
(1995) 02 GAU CK 0003
In the Gauhati High Court
Case No : Civil Rule No. 5189 of 1995

Santanu Nag Choudhury

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

Date of Decision : 01-02-1995

Acts Referred:

Citation : (1995) 1 GLJ 203 : (1995) 1 GLT 388

Hon'ble Judges : J.N.Sarma, J

Bench : Single Bench

Advocate : S.C.Kayal, N.M.Lahiri, N.Choudhary, H.Roy, E.S.Thankhiew,
B.B.Narzary, B.W.Phira, Advocates appearing for Parties

Judgement

1. This application is with regard to the prayer for stay of the order of suspension dated 16. 12.94 issued by the Principal Secretary, Karbi Anglong Autonomous District Council (KAADC) Diphu. The order of suspension is Annexure 12 to the writ application which is quoted below:

"Pending drawal of departmental proceedings under Rule 11(1) of Assam Service (Discipline and Appeal[^] Rules, 1964 and in exercise of the powers conferred on the District Council vide Govt. letter No. HAD. 218/77/185 dated 29.7.81 and Memo No. HAD29/84 dated 16.3.84 Shri S.Nag Choudhury, Executive Engineer, Diphu Flood Control Division, Diphu is placed under suspension with immediate effect.

Further, Shri S. Thick. ACS, Secretary, Karbi Anglong Autonomous District Council is hereby allotted to hold the temporary charge of Executive Engineer, Diphu Flood Control Division, Diphu immediately until further orders."

2. It would have been better and more appropriate to decide the main Civil Rule itself and as a matter of fact I asked the panics to argue the main mailer itself. But the learned counsel for the petitioner urged that the stay matter may be heard earliest inasmuch as it will take some time for the main Civil Rule being ready for hearing. Accordingly, the stay matter was heard.

3. I have heard Mr. NM Lahiri, learned counsel and Advocate General of Meghalaya for the petitioner, Mr. BB Narzary, learned Senior Govt. Advocate for respondents 1, 2, 6 and 7 and also Mr. H Roy, learned counsel for respondents 3 and 4.

3. An affidavit in opposition has been filed with regard to the stay on behalf of the State of Assam and another affidavit in opposition has been filed on behalf of the respondents 3 and 4 and the petitioner also filed an affidavit in reply. In the affidavit in opposition filed by the State of Assam, the respondents 1, 2, 6 and 7 supported the case of the petitioner. Mr. Roy, learned counsel for respondents 3 and 4 also produced before me the record of the case with regard to the allegations against Shri S. Nag Choudhury, Executive Engineer, Flood Control Division,

4. The brief facts are as follows : The petitioner joined as Assistant Engineer under Irrigation and Flood Control Department, Govt. of Assam on 19.11.70. On 1.7.94 the petitioner was promoted to the post of Executive Engineer and was posted at Diphu where the petitioner joined on 6.7.94. It is the case of the petitioner that he is an employee of the State of Assam.

5. In paragraph 6(2) of the VIth Schedule of the Constitution of India inter alia provides as follows :

"The Governor may, with the consent of any District Council entrust either conditionally or unconditionally to that Council or its officers functions in relation to agriculture, animal husbandry, community projects, cooperative societies, social welfare, village planning or any other matter to which or the executive power of the State extends."

6. So, Flood Control is not a matter enumerated in this clause. On 6th Nov"92 a notification was issued by the Commissioner and Secretary to the Govt of Assam, Hill Areas Department by which by virtue of the power conferred by paragraph 6 (2) of the Sixth Schedule of the Constitution of India as quoted above, the Govt of Assam was pleased to entrust the department enumerated in Annexure II to this notification to the NC Hill District Council and the Karbi Anglong District Council with effect from Monday, the 16th Nov" 92 and Item No. 18 to this notification as follows :

"Item No. 18: Flood Control Scheme for protection of village paddy field, marketing, town etc. (Not of technical nature)."

7. Thereafter on 21.7.94 by another notification the services of 11 officers including that of the petitioner were placed at the disposal of the Karbi Anglong Autonomous District Council with immediate effect. There is dispute as to whether the entrustment of the department made to the District Council was completed or not. The Principal Secretary of the District Council on 11.10.94 wrote that all formalities of entrustment have already been completed. But no fund was released and requested the Government to release the fund. On 5.8.94

the Principal Secretary of Karbi Anglong District Council wrote a letter to the Deputy Commissioner, Karbi Anglong, SubDivisional Officer, Bokajan, Hamren and the Treasury Officer, Diphu/Hamren that bills/cheques from the departments entrusted to the District Council should not be entertained for payment by the Treasury concerned as these departments are already entrusted to the District Council and the District Council only is responsible for payment etc. On 18.8.94 the Superintending Engineer, Diphu Flood Control Circle wrote a letter to the Secretary to the Govt of Assam, Flood Control Department, Guwahati 3 wherein he stated that the directions issued by the District Council is not legal and that matter created complicity in managing the affairs of the departments. This is Annexure 3 to the writ application. On 5.9.94 the Deputy Secretary to the Govt of Assam, Flood Control Department wrote to the Principal Secretary, District Council, inter alia, as follows :

"Sub : Transfer of subject to Autonomous Karbi Anglong District Council, Diphu.

Ret: Your letter No KAG/05/94/45/7221 (A) dated 5.8.94 addressed to DC. Karbi Anglong and others.

Sir,

In this connection, I am to say that this department has already taken action to place the staff/works at the disposal of the District Councils and the process is likely to take some more time to complete in all respects. In view of the transitory period for transfer of functions alongwith staff to District Councils of the Hill Areas, the ban imposed as above is likely to adversely affect the salaried staff as well as needy contractors.

I, therefore, request you kindly to withdraw the above ban imposed on treasury transactions till Dec'94 within which the department will make all possible endeavours to transfer the functions/Schemes/Staff/Budget etc. as decided by the Govt."

8. On 9.9.94 the Deputy Commissioner, Karbi Anglong, Diphu sent the following telegram to the Finance Secretary, Assam which is quoted below :

"No.DTP72/9192 (.) Principal Secretary Karbi Anglong District Council Diphu vide his letter No. KAC/G/OS/9495/722 (A) Dt. 55.8.94. with copies to all concerned has requested us unilaterally not to entertain Bill/Cheque for Pay/TA and other expenses and Bills/Cheques against expenditure on different schemes of Diphu Flood Control Division and District Information and Public Relation Officer by Diphu Treasury as these Departments are placed at the disposal of Karbi Anglong District Council with immediate effect (.) However no Govt. notifications entrusting these Departments at the disposal of KAADC have either been received by the undersigned or by the Treasury Officer Diphu till date (.) In view of the prevailing circumstances kindly instruct whether to Diphu should entertain the Pay/TA and Bills/Cheques on other expenses of these Departments from September/94 onwards in absence of any specific order from Govt. (.) Matter

very urgent (.)"

9. A reply to it was sent vide Annexure 6 to the writ application to the Treasury Officer, Haflong/Diphu as well as Deputy Commissioner, Diphu/Haflong, Principal Secretary, HC Hills/Karbi Anglong Autonomous District Council and also Executive Engineer, Diphu/Haflong, Flood Control Department. That telegram reads as follows :

"No. BB 468/94/2 dated 1.10.94 (.) Reference Deputy Commissioner Diphu Message No.DTP71/9192/266 dt. 12.9.94 (.) You are instructed to accept Bills/Cheques for salary and other expenditure and continue to allow drawal by the Executive Engineer on existing procedure till all the formalities of entrustment of subjects including placement of fund to District Council is .completed (.) Message ends (.)"

10. There is another telegram dated 4th Oct'94 which is Annexure 7 to the writ application. That reads as follows :

"No. HAD. 113/94/30 dated 4.10.94 (.) Reference Dep Com Diphu's Message No. DTP. 71/9192/266 dated 12.9.94 and Finance (BT) Department's Message No. BB. 468/94/2 dated 1.10.94 (.) Kindly accept the Bills/Cheques for salary/TA and other expenditure and continue to allow drawal by the Executive Engineer/Officer's of Flood Control Department on existing procedure till all the formalities of entrustment of subjects including placement of fund to the District Councils completed (.)"

11. On 11.10.94 a reply was sent by the Principal Secretary, District Council that has been referred to in the earlier part of this order. On 28th Nov'94 vide h Annexure 9 the Secretary to the Govt. of Assam, Hills Areas Department wrote as follows:

"Sub : Entrustment of departments, release of fund thereof to the Autonomous District Councils."

Sir,

In inviting a reference to your letter No. FC (E) 147/04/6 dated 2L7.94 and No. FC (E) 357/88/38 dated 5.10.94 on the above subject, I am directed to state that unless the fund is released, the entrustment of department to the District Council is not complete by mere placing the services of the officers and staff at the disposal of District Council.

I would therefore, request you kindly to let this department know whether the fund for the said officer and staff are released during 190495 if not already done please do the needful with effect from April/95 without fail to avoid any complications in this respect. "

12. On 6th Dec'94 the Secretary to the Govt of Assam, Flood Control Deptt. Guwahati 3 vide Annexure 10 to the writ application wrote as follows :

"Sub : Release of fund to the District Councils upto March/95.

Ref: Your letter No. HAD 103/89/Pt/286 dt. 3.12.94. J Sir,

In inviting reference to above, I am directed to state the present status of the matter as below:

(i) Budgetary provision under Flood Control Sector for each of the two District Council has not been prepared separately at the middle of the financial year and as such the fund for the year 1994/95 has not been placed at the disposal of the two District Councils separately.

(ii) Budget for the year 1995/96 for each District Council with due counters signature and certificate from the concerning Principal Secretary has since been received by this Deptt. These 2 (two) Budgets prepared separately for the two District Council when duly passed by the Assembly in the forthcoming Budget Session of March/95.

(iii) Administrative steps like placement of services of officers/staff of this deptt. at the disposal of the both the District Councils of Karbi Anglong and North Cachar Hills have already been taken vide this Deptt.'s letter No. FC (E) 147/94/6 dated 21.7.94, No.CEFC (E) 357/88/39. dt. 6.10.94 and No. CEFC (E) 357/88/39 dt. 6.10.94. (Copies enclosed)."

13. On 16.12.94 vide Annexure 11 to Hie writ application, the following order was passed by the Principal Secretary, Karbi Anglong Autonomous District Council, Diphu, that is quoted below :

"WHEREAS Govt of Assam vide its Notification No. FC (E) 147/94/6 dated 21.07.94 of the Flood Control Department/No. CEFC (E) 357/88/38 dated 6.10.94 have entrusted the services of District and SubDivisional Officers and staff of Flood Control Department serving under Karbi Anglong District at the disposal of the Karbi Anglong Autonomous District Council;

AND WHEREAS, the services of the District and Divisional level officers and staff serving in the Karbi Anglong District have also been accepted by the authority of the Karbi Anglong Autonomous District Council vide its Notification No. KAC/ G/ OS/94/95/45/7223 dated 05.08.94 and No.KAC. G/OS/94/95/55/ 9728 dated 28.11.94;

NOW THEREFORE, the authority of Karbi Anglong Autonomous District Council is pleased to order that the Superintending Engineer and Executive Engineer and their subordinate officers and staff of the Flood Control Department, whose services have been placed at the disposal of the Karbi Anglong Autonomous District Council, shall not draw any amount from the Treasury with immediate effect (for pay, TA. contingencies, and works etc.) pending finalisation of all the formalities of entrustment of subjects including placement of fund to the Karbi Anglong Autonomous District Council is completed as informed by Govt message No.113/94/30 dated 04.10.94 and No.BB.468/94/2 dated 1.10.94."

14. Thereafter, it is stated in the writ application that within 1 hour of this order and in the affidavit in opposition filed by the Govt within 6 hours of this order, the impugned order of suspension of the petitioner was passed. In the writ petition in paragraph 9 it is stated as follows :

"..... in due compliance of the instruction of the Govt. the petitioner refused to hand over the accounts to the Senior Finance and Accounts Officer of respondent No. 3. At this the respondent No. 4 became vindictive and issued an order within an hour placing the services of the petitioner under suspension with immediate effect. Be it mentioned here that the respondent No. 4 by the said order has allowed one S. Thick, ACS to hold the charge of Executive Engineer that is the post held by the petitioner. The said Shri Thick is not an Engineer and being an Administrative Officer is incompetent and ineligible to work as Executive Engineer."

15. In Annexure A to the affidavit in opposition filed by respondents 1 and 2 it is inter alia stated as follows :

"... .. The Principal Secretary also deputed the Sr. FAO of the KA District Council, Diphu to close the accounts of expenditure of the Diphu FC Division on 16.12.94 itself. It is surprising to note that as per aforesaid order of the Principal Secretary, Shri SP Dey, Sr. FAO of the Council came to the Diphu FC Division office at 4 PM on the same day and instructed the Executive Engineer to carry out the order without allowing any time. Shri Nag Choudhury, EE, however did not comply with the direction of the Principal Secretary on the ground that all the accounts and financial transaction are related to State Govt fund and till then he was not handling any fund released to by the District Council. But, unfortunately at about 4.30 PM on the same day i.e. on 16.12.94, the Principal Secretary issued an order placing Shri Nag Choudhury under suspension vide his order No.KAC/Estt.139/P (B) 7949510851, dated 16.12.94 without even consulting the Departmental Secretary directed on Shri S. Thick, ACS, Secretary of the KA District Council to take over charge from Shri S. Nag Choudhury, Executive Engineer and accordingly he has taken over the charge from Shri S. Nag Choudhury on 19.12.94 at 4.30 PM... .."

16. On 4.1.95 the Govt of Assam sent the following telegram and letter to the District Council. That is Annexures C and D to the affidavit in opposition. They are quoted below:

"Annexure C : No. HAD. 113/94/Pt/22 Dated Dispur the 3rd January"95 (.) Kindly refer your Memo No. KAC/ESTT. 139/PfB) 9495/10851 dated 16.12.94 (.) The Suspension order against Shri S. Nag Choudhury issued vide your Memo No. KAC/ESTT. 139/P (E)/9495/10852 (A) dated 16.12.94 may be withdrawn forthwith in the absence of valid ground not yet furnished by the Council (.) Shri S. Nag Choudhury, EE, FC has not yet submitted his joining report in the Council (.) The FC Division, Diphu may be allowed to function as usual as on 16.12.94 (.) In future when such cases arise the District Council may take, approval of the

State Govt. in the Administrative Department as well as of the Hill Areas Department before an Officer of the State Govt. is placed under suspension or proceeded against Departmental (.) Message over (.)"

Annexure D :

Sub : Suspension order issued to Shri S. Nag Choudhury, Executive Engineer, Diphu Flood Control Division by the Karbi Anglong District Council.

Ref: Your letter No. FC (E) 147/94/36 dated 28.12.94.

Sir,

Reference to the subject above I am directed to advise you to keep the notification of entrustment of officers and staff of Flood Control Division, Diphu in abeyance till March, 1995 and make the fullfledged entrustment of the concerned officers and staff along with the budget with effect from 1.4.95 in order to avoid any misunderstanding with the Karbi Anglong District Council, Diphu over the question of entrustment.

Regarding the suspension order issued by the Council against Shri S. Nag Choudhury, Executive Engineer, Diphu we are advising the District Council to withdraw the said order forthwith separately. This is for your information and necessary action."

17. In the affidavit in opposition filed on behalf of respondents 1 and 2, it is stated that the entrustment of the department is not completed. No budget provision was made for the department under the District Council. The petitioner did not join as an Executive Engineer under the District Council. He was not an employee of the District Council, but an employee of the State Govt and as such, the District Council had no jurisdiction to suspend the petitioner. It was further stated that the salary of the petitioner was paid from July to Nov'94 by the State Govt. But because of the complicity created by the District Council the salary for the month of December'94 has not been paid either to the petitioner or the any staff member of the department.

18. In the affidavit in opposition filed on behalf of the respondents 3 and 4, the main contention is that the entrustment of the department is completed and that he is an employee of the District Council on the concept of borrowed officer as envisaged in the Assam Services (Discipline and Appeal) Rules, 1964. Rule 11 (1) of the aforesaid Rules alongwith the proviso is quoted below:

"11. Provisions regarding lent officers : (1) Where the service of a Government servant are lent to the Central Government, and 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."

19. In this connection reliance is also placed in FR 110 (a) (i) (ii) which is quoted below:

"FR 110: (a) No Government servant may be transferred to foreign service against his will; provided that this subrule shall not apply to the transfer of a Government servant in the service, of

(i) a body, incorporated or not, which is wholly or substantively owned or controlled by the Government, and

(ii) an Autonomous District Council."

20. Reliance is also placed in the Notification dated 29th July" 81 issued by the State of Assam and that Notification is with regard to the disciplinary control over transferred staff. That is quoted below:

"Sub : Disciplinary control over transferred staff.

Sir,

I am directed to say that with the entrustment of certain functions to the District Council, the relevant staff has been transferred to the District Council along with the schemes. All these employees continue to be Government servants. It is clarified that for the purpose of the Assam Services (Discipline and Appeal) Rules, 1964 the District Council will be regarded as "the Borrowing Authority" under Rule 11 (1) thereof."

21. There is also an Office Memorandum dated 14.11.79 with regard to such officers whose entrustment is completed to the District Council. Clause (g) of the aforesaid Office Memorandum is quoted below:

"Clause (g): All the District Level Officer of the Development Departments enumerated in the annexure and their subordinate officers and staff will be placed under the administrative control of the District Council with effect from 1.6.1970. These officers and staff will not cease to be Government servants but will function primarily as officers and staff of the District Council and the District Council will be associated in the preparation of their annual confidential report in accordance with detailed procedure to be prescribed by the State Government. Such procedure will inter alia be that the Secretary incharge of the respective entrusted functions shall initiate the Annual Confidential Reports of the District Level Officers the Executive Member of the District Council incharge of the respective entrusted functions shall review the Annual Confidential Reports initiated by the said Secretary incharge and this will be accepted by the respective Heads of concerned Government Departments. These officers and staff will continue to be responsible to the State Govt for implementing schemes which have not been transferred to the District Council and no administrative

charge shall be admissible to the District Council for such implementation. While the administrative control of the District Council over the officers and staff placed at their disposal will be complete in the matter of interdistrict transfer, interdistrict transfer shall be within the exclusive jurisdiction of the State Government.

The Heads of Departments will continue to exercise full power and responsibility in the matter of technical control and supervision over the officers placed at the disposal of the District Council even in respect of schemes transferred to the District Council. The Heads of Departments will also be available to the District Council for any assistances or guidance they may desire. It will be the responsibility of the Heads of Departments and Regional Officers to bring to the notice of the Executive Member in charge any defects they may have noticed in the implementation of the transferred schemes by the officers of their department. Copies of inspection notes by the Heads of Departments and Regional Officers will also be sent invariably to the Executive Member in charge for his information.

The services of subject matter specialists or other officers whose jurisdiction is not confined solely to one district will not be placed at the disposal of the District Council; it will; however be open to the District Council to seek assistance and guidance from such officers."

22. Two questions mainly arise for determination of the question of stay (1) whether the entrustment is complete in the eye of law; (2) whether the order of suspension was passed mala fide, arbitrarily and/or in a high handed manner.

23. Regarding the entrustment, Mr. NM Lahiri draws my attention to paragraph 13 of the VIth Schedule of the Constitution of India. Paragraph 13 is quoted below:

"13. The estimated receipts and expenditure pertaining to an autonomous district which are to be credited to, or is to be made from, the Consolidated Fund of the State shall be first placed before the District Council for discussion and then after such discussion be shown separately in the Annual Financial Statement of the State to be laid before the legislature of the State under Article 202."

24. Mr. Lahiri urges that in respect of the Flood Control Schemes no budgetary provision was made as required under Chapter 13 of the Sixth Schedule and in the absence of budgetary provision, no question of entrustment can arise. He further submits that entrustment must be made in accordance with the provision in the Constitution and in the instant case such entrustment cannot be deemed to be a complete entrustment.

25. On the other hand, Mr. H. Roy, learned counsel appearing on behalf of respondents 3 and 4 draws my attention to the detailed estimates of revenue and expenditure for the year 1994-95 for the Karbi Anglong District. This is a Brochure of Karbi Anglong Annual Financial Statement for 1994-95 revenue and

receipt. At page 153 of this Brochure, it appears that there was an estimates of the amount required for the year ending 31st March, 1995 to defray the expenses in connection with the Administration of Flood Control. A photocopy of this is annexed as Annexure 4 to the affidavitinopposition filed on behalf of respondents 3 and 4. It is further stated that this grant will be accounted for by the Flood Control Department So, this does not show that budgetary provision was made as required under Chapter 13 of the Sixth Schedule of the Constitution of India. In the affidavitinopposition filed on behalf of respondents 1 and 2, in paragraph 4 it is stated as follows :

"..... The writ petitioner being the Executive Engineer posted at Diphu Flood Control Division under the Karbi Anglong District Council was authorised to draw all the expenditures stated above through treasury against the State Budget for the year 199495."

26. Further, it appears from the various Annexures to the affidavitinopposition filed by respondents 1 and 2 that no budgetary provision was made as required under the Constitution. It is also clear from the Annexures to the writ application the mere placing certain officers at the disposal of the District Council without completing the requirements of finance, cannot be deemed to be a case of entrustment.

27. In view of that matter, I am prima facie satisfied that there was no entrustment of this department of Flood Control to the Karbi Anglong Autonomous District Council as required by law and the entrustment was also not complete.

28. This being the position, the respondent No. 4 had no jurisdiction to place the petitioner under suspension as was done.

29. Coming to point No. 2, it is crystal clear that the order of suspension was passed in undue haste and in a high handed manner as will be evident from the facts" enumerated above. No doubt, suspension is not a punishment, but at the same time it is also indisputable that suspension creates humiliation and other difficulties to an officer/employee and as such, the order of suspension can be passed only after application of mind and in a reasonable and fair manner and not according to the whims and caprice of the authority. Ksuch along hand is given to the authority, there will be no security of the employees and employees would not be in a position to carry out their duties for the purpose for which they are employed.

30. Here is a case where an order was passed on 16.12.94 vide Annexure 11 to d the writ application directing the Superintending Engineer and Executive Engineer not to draw any amount from the treasury and within half an hour/one hour, the order of suspension was passed and curiously enough an ACS officer was allowed to hold the temporary charge of the Executive Engineer, Flood Control Division, Diphu. No doubt, subsequently he was replaced by an Engineer.

31. Be that as it may, it also appears that after the suspension order was passed the respondent No. 4 took away the key of the office from the Chowkidar and as a result the office did not function for two days. The order of suspension was advised to be withdrawn by the State Govt, but that was not done. Accordingly, after hearing the learned counsel for the parties and on perusal of the materials on record, I am prima facie satisfied as follows :

1. There was no entrustment of this department as required in the eye of law and as such, the petitioner cannot be (teemed to an employee of the District Council to give jurisdiction or right to the District Council to exercise the power of suspension of the petitioner.

2. The order of suspension is absolutely arbitrary without application of mind and was an action in haste and in a high handed manner.

32. Accordingly, the order of suspension dated 16.12.94 passed by the Principal Secretary, Karbi Anglong Autonomous District Council, Diphu (Annexure 12 to the writ application) shall stand suspended and the petitioner shall be immediately allowed to work in his original post. As prima facie I have found that the order of suspension is nonest in the eye of law the petitioner shall be entitled to all the service benefits during this period of suspension.

With the above directions and observations, this application for stay stands disposed of.