

## THE HIGH COURT OF ORISSA : CUTTACK

### W.P.(C) No.20396 of 2015

In the matter of an application under Articles 226 and 227 of the Constitution of India.

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|--------------------------|----------|--------------|
| Narayan Dash             | ...      | Petitioner   |
|                          | -Versus- |              |
| State of Odisha & others | ...      | Opp. Parties |

For Petitioner : M/s. Dr. J.K. Lenka, P.K. Behera &  
S.K. Acharya

For Opp. Parties : Mr. Bibhu Prasad Tripathy,  
Additional Government Advocate

(For opposite party Nos.1 and 2)

M/s. G. Panda, S.K. Panda, A.K. Jena  
& K. Panda

(For opposite party Nos.3 to 5)

### **P R E S E N T :**

**THE HON'BLE MR. JUSTICE B.K. NAYAK**

**&**

**THE HON'BLE DR. JUSTICE D.P. CHOUDHURY**

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Date of hearing: 24.01.2017

Date of Judgment: 31.03.2017

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**Dr. D.P. Choudhury, J.** Challenge has been made to the inaction of the opposite parties for not promoting the petitioner to the post of Senior Clerk with effect from the date his juniors got promoted to the rank of Senior Clerk.

**FACTS**

**2.** The factual matrix leading to the case of the petitioner is that the petitioner and the opposite party Nos.3 and 4 were appointed as Junior Clerk in the erstwhile undivided district of Sambalpur-Bargarh-Deogarh and Jharsuguda as per order No.54 dated 13.5.1998. At the same time the opposite party Nos.5 and 6 were appointed initially and joined as Junior Clerk on 22.6.1997. Be it stated that in the Gradation list communicated vide Annexure-2 the name of the petitioner finds place at Sl. No.59 and the names of opposite party Nos.3 and 4 find place at Sl. No.60 and 61 respectively but the names of opposite party Nos.5 and 6 find place at Sl. No.39 and 49 respectively.

**3.** It is stated that under Rule 11 (a) and Appendix-B of the Orissa District and Subordinate Courts' Non-Judicial Staff Services (Method of Recruitment and Conditions of Service) Rules, 2008 (hereinafter called "the Rules") promotion to the post of Senior Clerks shall be made from amongst the Junior Clerks, who have passed the departmental examination as laid down in Appendix 'B' annexed to these rules; provided that, if no Junior Clerk as aforesaid is available, a Junior Clerk who has put in not less than 5 years of service as such and is otherwise suitable may be promoted to the post of Senior Clerk on temporary basis subject to the condition that he shall not be allowed any increment in the time scale of pay of the said post of Senior Clerk and shall be reverted as soon as a Junior Clerk having

passed departmental examination is available. It is also made clear in that rule that promotion would be considered on the basis of merit and suitability with due regard to seniority. Be it stated that the opposite party Nos.5 and 6 were promoted on ad hoc basis to the rank of Senior Clerk/U.D. Clerk even though they have not passed the departmental examination as required under the Rules and the petitioner being Junior Clerk having passed the departmental examination under the Rules was already available on the date of ad hoc promotion of opposite party Nos.5 and 6. So, the opposite party Nos.1 and 2 ignoring the Rules promoted the opposite party Nos.5 and 6 on ad hoc basis vide order dated 16.12.2011. Not only this but also the opposite party No.5 was regularized with effect from 24.12.2011 in the promotional post vide order dated 30.9.2012. It is alleged inter alia that opposite party Nos.5 and 6 had not passed departmental examination for promotion to the Senior Clerk till 16.11.2013.

**4.** It is the further case of the petitioner that opposite party No.6 also has not passed the departmental examination till 13.11.2015. On the other hand the opposite party Nos.3 and 4 who were in the Sl. Nos.60 and 61 of the Gradation list published in the rank of Junior Clerk superseded the petitioner and were promoted to the rank of Senior Clerk vide order No.33 dated 29/30.9.2012. The petitioner purportedly has no adverse remark in his C.C.R. and has already passed the departmental examination but was ignored while

his juniors got promoted in terms of the said order passed by the opposite party No.2 vide Annexure-6.

**5.** Then the petitioner made representation on 9.10.2012 ventilating his grievance to the opposite party No.2 but no action was taken. So, the petitioner preferred W.P.(C) No.21681 of 2012 before this Court claiming promotion to the rank of Senior Clerk from the date the opposite party Nos.3 and 4 got promoted by quashing the promotion of opposite party Nos.3 and 4. On 16.5.2013 this Court without expressing any opinion on the merit of the case directed the opposite party No.2 to look into the grievance of the petitioner as made out in his representation by the end of July 2013. Then the opposite party No.2 purportedly promoted the petitioner vide order dated 28.10.2013 to the next higher rank, i.e., Senior Clerk vide Annexure-8 without restoring the seniority and giving consequential service benefits although the petitioner has made representation praying to give him promotion with effect from the date when his juniors got promoted. Thereafter the petitioner continuously made representation to opposite party No.2 through proper channel on 1.2.2014 and 15.12.2014. Be it stated that to the utter surprise of the petitioner the opposite party No.2 rejected the representations of the petitioner on 9.11.2015 on the vague ground that the earlier decision of the District Judge, Bargarh cannot be subject to adjudication at a later stage which would be subversive of the judicial discipline and violation of the Government notification dated 14.3.1963. So, the

present writ petition is filed to quash the promotion of opposite party Nos.3, 4, 5 and 6 to the next higher rank and further promotion of opposite party No.5 to the post of Head Clerk and to direct the opposite party No.2 to promote the petitioner to the rank of Senior Clerk with all service and financial benefits from the date his juniors opposite party Nos.3 and 4 got promoted.

**6.** Per contra, the opposite party No.2 filed counter stating that in accordance with Rule 11 (a) of the Rules the opposite party Nos.5 and 6 were promoted because the opposite party No.5 has given an undertaking that he has passed the Departmental Examination conducted under parent Judgeship of Sambalpur vide Gradation list issued on 22.3.2010. Be it stated that the service of opposite party No.5 was regularized vide order dated 29/30.9.2012 but the service of opposite party No.6 has not been regularized as he has not passed the Departmental Examination.

**7.** The opposite party No.2 has admitted that the petitioner was considered having remained in the zone of consideration to the post of Senior Clerk but he was not found suitable and his juniors, namely, opposite party Nos.3 and 4 being found suitable have got promotion. The promotion to the post of Senior Clerk not only depends on passing of Departmental Examination but the candidate's seniority and suitability are required to be judged. Giving promotion is subjective satisfaction of the appointing authority subject to fulfillment of requirements under Rule 11 (a) of the Act. So, the petitioner was

considered by then but not promoted. It is also stated that it is the prerogative of the appointing authority to give promotion if the Junior Clerk is suitable for promotion in all respect. The representation of the petitioner has been considered by the opposite party No.2 but with the observation that his promotion would be considered at the time of general transfer of the staff. Accordingly he was promoted on 28.10.2013 at the time of general transfer.

**8.** It is further averred in the counter filed by opposite party No.2 that the opposite party No.2 considered petitioner's representation made in 2013 but it was rejected since the earlier decision has been taken by the then District Judge, Bargarh and the State Government notification dated 14.3.1963 states that any decision by the appointing authority at a given point of time cannot be set aside or overruled by the successor as it would amount to impropriety and indiscipline. So, the opposite party No.2 has rightly rejected the representation and set the case of the petitioner at rest.

**9.** The opposite party No.5 filed separate counter stating inter alia that he was appointed as Junior Clerk earlier to the petitioner and he has appeared in the Departmental Examination in the undivided Judgeship of Sambalpur and in the Gradation list it has been mentioned that he has passed the Departmental Examination. It is his further case that the petitioner was not considered by the opposite party No.2 to be promoted. Since in the Gradation list opposite party No.5 is shown to have passed the Departmental Examination, rightly

opposite party No.2 regularised his service with effect from 24.12.2011. At the time of promotion the opposite party No.2 has considered his seniority, merit and suitability. Similarly in the year 2013 the petitioner got promoted to the rank of Senior Clerk. As the opposite party No.5 got promoted to the post of Senior Clerk earlier to the petitioner, he was promoted to the post of Head Clerk vide order dated 29/30.9.2012. So, the promotion of opposite party No.5 being made in accordance with the Rules is correct and legal and petitioner has no right to challenge the same.

### **SUBMISSIONS**

**10.** Dr. J.K. Lenka, learned counsel for the petitioner submitted that Rule 11 (a) of the Rules has been clearly violated in this case by the opposite party No.2 by ignoring the merit of the petitioner. According to him when the promotions of opposite party Nos.5 and 6 were given to the post of Senior Clerk, the petitioner was available having passed the Departmental Examination in 2003-2004 and he should have been promoted instead of opposite party Nos.5 and 6 who have not passed the Departmental Examination by then. He further submitted that even if the opposite party Nos.3 and 4 are in the Gradation List at Sl. Nos.60 and 61 and junior to the petitioner, they have been illegally promoted ignoring the case of the petitioner who is senior to them and there is no adverse remark against the petitioner.

**11.** Dr. Lenka, learned counsel for the petitioner relying upon the decisions reported in ***AIR 2008 SC 1817 (Pramod Kumar v. U.P. Secondary Education Services Commission & others), (2006) 4 SCC 1 (Secretary, State of Karnataka and others v. Uma Devi (3) and others)*** and ***AIR 1972 SC 1767 (R.N. Nanjundappa v. T. Thimmaiah and another)*** submitted that when in the Rules there is clear provision to give promotion basing on the merit and suitability with due regard to the seniority and passing of Departmental Examination is considered as merit under the Rules, debarring the petitioner from promotion to the post of Senior Clerk vis-à-vis his juniors is highly illegal, irregular and improper. He submitted that the promotion of opposite party Nos.3 and 4 by superseding the petitioner to the rank of Senior Clerk is de hors Rule 11 (a) of the Rules and as such the same is liable to be quashed. He further submitted that the opposite party Nos.5 and 6 having not passed the Departmental Examination, a pre-condition for promotion to the higher rank under the Rules, their promotions are also equally illegal and same should be set aside.

**12.** It is further contended on behalf of the petitioner that the petitioner was given promotion in the year 2013 but his seniority was not restored and the opposite party No.2 has rejected his representation for restoring seniority on vague grounds. The ground for rejection of representation is quite unknown to the administrative law because in the instant case by virtue of the order of this Court in



the earlier writ application the opposite party No.2 was directed to consider the representation and in administrative side it is always for the administrative authority to take a view being alive to the facts and circumstances placed before it. When the rules have been framed, the application of the said Government notification is unnecessary. So, the order dated 9.11.2015 vide Annexure-11 rejecting the representation is the outcome of non-application of mind by the opposite party No.2 and the same should also be quashed. The promotion of the petitioner vide Sl. No.100 dated 28.10.2013 may be given effect to from the date the opposite party Nos.3 and 4, who are juniors to the petitioner, got promoted and all consequential service benefits be allowed to the petitioner.

**13.** Mr. B.P. Tripathy, learned Additional Government Advocate submitted that the opposite party Nos.5 and 6 being recruited in the base level post earlier to the petitioner and opposite party Nos.3 and 4 have been rightly placed above them in the Gradation list. Since the performance of the opposite party Nos.5 and 6 was satisfactory and there is proviso to Rule 11 (a) to the effect that Junior Clerk can be temporarily promoted till regular recruitment is made, the opposite party Nos.5 and 6 were temporarily promoted even if they have not passed the Departmental Examination. When the opposite party Nos.5 and 6 are quite senior to the petitioner in the Gradation list, the petitioner cannot challenge their promotion to the rank of Senior Clerk

and further promotion of opposite party No.5 to the rank of Head Clerk.

**14.** It is further submitted by the learned Additional Government Advocate that the petitioner, opposite party Nos.3 and 4 were all placed in the zone of consideration for promotion to the rank of Senior Clerk during 2012 and in view of Rule 11 (a) that the promotion has to be made on the basis of merit and suitability with due regard to seniority, the opposite party Nos.3 and 4 being found more meritorious and suitable were promoted by superseding the petitioner. It may not be out of place to mention that the petitioner, opposite party Nos.3 and 4 have all passed the Departmental Examination. The promotion depends on the subjective satisfaction of the appointing authority and in the instant case the suitability of the petitioner being not up to the mark he was not promoted even if he is senior to the opposite party Nos.3 and 4. He further submitted that in pursuance of the order of this Court the case of the petitioner was again considered in 2013 and he was promoted. With regard to the impugned order passed by the opposite party No.2 on 9.11.2015 vide Annexure-11, the authority has taken the decision of his predecessor into consideration and found no merit in the representation for which it was rejected. According to him, had there been any direction by the superior authority to refurbish the earlier view of his predecessor, the opposite party No.2 could have taken other view. However, he fairly submitted that the opposite party No.2 could have taken a different

view by not supporting the action of his predecessor. He submitted that the writ application having no merit should be rejected.

**15. The points for consideration:-**

(i) Whether the petitioner is entitled to be promoted to the rank of Senior Clerk while his juniors opposite party Nos.3 and 4 got promoted.

(ii) Whether the promotion of opposite party Nos.5 and 6 is liable to be quashed.

**DISCUSSIONS**

**POINT NO.(i) :**

**16.** It is admitted fact that the petitioner and opposite party Nos.3 and 4 were appointed on 13.5.1998. It is also admitted fact that opposite party Nos.5 and 6 joined as Junior Clerk on 22.6.1997 which is about a year before the appointment of the petitioner, opposite party Nos.3 and 4. It is also admitted fact that in the Gradation list published in the cadre of Junior Clerk vide Annexure-2, the name of the petitioner finds place at Sl. No.59 and opposite party Nos.3 and 4 find their place at Sl. Nos.60 and 61 respectively. Similarly the names of opposite party Nos.5 and 6 find place at Sl. Nos.39 and 40 respectively in the said Gradation list in the cadre of Junior Clerk. It is not in dispute that the Rules vide Annexure-12 came into force on 30.12.2008 and both parties are governed by the said Rules.

**17.** Rule 11 (a) is enshrined below for better appreciation:-

**"11. Promotion to Higher Posts-** Promotion to the higher posts shall be subject to passing of the

departmental examination and shall be based on merit and suitability in all respects with due regard to seniority and be made in the following manner, namely –

- (a) Promotion to the post of Senior Clerks shall be made from amongst the Junior Clerks, who have passed the departmental examination as laid down in Appendix 'B' annexed to these rules; provided that if no Junior Clerk as aforesaid is available, a Junior Clerk who has put in not less than 5 years of service as such and is otherwise suitable may be promoted to the post of Senior Clerk on temporary basis subject to the condition that he shall not be allowed any increment in the time scale of pay of the said post of Senior Clerk and shall be reverted as soon as a passed Junior Clerk is available:

Provided that, a Typist who has been appointed as Junior Clerk after passing the departmental examination shall not be required to pass a similar examination again to be eligible for promotion to the post of Senior Clerk".

Appendix 'B' with reference to Rule 11 (a) speaks about Syllabus for the Departmental Examination. It is made clear from Rule 11 (a) that any promotion to the higher posts shall be subject to passing of the departmental examination and shall be based on merit and suitability in all respects with due regard to seniority. So, passing of Departmental Examination is a condition precedent for promotion to the post of Senior Clerk from the Junior Clerk and the promotion should be strictly on merit and suitability, of course with due regard to the seniority. But there is first proviso to the effect that where Junior Clerk having passed Departmental Examination is not available, one who has put in five years service and is otherwise suitable, may be

promoted to the post of Senior Clerk temporarily till a Junior Clerk having all qualification to become Senior Clerk is available. In the event of availability of such Junior Clerk, such person who is promoted temporarily will be reverted, obviously without claiming any seniority in the next higher rank as he is temporarily promoted and not allowed increment in the time scale of pay of the post of Senior Clerk.

**18.** In view of the above provisions, now the case of the petitioner, opposite party Nos.3 and 4 are to be examined. As it appears from the writ petition that petitioner and opposite party Nos.3 and 4 have passed the Departmental Examination. Annexure-5 shows that on 16.11.2013 the Gradation list of Class-III employees was circulated for their information. In the Gradation List it appears the names of opposite party Nos.3 and 4 find place at Sl. No.8 and 9 as Grade-III Bench Clerk with effect from their promotion from the Junior Clerk to the Junior U.D. Clerk/Senior Clerk since 5.10.2012. On the other hand, the name of the petitioner finds place in the Junior Clerk having no promotion to the Junior U.D. Clerk. It may not be out of place to mention that the Grade Pay in the Junior Clerk is Rs.1,900/- and Grade Pay in the Junior U.D. Clerk/Senior Clerk is Rs.2,400/- and both the posts are under the Class-III Grade having one Pay Band, i.e., Rs.5,200-20,200/-. It is also clear from the Gradation List that the Departmental Examination has been cleared by the petitioner, opposite party Nos.3 and 4. Petitioner claims to have passed the Departmental

Examination in 2003-2004 which has not been challenged by the opposite parties in their counter.

**19.** Annexure-6 shows that on 3.9.2012 opposite party Nos.3 and 4 were promoted to the cadre of Junior U.D. Clerk as aforesaid and both the parties admit that Junior U.D. Clerk is the post of Senior Clerk under the Rules having same Grade Pay. Opposite party No.2 in his counter did not dispute such facts. It is revealed from the counter that petitioner was given promotion vide order No.100 dated 28.10.2013 as available from Annexure-A/2. There is nothing found from the counter as to how the Gradation List was issued after the promotion is given to opposite party Nos.3 and 4. It is well known in the service jurisprudence that the publication of the Gradation List precedes the promotion. In the instant case the promotion has preceded the Gradation List of the Class-III employees in the Judgeship of Bargarh.

**20.** As discussed above, the petitioner before 2012 has passed the Departmental Examination. The opposite party Nos.3 and 4 have also passed the Departmental Examination. No doubt the petitioner was senior to opposite party Nos.3 and 4 in the feeder cadre as admitted by both the parties. Opposite party No.2 in the counter has stated in paragraph-8 that as per their records the petitioner has not been promoted to the next higher cadre even if he has passed the Departmental Examination and was in the zone of consideration for promotion to the post of Senior Clerk. Further it is stated in the same

paragraph that a Junior Clerk is required to be eligible in all respect for the purpose of promotion to the post of Senior Clerk because not only he has seniority and passed the Departmental Examination but also should be meritorious and suitable. It is contended by the State that it is always a subjective satisfaction of the appointing authority to promote a Junior Clerk to the post of Senior Clerk subject to fulfillment of all requirements as envisaged in Rule 11 (a) of the Rules. The counter has not explained how the subjective satisfaction of the appointing authority is to be measured even if one person is qualified under the Rules to get promotion. Subjective satisfaction is nothing but personal caprice and whims of the appointing authority but not the requirement of the Rules. It is further mentioned in paragraph-8 of the counter "if the then District Judge, Bargarh debarred Mr. Dash for promotion temporarily, it is then to be assumed that he was found not suitable for being promoted to the post of Senior Clerk at the relevant point of time". Of course the counter does not specify any remark of the then District Judge, Bargarh for not promoting the petitioner. No document is filed to show the reasoning of opposite party No.2 for not giving promotion to the petitioner. The propriety demands that the authority when takes away any right of a person to be promoted, he must record the reasons for his dissatisfaction on the concerned employee. It may not be very elaborate note but the reason must be assigned in brief with due regard to the documents available on record. Mere quoting the dissatisfaction in the counter is not enough to

remove a person from the line of succession to next higher post. Time and again the courts have cautioned for not exercising the administrative power without any valid and proper reason. If at all the petitioner was not found suitable and meritorious in 2012 when promotion was given to opposite party Nos.3 and 4, how could he be able to satisfy the parameters and found suitable in 2013 when he was promoted to the rank of Senior Clerk. Learned Additional Government Advocate could not satisfy us with reasons, which are enough to conclude that the petitioner was wrongly deprived of promotion to the rank of Senior Clerk when opposite party Nos.3 and 4 were promoted. A single document is not placed to show the disentitlement of the petitioner for promotion to the post of Senior Clerk vis-a-vis the service records of opposite party Nos.3 and 4.

**21.** Learned counsel for the petitioner placed reliance on the decision reported in **(2007) 1 SCC (L&S) 192; Sankar Deb Acharya and others v. Biswanath Chakraborty and others** where Their Lordships observed at paragraphs-36 and 39:-

**"36.** The promotion policy announced by the Government would clearly disclose that the consideration is merit-cum-seniority. The streams (*sic* scheme) of the Rules as referred to above and considered, also contemplates passing of departmental examination as a condition precedent for completion of probation and confirmation. In the scheme of the Rules and policy of promotion, the consideration being merit-cum-seniority, the sole basis of judging merit is the passing of the departmental examination.



**39.** When the principle of merit-cum-seniority is applied, it is now a well-settled principle that great emphasis is on merit and ability and seniority plays a less significant role. Seniority has to be given weightage only when merit and ability are approximately equal. (See ***B.V. Sivaiah v. K. Addanki Babu; (1998) 6 SCC 720 : 1998 SCC (L&S) 1656, Central Council for Research in Ayurveda & Siddha v. Dr. K. Santhakumari; (2001) 5 SCC 60 : 2001 SCC (L&S) 772***)”

**22.** With due respect to the said decision, it appears that in that case there is promotion policy brought out by the Government to consider for promotion on the basis of consideration on merit-cum-seniority and passing of Departmental Examination was also a condition precedent for promotion. The present Rule under which we are considering this case is similar to the case as discussed by Their Lordships. So, in the instant case the petitioner and opposite party Nos.3 and 4 having passed the Departmental Examination and without there being any contention of the opposite parties about the adverse entry in ACR of petitioner in preceding 5 years, it cannot be said that the petitioner has no merit or suitability on the date of promotion of opposite party Nos.3 and 4. On the other hand, the petitioner and opposite party Nos.3 and 4 are all meritorious and suitable for promotion. The then District Judge, Bargarh has neither recorded any reason nor the opposite party No.2 produced any documents to show any allegation or demerit of the petitioner for promotion to the rank of Senior Clerk. When the petitioner and opposite party Nos.3 and 4 are all equally meritorious and suitable for promotion, the question of seniority becomes decisive. Since the petitioner is senior to opposite

party Nos.3 and 4 in the feeder cadre as per the Gradation list published in 2009, the petitioner ought to have been promoted to the rank of Senior Clerk and there is no chance of his supercession. On the other hand, the opposite party No.2 has simply failed to substantiate the supercession of the petitioner while giving promotion to opposite party Nos.3 and 4.

**23.** Learned counsel for the petitioner submitted that the petitioner has made representation to restore his seniority but it was ignored for which he had to approach this Court vide W.P.(C) No.21681 of 2012 where this Court directed the opposite party No.2 to look into the grievance of the petitioner. But the opposite party No.2 passed a cryptic order stating that since his predecessor has not considered him for promotion, he is not able to take a decision other than the decision taken by his predecessor for the reason of maintaining propriety and discipline. Counsel for the petitioner submitted that such order of the District Judge passed on 9.11.2015 is capricious and devoid of merit as in administrative law such principle is quite unknown. He further submitted that the opposite parties have not produced any such letter of the Government of Orissa which is relied on by the opposite party No.2 while rejecting the representation of the petitioner. So, he submitted to quash such letter while observing that the petitioner has a case to get his seniority restored.

**24.** Learned Additional Government Advocate submitted that the rejection order of the opposite party No.2 is self-explanatory and

fairly submitted that in the administrative law decision can be taken always basing on the material on record and there is no strait-jacket formula to show that the successive administrative authority will not take a decision by overruling the decision of his predecessor if it is required under law to take a new decision. However, he submitted that the order of rejection is only to justify the decision taken by his predecessor.

**25.** When this Court has passed order in W.P.(C) No.21681 of 2012 to take a view on the representation of the present petitioner, it is obviously to take a fresh look to the grievance of the petitioner. Moreover, under administrative law, propriety and discipline demand that the authority would take a view basing on the facts and law independently. If a fresh look is given, he is supposed to take view independently and either confirm the earlier view or modify the earlier view or replace the same with his new opinion. On perusal of the order of opposite party No.2 vide Annexure-11 it is found that he has simply adhered to the opinion of his predecessor without giving his independent view. He has referred to Government of Odisha Notification No.FI (2)-Estt.111/89 dated 14.03.1963 and observed that any question pertaining to promotion or otherwise of a particular Government servant should only be determined by an authority next higher than the appointing authority in accordance with the established principles governing promotion. Even if such circular is considered it may not be out of place to mention that this Court in the

writ application has permitted the appointing authority to take a fresh view on the representation. So, the opposite party No.2 has misdirected himself by relying upon such notification. However, we are of the opinion that the petitioner ought to have been promoted when opposite party Nos.3 and 4 were promoted in 2012 and the representation of the petitioner has been illegally rejected by the opposite party No.2 vide order under Annexure-11. Point No.(i) is answered accordingly.

**POINT NO.(ii)**

**26.** Learned counsel for the petitioner submitted that the promotion of opposite party Nos.5 and 6 has been made contravening the Rule 11 (a) of the Rules because both of them had not passed the Departmental Examination when they were promoted to the rank of Senior Clerk in the year 2011-2012 respectively. He drew the attention of the Court to the Gradation List. Learned Additional Government Advocate submitted that proviso to Rule 11 (a) allows the appointing authority to give promotion to the Junior Clerk having 5 years experience to the post of Senior Clerk if no Junior Clerk having passed the Departmental Examination is available. He also submitted that opposite party Nos.5 and 6 being senior to petitioner were promoted to the rank of Senior Clerk subject to passing of the Departmental Examination by the time the Junior Clerk having passed the Departmental Examination was available. So, he supported the

decision of the opposite party No.2 in promoting the opposite party Nos.5 and 6 to the rank of Senior Clerk.

**27.** It is revealed from the Gradation List vide Annexure-2 that opposite party Nos.5 and 6 have occupied their position at Sl. No.39 and 49 respectively whereas the petitioner occupies the position at Sl. No.59. Annexure-3 shows that on 16.12.2011 the opposite party Nos.5 and 6 were promoted on ad hoc basis subject to passing of Departmental Examination to the cadre of Junior U.D. Clerk in the scale of pay of Rs.5,200-20,200/- plus Grade Pay of Rs.2,400/-. On further scrutiny of Annexure-3, it appears that Sl. Nos.8 to 16 were promoted to the cadre of Junior U.D. Clerk which is otherwise known as Senior Clerk and O.P. Nos.5 and 6 respectively comes within Sl. Nos.8 to 16. Out of nine candidates only these two candidates have been promoted subject to passing of Departmental Examination. On the other hand, their promotion purportedly have been made according to proviso to Rule 11 (a) of the Act inasmuch as nine persons have been promoted against the vacancies of nine posts and same promotion has been made on one day. But very strangely Annexure-4 shows that the promotion of opposite party No.5 has been regularized with effect from 24.12.2011. When Rule 11 (a) makes it mandatory to clear the Departmental Examination, it is not understood as to how opposite party No.5 got promotion on regular basis without passing the Departmental Examination.

**28.** The counter affidavit of opposite party No.5 stated that from the Gradation list it appears that opposite party No.5 passed the Departmental Examination. But no such document is produced by opposite party No.5 before this Court. Moreover, Annexure-5 shows that the opposite party No.5 was promoted to the post of Head Clerk even if Departmental Examination has not been passed by him although he has passed the Accounts Training Examination which is one of the condition precedents to promote a Senior Clerk to the post of Head Clerk. When his promotion as regular Senior Clerk could not be substantiated due to absence of any document to show that he has passed the Departmental Examination to become the U.D. Clerk/Senior Clerk, mere passing of Accounts Examination and without clearing the Departmental Examination cannot justify his promotion to the post of Head Clerk vide Annexure-5. So, the promotion of opposite party No.5 to the regular cadre of Junior U.D. Clerk and further promotion to the post of Head Clerk are de hors to the Rules. But the material produced before us as to the promotion of opposite party No.6 it appears that he is still continuing in the post of Junior U.D. Clerk but not promoted to the post of Head Clerk and same is clear from Annexure-5. When he has not passed the Departmental Examination as per Annexure-5 and there are employees below him are available having passed the Departmental Examination, his continuance in the post of Junior U.D. Clerk perhaps is not according to the Rules as Rule 11 (a) of the Rules prescribes that the moment the

regular candidate having passed the Departmental Examination is available, the opposite party Nos.5 and 6 would be reverted to the post of Junior Clerk. Thus, on proper anatomy of the facts and the Rules, it appears that the promotion of opposite party No.5 to regular post of Junior U.D. Clerk and temporary promotion to the post of Head Clerk and continuance of opposite party No.6 in the post of Junior U.D. Clerk/Senior Clerk are not proper and legal being de hors the Rules as discussed above.

**29.** It is pertinent to note here that the petitioner is not immediately below opposite party Nos.5 and 6 in the original Gradation list vide Annexure-2. In earlier writ petition, W.P.(C) No.21681 of 2012 the petitioner had claimed promotion vis-à-vis opposite party Nos.5 and 6, but no relief was granted to him. Hence, he is debarred from reagitating the same matter. Similarly petitioner has not brought any material to show that on the date of promotion of opposite party Nos.5 and 6 to the post of Junior U.D. Clerk/Senior Clerk, he was immediately below the opposite party Nos.5 and 6 to be considered for his promotion to the post of Junior U.D. Clerk/Senior Clerk as there are good number of employees available who have passed the Departmental Examination in between the petitioner and the opposite party Nos.5 and 6. When the promotion of opposite party Nos.5 and 6 vide Annexure-3 does not affect the petitioner, the petitioner has no locus standi to challenge the same. Moreover, none of the employees just below opposite party Nos.5 and 6 in the

Gradation list has challenged the promotion of opposite party Nos.5 and 6. Therefore, we are of the view that the promotion of opposite party Nos.5 and 6 and their continuance in regular post even if become illegal, in terms of discussion made above, same is left open when right of petitioner is no way affected by their promotion to the next higher rank. Point No.(ii) is answered accordingly.

### **CONCLUSION**

**30.** From the foregoing discussion, it is made clear that the petitioner has been illegally superseded when his junior opposite party Nos.3 and 4 have been promoted and the order of rejection of his representation by opposite party No.2 vide Annexure-11 is also illegal and improper. Thus, we are of the opinion that the promotion of the petitioner is to be restored with seniority over opposite party Nos.3 and 4 with effect from the date opposite party Nos.3 and 4 got promoted, with all consequential service benefits and accordingly we so direct.

In the result, the writ petition is partly allowed.

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**Dr. D.P. Choudhury, J.**

**B.K. Nayak, J.** I agree.

.....  
**B.K. Nayak, J.**