

GAHC010011112022



2024:GAU-AS:11341

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/483/2022

ANITA SAIKIA
W/O SRI PINKU MONI SAIKIA
RESIDENT OF NEHRU PARK, NEAR JANAMBHUMI PRESS, JORHAT, ASSAM

VERSUS

THE STATE OF ASSAM AND 6 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, PUBLIC WORKS DEPARTMENT, DISPUR GUWAHATI 781006

2:THE COMMISSIONER AND SPECIAL SECRETARY
TO THE GOVT. OF ASSAM
PUBLIC WORKS DEPARTMENT (BUILDING AND HN) DISPUR GUWAHATI
781006

3:THE UNDER SECRETARY TO THE GOVT. OF ASSAM

PUBLIC WORKS DEPARTMENT (ESTABLISHMENT B BRANCH) DISPUR
GUWAHATI 06

4:THE CHIEF ENGINEER

PUBLIC WORKS (BUILDING) DEPARTMENT
ASSAM
CHANDMARI
GUWAHATI 781003

5:THE EXECUTIVE ENGINEER
PWD

JORHAT ELECTRICAL DIVISION
DIST JORHAT

ASSAM 785001

6:THE SUPERINTENDING ENGINEER

PUBLIC WORKS DEPARTMENT
GUWAHATI ELECTRICAL CIRCLE
FANCY BAZAR
GUWAHATI 781001

7:THE DEPUTY SECRETARY TO THE GOVT. OF ASSAM

PUBLIC WORKS (BUILDING AND HN) DEPARTMENT
DISPUR GUWAHATI 78100

Advocate for the Petitioner : MR. P K ROYCHOUDHURY, MR G DEKA,MR. N G KUNDU

Advocate for the Respondent : SC, PWD,

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the petitioner	: Mr. P.K. Roy Choudhury, Advocate.
For respondents	: Mr. P. Nayak, standing counsel
Date of hearing	: 17.07.2024.
Date of judgment	: 20.11.2024.

JUDGMENT AND ORDER

(CAV)

Heard Mr. P.K. Roy Choudhury, learned counsel for the petitioner. Also heard Mr. P. Nayak, learned standing counsel for the PWD representing all the respondents.

2. In brief, the case of the petitioner is that she had obtained Diploma in Electrical Engineering in the year 1991 from Nagaon Polytechnic. She claims to have been regularly appointed as Electrician under Electrical Section-IV under PWD Jorhat Electrical Sub-Division vide order dated 01.04.1996 issued

by the Executive Engineer, PWD, Jorhat Electrical Division for a period of 3 (three) months and posted in the office of the Assistant Executive Engineer, PWD Electrical Sub-Division, Jorhat. It is also projected that by order dated 09.07.1996, issued by the Executive Engineer, PWD, Jorhat Electrical Division, the service of the petitioner was continued till further orders purportedly in terms of order passed by this Court in CR No. 3034/1996.

3. Her further case is that after obtaining study leave, which was sanctioned vide notification dated 15.02.2005 by the Deputy Secretary to the Govt. of Assam, PWD (Estt.B) Branch, which was extended on 08.11.2007, the petitioner had obtained B.E. (Electrical) Degree from the Jorhat Engineering College. Thereafter, on 12.12.2008, she had submitted an application before the Commissioner & Special Secretary to the Govt. of Assam, PWD with a request to promote her to the post of Assistant Engineer. As the petitioner's prayer and subsequent representations were not considered, the petitioner had approached this Court by filing W.P.(C) 4029/2012. By order dated 22.11.2012, the said writ petition was disposed of by directing the Commissioner & Secretary to the Govt. of Assam, P.W. (NH & Building) Department to consider the grant of stagnation benefit to the petitioner w.e.f. the date of completion of 10 (ten) years of service in the post of Electrician, if found entitled to. By order dated 05.10.2013, passed by the Executive Engineer, PWD, Jorhat Electrical Division, the service of the petitioner as Electrician was regularized in the vacant post which she was holding since 01.09.1996.

4. On 25.10.2013, the petitioner had submitted a representation for upgradation to a rank that suits her qualification if there is any vacant post, which was followed by representation dated 30.01.2014 and 21.03.2014 to the Commissioner & Special Secretary to the Govt. of Assam, PWD (Building & NH).

5. As nothing happened, the petitioner had again approached this Court and by filing W.P.(C) 5252/2015, she had prayed for a direction to the respondents to promote her to the post of Junior Engineer. This Court by order dated 05.08.2019, disposed of the said writ petition by directing the respondent department to consider the case of the petitioner and take necessary action subject to prevailing law to promote the petitioner to the post of Jr. Engineer and to that effect, to examine all the cogent reasons to be urged by the petitioner before the competent authority by way of her representation and to dispose of the representation to be made by the petitioner before the concerned authority of the department, if possible within 3 (three) months from the date of the order by a speaking order. Accordingly, the said writ petition was disposed of.

6. The petitioner had served copy of the said order dated 05.08.2019, passed by this Court in WP(C) 5252/2015. However, the Deputy Security to the Govt. of Assam, PWD (Bldg. & NH), Estt. Branch requested the petitioner to submit a petition before the competent authority urging the cogent reason for disposing of her representation seeking promotion to the post of Junior Engineer (Electrical). The aggrieved petitioner had again approached this Court by filing W.P.(C) 1868/2020 and this Court by order dated 11.03.2020, disposed of the said writ petition by directing that the petitioner will have to first file a representation in term of order dated 05.08.2019 and thereafter, the competent authority shall dispose of the writ petition by passing a speaking order. Accordingly, the petitioner had submitted her representation dated 20.03.2020 before the Commissioner & Secretary to the Govt. of Assam, PWD. The petitioner had submitted another representation dated 05.11.2021. Thereafter, the petitioner had filed W.P.(C) 7149/2021, which was permitted by

this Court to be withdrawn by order dated 05.01.2022. The present writ petition has thereafter been filed for issuance of a direction upon the respondents to consider the case of the petitioner for promotion to the post of Assistant Engineer (Electrical) w.e.f. such date when promotion became due to her.

7. The learned counsel for the petitioner has submitted that the State Govt. in the Public Works Department had issued a draft service rules, being the Assam Technician Establishment Service Rules, 2015 for the Assam Public Works Department, which envisages promotion to the cadre of Junior Engineer (Electrical) from the cadre of Head Electrician/Electrician on possessing a Diploma in Electrical Engineering from a recognized institution. It has further been submitted that under the Assam Subordinate Engineering (Irrigation Department) Service Rules, 1978, a candidate who has passed 3 (three) year diploma course in the respective branch of engineering from a recognized institution, is entitled for direct recruitment to the post of Subordinate Engineer Grade-I and for further promotion in the manner as envisaged therein. Accordingly, it is submitted that few persons who are similarly situated as the petitioner were given the benefit of promotion by taking recourse to Rule 28 of the Assam Engineering (PWD) Service Rules, 1978, which provided power to the Govt. for relaxing the Rules.

8. It has been submitted that pursuant to the projection made by the learned counsel for the petitioner regarding promotion of similarly situated persons, this Court by order dated 08.06.2023, directed the standing counsel for the PWD to obtain instruction, which was reiterated by order dated 13.10.2023, by which direction was issued to obtain instructions regarding the manner and methodology for the promotion of Shri S. Sen Sarma and Shri Abdul Matin Choudhury, who had joined the department as Section Assistant. As per written

instructions dated 27.10.2023 to their learned standing counsel, the hereinbefore named Shri S. Sen Sarma and Shri Abdul Matin Choudhury, who had both joined service as Section Assistant, were promoted as Sub-Engineer Grade-II and then to the next higher post of Sub-Engineer Grade-I, and finally promoted as Assistant Engineer (Electrical). However, it was stated that as per record there is no instance of promotion to the post of Assistant Engineer (Electrical) from the post of Electrician directly in the Guwahati Electrical Division, PWD.

9. In support of his submissions, the learned counsel for the petitioner has cited the case of *Tamil Nadu Administrative Service Officers Association & Anr. v. Union of India & Ors., (2000) 5 SCC 728*.

10. Per contra, the standing counsel for the PWD has submitted that notwithstanding that the petitioner had obtained her B.E. (Electrical) Degree pursuant to study leave granted by the State, but the service rules in force does not envisage promotion of a person holding the post of Electrician to any higher post. It is submitted that the post of Electrician is a non-gazetted post whereas the post of Junior Engineer is a gazetted post. Nonetheless, the petitioner is getting the benefit of Assured Career Progression Scheme (ACPS for short) w.e.f. 01.01.2011 and Modified Assured Career Progression Scheme (MACPS for short) w.e.f. 01.04.2017.

11. It was submitted that in the synopsis of the writ petition, the petitioner has projected that one Bhabesh Ch. Deka had been promoted to the rank of Executive Engineer in PWD, Jorhat Electrical Division, but in paragraph-4 of the additional-affidavit-in-opposition, the respondents have denied about any incumbent by the name of Bhabesh Ch. Deka. It is submitted that Shri S. Sen Sarma and Shri Abdul Matin Choudhury had both joined as Section Assistant

and not as Electrician and therefore, the petitioner cannot claim to be similarly situated as those two persons.

12. It was submitted that pursuant to orders passed by this Court, the representation submitted by the petitioner on 20.03.2020, wherein she had urged for consideration of her promotion to the next higher post keeping in view her seniority and qualification, was disposed of by the Deputy Secretary to the Govt. of Assam, PW (B & NH) Department, Estt. Branch, on the following 3 (three) grounds, viz. (1) there is no prevailing law/ provision for promotion from the post of Electrician (Non-Gazetted post) to Junior Engineer (Gazetted post) in the Assam Engineering Service Rule, 1978; (2) "Assam Technician Establishment Service Rule" is in draft stage and yet to be finalized and notified; and that (3) on approval of "Assam Technician Establishment Service Rules", if the petitioner, Smt. Anita Saikia is found eligible for promotion to the next higher rank, her promotion may be given effect, subject to availability of vacancy and fulfillment of relevant rules.

13. It has also been submitted that the draft service rules, being the Assam Technician Establishment Service Rules was never acted upon and therefore, as and when the said Rule is adopted and/or an appropriate Rule is notified, the petitioner would not have a claim to promotion in the absence of Rules.

14. In support of his submissions, the learned standing counsel for the respondents has placed reliance in the case of (1) *State of Orissa & Ors. v. Jagabandhu Panda*, (2013) 11 SCC 631; (2) *Union of India v. Pushpa Rani & Ors.*, (2008) 9 SCC 242; (3) *State of Haryana & Ors. v. Navneet Verma*, (2008) 2 SCC 65; (4) *P.U. Joshi & Ors. v. Accountant General, Ahmedabad & Ors.*, (2003) 2 SCC 632; and (5) *Dilip Talukdar & Ors. v. State of Assam & Ors.*, 2017

(3) GLR 376.

15. Considered the submissions made by the learned counsel for both sides and also considered the materials available on the record and also considered the cases cited by both sides.

16. In this case, the petitioner has not been able to demonstrate that the draft service rules, i.e. the Assam Technician Establishment Service Rules had been acted upon for any person in service under PWD. The said draft rules of 2015 has not been notified and it appears that the State Government has no intention to notify the said rules. Therefore, though non-granting of promotion to the petitioner is unjust and unfair, it is not open to the Court to invoke any of the provisions of such draft rules particularly when the Government has not provided any explanation as to what the said rules, which was made in the year 2015, has not been brought into force for about 9 (nine) years. We would refer to and quote paragraph 8 of the decision of the Supreme Court of India in the case of *Vimal Kumari v. State of Haryana & Ors.*, (1998) 4 SCC 114, which is as follows:-

8. *In the absence of any decision of the State government that so long as the Draft Rules were not notified, the service conditions of the appellant or the respondent and their other colleagues would be regulated by the "Draft Rules" prepared in 1983, it was not open either to the Government or to any other authority, nor was it open to the High Court, while disposing of the writ petition, to invoke any of the provisions of those Rules particularly as the Government has not come out with any explanation why the Rules, though prepared in 1983, have not been notified for the long period of more than a decade. The delay, or rather inaction, is startling.*

17. The post of Electrician is admittedly an ex-cadre post, but the post is being continued indefinitely. Therefore, in the absence of any rules, promotion cannot be made *dehors* the rules or administrative notifications or

orders in force. If one needs any authority on the same, the case of *Jagabandhu Panda (supra)*, cited by the learned standing counsel for the respondent may be referred to, where earlier decision of the Supreme Court of India in the case of *Tamil Nadu Administrative Service Officers Association (supra)* is referred to and followed.

18. The learned counsel for the petitioner has placed reliance on observations made by the Supreme Court of India in the case of *Tamil Nadu Administrative Service Officers Association (supra)*. Para-29 thereof is quoted below:-

29. *Though prima facie we have accepted the explanation given by the Union of India still we find such posts are being continued by the States concerned even till date. We have not found any reason either in the pleadings or in the arguments addressed on behalf of the Union of India why it has not taken any steps to direct the State Governments concerned to abolish these posts if not required to be encadred. Therefore, we find it necessary to direct the Union of India to consider in consultation with the State Government concerned, as required in the Cadre Rules, review the necessity of either to encadring these ex-cadre/temporary posts or nor and take such other necessary steps. In this process the Central Government shall bear in mind the existence of these posts for the last so many years and if it is so satisfied and finds it necessary in the interest of justice to encadre these posts, it may do so with retrospective date so that officers promoted consequent to such encadrement would have the benefit of the seniority from such date, bearing, of course, in mind the possible conflict that may arise in fixation of inter se seniority and take appropriate decisions in this regard so as to avoid any further disharmony in the service.*

19. The said directions were issued under the unique facts of the case because certain posts in the State were earmarked to be manned by I.A.S. cadre, but the Government had created some posts, which were being continued for long, but not encadred and thereby I.A.S. cadre officers could not be appointed to those posts. Therefore, the observations made in the said case

does not come to the aid of the petitioners in light of the decision of the decision in the case of *Vimal Kumar (supra)*, which is more appropriate in the facts of the present case.

20. In the case of *P.U., Joshi & Ors. v. Accountant General, Ahmedabad & Ors.*, (2003) 2 SCC 632, the Supreme Court of India has categorically held that determination of conditions of service, alteration thereof by amending rules, constitution, classification or abolition of posts, cadres or categories of service, amalgamation, bifurcation of departments, reconstitution, restructuring of patters, etc. all pertain to executive policy and within the exclusive discretion of the State and it was further held that the Government servants have only right to safeguarding rights or benefits already earned, acquired or accrued but they cannot challenge the authority of the State to make amendments or alterations to the rules. Para-10 thereof is quoted below:-

10. *We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/ abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substruction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/posts. There is no*

right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service.

21. The Division Bench of this Court, in the case of *Dilip Talukdar (supra)*, had observed and held in paragraphs 9 to 12 as follows:-

9. *As promotion to higher rank can be considered only from the feeder cadre and since the writ petitioners were not en-cadred in the feeder cadre, the learned Judge opined that they are disentitled to claim promotion to the higher cadre. The learned Judge found that regularization of the incumbents in the temporarily created personal posts, was accepted without protest, with the attendant terms and condition and therefore it was observed that the beneficiaries of the regularization order cannot turn around and assail the decision of the Government, which wanted to confer limited benefits, through the process of regularization.*

10. *On the plea of discrimination vis-à-vis those already en-cadred in the feeder cadre, the Court held that the incumbents regularized against the posts created personal to them are on a different footing as their posts being temporary in nature were not added to the cadre strength in the department. Thus the plea of discrimination was negated visa-a-vis those who were working in the posts within the notified cadre, of the department.*

11. *On the basis of above reasoning, the prayer for promotion made by the ex-cadre incumbents holding posts on personal basis, was found to be untenable and accordingly the cases came to be dismissed, under the common judgment dated 16.3.2015.*

12. *We have seen the reasons recorded by the learned Judge for the impugned verdict and find that the posts against which the writ petitioners were regularized were never added to the notified cadre in the department. Yet no plea was advanced for en-cadrement of the posts held by the affected parties. The promotion in the department can be considered only from the eligible employees in the feeder cadre and the writ petitioner being outside of the cadre, cannot have any enforceable right to claim promotion, particularly when, the regularization order itself stipulates that they are regularized in posts personal to them. Such temporary creation of post cannot automatically add to the cadre strength of the department and claim for promotion from a person holding an ex-cadre post, is not legally tenable. Therefore we see no basis to take a different view in the matter*

than the one taken by the learned Single Judge, in dismissing the cases.

22. In this case, we note that the petitioner had joined service pursuant to order dated 01.04.1996 issued by the Executive Engineer, PWD, Jorhat Electrical Division. Thus, the petitioner has stagnated in the post of Electrician for about 28 (twenty eight) years. It is well settled that when there is no statutory rules holding the field, the Government has the power to issue administrative instructions, which would go to ensure that the petitioner and others similarly situated like her do not suffer any injustice by way of stagnation in her career.

23. Therefore, in light of the discussions above, the petitioner is not found entitled to any relief in this case.

24. Be that as it may, before parting with the records, this Court is inclined to observe that in view of the cases discussed above, it would not be open to this Court to issue any directions to the Government. However, the Government is not only expected to be a model employer, but the Government is committed to bring about a welfare State, and as such, it is hoped that the appropriate Government would make an endeavour to take an administrative decision at the highest level of administration in respect of the grievances of the petitioner by taking note that the Assam Technician Establishment Service Rules, 2015 for the Assam Public Works Department has not yet been notified. However, the observations made in this paragraph shall not be construed as a direction by the Court.

JUDGE

Comparing Assistant