

**HIGH COURT OF TRIPURA
AGARTALA**

WP(C) NO.335 OF 2021

Sri Abhijit Das, son of Late Jatindra Chandra Das, resident of Village & P.O. Indranagar (South) Surja Sen Road, Agartala, West Tripura.

... Petitioner

Vrs.

1. The State of Tripura, represented by the Secretary & Commissioner to the Department of Finance, Government of Tripura, having his office at New Secretariat Complex, Gorkhabasti, Agartala, PO-Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

2. The Secretary & Commissioner to the Department of Finance, Government of Tripura, having his office at New Secretariat Complex, Gorkhabasti, Agartala, P.O. Kunjaban, PS- New Capital Complex, Sub-Division-Agartala, District-West Tripura.

3. The Hon'ble High Court of Tripura, represented by the Learned Registrar General, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

4. The Learned Registrar General, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

5. The Learned Registrar General (Administration, P & M) In-Charge, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

6. Sri Arindam Das, son of Sri Sital Chandra Das, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

7. Sri Indu Bhusan Sarkar, son of Sri Naresh Ch. Sarkar, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

8. Sri Anil Majumder, son of Sri Balahari Majumder, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

9. Sri Krishnadhan Debnath, son of Sri Surya Kumar Debnath, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

10. Sri Biswajit Mallik, son of Sri Radhasshyam Mallik, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

11. Sri Chinmoy Debbarma, son of Sri Rathin Kumar Debbarma, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

12. Sri Daya Sankar Chakma, son of Sri Gyana Lal Chakma, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

... Respondents.

WP(C) NO.177 OF 2022

Sri Hiralal Hrishidas, son of Late Bishnu Hrishidas, resident of Village-79 Tilla, PO-Kunjaban, PS-East Agartala, Sub-Division-Agartala, District-West Tripura, PIN-799006, aged about 48 years.

... Petitioner

Vrs.

1. The State of Tripura, represented by the Secretary & Commissioner to the Department of Finance, Government of Tripura, having his office at New Secretariat Complex, Gorkhabasti, Agartala, PO-Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

2. The Secretary & Commissioner to the Department of Finance, Government of Tripura, having his office at New Secretariat Complex, Gorkhabasti, Agartala, P.O. Kunjaban, PS- New Capital Complex, Sub-Division-Agartala, District-West Tripura.

3. The Hon'ble High Court of Tripura, represented by the Learned Registrar General, having his office at the Hon'ble High Court of Tripura, P.O. Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

4. The Learned Registrar General, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

5. The Learned Registrar General (Administration, P & M) In-Charge, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

6. Sri Arindam Das, son of Sri Sital Chandra Das, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

7. Sri Indu Bhusan Sarkar, son of Sri Naresh Ch. Sarkar, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

8. Sri Anil Majumder, son of Sri Balahari Majumder, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

9. Sri Krishnadhan Debnath, son of Sri Surya Kumar Debnath, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

10. Sri Biswajit Mallik, son of Sri Radhasshyam Mallik, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

11. Sri Chinmoy Debbarma, son of Sri Rathin Kumar Debbarma, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

12. Sri Daya Sankar Chakma, son of Sri Gyana Lal Chakma, working in the post of Head Clerk, having his office at the Hon'ble High Court of Tripura, P.O.Kunjaban, PS-New Capital Complex, Sub-Division-Agartala, District-West Tripura.

13. Sri Abhijit Das, son of Late Jatindra Chandra Das, resident of Village & P.O. Indranagar (South) Surja Sen Road, Agartala, West Tripura.

... Respondents.

PRESENT

In WP(C) No.335 of 2021

For the petitioner (s)	:	Mr. Somik Deb, Sr. Advocate Mr. Abir Baran, Advocate. Mrs. Riya Chakraborty, Advocate.
For the respondent Nos. 1 & 2	:	Mr. D. Bhattacharya, G.A. Mr. D. Sarma, Addl. G.A.
For the respondent Nos.3,4 & 5	:	Mr. B. N. Majumder, Sr. Advocate. Mr. D. J. Saha, Advocate.
For the respondent Nos. 7 & 10	:	Mr. Samarjit Bhattacharjee, Advocate.
For the respondent Nos.8,9 & 11	:	Mr. Abhijit Sengupta, Advocate.
For the respondent Nos. 6 & 12	:	Ms. Rajashree Purkayastha, Legal Aid Counsel.

In WP(C) No.177 of 2022

For the petitioner (s)	:	Mr. Somik Deb, Sr. Advocate Mr. Abir Baran, Advocate. Mrs. Riya Chakraborty, Advocate.
For the respondent Nos. 1 & 2	:	Mr. D. Bhattacharya, G.A. Mr. D. Sarma, Addl. G.A.
For the respondent Nos.3, 4 & 5	:	Mr. B. N. Majumder, Sr. Advocate. Mr. D. J. Saha, Advocate.
For the respondent Nos. 7 & 10	:	Mr. Samarjit Bhattacharjee, Advocate.
For the respondent	:	Mr. Abhijit Sengupta, Advocate.

Nos.8, 9 & 11

For the respondent : Ms. Rajashree Purkayastha,
Nos. 6 & 12 Legal Aid Counsel.

For the respondent : Mrs. S. Deb (Gupta), Advocate.
No.13

Date of hearing : 19.05.2023

Date of delivery of Judgment
& Order : 15.12.2023

Whether fit for reporting : Yes

HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT & ORDER

Since common questions of facts and law are involved, these writ petitions were heard together on consent of learned counsel appearing for the parties to the *lis* and these are taken up for disposal by this common judgment.

2. The facts, in a nutshell, are that the petitioners of both the writ petitions were initially appointed in the year 2000 to the post of Lower Division Assistant/Typist in the Agartala Bench of the then Gauhati High Court (The High Court of Assam, Meghalaya, Nagaland, Manipur, Tripura, Mizoram & Arunachal Pradesh). Since then they had been rendering their services in the Agartala Bench of the then Gauhati High Court and after 12 (twelve) years of their services, they had been promoted to the post of Bench Assistant in the Agartala Bench in the Pay Band-2 of Rs.5,310-24,000/- with Grade Pay of Rs.2,000/- vide notification dated 05.11.2012 [*Annexure 2* to the WP(C) No.335 of 2021] & notification dated 16.04.2012 [*Annexure 2* to the WP(C) No.177 of 2022] respectively. After a short span, they again had achieved another promotion to the post of Senior Administrative Assistant

under the High Court of Tripura after bifurcation from the then Hon'ble Gauhati High Court, in the Pay Band-2 of Rs.5,310-24,000/- with Grade Pay of Rs.2,100/- vide notification dated 06.08.2013 [**Annexure-4** to the writ petition No.335 of 2021].

2.1 The petitioners contended that the private respondents namely, Sri Arindam Das, Sri Anil Majumder, Sri Krishnadhan Debnath, Sri Chinmoy Debbarma and Sri Dayasankar Chakma were appointed to the post of Lower Division Assistant/Typist in the Agartala Bench of the then Gauhati High Court with effect from 01.04.2002 i.e. after about two years from the date of initial appointment of the petitioners to the said post of Lower Division Assistant/Typist. Subsequently, the Registrar General, High Court of Tripura vide notification dated 18.02.2016 [**Annexure 6** to the writ petition No.335 of 2021] promoted nine persons including the petitioners and the aforesaid private respondents to the post of Head Clerk Grade in the Pay Band-2 of Rs.5,700-24,000/- with Grade Pay of Rs.4,200/- in order of preference therein noting that the same represents their *inter se* seniority.

The notification dated 18th February, 2016 is the main bone of contention of these two writ petitions because the petitioner in WP(C) No.335 of 2021 and the petitioner in WP(C) No.177 of 2022 have been placed at Serial No.8 and 9 respectively in the seniority list i.e. at the bottom of private respondents, which the petitioners have allegedly claimed that they have been superseded by the private respondents.

2.2 Feeling aggrieved by the said seniority position, the petitioners had submitted their representations for correction of their seniority position, but, those were rejected vide communication dated 28.04.2016 [**Annexure-9** to the Writ Petition No.335 of 2021] only on the ground that they had poor

recordings in their Annual Confidential Reports (ACRs, for short) than that of the private respondents. Having dissatisfied with the said reply dated 28.04.2016, petitioner Sri Abhijit Das had submitted another representation to the Respondents-High Court on 30.12.2020 soliciting his grievances, but, that representation has not been addressed to till today.

2.3 The petitioners have assailed another Notification dated 23.03.2021, issued by the respondents-High Court of Tripura whereunder one of the private respondents, namely, Sri Arindam Das has been again promoted to the post of Superintendent (Group-B Gazetted) regardless of their original i.e. initial seniority position.

2.4 With the aforesaid facts and grievances, the petitioners have presented the above two writ petitions. WP(C) No. 335 of 2021 has been taken up as lead case with the consent of the learned counsels appearing for the parties and for brevity, the reliefs sought for therein may be reproduced hereunder:

- (i) *“Issue Rule, calling upon the respondents and each one of them, to show cause as to why a Writ of Certiorari and/or in the nature thereof, shall not be issued for directing them, to transmit the records, relevant to the subject matter of this writ petition for rendering substantive and conscionable justice to the petitioner, and for quashing/setting aside the impugned Notification dated 18.02.2016 (Annexure-6 supra) insofar as the same places the petitioner below the private respondents, the impugned Communication dated 28.04.2016 (Annexure-9 infra) & the impugned Notification dated 23.03.2021 (Annexure-11 supra);*
- (ii) *Issue Rule, calling upon the respondents and each one of them, to show cause as to why a Writ of Mandamus and/or in the nature thereof, shall not be issued for mandating/directing the respondents, to revoke/rescind the impugned Notification dated 18.02.2016 (Annexure-6 supra) insofar as the same places the petitioner below the private respondents, the impugned Communication dated 28.04.2016 (Annexure-9 supra) & the impugned Notification dated 23.03.2021 (Annexure-11 supra), and thereupon, restore the seniority of the petitioner over the private respondents, and grant promotion to him to the post of*

Superintendent (Group-B Gazetted), with effect from the date of promotion of the private respondent, namely, Sri Arindam Das, with all consequential benefits thereof:

(ii)(a) Issue Rule, calling upon the respondents and each one of them, to show cause as to why a Writ of Mandamus and/or in the nature thereof, shall not be issued for mandating/directing the respondents to place the petitioner above the private respondents, thereby interfering with the impugned Notification dated 18.02.2016, the impugned Communication dated 28.04.2016 and the impugned Notification dated 23.03.2021, and accord promotion to the petitioner to the post of Head Clerk Grade above the private respondents with all consequential benefits thereof;

(ii)(b) Issue Rule, calling upon the respondents and each one of them, to show cause as to why a Writ of Prohibition and/or in the nature thereof, shall not be issued for restraining/prohibiting the respondents, from according any promotion, in favour of the private respondents, in furtherance of the impugned Notification dated 18.02.2016, the impugned Communication dated 28.04.2016 and the impugned Notification dated 23.03.2021, till the final decision of this writ petition.”

3. Heard Mr. Somik Deb, learned senior counsel assisted by Mrs. Riya Chakraborty, learned counsel appearing for the petitioners in both the writ petitions.

Also heard Mr. B. Nandi Majumder, learned senior counsel assisted by Mr. D.J.Saha, learned counsel appearing for the respondents-High Court; Mr. D. Bhattacharya, learned GA assisted by Mr. D. Sarma, learned Addl. GA appearing for the State-respondents; Mr. Samarjit Bhattacharjee, Mr. Abhijit Sengupta; Ms. Rajashree Purkayastha and Mrs. S. Deb (Gupta), learned counsels appearing for the private respondents.

4. Mr. Deb, learned senior counsel at the time of hearing contended with vehemence that the post of Head Clerk/Accountant is to be filled up by promotion, from the feeder post of Senior Administrative Assistant, on the

basis of seniority-cum-merit. Mr. Deb, learned senior counsel reiterated that promotion by applying the principle of seniority-cum-merit would mean that there cannot be any relative assessment of *inter se* merit, and once, a government servant meets the requisite benchmark, promotion has to be made on the basis of *inter se* seniority. In the instant cases, the petitioners have been completely superseded by the private respondents merely on the basis of poor ACR rating. He has challenged the legality and validity of the Communication dated 28.04.2016 whereby it has been noted that the Order of promotion was issued, solely on the basis of merit, even though, no statutory rule has been placed on record to substantiate such conclusion. Learned senior counsel had given much emphasis to the Rules 14 & 15 of the High Court of Tripura Services (Appointment, Conditions of Service and Conduct) Rules, 2014 (here-in-after referred to as the 'Service Rules, 2014'). Drawing attention to Rules 14 & 15 of the Service Rules, 2014 Mr. Deb, learned senior counsel contended that in all grades of the High Court, promotions have been made only on the basis of seniority, and therefore, adoption of such unique process of marks allocated against the ACR gradings for 5(five) years for promotion to the post of Head Clerk Grade has resulted in gross injustice to the petitioners since the principle of seniority-cum-merit has been altered by the principle of merit-cum-seniority, leaving no space for seniority which is contrary to the settled principle of promotion by way of seniority-cum-merit. Mr. Deb, learned senior counsel emphatically confronted the following parameters as fixed by the High Court in contrary to Rule of promotion to the post of Head Clerk Grade, which reads thus:

“...As far as the posts which are to be filled in on the basis of seniority-cum-merit are concerned, I feel that it would be proper

to allot 25 marks for seniority and 25 marks for merit. The criteria in this regard will be as follows:-

As far as merit is concerned, ACRs of each employees for the last five years have been considered. An employee getting overall grading 'outstanding' will get 5 marks, 4 for 'very good', 3 for 'good', 2 for 'fair' and for 'poor' 0 marks...."

According to learned senior counsel, the High Court, particularly, Hon'ble the Chief Justice arbitrarily exercised his jurisdiction by way of flouting the established rules construing the principles of seniority-cum-merit for the purpose of promotion.

In support of his submission, Mr. Deb, learned senior counsel has referred to the following decisions:

- i. *(2022) 5 SCC 150 [Rama Negi Vrs. Union of India & Ors.];*
- ii. *(1974) 3 SCC 91[Haryana State Electricity Board Vrs. State of Punjab & Ors];*
- iii. *(1987) 3 SCC 622 [P.D. Aggarwal & Ors. Vrs. State of U.P. & Ors.];*
- iv. *(1990) 4 SCC 174 [Mahadev Kalekar & Ors. Vrs. State Bank of Hyderabad & Ors.];*
- v. *(1998) 8 SCC 685 [State of U.P. & Ors. Vrs. Raj Bahadur Singh & Anr.]*
- vi. *AIR 1976 SC 490: (1976) 2 SCC 310 [State of Kerala & Anr. Vrs. N.M.Thomas & Ors.] and*
- vii. *(1998) 6 SCC 720 [B.V. Sivaiah & Ors. Vrs. K. Addanki Babu & Ors];*
- viii. *(2002) 10 SCC 359 [Ved Prakash & Ors. Vrs. State of Haryana & Ors.]*

5. At the very outset, Mr. Nandi Majumder, learned senior counsel appearing for the respondents-High Court submitted that the promotion list issued vide notification dated 18.02.2016 by the Hon'ble High Court showing the placement of the petitioners at Serial No. 8 & 9 respectively was a conscious decision of the then Hon'ble Chief Justice dated 17.02.2016 on administrative side. He has submitted that a specific order was passed by the

then Hon'ble Chief Justice with respect to the filling up of 9(nine) vacant posts of Head Clerk from the eligible Senior Administrative Assistant taking into consideration the diverse merit of the candidates and directed that the seniority of the employees on promotion to the grade of Head Clerk will be on the basis of Merit List drawn up by the Registrar General which was based on the formula evolved by the Hon'ble Chief Justice as per His Lordship's order dated 14.07.2014.

5.1 Mr. Nandi Majumder had drawn my attention to the ***Annexure R/2 & R/3*** to the counter affidavit of WP(C) No.335 of 2021, which read as follows:-

ANNEXURE-R/2 [Note dated 14.07.2014]

"I have perused detailed note of the Registrar General. As far as the post of Superintendent is concerned, the same has to be filled in on the basis of merit-cum-seniority. The system which I have followed is that the employee has been given 1(one) mark for each completed year of service in the grade excluding the minimum service in the lower grade which is necessary for being considered for the higher post upto a maximum of 10 marks. Therefore, where three years service is required in the lower grade, in case of an employee who has five years of service in the lower grade he will get 2 marks for his seniority and the employees having 13 or more years of service will get 10 marks for seniority. With regard to merit 40 marks have been allotted in the following fashion:-

ACRs of each of the employees shall be considered for the last 5(five) years. An employee getting overall grading 'outstanding' has been awarded 8 marks, for 'very good' it is 6 marks, for 'good' it is 4 marks, for 'fair' it is 2 marks and for 'poor' 0 marks.

As far as the posts which are to be filled in on the basis of seniority-cum-merit are concerned, I feel that it would be proper to allot 25 marks for seniority and 25 marks for merit. The criteria in this regard will be as follows:-

As far as merit is concerned, ACRs of each employee for the last five years have been considered. An employee getting overall grading 'outstanding' will get 5 marks, 4 for 'very good', 3 for 'good', 2 for 'fair' and for 'poor' 0 marks.

In case of merit-cum-seniority, an employee must have 3 'good' in the last five years to be considered for promotion and in case of seniority-cum-merit, an employee must have at least 2 'good' in the last five years to be considered for promotion.

Where seniority is the only criterion for promotion, the employee senior most in service will be selected subject to the condition that he should have at least one 'good' and not more than 2 'poor' in the

last five years. If an employee does not have one 'good' or has more than 2 'poor' in the last five years shall not be considered fit for promotion.

Registrar General is directed to prepare a chart on the basis of above formula. As far as relaxation is concerned, I shall pass necessary order after preparation of the chart."

ANNEXURE-R/3[Note dated 17.02.2016]

"I have considered the proposal of the Registrar General dated 17.02.2016 for filling up the existing 09 vacant posts in the grade of Head Clerk belonging to Group-C non-gazetted. These posts have to be filled up on the basis of seniority-cum-merit. None of the employees who are under consideration fulfill the requisite essential qualification of having completed three years of service in the feeder post of Senior Administrative Assistant. However, it is necessary to fill up these posts because work of the High Court is suffering.

While making promotions merit cannot be ignored because I find that there is a lot of disparity in the overall grading of the employees. To give an example, there is one employee who has five 'Outstanding' grading in the last five years' ACRs whereas another employee has four 'Good' and one 'Very Good' grading. As such they cannot be equated. I am of the view that relaxation may be granted and all the nine vacant posts in the grade of Head Clerk be filled up but the seniority of the employees on promotion will be as per the merit drawn up by the Registrar General on the basis of the formula evolved as per my Order dated 14.7.2014.

After the nine vacant post of Head Clerk grade are filled up, nine posts of Senior Administrative Assistant shall fall vacant. Two Bench Assistants have more than three years service as Junior Administrative Assistant and they may be promoted as Senior Administrative Assistants in the order of their present seniority. Out of the remaining seven posts of Senior Administrative Assistant only three may be filled in at present maintaining the present seniority since only three Junior Administrative Assistants namely, Smti Madhumita Debbarma, Smti Soma Rani Deb (Nag) and Shri Sudip Pal have the requisite essential qualification of three years service in the feeder post."

5.2 It was argued that Hon'ble the Chief Justice had exercised his power as envisaged under proviso to Rule 14 because none of the candidates completed three years' of service as required for promotion to the post of Head Clerk from Senior Administrative Assistant.

5.3 Further, Mr. Nandi Majumder, learned senior counsel reiterated that the petitioners have preferred these writ petitions after a lapse of more than 4 and ½ years from the date of disposal of their representations dated 14.03.2016 & 15.03.2016. Petitioner Sri Abhijit Das of WP(C) No.335 of

2021 had submitted another representation dated 30.12.2020 i.e. after lapse of more than four and half years without any cogent reason for delay. Mr. Nandi Majumder, learned senior counsel appearing for the respondents-High Court quite emphatically submitted that these writ petitions are barred by the doctrine of delay and laches.

5.4 Mr. Nandi Majumder, learned senior counsel has relied upon the following decisions, in support of his argument:-

- i. ***AIR 1968 SC 1113 [The State of Mysore & Anr. Vrs. Syed Mahmood & Ors.];***

5.5 Finally, Mr. Nandi Majumder, learned senior counsel placing strong reliance upon the 'Residuary Power' as contemplated under Rule 26 of the Service Rules, 2014 strenuously argued that- *Hon'ble the Chief Justice has ample power to make such order from time to time as he may deem fit in regard to all matters, incidental or ancillary to these rules not specifically provided for herein or in regard to the matters as have not been sufficiently proved for and the Chief Justice shall have power to relax age or qualification and experience for appointment to the service in appropriate case according to his discretion.* Hence, learned senior counsel for the respondents-High Court prayed for dismissal of these writ petitions.

6. Ms. Purkayastha, learned counsel appearing for the private respondent, Arindam Das submitted that the petitioners have no locus to challenge the promotion of respondent Arindam Das for his promotion to the post of Superintendent, which he holds now since 2021. Ms. Purkayastha, learned counsel appearing for the private respondent, Arindam Das has placed reliance on the decisions reported in ***AIR 1974 SC 2271 [P.S. Sadasivaswamy Vrs The State of Tamil Nadu]; (2009) 5 SCC 1 [Andhra Pradesh Public***

Service Commission Vrs. Balaji Badhavath & Ors. & (2011) 10 SCC 121
[Hardev Singh Vrs. Union of India & Anr.].

7. Learned counsels appearing on behalf of other private respondents have adopted the submissions made by Mr. Deb, learned senior counsel appearing for the petitioners.

8. In reply to the argument advanced by learned counsels appearing for the respondents, Mr. Deb, learned senior counsel for the petitioners submitted that there is no delay or laches in filing the writ petitions before the High Court. To support this submission, Mr. Deb, learned senior counsel eloquently contended that the promotion of the petitioners to the post of Head Clerk was made on 18.02.2016. The petitioners submitted representations on 14.03.2016 & 15.03.2016 respectively. Those representations being not responded to, the petitioners filed the present writ petitions on 28.04.2021 and 21.02.2022. As such, the last promotion of respondent no.6, Arindam Das vide order dated 23.03.2021 and the representation thereafter raising serious objection against such promotion with a prayer for consideration of the promotion of the petitioners rectifying their seniority position gave rise to fresh cause of action to file the instant writ petitions by the petitioners. In support of his submission, learned senior counsel for the petitioners relied upon a decision rendered in the case of *Haryana State Electricity Board Vrs. State of Punjab & Ors.* reported in (1974) 3 SCC 91, wherein, Hon'ble Supreme Court at Para 5 & 6 of the judgment held thus:

“5. On the question of laches various representations and petitions which B.K. Puri had been making consistently were referred to by the High Court and it was considered that it was not a case where relief could be declined on the ground of laches or delay. The High Court quashed the order, dated June 27, 1963, confirming

B.K.Puri in Class I with effect from April 7, 1957 and issued a writ of Mandamus to consider the case for confirmation in Class I with effect from September 1, 1956 or a date earlier than that and refix his seniority vis-à-vis Respondents 3 to 9 in Class I and that of Executive Engineers in the light of interpretation of Rule 7-A as given in the judgment. It may be mentioned that this interpretation was the same as has been accepted by us as correct in the connected appeal, i.e., C.A.456 of 1970.

6. *It appears to us that the judgment of the High Court in this case does not call for any interference. The main stress that was laid by the learned counsel for the State was on the laches and delay on the part of B. K. Puri in filing the petition in the High Court. From the resume of the various dates which has already been given it is apparent that he kept on making representations and moving the appropriate authorities at all stages and the only reason which has been suggested for confirming him Class I subsequent to Respondents 3 to 9 is that he had been passed over on the ground which has already been mentioned. The High Court has dealt with that aspect fully and in view of the interpretation of the proviso to Rule 7-A which has already been discussed in the connected appeal by us it is difficult to disagree with the High Court that there was no justification for not confirming B. K. Puri in Class I from the same date on which the Respondents (3 to 9) were confirmed, namely, September 1, 1956.....”*

9. Here, in the instant writ petitions, I find that the petitioner in WP(C) No.335 of 2021 had at first filed his representation on 14.03.2016 and the petitioner in WP(C) No.177 of 2022 filed his representation on 15.03.2016. The filing of representations was the effect of deprivation of their seniority position to the Post of Head Clerk whereby they were superseded by the private respondents though they were senior to the private respondents by virtue of seniority-cum-merit. Both the representations of the petitioners were rejected by the Respondents-High Court vide communication dated 28th April, 2016. The extract of the said communication reads as follows:

“I have considered the representations of Shri Hiralal Das, Head Clerk, dated 15.03.2016 and Shri Abhijit Das, Head Clerk, dated 14.03.2016 who were promoted as Head Clerk vide Notification dated 18.02.2016 granting relaxation in experience.

The grievance of these two officials is that in the feeder category of Senior Administrative Assistants, they were at Sl. No. 1 and 2 respectively but now they have gone to Sl. Nos. 9 and 8 respectively in the merit of Head Clerks.

While making the promotions I had clearly mentioned that merit cannot be ignored. There was a lot of disparity in the grading of the various employees. Shri Hiralal Hrishidas was graded ; good' for the years 2011, 2012, 2013 and 2014 and 'very good' for the year 2015. On the other hand, Shri Arindam Das who has been placed above them was graded 'outstanding' for all the five years and Shri Indu Bhusan Sarkar was graded 'good' for the year 2011 and 'outstanding' for the remaining four years. The seniority positions in the promotional post have been fixed as per the merit and, therefore, in my opinion, there is no force in the representations made by the representationists, which are accordingly rejected"

10. Subsequently, another representation filed by the petitioner Abhijit Das was also not redressed to by the Respondents-High Court which prompted the petitioners to file these two writ petition seeking remedy.

11. It is therefore, evident that there was a considerable period spent by the petitioners in filing their writ petitions. Learned counsels for the respondents expressively raised their pleas that these writ petitions have been barred by delay and laches because the petitioners have come up with their pleas before this Court after 4 and ½ years. It was their contention that the petitioners could have sought remedy when the cause of action arose on 18.02.2016 i.e. when they were deprived of getting their seniority position in the alleged promotion order. But, they did not. These averments have been intensely resisted by Mr. Deb, learned senior counsel for the petitioners. Mr. Deb, learned senior counsel strongly submitted that the petitioners obviously could have come forward with filing of a case before the Court of law, but, they had hope in their mind that perhaps their seniority matter would be reckoned and considered by the Respondents-High Court at a subsequent promotion. When they were again deprived of their promotion and they had been placed at the bottom of the seniority list, they have come up before the

court finding no other way when they felt that they would be in a great professional loss.

12. Having considered the submission put forward by Mr. Deb, learned senior counsel for the petitioners and in view of the decision rendered in *Haryana State Electricity Board* (supra), I find force that these writ petitions are not barred by doctrine of delay and laches.

13. Now, coming to the main controversy which centered round the impugned promotion order dated 18.02.2016 whereby the private respondents had been shown top of the list allegedly violating the seniority position of the petitioners, I must tally the actual seniority position of the petitioners on the basis of seniority-cum-merit prepared vide Note dated 17.02.2016 [***Annexure-R/3*** to the ***WP(C) No.177 of 2022***] with the promotion list dated 18.02.2016 which was made on the basis of merit-cum-seniority by the Respondents-High Court, which may be reproduced here-in-below for the sake of convenience:

The extracts of Annexure-R/3 to the WP(C) No.177 of 2022

“THE HON’BLE THE CHIEF JUSTICE

This is a proposal for kind consideration of Your Lordship for filling up of existing 09 vacant posts in the grade of Head Clerk (Group-C non-gazetted) in the Pay Band 2 of Rs.5700-24000/- with Grade Pay of Rs.4200/- by promotion from the employees holding the post of Senior Administrative Assistant (Sr. A.A.) of the High Court Service and also to fill up the resultant vacancies thereof as desired by Your Lordship.

The proposal is submitted in seriatim as follows:

A. THE POSTS OF HEAD CLERK GRADE BELONGING TO GROUP-C NON GAZETTED

As per Schedule I(7) of the High Court of Tripura Services (Appointments, Conditions of Service & Conduct) Rules, 2014 (for short the Service Rules), the posts in the grade of Head Clerk will be filled up by promotion from Senior Administrative Assistant having 3 years experience in that grade on the basis of seniority-cum-merit.

In this Registry, there are 17 Sr. A.A. and as on today, none of them has completed eligible period of 03 years of Service in that Grade. I am furnishing below the particulars of the 12 senior most Sr. A.A. who have completed at least more than 1 ½ years

of service in the grade, as per their seniority, indicating their qualification, date of joining in the present post & date of retirement for consideration in filling up the vacant posts of Head Clerk Grade:

Sl.No.	Name & Qualification of the Sr. Administrative Assistant	Date of Joining in present post	Date of retirement
1.	Shri Hiralal Hrishidas, B.Com(Hons)	06.08.2013	28.02.2034
2.	Shri Abhijit Das, B.A.	06.08.2013	31.07.2033
3.	Shri Indu Bhusan Sarkar, B.A.	01.08.2014	31.11.2034
4.	Shri Biswajit Mallik, B.Com	01.08.2014	31.12.2031
5.	Shri Krishnadhan Debnath, M.A.	01.08.2014	31.07.2025
6.	Shri Arindam Das, B.A	01.08.2014	31.12.2036
7.	Sri Anil Majumder, B.A.	01.08.2014	31.03.2025
8.	Shri Chinmoy Debbarma, B.Com	01.08.2014	31.12.2036
9.	Shri Daya Sankar Chakma, B.A.	01.08.2014	30.06.2035
10.	Smti. Mithu Debbarma, B.A.	01.08.2014	30.09.2036
11.	Shri Biplab Chakraborty, B.Com	01.08.2014	30.11.2032
12.	Shri Prasenjit Mukherjee, B.Sc.	01.08.2014	31.03.2028

The remarks of A.C.Rs for the years 2011-2015 of above mentioned 12 Sr. A.A. are given below for favour of kind consideration of Your Lordship as follows:

Sl. No.	Name of the staff	2011	2012	2013	2014	2015
01.	Shri Hiralal Hrishidas	Good	Good	Good	Good	V. Good
02.	Shri A. Das	Good	Good	Good	V. Good	V. Good
03.	Shri I. Bhusan Sarkar	Good	O. standing	O. standing	O. standing	O. standing
04.	Shri Biswajit Mallik	V. Good	V. Good	V. Good	V. Good	V. Good
05.	Shri K. Debnath	V. Good	V. Good	V. Good	O. standing	O. standing
06.	Shri Arindam Das	O. standing	O. standing	O. standing	O. standing	O. standing
07.	Sri Anil Majumder	V. Good	V. Good	O. standing	O. standing	O. standing
08.	Shri Chinmoy Debbarma	V. Good	V. Good	V. Good	V. Good	V. Good
09.	Shri D. Sankar Chakma	V. Good	V. Good	V. Good	V. Good	V. Good
10.	Smti. Mithu Debbarma	Good	V. Good	V. Good	V. Good	V. Good
11.	Shri Biplab Chakraborty	V. Good	V. Good	V. Good	V. Good	V. Good
12.	Shri P. Mukherjee	Good	V. Good	V. Good	V. Good	V. Good"

14. Subsequently, the Respondents-High Court issued the impugned Notification dated 18th February, 2016 with regard to the promotion to the post of Head Clerk from the feeder post of Sr. Administrative Assistant. In that notification the petitioners' name had been shown at the bottom of the list

whereas the private respondents had been shown ahead of them. The said Notification dated 18.02.2016 also may be reproduced here-under for ready reference:

**“HIGH COURT OF TRIPURA
AGARTALA**

No.F.4(22)-HC/2016/3065
February, 2016

Dated, Agartala, the 18th

NOTIFICATION

With kind approval of Hon’ble the Chief, the following employees in the Grade of Senior Administrative Assistant, High Court of Tripura have been promoted to the post of Head Clerk Grade, High Court of Tripura temporarily in the following order of preference, which represents their inter se seniority in the Pay Band-2 of ₹5700-24000/- with Grade Pay of ₹4200/- plus other allowances as admissible under the rules with effect from the date of their joining with relaxation relating to experience as per Rule 26 of the High Court of Tripura Services (Appointment, Conditions of Service and Conduct) Rules, 2014 (as amended):

Sl.No.	Name of the Employees
1.	Shri Arindam Das, Senior Administrative Assistant
2.	Shri Indu Bhusan Sarkar, Senior Administrative Assistant
3.	Shri Anil Majumder, Senior Administrative Assistant
4.	Shri Krishnadhan Debnath, Senior Administrative Assistant
5.	Shri Biswajit Mallik, Senior Administrative Assistant
6.	Shri Chinmoy Debbarma, Senior Administrative Assistant
7.	Shri Daya Sankar Chakma, Senior Administrative Assistant
8.	Shri Abhijit Das, Senior Administrative Assistant
9.	Shri Hiralal Hrishidas, Senior Administrative Assistant

They will perform their present duties until further order(s).

They will remain on officiating basis for a period of 2(two) years as per Rule 121 of the High Court of Tripura Services (Appointment, Conditions of Service and Conduct) Rules, 2014 (as amended).

By order,

Sd/-

(M. Chakraborty)

Registrar General”

15. The petitioners have contended in their writ petitions that both of them had entered into the High Court Services as Lower Division Assistant (LDC), now renamed as Junior Administrative Assistant in the year 2000 which is very much evident from the Note dated 21.01.2021[*Annexure-R/1* to the counter affidavit in *WP(C) No.335 of 2021*] made by the Respondents-High Court. On perusal of the said Note, I find that at the time of recruitment in the year 2000, petitioner Abhijit Das along with three other candidates were recruited by the Gauhati High Court, Agartala Bench, Agartala (now High Court of Tripura) as per the following seniority;

1. Shri Hiralal Rrshidas
2. Shri Abhijit Das
3. Shri Indu Bhusan Sarkar
4. Shri Biswajit Mallik.

In the said Note, the Respondents-High Court further mentioned that in the year 2002, following five persons joined on 01.04.2002 as LDA/LDC:

1. Shri Arindam Das
2. Shri Anil Majumder
3. Shri Krishanadhan Debnath
4. Shri Chinmoy Debbarma
5. Shri Daya Sankar Chakma

16. Therefore, it is established that the private respondents were recruited in the year 2002 i.e. subsequent to the recruitment of the petitioners in the year 2000. In this aspect, there is no ambiguity regarding their seniority position among the nine incumbents by virtue of seniority-cum-merit. Further, on perusal of the Notification dated 06.08.2013[*Annexure-4* to the *WP(C) No. 335 of 2021*], it reveals that both the petitioners got promotion to the post of Sr. Administrative Assistant and there was no dispute regarding their promotion and seniority. But, the disputes cropped up in the year 2016 when

the petitioners have been promoted to the Post of Head Clerk showing their *inter se* seniority at the place of Sl. Nos. 8 & 9 though they were noticeably found senior to the private respondents in the Note dated 21.01.2021 made by the Respondents-High Court.

17. The Respondents-High Court in their counter affidavit unequivocally clarified that the then Hon'ble Chief Justice in administrative side made a Note dated 14.07.2014 [**Annexure-R/2** to the WP (C) No.335 of 2021] wherein it was observed that –

“With regard to merit 40 marks have been allotted in the following fashion:-

ACRs of each of the employees shall be considered for the last 5(five) years. An employee getting overall grading ‘outstanding’ has been awarded 8 marks, for ‘very good’ it is 6 marks, for ‘good’ it is 4 marks, for ‘fair’ it is 2 marks and for ‘poor’ 0 marks.

As far as the posts which are to be filled in on the basis of seniority-cum-merit are concerned, I feel that it would be proper to allot 25 marks for seniority and 25 marks for merit. The criteria in this regard will be as follows:-

As far as merit is concerned, ACRs. of each employee for the last five years have been considered. An employee getting overall grading ‘outstanding’ will get 5 marks, 4 for ‘very good’, 3 for ‘good’, 2 for ‘fair’ and for ‘poor’ 0 marks.

In case of merit-cum-seniority, an employee must have 3 ‘good’ in the last five years to be considered for promotion and in case of seniority-cum-merit, an employee must have at least 2 ‘good’ in the last five years to be considered for promotion.”

18. It is apparent that subsequently, the then Hon'ble Chief Justice on the basis of a proposal made on 17.02.2016 by the Registrar General for filling up the existing 09 vacant posts of Head Clerk, the then Hon'ble Chief Justice in His Lordship's Note dated 17.02.2016 observed that-*while making promotions merit cannot be ignored because I find that there is a lot of disparity in the overall grading of the employees. To give an example, there is one employee who has five ‘Outstanding’ grading in the last five years ‘ACRs whereas another employee has four ‘Good’ and one ‘Very Good’ grading. As*

such they cannot be equated. It has been further clarified in the said Note that relaxation may be granted and all the nine vacant posts in the grade of Head Clerk be filled up but the seniority of the employees on promotion will be as per the merit drawn up by the Registrar General on the basis of the formula evolved as per Note dated 14.07.2014 made by the then Chief Justice.

19. On reading of the above Note made by the then Hon'ble Chief Justice, it is apparently clear that a mechanism had been adopted for consideration of promotion to the post of Head Clerk from the feeder post of Sr. Administrative Assistant. More particularly, in case of promotion, the ACR grading of an employee would be the first priority. In that system, there is provision for allocation of 25 marks for seniority and 25 marks for merit. From the Note dated 14.07.2014 made by the then Hon'ble Chief Justice, it is aptly clear that special priority had been given on the point of merit to be considered for promotion. It has been taken note of grading in the ACR of the employees i.e. for 'Outstanding' 5 marks has been allocated, for 'Very Good' it is 4 marks, for 'Good' it is 3 marks, 2 marks for 'Fair' and 0 marks for 'poor'. That formula had been applied in considering the promotion of the petitioners including the private respondents. Resultantly, on calculation of five years' ACR grading of 09(nine) incumbents w.e.f. 2011 to 2015 the promotion was effected to the private respondents including the petitioners. In a clear perception, reckoning the five years' grading of the employees who got highest marks out of 25 marks on assessment of their ACR during those five years would be considered for their promotion and thus, the impugned notification dated 18.02.2016 was arranged in descending order.

20. Following the aforesaid formula evolved by the then Hon'ble Chief Justice, the private respondent, namely, Arindam Das had further been promoted to the post of Superintendent from the post of Head Clerk vide notification dated 23.03.2021, issued by the Respondents-High Court which is also challenged by the petitioners in these writ petitions.

21. Having gone through the above methodology, a question arose in the mind of this Court that as to how and in what manner these marks have been allotted since in the Service Rules, 2014 no provisions have been prescribed for allocation of marks in order to provide promotion of the employees of the High Court. This is beyond the established rule of the seniority-cum-merit. For the sake of convenience, I may gainfully refer here Rules 14 & 15 of the Service Rules, 2014 which reads as under:

"14. Promotion—

Promotion to the higher post/grade in all the cadres of the service shall be made on the basis of merit, merit-cum-seniority, seniority-cum-merit or seniority subject to rejection of unfit as specified in the schedules.

Provided that suitability test for promotion to certain posts may be taken as may be prescribed by the Chief Justice.

15. Seniority—

(1) The members of the service appointed or promoted in accordance with these rules, on regular basis shall be senior to persons appointed on ad hoc or temporary basis.

(2) The inter se seniority of the members of the service appointed on the basis of the result of the competitive examination shall be determined according to the merit list and where two or more members are placed at the same position in the merit list, the person senior in age shall be senior to the other(s).

(3) The inter se seniority of the members of the service appointed by direct recruitment or promotion in the same/grade in any English calendar year shall be determined from the date of their appointment/promotion, as the case may be.

(4) Where more than one member is promoted in any cadre of the service by the same order, the inter se seniority of persons, so promoted, shall be determined by their inter se seniority in the lower grade of the respective cadre, unless directed otherwise."

22. On going through the above Rules, it reveals that there is no disclosure of any method for providing marks upon any employees of the High Court in determining their promotion.

23. However, the Chief Justice of the High Court of Tripura adopted a mechanism of allocating/distributing marks to the eligible employees in the feeder posts for promotion to the post of Head Clerk grade and exercised his power under Rule 26 of the Service Rules, 2014 to determine the merits of such employees including the petitioners and the private respondents.

24. Before I advert into the legality of exercising such residuary power in determining the merits of the employees in the feeder posts, it would be apposite to revisit the provision embodied in Rule 26 of the Service Rules, 2014, which is encapsulated here-in-below:

“26. Residuary Power—

(1) Nothing in these rules shall be deemed to affect the power of the Chief Justice to make such order from time to time as he may deems fit in regard to all matters, incidental or ancillary to these rules not specifically provided for herein or in regard to the matters as have not been sufficiently provided for.

\ *Provided, that if any such order relates to salary, allowances, leave or pension of the member of the service, the same shall be made with the approval of the Governor.*

(2) The Chief Justice shall have power to relax age or qualification and experience for appointment to the service in appropriate case according to his discretion.

Provided that no person shall get the benefit of relaxation more than once in his service life.”

25. On bare perusal of Rule 26, it would indicate that the Chief Justice can execute his residuary power in regard to all matters and make such order incidental or ancillary to the provisions embodied in the Service Rules,

2014 where no specific Rule is made for a particular subject and in regard to the matters which have not been sufficiently provided for.

26. In the instant case, Service Rules, 2014 specifically prescribes the mode of promotion to the post of Head Clerk from the post of Senior Administrative Assistant under Schedule 1(7) of the Service Rules, 2014. It is specifically provided that the posts in the Grade of Head Clerk will be filled up by promotion from Senior Administrative Assistant having 3(three) years of experience in that grade on the basis of 'seniority-cum-merit'.

27. The principle of the criterion 'seniority-cum-merit' is well settled. In the *State of Kerala Vrs. N.M. Thomas, reported in (1976) 2 SCC 310* explaining the criterion of 'seniority-cum-merit' the Supreme Court held that -- with regard to promotion the normal principles are ***either merit-cum-seniority or seniority-cum-merit***. ***Seniority-cum-merit*** means that given the ***minimum necessary merit requisite for efficiency of administration, the senior though*** the less meritorious shall have priority. It was further observed at Para 18 that --*we thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that—*

- *Given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made.*
- *For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion.*
- *Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.*

27.1 In the case of *K. Samantaray Vrs. National Insurance Co. Ltd.*, reported in (2004) 9 SCC 286, the Hon'ble Supreme Court held that –*the principles of 'seniority-cum-merit' and 'merit-cum-seniority' are conceptually different. For the former, greater emphasis is laid on seniority, though it is not the determinative factor, while in the latter, merit is the determinative factor.*

27.2 In *B.V. Sivaiah Vrs. K. Addhanki Babu & Ors.*, reported in (1998) 6 SCC 720, it was held by the Hon'ble Supreme Court that --*as between the two principles of 'seniority-cum-merit', the criterion of 'seniority-cum-merit' lays a greater emphasis on seniority.*

27.3 In *B.V.Sivaiah (supra)*, the Hon'ble Supreme Court referring to the case of *State of Mysore Vrs. C.R. Shesadri [(1974) 4 SCC 308]* has explained the criterion of 'seniority-cum-merit', which reads thus:

“15. In C.R. Sheshadri [(1974) 4 SCC 308 : 1974 SCC (L&S) 264] the Court was considering the question whether the High Court could have given a direction to the State to give to the respondent therein notional promotion to the post of Deputy Secretary with effect from the date on which his junior secured such promotion. This Court said that such a direction could not be given by the High Court because promotion of a government servant was basically in the Government's discretionary power and that in the absence of positive proof of the relevant service rules, it was hazardous to assume that by efflux of time, the respondent would have spiralled up to Deputy Secretaryship and that the proper direction could only be that the Government would reconsider the case of the respondent afresh for the purpose of notional promotion. In that context, this Court pointed out that if the rule of promotion is one of “sheer seniority”, it may well be that promotion is a matter of course and that if seniority-cum-merit is the rule, promotion is problematical. Since the relevant Rule governing promotion to the post of Deputy Secretary had not been placed before it, the Court was not required to define the criterion of “seniority-cum-merit” and to delineate the fine distinction between the criterion of “seniority-cum-merit” and the criterion of “merit-cum-seniority” in the matter of promotion. In the observations on which reliance has been placed by the learned counsel for the rural banks and the promoted officers, the distinction between “seniority-cum-merit” and “merit-cum-seniority” has been obliterated and both the criteria have been equated. Since comparative assessment of merit is required to be made while applying the criterion of “merit-cum-

seniority” and for “seniority-cum-merit” no such comparative assessment is required, the aforementioned observations in the case of C.R. Sheshadri [(1974) 4 SCC 308 : 1974 SCC (L&S) 264] on which reliance has been placed cannot be regarded as correctly reflecting as to what is meant by the criterion of “seniority-cum-merit”.

27.4 Having observed thus, the Hon’ble Supreme Court in **N.M. Thomas** (*supra*) has ultimately held that—“*the principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment, promotion, retirement, payment of pension and gratuity. With regard to **promotion** the normal principles are **either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. This will not violate Articles 14, 16(1) and 16(2). A rule which provides that given the necessary requisite merit, a member of the backward class shall get priority to ensure adequate representation will not similarly violate Article 14 or Article 16(1) and (2)....***”

27.5 In the case of **Haryana State Electronics Development Corpn. Ltd. Vrs. Seema Sharma**, reported in (2009) 7 SCC 311, the Hon’ble Supreme Court had discussed the distinguishable features for the criterion of ‘seniority-cum-merit’ and the requirement to consider the entirety of the candidate’s service record and held that—“*the principle of merit-cum-seniority puts greater emphasis on merit and ability and where promotion is governed by this principle seniority plays a less significant role. However, seniority is to be given weightage when merit and ability more or less are equal among the candidates who are to be promoted.*

27.6 In so far as the principle of ‘seniority-cum-merit’ is concerned, the Hon’ble Supreme Court, however, had made reference to the case of *Jagathigowda, C.N. Vrs. Cauvery Gramina Bank*, reported in (1996) 9 SCC 677 held that – *the criterion ‘seniority-cum-merit’ gives greater importance to seniority and promotion to a senior person cannot be denied unless the person concerned is found totally unfit on merit to discharge the duties of the higher post. The totality of the service of the employee has to be considered for promotion on the basis of ‘seniority-cum-merit’.*

28. What has emerged out of the aforesaid decisions is that *the principle of equality is applicable to all stages of employment including promotion where the promotion is to be made on the basis of criterion ‘seniority-cum-merit’, then, a senior person though the less meritorious shall have priority to his senior unless and until such senior person is totally declined unfit for promotion. To apply the principle of ‘seniority-cum-merit’ for the purpose of promotion, the inter se seniority of the employees in the feeder post who are eligible for consideration of promotion are to be taken into account. Determination of seniority confers certain rights and the principle of ‘seniority-cum-merit’ gives effect to such rights, flowing from seniority. Comparative assessment of merits of each individual employee under the consideration zone for promotion is not required.*

[Emphasis supplied]

29. In the instant case, it is surfaced that the Chief Justice has made a comparative assessment of merits of the employees holding the feeder post of Senior Administrative Assistant for promotion to the post of Head Clerk grade and in doing so, the junior employees had been given higher marks on the

basis of their ACRs which virtually frustrates the principle of ‘seniority-cum-merit’. The Chief Justice had allotted 25 marks for seniority and 25 marks for merit. The Chief Justice had allotted 5 marks for an employee having his ACR ‘outstanding’, 4 marks for ‘very good’, 3 marks for ‘good’ 2 for ‘fair’ and for poor ‘0’ marks. It is found from the comparative merit list that the petitioner Sri Abhijit Das had obtained three ‘goods’ and two ‘very goods’ and the petitioner Sri Hiralalhrisi Das had obtained four ‘goods’ and one ‘very good’ in their respective ACRs. Since the private respondents had better ACR grading, i.e. found to be meritorious than the two writ petitioners herein, it was decided to promote the private respondents.

30. In view of the principles laid down in the authoritative discussions as regards the principles of ‘seniority-cum-merit’, in the opinion of this court, allocation of equal marks for seniority and merit is illegal and arbitrary and violative of Articles 14 and 16 of the Constitution of India.

31. In the opinion of this Court, Hon’ble the Chief Justice ought to allocate lesser marks for merits because of the well established principle of ‘seniority-cum-merit’. The writ petitioners were never declared as ‘unfit’ to hold the promotional post. Only they were found less meritorious but, admittedly they obtained the benchmark for promotion since they were having at least one ‘good’ and never graded as ‘poor’ in the last 5(five) assessment years. The note of the Chief Justice dated 17.02.2016 is very relevant where he observed that –*Head Clerk posts belonged to Group ‘C’ non-gazetted and those posts had to be filled up on the basis of ‘seniority-cum-merit’ but none of them had completed three years of service in the feeder post of Senior Administrative Assistant which is an essential qualification to fill up those posts. However, it was necessary to fill up those posts because the High*

Court's work was suffering. The Hon'ble Chief Justice had further observed that while making promotions, merit could not be ignored because he found a lot of disparity in the overall gradings of the employees and thus, he had considered the meritorious candidates for promotion to the post of Head Clerk grade.

32. As I said earlier that Hon'ble the Chief Justice of the High Court had deviated from the principle of 'seniority-cum-merit' and given primacy to the merits of the candidates without considering the fact that the petitioners though found less meritorious but were never declared as unfit or unsuitable for promotion to the next higher post by the Chief Justice. It is contended by learned counsel appearing for the High Court that the Chief Justice had ample power to adopt certain procedures and ignored the criterion 'seniority-cum-merit' as envisaged in Schedule 1(7) of the Service Rules, 2014 in view of the power vested upon him under 26 of the Service Rules, 2014 and under Article 229 of the Constitution of India.

33. It is already stated that Schedule 1(7) of Service Rules, 2014 has specifically provided the criterion of 'seniority-cum-merit' for promotion to the post of Head Clerk from its feeder post of Senior Administrative Assistant. So, the residuary power cannot be exercised in a matter where there is specific provision provided in the Rules itself.

34. The discretionary and residuary power upon the Chief Justice under Rule 26 of the Rules, 2014 and the exercise of power under Article 229 of the Constitution of India have to be considered and exercised only in exceptional cases and that too, in a just and equitable manner without

obliterating fundamental principles of equality as enshrined under Articles 14 and 16 of the Constitution of India.

35. Residuary powers given to the Chief Justice does not include the powers to amend the Rules and, therefore, invoking the said Rules to restructure the seniority of the employees possessing the same post in the High Court cannot be sustainable. Furthermore, in my considered view, the residuary power provided under Rule 26 is not meant to be exercised when it would be in direct conflict with what has been expressly provided for in the statute dealing with the subject. The Rule of 'seniority-cum-merit' in a statute relating to promotion from a feeder post to the next higher grade being a statutory provision dealing with the subject-matter, as in the instant case, cannot be altogether ignored by the Hon'ble Chief Justice since such action will offend the equality clauses laid down in Article 14 and 16 of the Constitution of India.

36. The principle emerged from the aforesaid discussions is that the residuary power vested upon the Chief Justice in the Service Rules, 2014 cannot be or should not be construed to mean that it can be exercised notwithstanding the fundamental rights and obligation under the Constitution and this power has to be exercised inconsonance with the provisions of Article 14 and Article 16 of the Constitution. Similarly, the powers conferred upon the Chief Justice under Article 229 of the Constitution of India are also subject to the fundamental principles of Article 14 and 16 of the Constitution of India in view of the law as propounded by the Apex Court in *Renu & Ors. Vrs. District & Sessions Judge, Tis Hazari Courts, Delhi & Anr. [(2014) 14 SCC 50]* wherein, it is further held that the Chief Justice of the High Court has no unfettered power and his power is subject to fundamental principles of Article

14 and Article 16 of the Constitution of India. The relevant observations of the larger bench of the Supreme Court in *Renu (supra)* may be reproduced herein.

“19. In Som Raj v. State of Haryana [(1990) 2 SCC 653 : 1990 SCC (L&S) 380 : (1990) 13 ATC 702 : AIR 1990 SC 1176] this Court held as under : (SCC pp. 658-59, para 6)

“6. ... The absence of arbitrary power is the first postulate of rule of law upon which our whole constitutional edifice is based. In a system governed by rule of law, discretion when conferred upon an executive authority must be confined within clearly defined limits. The Rules provide the guidance for exercise of the discretion in making appointment from out of selection lists which was prepared on the basis of the performance and position obtained at the selection. The appointing authority is to make appointment in the order of gradation, subject to any other relevant rules like, rotation or reservation, if any, or any other valid and binding rules or instructions having force of law. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of rule of law. Discretion means sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority.”

20. In making the appointments or regulating the other service conditions of the staff of the High Court, the Chief Justice exercises an administrative power with constitutional backing. This power has been entrusted to the safe custody of the Chief Justice in order to ensure the independence of the Judiciary, which is one of the vital organs of a Government and whose authority is to be maintained. The discretion exercised by the Chief Justice cannot be open to challenge, except on well-known grounds, that is to say, when the exercise of discretion is discriminatory or mala fide, or the like(s).

21. Even under the Constitution, the power of appointment granted to the Chief Justice under Article 229(1) is subject to Article 16(1), which guarantees equality of opportunity for all citizens in matters relating to employment. “Opportunity” as used in this article means chance of employment and what it guaranteed is that this opportunity of employment would be equally available to all.

23. Article 235 of the Constitution provides for power of the High Court to exercise complete administrative control over the subordinate courts. This control, undoubtedly, extends to all functionaries attached to the subordinate courts including the ministerial staff and servants in the establishment of the subordinate courts. If the administrative control cannot be exercised over the administrative and ministerial staff i.e. if the High Court would be denuded of its powers of control over the other administrative functionaries and ministerial staff of the District Court and subordinate courts other than judicial officers, then the purpose of superintendence provided therein would stand frustrated and such an interpretation would be wholly destructive to the harmonious, efficient and effective working of the subordinate courts. The courts are institutions or an organism where all the limbs complete the whole system of courts and when the constitutional provision is of such wide amplitude to cover both the courts and persons belonging to the judicial office, there would be no reason to exclude the other limbs of the courts, namely, administrative functionaries and ministerial staff of its establishment from the scope of control. Such control is exclusive in nature, comprehensive in extent and effective in operation. (Vide State of W.B. v. Nripendra Nath

Bagchi [AIR 1966 SC 447] , *Baradakanta Mishra v. High Court of Orissa* [(1974) 1 SCC 374 : 1974 SCC (Cri) 128] , *Yoginath D. Bagde v. State of Maharashtra* [(1999) 7 SCC 739 : 1999 SCC (L&S) 1385] , *Subedar Singh v. District Judge, Mirzapur* [(2001) 1 SCC 37 : 2001 SCC (L&S) 141] , *High Court of Judicature of Rajasthan v. P.P. Singh* [(2003) 4 SCC 239 : 2003 SCC (L&S) 424] and *High Court of Judicature of Madras v. R. Perachi* [(2011) 12 SCC 137 : (2011) 2 SCC (L&S) 643] .)

24. In *M. Gurumoorthy v. Accountant General, Assam and Nagaland* [(1971) 2 SCC 137 : AIR 1971 SC 1850] the Constitution Bench of this Court held : (SCC p. 143, para 11)

“11. The unequivocal purpose and obvious intention of the framers of the Constitution in enacting Article 229 is that in the matter of appointment of officers and servants of a High Court it is the Chief Justice or his nominee who is to be the supreme authority and there can be no interference by the executive except to the limited extent that is provided in the article. ...

12. ... Thus, Article 229 has a distinct and different scheme and contemplates full freedom to the Chief Justice in the matter of appointments of officers and servants of the High Court and their conditions of service.”

In that case, this Court spelt out the powers of the Chief Justice of the High Court in the matters of appointment of staff of the High Court, but this Court did not lay down in any way that the Chief Justice can exercise such powers in contravention of the provisions of Articles 14 and 16 of the Constitution while making appointments in the establishment of the High Court.

25. In *H.C. Puttaswamy v. High Court of Karnataka* [1991 Supp (2) SCC 421 : 1992 SCC (L&S) 53 : (1992) 19 ATC 292 : AIR 1991 SC 295] , while dealing with a similar situation and interpreting the provisions of Article 229(2) of the Constitution and the Karnataka State Civil Services (Recruitment to Ministerial Posts) Rules, 1966, this Court held the appointments made by the Chief Justice of the High Court without advertising the vacancies as invalid being violative of Articles 14 and 16(1) of the Constitution. The Court came to the said conclusion as the appointments were made without following the procedure prescribed in the Rules. The Court further observed : (SCC pp. 426-27, paras 10-11)

“10. While the administration of the courts has perhaps never been without its critics, the method of recruitment followed by the Chief Justice appears to be without parallel. ... The methodology adopted by the Chief Justice was manifestly wrong and it was doubtless deviation from the course of law which the High Court has to protect and preserve.

11. The judiciary is the custodian of constitutional principles which are essential to the maintenance of rule of law. It is the vehicle for the protection of a set of values which are integral part of our social and political philosophy. Judges are the most visible actors in the administration of justice. Their case decisions are the most publicly visible outcome. But the administration of justice is just not deciding disputed cases. It involves great deal more than that. Any realistic analysis of the administration of justice in the courts must also take account of the totality of the Judges' behaviour and their administrative roles. They may appear to be only minor aspects of the administration of justice, but collectively they are not trivial. They constitute in our opinion, a substantial part of the mosaic which represents the ordinary man's perception of what the courts are and how the Judges go about their work. The Chief

Justice is the prime force in the High Court. Article 229 of the Constitution provides that appointment of officers and servants of the High Court shall be made by the Chief Justice or such other Judge or officer of the court as may be directed by the Chief Justice. The object of this article was to secure the independence of the High Court which cannot be regarded as fully secured unless the authority to appoint supporting staff with complete control over them is vested in the Chief Justice. There can be no disagreement on this matter. There is imperative need for total and absolute administrative independence of the High Court. But the Chief Justice or any other Administrative Judge is not an absolute ruler. Nor is he a free wheeler. He must operate in the clean world of law, not in the neighbourhood of sordid atmosphere. He has a duty to ensure that in carrying out the administrative functions, he is actuated by same principles and values as those of the court he is serving. He cannot depart from and indeed must remain committed to the constitutional ethos and traditions of his calling. We need hardly say that those who are expected to oversee the conduct of others, must necessarily maintain a higher standards of ethical and intellectual rectitude. The public expectations do not seem to be less exacting."

(emphasis supplied)

(See also State of Assam v. Bhubhan Chandra Dutta [(1975) 4 SCC 1 : 1975 SCC (L&S) 186] .)

26. *In Binod Kumar Gupta v. Ram Ashray Mahoto [(2005) 4 SCC 209 : 2005 SCC (L&S) 501] this Court did not accept the contention that appointment could be made to Class IV post in subordinate courts under the Civil Court Rules without advertisement in the newspapers inviting applications for the posts as that would lead to lack of transparency and violation of the provisions of Article 16 of the Constitution. The Court terminated the services of such appointees who had worked even for 15 years observing that the Court otherwise "would be guilty of condoning a gross irregularity in their initial appointment".*

27. *To say that the Chief Justice can appoint a person without following the procedure provided under Articles 14 and 16 would lead to an indefinite conclusion that the Chief Justice can dismiss him also without holding any inquiry or following the principles of natural justice/Rules, etc. for as per Section 16 of the General Clauses Act, 1897, power to appoint includes power to remove/suspend/dismiss. (Vide Pradyat Kumar Bose v. High Court of Calcutta [AIR 1956 SC 285] and Chief Justice of A.P. v. L.V.A. Dixitulu [(1979) 2 SCC 34 : 1979 SCC (L&S) 99] .) But as no employee can be removed without following the procedure prescribed by law or in violation of the terms of his appointment, such a course would not be available to the Chief Justice. Therefore, the natural corollary of this is that the Chief Justice cannot make any appointment in contravention of the statutory rules, which have to be in consonance with the scheme of our Constitution.*

28. *In State of W.B. v. Debasish Mukherjee [(2011) 14 SCC 187 : (2012) 2 SCC (L&S) 869] this Court again dealt with the provisions of Article 229 of the Constitution and held that the Chief Justice cannot grant any relief to the employee of the High Court in an irrational or arbitrary manner unless the Rules provide for such exceptional relief. The order of the Chief Justice must make reference to the existence of such exceptional circumstances and the order must make it so clear that there had been an application of mind to those exceptional circumstances and such orders passed by the Chief Justice are justiciable. While deciding the matter, the Court placed reliance on its earlier judgment of the Constitution Bench in State of U.P. v. C.L. Agrawal [(1997) 5 SCC 1 : 1997 SCC (L&S) 1100] .*

29. Thus, in view of the above, the law can be summarised to the effect that the powers under Article 229(2) of the Constitution cannot be exercised by the Chief Justice in an unfettered and arbitrary manner. Appointments should be made giving adherence to the provisions of Articles 14 and 16 of the Constitution and/or such rules as made by the legislature.”

37. After analyzing various facets and extent of power conferred upon the Chief Justice under Article 229 of the Constitution of India, the Hon’ble Supreme Court had passed certain directions in ***Renu*** (supra) and one of such directions appears to have crucial relevance to the context of the instant case which may be reproduced here-in-below:

“35. In view of the above, the appeal stands disposed of with the following directions:

“35.1. (i) *****

35.2. (ii) *To fill up any vacancy for any post either in the High Court or in courts subordinate to the High Court, in strict compliance with the statutory rules so made. In case any appointment is made in contravention of the statutory rules, the appointment would be void ab initio irrespective of any class of the post or the person occupying it.*

35.3. (iii) *****

35.4. (iv) *****

35.5. (v) *****

*****”

38. So, the law what is emerged in the case of ***Renu*** (supra) that **statutory authority including the Chief Justice exercising his power under Article 229 of the Constitution of India has no unfettered power on the subject, and must strictly adhere to statutory rule. Added to it, any contradiction to such rule would be void *ab initio* irrespective of any class of posts or the person occupying it.**

[Emphasis supplied]

38.1 It is true that under Rule 26 of Service Rules, 2014, the Chief Justice can pass any order incidental or ancillary to the Rules laid down in the Service Rules, 2014. In the instant case, the Chief Justice of this Court had correctly exercised his power which was found to be incidental or ancillary

when he relaxed the requisite essential qualification of three years' experience for promotion to the post of Head Clerk grade from Senior Administrative Assistant. There is no quarrel that the Chief Justice can invoke the residuary power clause and to pass necessary order in regard to all matters **incidental or ancillary to the Rules laid down in the Service Rules, 2014 to enhance or to bring efficiency in administration of the High Court.** In the instant case, the Chief Justice thought it necessary that to bring efficiency in administration vacant posts of Head Clerk grade were necessarily be filled up, but, none of the employees in the feeder posts were found to be eligible since they had not completed three years of service, which is one of the essential criteria for promotion to the post of Head Clerk.

39. In my considered view, incidental and ancillary power could be exercised only to subvert and abrogate the statutory rules prescribing the essential criterion of 'seniority-cum-merit' for promotion to the post of Head Clerk grade from Senior Administrative Assistant.

40. To appreciate the scope of exercise of residuary power, I have also simultaneously examined the scope of exercising the power incidental and ancillary to the power of the Chief Justice as encapsulated in Rule 26 of the Service Rules, 2014.

41. The doctrine of incidental or ancillary powers is well recognized in the Indian Law. The said doctrine postulates that, everybody, be it a Court or a Tribunal vested with judicial or quasi judicial power is endowed with ancillary and incidental powers as are necessary to discharge the functions effectively for the purpose of doing justice between the parties.

41.1 **Incidental or ancillary powers can be exercised when the statute itself would become impossible of its enforcement and the**

statutory provision would become a dead letter and cannot be enforced unless the ancillary power is exercised. In other words, incidental or ancillary power can be exercised only to enforce a provision effectively but not to usurp [Ref. AIR 1962 SC 486].

[Emphasis supplied]

41.2 The Hon'ble Supreme Court in *R.S. Joshi , STO Vrs. Ajit Mills Ltd., (1977) 4 SCC 78* had delineated the principle that the doctrine of incidental or ancillary power cannot overreach the main statutory provision.

42. In the present case, without relaxation of criterion of 3 years' of essential service for promotion to the post of Head Clerk grade would have been an absurdity to effectuate the principal statutory provision of 'seniority cum merit' as embodied in Schedule 1(7) of the Service Rules,2014. The residuary power was exercised by the Chief Justice in relaxing 3 (three) years' essential criterion and the order thereof was itself said to be incidental and ancillary power conferred upon the Chief Justice to enforce the rule of 'seniority cum merit' as contemplated in the Service Rules,2014.

43. That apart, the order of the Chief Justice to award equal marks of 25 against both 'seniority-cum-merit'; and out of 25 marks awarded against merit, distribution of higher marks on the basis of comparative assessment of merits of the employees under consideration zone purportedly defeats the very object of the rule making authority who wanted to achieve in embodying the criterion of 'seniority-cum-merit' instead 'merit-cum-seniority' for the employees working or holding certain category of posts.

44. Furthermore, the authorities/executives performing administrative functions while exercising such power should not forget that the principle of

‘seniority-cum-merit’ cannot be intermingled with or allowed to be tinkered by the principle of ‘merit-cum-seniority’, which would not only be prejudicial affecting a very valuable and substantive right of the employees, but also counterproductive to the institutional morality.

45. In the opinion of this court, true it is, that the claim of seniority or promotion thereof is not a fundamental right, but it is a civil right; however, when such right is regulated by a statute, then any departure would be arbitrary resulting hostile discrimination, thus to offend Articles 14 and 16(2) of the Constitution of India. Strict observance to such statutory provision with some advisories would keep up morale of the employees in the organization they work.

46. In the instant case, the fundamental principles of seniority-cum-merit have been obliterated, and in my opinion, it needs reconsideration. Accordingly, I remit the matter to Hon’ble the Chief Justice of the High Court to revisit the challenge posed by the petitioners *vis-a-vis* reconstruction of the seniority position of the petitioners and the private respondents impleaded in the above two writ petitions.

The matter be placed accordingly before Hon’ble the Chief Justice.

The instant writ petitions, accordingly, stand disposed.

JUDGE

SAIKAT KAR
sanjay

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