

GAHC010217202021



Judgment reserved on : **18th May, 2023**

Judgment delivered on : 30th June, 2023

In the Gauhati High Court

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

W.P(C) NO. 7075/2021

1. Smti. Manalisha Deka.

.....Petitioner

-Versus-

1. The State of Assam, represented by the Commissioner and Secretary to the Government of Assam, Handloom Textiles and Sericulture Department, Dispur, Guwahati-6.
2. The Deputy Secretary to the Government of Assam, Handloom Textiles & Sericulture Department, Dispur, Guwahati-6.
3. The Assam Khadi & Village Industries Board, represented by its Chairman, Chandmari, Guwahati-3.
4. The Chairman, Assam Khadi & Village Industries Board, Chandmari, Guwahati-3.

5. The Chief Executive Officer, Assam Khadi & Village Industries Board, Chandmari, Guwahati-3.

6. The Chief Accounts Officer, Assam Khadi & Village Industries Board, Chandmari, Guwahati-3.

7. The Executive Officer, Establishment, Assam Khadi & Village Industries Board, Chandmari, Guwahati-3.

.....Respondents

- B E F O R E -

HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Advocate for the petitioner :Mr. A. Jahid, learned counsel.

1. Ms. A. Begum, learned counsel.

Advocate for the respondents : Mr. P. K. Munir and Mr. R. Dhar, learned counsels.

JUDGMENT AND ORDER (CAV)

(Soumitra Saikia, J)

Heard Mr. A. Jahid, learned counsel appearing for the petitioner. Also heard Mr. P. K. Munir, learned counsel for the respondents Nos. 3 to 7 and Mr. R. Dhar, learned counsel for respondent Nos. 1 and 2.

2.The petitioner was initially appointment as LDA-cum-Typist by the Khadi Board on 07.07.1988. Subsequently by order dated 04.03.2014 the petitioner was promoted to the post of U.D.A. The Assam Khadi and Village Industries Board (herein after referred to as the Khadi Board) was

constituted pursuant to the enactment of Assam Khadi Village Industries Board Act, 1955. The Board consisted of members as appointed by the State Government. One such member will be appointed as a Chairman and another as a Secretary. The Board is empowered under the Act to appoint staff as it may consider necessary. Under the provisions of the Act the Board may create post on reasonable scale ordinarily similar to the scale applicable to the Government servants in the State of Assam entrusted with similar responsibilities. Under the said Act the Board is also empowered to employ persons on casual employment as well as honorary workers, if it is necessary to do so in the interest of the work of the Board. The Chairman of the Board is bestowed with the powers for proper functioning of the Board. He shall be a member of the Executive committee nominated by the Board and shall function as the Chairman of the Executive committee. Chairman may also delegate some of his powers and functions to the Vice Chairman. The Secretary shall implement all decisions taken under the provisions of the Act by the Board, the Executive committee and the Chairman and shall exercise general supervision on all matters of the Board. Under the provisions of the Act of 1955, the Government has deep and pervasive control over the activities of the Board.

3.The Service Rules for governing the service conditions of the employees of the Board were required to be framed by the Board. A set of draft Service Rules was prepared in the year 1985 and the same was sent for approval to the competent department in the Government of Assam. However, as per the communication dated 04.11.1988 the same was returned back to the Chief Executive Officer of the Board requiring the Board to re-draft the Service Rules in the model/the format supplied by the A.R.P Department and be re-submitted thereafter along with the schedule at an early date for consideration of the Government. A committee was constituted by the Board for reconsideration of the draft rules and for resubmitting the said draft rules in the model form as indicated by the letter issued by the Deputy Secretary, Government of Assam dated 04.11.1988 and to submit the same for being published. The said committee, thereafter, prepared a set of draft service rules and submitted it to the competent authority in the Board. The said draft service rules were accepted by the authority without any modification and the same was circulated inviting objections from all employees. Although no objections were received by the authorities and although there was no clarity about the enforcement of the said rules by the competent authority, they were considered to be the Rules which will govern the

service conditions of the employees of the board.

4.The petitioner was working in the post of U.D.A at the relevant point in time came to be recommended for further promotion. The department promotional committee by its meeting held on 20.03.2020 prepared a Panel of names for promotion to the next higher post of Superintendent. Four (4) numbers of U.D.As including the petitioner were recommended for promotion to the post of Superintendent. The petitioner's order for promotion was to be made effective only upon the retirement of the incumbent in the post at the relevant point in time. Subsequently, the incumbent, in the post of Superintendent retired on 12.08.2020 and the petitioner was promoted to the post of Superintendent along with the 2 (two) other U.D.A. The petitioner joined in her post on 12.08.2020. Although, the petitioner took charge over post upon promotion but her pay was not fixed in the said post, even after repeated representations to the authority. Subsequently, certain complaints and objections were raised in respect of the promotions given to the some persons including the petitioner. A committee was constituted by the Chairman to examine the said complaints made. The committee upon examining the complaints, made certain suggestions to the Chairman/the Board. The

committee suggested that the pay scale of Assistant Superintendent is higher than U.D.A(HQ). As such U.D.A (HQ) was required to be promoted to the post of Assistant Superintendent. Thereafter, upon receipt of the enquiry/committee report the Board in its 179th meeting held on 11.01.2021 held that the petitioner who was holding the post of UDA (HQ) at the relevant time, had been promoted to the post of Superintendent without holding the feeder post i.e. Assistant Superintendent, ignoring the Panel list prepared by the sub-committee and also in contravention to the Government norms by the guidelines. The petitioner immediately represented before the competent authorities pointing out that under the draft Rules as well as Rules of the Assam Ministerial Service Rules as well as the Model Form B supplied by the Government while returning the draft rules sent for approval, there was no error in her promotion from the post of U.D.A to Superintendent and the subsequent committee report is contrary to the said Rules, the draft rules as well as the Government instructions. The Board, however, decided to re-examine the case of the petitioner and to put up proposal from the promotion to the post of Assistant Superintendent. Pursuant to the discussion held on 30.11.2021 by office order dated 06.11.2021 issued by the Chief Executive Officer, Khadi Board, the promotion order of

the petitioner has been kept in abeyance till the review of the matter. Being aggrieved, the present writ petition has been filed praying for issuance of a writ Certiorari for setting aside and quashing the decisions taken by the Board in its discussion dated 30.11.2021 and the Office Order dated 06.12.2021.

5. This Court while issuing notice vide order dated 21.12.2021 had directed *status quo* as on date to be maintained. The case of the petitioner was contested by the respondent Board by filing their affidavits and disputing the claims of the petitioner. By way of the said affidavit, the Board contended that the draft service rule, that was published for acceptance by the Board employees was not forwarded to the Government for getting approval as the same was not approved in the Board meeting. As such, the second draft service rules could not be accepted as a final service rule of the Khadi Board. That apart, the Khadi Board has an unique quasi government establishment having special types of cadres and posts. As such, the patterns and cadres of the Board employees are not similar to the purely Government establishments and Directorates. It is contended that in the Khadi Board Head Office, there is a promotional cadre or post, which is called the Assistant Superintendent

and which is required to be filled up on promotion form the U.D.A (HQ).

It is further contended that in the sub committee which was constituted by the Board for examining matters relating to draft Rules, promotions etc., and to assist in the promotional process, both the petitioners and one Md. Zakir Khan were included in the said sub committee as they were working in the establishment section dealing with the promotion related files. It is contended that in the report which was furnished, on the page which contained the recommendations regarding the promotion to the post of Superintendent, the said page is found to have been signed only by the said Zakir Khan and the petitioner without having the signatures of the other senior officers of the constituted sub committee for promotion. As such both Zakir Khan and the petitioner misguided the departmental promotional committee for their vested interests and therefore, the same is seen as a serious offence. It is contended that the board is an autonomous body and therefore, all policies made as well as administrative decisions adopted in the Board meeting are approved by the Chairman of the Board. It is contended that the subcommittee examined the matter in details and it found that not only the petitioner but two other officers namely Zakir Khan and Junu Mahanta were also promoted inadvertently to the post of Superintendent from the post of

U.DA. It is contended that in the history of the board, no promotions to the post of Superintendent had been directly made from the post of U.D.A(HQ) by superseding the post of Assistant Superintendent.

6. In response to the affidavit filed by the respondents the petitioner filed an affidavit in reply reiterating her claims made in the writ petition. It is contended in the affidavit in reply that no such rule even in the draft form exists in the Khadi Board, where the Assistant Superintendent is shown to be the feeder post for promotion to the post of Superintendent. It is denied by the petitioner that there was any irregularity committed in the preparation of the Panel or that the petitioner had any role to play in misguiding or attempting to misguide the sub committee members or the board at any point in time.

7. Learned counsel for the petitioner has strenuously urged that while there is no dispute that the Board is an autonomous body, however he contends any such policy decision adopted by the Board must have approval of the Government. There is no dispute that the draft rules, which were prepared by the Board, were never sent to the Government for approval. It is submitted that even assuming though not admitting

that the board is still empowered to proceed on the draft rules prepared, even then the said draft rules cannot operate contrary to the government instructions, which had been communicated to the board requiring the board to redraft the rules in the format communicated to the Board by the appropriate department in the Government. The impugned order issued by the Chief Executive Officer is contrary to all canons of service jurisprudence. As such, the impugned orders passed by the Board and the Chief Executive Officer being contrary to law, the same is required to be interfered with, set aside and quashed and the petitioner be permitted to serve as a Superintendent in terms of her promotion and her pay should be fixed at the pay scales applicable to the post of Superintendent and further all arrear pay from the date of her assumption of duties as a Superintendent be directed to be released.

8. Per contra Mr. P. K. Munir, learned standing counsel, Assam Khadi and Village Industries Board submits that the board is an autonomous body and it is the chairman, who is empowered to take all decisions in respect of service of the employees regarding promotion and appointment. It is submitted that under the Assam Khadi and Village Industries Board, Rules and Regulations, 1961, it is with the approval of

the Chairman that the orders with regard to promotion shall be passed.

9. Learned counsels for the parties have been heard. Pleadings on record have been carefully perused.

10. The Assam Khadi and Village Industries Board was constituted under Section 3 of the Act of 1955. Under Section 3 (2) of the Act, 1955 provided that the Board shall be a body corporate having perpetual succession and a common seal and may use and be used in its corporate name and shall be competent to acquire and hold property both movable and immovable and to contract and do all things for the purposes of the Act. Under section 4 of the Act, 1955, it is provided that the Board shall be constituted of such members as the State Government may appoint. One of such member will be appointed by the State Government as the Chairman and another as the Secretary. Additionally, the Government may also appoint another member as a Vice Chairman. All the members including the Chairman, Vice Chairman, Secretary shall hold office for the period as the State Government may by general or special order direct. Under Section 4 (C) the State Government is empowered on its own motion or in consultation with the Khadi and Village Industries

Commission and the Board to add or omit from the schedule any Khadi or village industry or alter its description of any Khadi or village industry and the schedule shall accordingly be amended. Section 7 of the Act provides that any member of the staff may be appointed by the Board subject to prior approval of the Government in the Finance department. As per Section 26 of the Act, it is provided that the Board shall be guided by such instructions and questions of policy as may be given to the State Government. Under Section 30 of the Act, the board is empowered to make regulations for its internal administration consistent with the Act and the Rules made thereunder. The Board may frame regulations amongst others, for remuneration, allowance and other conditions of service of members of the staff.

11. The Rules framed by the Board are the Assam Khadi and Village Industries Board, Rules, 1961. The Assam Khadi and Village Industries Board, Regulations, 1961 is also framed by the Board. Neither under the Rules nor under the Regulations any provision is prescribed for governing the service conditions of the employees of the Board. However, as referred above, under the provisions of the Section 30 of the Act of 1955, the Board is empowered to make regulations governing service

conditions, remunerations, allowances etc. of the members of the staff of the Board as well as functions and duties of the members of the staff of the board. In terms of the provisions prescribed under the Act read with the Rules and Regulations a draft set of rules was prepared by the Board and forwarded to the Government for approval. The said rules were remitted back to the Board instructing the Board to redraft the rules in the model/format supplied by the ART department, Government of Assam and to be resubmitted along with the schedule at an early date for consideration of the Government. In the category of posts shown in the said communication dated 04.11.1988, issued from the office of the Deputy Secretary, Government of Assam, Handloom Textile and Sericulture Department to the Chief Executive Officer of the Board, amongst the class-II posts, 'Superintendent' is shown as one of the posts. In so far as the class-III posts are concerned, Assistant Superintendent and U.D.A are shown as class-III posts. It is not in dispute that pursuant to the communication dated 04.11.1988 although the service rules were revisited, the same were never approved by the Board for being sent to the Government for approval.

12.A careful perusal of the Act, the Rules and Regulations framed

there under, it is apparent that the Board having been constituted by the Act of 1951 by the State Government, the tenor of the Act reveals that there is a deep and pervasive control by the Government over the board in its functions and activities. It is not disputed by the Board that the service rules which were in the draft stage, required approval of the government and which approval never came because it was never put up for approval in the absence of the Board approving it in the first place. There is no dispute that the communication dated 04.11.1988 reflected the model of the format showing the category of posts and qualifications in respect of the board as well as the manner of promotion. Although the Board has stated that there is a draft Service Rules, the same is not in tune with the instructions received from the Government vide communication dated 04.11.1988. No official order or instructions or resolutions adopted by the Board has been presented before this Court to suggest that the instructions issued to the Board vide communication dated 04.11.1988 has been subsequently amended or altered. Even in the draft rules which were stated to have been prepared subsequently and submitted before the competent authority in the Board, it is seen that in the category of post, the post of Superintendent is shown in class-II (A) and the post of development officer/ planning officer/ publicity officer is

shown as class-II (C). The post of Assistant Superintendent and U.D.A and LDA are shown under category Class-III (A). The counsel for the board has referred to schedule C of the draft rules to project that the post of U.D.A (HQ) is shown to be the feeder post of Assistant Superintendent / Loan Recovery Officer and for the post of Superintendent, the post of Assistant Superintendent and Loan Recovery Officer is shown as a feeder post. Both the schedules appear to be in conflict in respect of the same category of posts. Learned counsel for the respondent has not been able to explain as to the applicability of schedule 'A' schedule 'B' and schedule 'C'. Under these provisions of said draft rules, under the heading promotion, it is prescribed that all promotions shall be made as per Government rules and an employee should be considered for promotion subject to satisfactory conduct and performance.

13. While there is no quarrel with the propositions that the draft rules can also be made the basis for governing conditions of service of the employees, however in view of the provisions of the Act 1955 read with the Rules and Regulations of 1961, it is apparent that any such draft rule would require approval of the Board. This is evident from the averments

made in the affidavit filed on behalf of the board. The communication dated 04.11.1988 issued by the department of Handloom and Textile by the Chief Executive Officer of the Board requiring the Board to reframe the service rules and be forwarded to the Government for approval reflects the category and class of posts with the necessary qualifications. The said communication is also not disputed by the department. A reading of the said communication reveals that the proposed rules are required to be framed in the model/format supplied by the Administrative Reforms and Training (ART) department and the same may be resubmitted for consideration of the Government and in the meanwhile the Government directed the Board to fill up the post in the manner prescribed in the said letter showing the various category of posts along with the qualifications. In the face of such unequivocal position as per the government instructions which are required to be followed by the Board, the submission of the counsel for the board that the promotion of the petitioner has not been given effect to, because of non approval by the Chairman of the Board on the ground that the promotion given to the petitioner is contra the draft rules, cannot be accepted.

14. It is open to the Government to regulate service conditions of the

employees on the basis of Rules which are at the "draft" stage provided there is a clear intention to enforce those rules in the near future. Recourse to such draft Rules is permissible only to meet emergency satiation in the interregnum. If however, the intention is not to enforce or notify the Rules at all then recourse to draft Rules cannot be taken. Draft Rules cannot be treated to the Rules made under Article 309 of the Constitution of India or Rules made under any Statue. To exclude any administrative instruction on the subject covered by the draft Rules. Such draft Rules cannot exclude the jurisdiction of the Government from issuing any executive instructions for regulating the service conditions of the employees to which this draft rules are sought to be applied¹.

15. In the facts of the present case, it is seen that the draft Rules which were framed and sent to the Government for approval was returned back to be resubmitted in the format or modal supplied by the Administrative Reforms and Training (ART) Department. As is evident from the communication dated 04th November, 1988 issued by the Department of Handloom Textile and Sericulture, Government of Assam. While instructing the Board to prepare the draft service Rules in the model or format supplied by Administrative Reforms and Training (ART)

Department and for resubmitting the same along with the schedule at an early date for consideration of the Government. It was instructed that till resubmission of the draft Rules as per the format prescribed, the post mentioned in the said communication are to be filled up in the manner prescribed by way of promotion/direct recruitment with immediate effect. By the said communication, it was also instructed that the Board should consider to frame two draft service Rules- one for gazetted and another for non-gazetted employees.

16. The Board although framed the revised draft Rules, the same, however, was not submitted for approval to the Government as the same was not approved by the Board. Consequently, the instruction issued by the Administrative Reforms and Training (ART) Department vide communication dated 04th November, 1988 laying down the manner in which the posts are to be filled up by promotion or direct recruitment is required to be followed and the same has been followed by the Board.

17. As such it can be said that the revised draft Rules not having the approval of the Board itself and further sent for approval to the Government cannot be accepted to be the Rules which will govern the

service conditions in the face of the administrative instructions issued by the communication dated 04th November, 1988 by the Administrative Reforms and Training (ART) Department. The manner prescribed for filling up the posts by way of promotion/direct recruitment as prescribed in the communication dated 04th November, 1988 issued by the Administrative Reforms and Training (ART) Department, will prevailed over any such draft Rules which does not have approval on the Board itself, and must be held to be binding on the Board for the purposes of governing the service conditions of its employees till such a Rule duly approved by the Board and sent to the Government for its concurrence and approval is notified in the manner prescribed.

18. In view of such discussions, this court finds merit in the submissions made by the petitioner. The writ petition, is therefore, allowed setting aside and interfering with the decisions taken by the board dated 30.11.2021 in so far as the writ petitioner is concerned as well as the office order dated 06.12.2021 issued by the Chief Executive Officer. The respondents are directed to allow the petitioner to perform her regular duties as the Superintendent under the Assam Khadi and Village Industries Board and all pay and emoluments as applicable to the

said post be released forthwith including any arrear pay and emoluments with effect from the date of her assumption of charge in the post of Superintendent under the Assam Khadi and Village Industries Board.

19. Writ petition is accordingly allowed and disposed of in terms of the above. Interim order stands merged with this order.

20. No order as to costs.

JUDGE

Comparing Assistant