PWD and its equivalent in all the entrusted Departments with all administrative, financial and technical powers of the Head of Department delegated by the State Government shall be posted and placed under the administrative control of the Karbi Anglong Autonomous Council.

The Additional Chief Engineer, P.W.D., and its equivalent Officers as mentioned above shall be posted within 31st January, 1997. During the interim period, the existing Zonal heads of Department stationed in Karbi Anglong District shall be placed under the administrative control of the Karbi Anglong Autonomous Council.

(G) The Chief Executive Member/Executive Member/Principal Secretary/Secretary to the Executive committee of the Council shall be competent to initiate/review/accept the Annual Confidential Reports (ACRs) of all the Officers and staff placed under the administrative control of the Council. The administrative control of the Council over the officers and staff at the disposal shall be complete in all matters of intra-Council transfer and posting. As regards disciplinary actions against the Officers and Staff of the entrusted subjects/Departments, the Council shall exercise the powers as the Borrowing Authority and the State Government shall

exercise the powers as the lending authority and both the State Government and the Council shall follow the relevant rules, regulations, etc. of the respective service rules, (IAS/ACS, etc.).

(H) The State Government shall consult the Council, while posting and transferring the officers of the entrusted subjects/departments in or out of the Council. Under no circumstances, the officers and staff not released by the Council shall be accepted by the State Government. Before deputing any Officer or staff, the State Government shall provide a panel of names, enabling the Council to select and accept the same. The State Government shall take necessary action under the relevant rules and procedure against the officers and staff, found involved in any prima facie case of misconduct/dereliction of duty, etc. during the period of deputation to the Council even after they are repatriated to the State Government.

(I) The salary and allowances of the Principal Secretary and other Secretaries/Deputy Secretaries as well as the officers and staff of the entrusted subjects/departments who are on deputation to the Council shall be paid by the council and necessary funds for this purpose shall be made available by the State Government. In respect of Provident Fund, Group Insurance and other related matters, these officers and staff shall continue to be controlled by the State Government. The Council shall not be liable to pay any leave salary, pension contributions, etc. in respect of these officers and staff of the entrusted subjects/department placed under the administrative control.

(Underlined for emphasis)

8. As already noticed, the term "deputation" is not mentioned at all in the Notification dated 6.2.2003. All that it said is that on his temporary promotion to the newly up-graded post of Additional Director, Sericulture for the KAAC, Diphu, the services of the petitioner were placed under the administrative control of the KAAC, Diphu and that he was subject to reversion without notice and without assigning any reasons thereof. The question is whether such terms of assignment, irrespective of the use of the term "deputation", can still be understood to be a transfer on deputation. It may be noted that the petitioner was not only placed under the administrative control of the KAAC but was subject to reversion without notice and without assigning any reasons thereof. At the first blush, it can be said that the placing of the petitioner under the administrative control of the KAAC in terms of the Notification dated 6.2.2003 certainly conveys the idea that such deployment constitutes a transfer on deputation. More so, when, in the case of the Principal Secretary of the Council, two Officers in the rank of Secretary to the Government of Assam and three Deputy Secretaries and the remaining ones from the Assam Civil Services, it has been expressly declared that their services shall be on deputation from the State Government to the Council as per usual terms and condition, and their services shall be placed at the disposal of the KAAC. However, on closer scrutiny, the nature of deployment of the petitioner to KAAC presents many peculiar features,

which are not seen in normal transfer order. The petitioner is the Additional Director looking after the Sericulture Department of KAAC. According to the notification issued in the Official Gazette dated 14.7.1995 by the Government of Assam, Sericulture Department is one of the Departments entrusted to the KAAC. In my opinion, the post of the petitioner like the post of Additional Chief Engineer and its equivalent officers, who are placed under the administrative control of the KAAC are undoubtedly covered by Clause (F) of the said Office Memorandum and, as such, the terms of their deployment in the KAAC shall necessarily have to be regulated by Clause (G) and (H) thereof.

9. As already noticed, what Clause (G) said is that as regards disciplinary actions against the Officers and staff of the entrusted subjects/departments, the Council shall exercise the powers as the Borrowing Authority and the State Government shall exercise the powers of the Lending Authority and both the State Government and the Council shall follow the relevant rules, regulations, etc. of the respective service rules. Clause (H) further says that the State Government shall take necessary action under the relevant rules and procedure against the officers and staff found involved in any prima facie case of misconduct/dereliction of duty, etc. during the period of deputation to the Council even after they are repatriated to the State Government. Thus, even though the term "deputation" is not used in the deployment order dated 6.2.2003, a combined reading of Clauses (G) and (H) of the said Office Memorandum unmistakably make it clear that the situation obtaining in the present case would amount to a case of deemed deputation. Courts are seldom swayed by the wrong use or misuse of the a nomenclature by public authorities be it in an order or a statute for determining a controversy confronting them: they are more concerned with the pith and substance of the matter. True, the word "deputation" nowhere appears in the notification dated 6.2.2003, but then the State Governments in issuing the said notification read with Clauses (G) and (H) of the said Office Memorandum have certainly acted in the manner as if they had placed the services of the petitioner under the administrative control of the KAAC on deputation. No other provision is shown to me whereunder the services of the petitioner can be placed under the KAAC, which is conceived to be an autonomous body, otherwise than on deputation by the said Office Memorandum. The concept of deemed deputation is recognised and accepted by the Apex Court in *Prasar Bharti and Others Vs. Amarjeet Singh and Others*,

10. The rules governing suspension and disciplinary action against a Government servant on deputation are dealt with by Clauses 11 and 12 of the Assam Services (Discipline and Appeal) Rules, 1964 ("the Rules" for short), which are in the following terms:

11. Provisions regarding lent officer -(1) Where the services of a Government servant are lent to the Central Government, any State Government, or to local or other Authority (hereinafter in this rule referred to as "the Borrowing Authority"), the Borrowing Authority shall have the powers of the Appointing Authority for the

purpose of placing him under suspension and of the Disciplinary Authority for the purpose of taking a disciplinary proceeding against him:

Provided that the Borrowing Authority shall forthwith inform the Authority which lent his services (hereinafter in this rule referred to as "the Lending Authority") of the circumstances leading to the order of his suspension or the commencement of the disciplinary proceeding as the case may be.

(2) In the light of the finding in the disciplinary proceedings taken against the Government servant-

(i) if the Disciplinary Authority is of the opinion that any of the penalty specified in clauses (i) to (iii) of Rule 7 should be imposed on him, it may, subject to the provisions of Rule 9 and in consultation with the Lending Authority pass such orders on the case as it deems necessary.

Provided that in the event of difference of opinion between the Borrowing Authority and the Lending Authority the services of the Government servant shall be replaced at the disposal of the Lending Authority:

(ii) if the Disciplinary Authority is of the opinion that any of the penalties specified in clauses (iv) to (vii) of Rule 7 should be imposed on him it shall place his services at the disposal of the Lending Authority and transmit to it the proceedings of the inquiry for such action as it deems necessary: Provided that in passing any such order the Disciplinary Authority shall comply with the provisions of sub-rule (10) of Rule 9.

Explanation - The Disciplinary Authority may make an order under sub-clause (ii) of sub-rule (2) on the record of the inquiry transmitted by the Borrowing Authority, or after holding such further inquiry as it deems necessary.

12. Provisions regarding borrowed officers-

(1) Where an order of suspension is made or a disciplinary proceeding is taken against a Government servant whose services have been borrowed from the Central Government, any State Government or a local or other authority, the authority lending his services (hereinafter in this rule referred to as "the Lending Authority"), shall forthwith be informed of the circumstances leading to the order of his suspension or the commencement of the disciplinary proceeding as the case may be.

(2) In the light of the finding in the disciplinary proceeding taken against the Government servant-

(i) if the Disciplinary Authority is of the opinion that any of the penalty specified in clauses (i) to (iii) of Rule 7 should be imposed on him, it may, subject to the provisions of Rule 9 and in consultation with the Lending Authority pass such orders on the case as it deems necessary:

Provided that in the event of a difference of opinion between the Borrowing

Authority and the Lending Authority the services of the Government servant shall be replaced at the disposal of the Lending Authority:

(ii) if the Disciplinary Authority is of the opinion that any of the penalties specified in clauses (iv) to (vii) of Rule 7 should be imposed on him it shall replace his services at the disposal of the Lending Authority and transmit to it the proceedings of the inquiry for such action as it deems necessary.

11. In the instant case, the KAAC is undoubtedly the Borrowing Authority of the petitioner. This being the unassailable position, Rules 11 and 12 of the Rules will come into operation. Thus, if a Government servant is to be placed under suspension or if any disciplinary action is contemplated against him, the provisions laid down in Rule 11 and 12 shall have to be complied with by the respondent authorities. In this view of the matter, it is only the Borrowing Authority i.e. the KAAC which alone has the power to place the petitioner under suspension or to initiate disciplinary action against him during his period of deputation in accordance with the procedure laid down in Rules 11 and 12. In other words, the State Government, which is the Lending Authority, has no power at all to suspend or take disciplinary action against the petitioner during his period of deputation. Of course, a power is reserved to themselves to take necessary action against the petitioner if he is found to be involved in any prima facie case of misconduct/dereliction of duty, etc. during the period of his deputation to the KAAC even after he is repatriated to them. If a statute prescribes the manner in which action is to be taken, it shall be done in the prescribed manner or not at all. In the instant case, notwithstanding the conditions stipulated in the notification dated 6.2.2003 that the deployment of the petitioner in the service of the KAAC is subject to reversion without notice and without assigning any reason thereof, the inference is, on the peculiar situation obtaining in this case, is irresistible and the conclusion inescapable that the placing of the services of the petitioner under the administrative control of the KAAC is nothing but deemed deputation and that the impugned suspension order and disciplinary proceedings initiated by the State Government against the petitioner are ultra vires the provisions of Rules 11 and 12 of the Rules. This warrants the interference of this Court. For what has been stated in the foregoing, this writ petition is allowed. The impugned order contained in the Notification dated 26.07.2006 placing the petitioner under suspension and of the departmental enquiry conducted against him arising out of the show cause dated 9.12.2005 are hereby quashed. The petitioner shall be reinstated to service within a period of one month from the date of receipt of this judgment. He shall also be entitled to full back wages, which shall be paid within a period of three months from today. The parties are however, directed to bear their respective costs.