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**(2001) 05 GAU CK 0003**

**Gauhati High Court (Agartala Bench)**

**Case No:** Civil Rule No. 90 of 1992

| | | |
|---|---|---|
| Shyamal Sarkar | | APPELLANT |
| | Vs | |
| State of Tripura and Others | | RESPONDENT |

**Date of Decision:** May 18, 2001

**Acts Referred:**

- Constitution of India, 1950 - Article 14, 226

**Citation:** (2001) 2 GLT 387

**Hon'ble Judges:** A.H. Saikia, J

**Bench:** Single Bench

**Advocate:** A. Chakraborty and P.K. Pal, for the Appellant; U.B. Saha and J. Majumdar, for the Respondent

**Judgement**

1. I have heard Mr. A. Chakraborty, learned senior Counsel assisted by Mr. P.K. Pal, learned Counsel appearing on behalf of the petitioner, Also heard Mr. U.B. Saha, learned Govt. Advocate assisted by Mr. J. Majumder, learned Counsel for the respondents.

2. The sole question raised in this writ petition under Article 226 of the Constitution of India is whether the petitioner, a Constable under Tripura Armed Police, 1st Battalion, is entitled to for promotion from Constable to the rank of Assistant Sub-Inspector of Police (Unarmed Branch), in short ASI, without appearing in further departmental examination though he once appeared and failed.

3. For the sake of proper discussion of the case in hand it would be necessary to refer to two Memorandum dated 3.1.1981 and 10.11.1987 issued by the Govt. of Tripura, Home Department in pursuance of Rule 11 of the existing Recruitment Rules relating to Departmental examination for promotion to the rank of ASI which are annexed as Annexures-6 and 6A to the writ petition as under :--

"No. F.1(5)-PD/80 Annexure-6

GOVERNMENT OF TRIPURA
HOME DEPARTMENT
Dated, Agartala, the 3rd January, 1981

MEMORANDUM

Subject: Promotion examination for Asstt. Sub-Inspector of Police (Men) (Unarmed Branch).

In pursuance of Rule 11 of Recruitment Rules for the post of Assistnat Sub-Inspector of Police (Men) (Un-armed branch) circulated vide Home Department Notification No. F. 1 (6)-PD/80 dated the 24th September, 1980, the State Government hereby prescribes the procedure and syllabus in the schedule, hereto annexed, for selection of Department candidates from the rank of Head constables (A.B/UB), Naiks and such constables of Tripura Police (armed & unarmed branch) other than women constable as have completed 2 years service for promotion to the rank of Asstt. Sub-Inspector of Police (Men) (unarmed branch).

Sd/- S.N. Gupta

Enclo : As stated 3.1.1981

Under Secretary
Government of Tripura

SCHEDULE

Department examination for promotion of Constables etc. as Asstt. Sub-Inspector (un-armed branch) as provided in the Recruitment Rules shall consists of two parts.

2. The examination shall be held under the arrangements of a Board of officers as may be formed by the Inspector General of Police by an order in writing.

Part-I

3. Part-I of the examination shall comprise practical and viva voce tests and evaluation of service records as under. Examination in this part shall be conducted by the Board of officers mentioned above :-

| S.No. | Item of examination | Min. marks assign |
|---|---|---|

| | | |
|---|---|---|
| (i) | Elementary drill (turn-out, general smarness. proficiency in handling rifle/canes/lathies/antiriot equipments etc. | 10 |
| (ii) | Viva voce test to assess general knowledge, mental alert-ness, aptitude, capacity for appreciation of situation etc. | 20 |
| (iii) | Record of Service | 15 |
| (iv) | Length of service 1/2 mark should be allowed for each year from third completed year onwards upto maximum of | 5 |
| | Total | 50 |

4. Service Record shall be assessed as under :-

Out of 15 marks, each candidate will first be given 6 marks to which bonus shall be added and penalties deducted as follows, subject to the condition that total score under this item does not exceed 15 or fall below zero :-

Bonus

(i) For each major reward - 1 mark

(ii) For each minor reward 1/2 mark

5. Only such candidated as secure 60% of marks in Part-I shall be eligible to take Part-II of examination.

6. Part-II of the examination shall consists of written paper of 50 marks of 3 hours duration on law and procedure (without Books). Syllabus of which shall be as prescribed by I.G. from time to time. Question paper setter and examiners for this part shall be appointed by IG of Police. Tripura. To, pass this part of examination, a candidate should secure at least 50% of marks. Those who qualify this part need not re-appear in the same during subsequent examinations and their score shall stand good for the subsequent examination.

Approved List

7. Those who qualify in both the parts and secure 60% in the aggregate, shall be included in approved list in order of merit, to be determined in accordance with respective score. When two or more candidates secure the same marks, they shall be arranged in the approved list as per their inter-se-seniority. Panel thus framed shall remain valid till exhausted.

Promotion

8. Individuals shall be promoted, against available vacancies on officiating basis, strictly in the order in which they figure in the approved list, subject to such adjustments as may be called for giving effect to the provisions of rules relating to representations of schedule tribes, schedules castes, etc. in public services."

Annexure - 6A

Tripura : Agartala

MEMORANDUM

Subject:- Departmental Examination for promotion to the rank of A.S.I. (U/B).

In modification to PHQ Memo. No. 4186-4209/F/35/3GP (CON)/ 86 dated 12.8.1987, it is informed that the candidates who secured 50% in aggregate In item (i) Elementary Drill and (ii) Viva-voce tests of Part-I Examination held earlier shall be declared to have qualified in those items and need not appear in these two items again for qualifying in Part-I Examination. The marks obtained in the earlier examination on the above two items, will be considered with the marks obtained now in item (iii) Record of Service and (iv) Length of service, for tabulation of total marks obtained in part-I Examination in this time. The candidates who secured 60% by this, will be eligible for appearing in Part-II examination. This is in accordance with PHQ Memo No. 3518-42/F/35/IGP (CON) 86 dated 18.6.1987. The break up of marks in Part-I Examination held in 1981 and 1982 had already been circulated vide PHQ Memo No. 3956-75 SPL/IPC (AST)/IGP/(CON)81 dated 11.8.1981 and Principal P.T.C. Letter No. 323-38/RSV/PTC/81 dated 4.2.1982 respectively. The break up of marks item-wise in Part-I examination held in 1979 and 1986 which were not circulated earlier, is being issued shortly.

2. The candidates who qualified in Part-I Examination by securing 60% in aggregate who qualified in Part-II Examination by securing 50% in the earlier examinations, but could not come out successfully because of not obtaining 60% in aggregate, may appear in part-II examination afresh or appear in items (i) Elementary Drill and (ii) viva-voce tests of Part-1 Examination, if they so wish or may request to re-examine item (iii) Record of Service and (iv) Length of Service, so that may get 60% In aggregate in the present examination by qualifying part-I and Part-II examinations for entering into the approved list to be prepared in order of merit in the present examination for promotion to the rank of ASI (U.B.). However, the marks obtained in the latest examination will stand for any part or item.

3. The candidates have to intimate their option for the following to appear in the present examination with reference to the marks obtained in the earlier examinations :-

(a) Items (i) Elementary Drill, and (ii) Viva-Voce tests of Part-I Examination.

(b) Part-II Examination (Written examination on Law and Procedure),

(c) To re-examine items (iii) Record of service and (iv) length of service.

4. The Chairman of the DPC may obtain fresh option from each candidate for appearing in the Departmental Examination for promotion to the rank of ASI(UB) as per proforma given vide PHQ Memo No. 3518-42/F.35/IGP (CON)/86 dated 18.6.1987.

Sd/- N. C. Jatav
Director General of Police Tripura"

No. 5579-604/F.35/IGP(CON)/86 Dated the 10th November, 1987

4. A bare perusal of those Memorandum being administrative instructions it appears that for promotion from the post of Constable to the post of ASI, an incumbent has to appear

in the Departmental examination which consists of two parts - Part-I and Part-II each carrying 50 marks. Part-1 of the Departmental examination shall comprise practical, viva voce and evaluation of service records including the length of service. 5 marks is assigned within the 50 marks for length of service. One must get 30 marks out of total marks of 50 in the Departmental part-I examination i.e; 60% of marks in Part-I examination for making him eligible to appear for the Part-II examination. Part-II departmental examination shall also consist of written paper of 50 marks of 3 hours duration of law and procedure and to pass this part of examination, a candidate should secure at least 50% of marks. Only after completion of said Part-I & II Departmental examination securing the prescribed percentage of marks i.e. 60% and 50% marks respectively, and incumbent shall be eligible for promotion to the post of ASI after obtaining 60% in aggregate out of total marks 100 in both Part-I and Part-II examination. It is also noted from the last sentence of paragraph-2 of the Notification dtd. 10.11.1987 that the marks obtained in the latest examination will stand for any part or item.

5. Now keeping in view the above mentioned Memorandum, the facts of the case of the petitioner may be stated as follows :-

The petitioner has been serving in the Police Department under the respondents since December, 1970 in the post of Constable and in terms of existing Recruitment Rules, on completion of two years of service as Constable from the date of his posting i.e. December, 1970, he has become eligible for consideration of promotion to the rank of ASI. Accordingly, as per decision of the respondents, the petitioner appeared in the departmental examination (Part-I and II) for promotion to the post of ASI for the year 1979. The petitioner obtained 32 marks in the said Part-I Departmental examination making himself qualified to appear in the Part-II examination. The petitioner appeared in the Departmental Part-II examination also. In the said examination, he obtained 26 marks out of total 50 marks. Thus his aggregate marks became only 58 i.e. two marks short from 60 out of 100 which was the qualifying marks for eligibility for promotion to the post of ASI. The result of the said departmental examination held in 1979 was declared on 22.8.1981 showing the marks secured by the candidates including the petitioner and showing the petitioner, in the remarks column, as failed in aggregate as evident from Annexure-I appended to the writ petition.

6. It is stated that on 12.9.1988 the Commandant, Tripura Arms Police, 1st Battalion issued a general circular to all the Superintendents of Police in Tripura including the Dy. Inspector Genera] of Police, Assistant Inspector General of Police, Commandant, 2nd B, TAP, the Commandant HG Bn. And the Principal, PTC Narsingarh, Tripura enclosing a nominal roll of candidates appearing in the Departmental examination for promotion to the rank of ASI(UB) from the respective units in order to facilitate their detailment serialwise on the date of examination to be fixed and intimated later on. In reference to the said circular dated 12.9.1988, the petitioner made a representation on 1.12.1988 (Annexure - 3 to the writ petition) praying to consider his case claiming 35 marks in Part-I instead of 32 marks by way of addition of 3 marks as per Memorandum dated 10.11.1987 and to

enter his name in the list to be prepared in order of merit in the present examination to be held for promotion to the rank of ASI (UB) stating that he appeared in the departmental examination in the year 1979 for promotion to the rank of ASI(UB) wherein he obtained qualifying marks as 26 marks in the part-II examination and taking into consideration of 35 marks plus 26 marks in Part-I and II examination he should get 61 marks, thus, qualifying 60% marks in aggregate for promotion to the post of ASI.

7. Instead of disposing the petition of the petitioner, the respondents asked the petitioner to appear in the Part-II Departmental examination of 1988-89 held on 11.3.1989. By filing reply to the affidavit-in-opposition filed on behalf of the respondents, the petitioner has claimed that he was compelled to appear at the second time examination in 1988-89 only to obey the orders of the superior authority and thereafter final result of the said departmental Part-I & II examination for promotion to the rank of ASI for the year 1988-89 was declared, but the petitioner''s name did not appear in the said list showing only the name of the successful candidates. It is stated that some other incumbents namely Abdul Maleque, Gopaldhan Mishra, and Smriti Bhusan Dasgupta being similarly situated with the petitioner did not appear in the Departmental examination of 1988-89, but they were promoted to the post of ASI without passing the Departmental examination. The grievance of the petitioner is that though the failed in the said Departmental examination (Part-II) appearing under compulsion, he ought to have been promoted in terms of the result of the Departmental examination held in 1979 adding 3 (three) marks from 5 (five) marks earmarked for length of service in consideration of the petitioner''s length of service waiving his appearance in the Part-II Departmental examination in 1988-89.

8. The State-respondents have contested the case by filing affidavit-in-opposition refuting and countering the said averment made in the writ petition. Mr. U.B. Saha, learned Govt. Advocate appearing on behalf of the State respondents relying on the affidavit-in-opposition as well as on records, has denied the submission of representation to the Chairman of DPC as mentioned by the petitioner. It is pleaded that the petitioner had appeared in the Part-II examination in the year 1988-89 of his own by applying option as per existing Rules and instructions but his position in the Part-II Departmental examination had deteriorated as he managed to secure only 15 1/2 marks against 26 marks obtained by him in 1979. It is further stated that had the petitioner not appeared in the Part-II examination in 1988-89, he could have declared passed in aggregate/both parts by evaluation of 2 additional marks considering his length of service as shown earned in his service records in 1988-89. Referring to the cases of other incumbents namely Abdul Maleque, Gopaldhan Mishra, and Smriti Bhushan Dasgupta as mentioned by the writ petitioner, the learned Govt. Advocate has stated that Abdul Maleque, Gopaldhan Mishra and Smriti Bhushan Dasgupta passed in both parts in aggregate and their cases cannot be equated with that of the petitioner. Mr. Saha. learned Govt. Advocate has drawn support to his contention from paragraphs- 13 and 14 which are reproduced as follows :

"13. That, in reply to the averments and/or contentions and/or allegations made in paragraph - 6 of this writ petition, I state that it is not a fact that the petitioner submitted representation to the Chairman of the D.P.C. It may kindly be seen that there is no specific reference to his (Petitioner) representation in the said paragraph. The document marked Annexure- 3 to the writ petition does not show seal and signature of the office and the official respectively in token of receipt of the said representation by the office of the Chairman of the D.P.C. The petitioner nowhere stated in the said paragraph that the said representation was submitted before the Chairman of the D.P.C. through proper channel. I also state that the petitioner could not qualify at the relevant time when the result of the examination was published in the year 1979. The petitioner secured 26 marks in 1979 examination and did not obtain 60 marks in aggregate. The petitioner is not entitled to get the benefit of Memorandum dated 3rd January. 1981 as the petitioner appeared in Part-II Examination again in 1988-89 but failed in that party by securing 15 1/2 marks only. It is stated that had the petitioner not appeared in Part-II Examination in 1988-89, he would have been declared passed in aggregate/both parts by evaluation of 2 additional marks in his service records earned by him in 1988-89.

Save and except what has been stated hereinabove. I deny and dispute all other contentions made therein excepting those related to matter or records.

14. That, in reply to the averments and/or contentions and/or allegations made in paragraph - 7 of the writ petition, I state that it is a fact that in the Result Sheet published under Police Headquarters No. 5455-79/DPC(ASI) IGP/CON/79 dated 15.10.79 S/Shri Abdul Maleque and Smriti Bhushan Das Gupta were shown failed in aggregate obtaining 55 and 57 marks respectively in both parts. It is also submitted that Shri Gopaldhan Mishra failed in part-I Examination in the year 1979 and said Shri Mishra did not take part-II examination and the statement of the petitioner that Shri Gopaldhan Mishra passed in 1988 as he was given additional marks for length of service is not correct. It is stated that Shri Abdul Maleque passed in 1988 because he improved his position in both the parts in 1988 examination. Moreover, the position of the petitioner in part-II examination in 1988 deteriorated as he failed in part-II examination in 1988 as the petitioner obtained 15 1/2 marks as against 26 marks obtained in 1979 examination. Thus the petitioner failed not because he was deprived of additional marks but because he could not qualify in Part - II. The results of the petitioner and other person mentioned in the writ petition for examination of 1979 and 1988 are given below :

| year of Exam held | Name of candidate | Marks obtained in | Remarks |
|---|---|---|---|

| | | Part I | Part II | Aggregate | |
|---|---|---|---|---|---|
| 1979 | 1. C/1445 Smriti Bhushan | 30 | 27 | 57 | Failed in aggregate. |
| | 2. C/H18 Shyamal Sarkar | 32 | 26 | 58 | -Do- |
| | 3. C/22 Abdul Maleque | 30 | 22 | 52 | Failed in Part-II |
| | 4. C/4097 Gopaldhan Mishra | 23 ï¿½ | -- | -- | Failed in Part-1 |
| 1988 | 1. C/1445 Smriti Bhushan Dasgupta | 34 | 27 | 61 | Failed in both parts & aggregate. |
| | 2. C/1118 Shyamal Sarkar | 34 | 1516 | 49 ï¿½ | Failed in Part II |
| | 3. C/22 Abdul Maleque | 38 | 25 | 63 | Passed in both parts & aggregate. |

| | | | | |
|---|---|---|---|---|
| 4. C/4097 Gopaldhan Mishra | 35 ï¿½ | 26 | 61 ï¿½ | Passed in both parts & aggregate. |

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It is stated that one of the candidates viz., Shri Smriti Bhusan Dasgupta who passed in both parts of the examination but failed in aggregate in 1979 was declared passed in the subsequent examination held in 1988-89 as a result of evaluation of additional marks in service records as earned by the individual without appearing in Part-II in subsequent examination but the petitioner who also passed in both parts in 1979 but failed in aggregate by 2 marks short appeared again in Part-II examination 1988-89, but failed in the said examination as he scored 15 1/2 marks in Part - II examination in 1988-89, he would have been declared passed in aggregate/both parts by evaluation of 2 additional marks in his service records earned by him in 1988-89 viz.,

```
Part - I  Part II  Aggregate
(32+2) = 34 26  60
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but for his appearance again In part - II examination in 1988-89 his score stands as below :-

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Part - I  Part II           Aggregate
34  15 1/2                  49 1/2
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As per Recruitment Rules to pass Part-II examination a candidate should secure at least 50% marks and those who qualify this part need riot reappear in the same during subsequent examinations. If any one appears again, latest score is to prevail."

9. A bare reading of the aforesaid contentions made in the counter affidavit by the State-respondents it would transpire that the submissions of the representation by the petitioner was categorically denied. Since the petitioner secured 26 marks in 1979 in Part-II examination he failed to get aggregate of 60 marks to make him eligible for promotion. The case of the State-respondents is that had the petitioner not appear in the Part-II examination in the year 1988-89 he would have been declared passed in aggregate by evaluation of two additional marks in his service record earned by him in 1988-89 in terms of Memorandum dated 3.1.81 and 10.11.87. So far the other candidates are concerned as mentioned by the petitioner, the State-respondents have clearly indicated by displaying result position of 1979 and 1988-89 of the petitioner along those other candidates that the petitioner''s merit position deteriorated in 1988 in comparison

1979 wherein in 1988 he obtained only 15 1/2 marks out of 50 when he obtained 26 marks in 1979 in the said examination and accordingly, he failed to cross the eligibility marks. In view of the Memorandum dated 10.11.87, if any one appears in the subsequent examination the latest score shall prevail and as such, the petitioner now cannot be permitted to insist a claim for consideration of his case by accepting his earlier result of 1979 in Part-II with addition of three marks for length of service in Part-I.

10. During the course of argument, Mr. Saha has produced a letter from the records by which the petitioner himself on 4.7.87 had shown his willingness to appear in Part-II examination for promotion to the post of ASI to be held in 1988-89 by submitting the same through proper channel to the Superintendent of Police (RSV), West Agartala, Tripura in reference to the letter dated 26.6.87 issued by the said S. P. A photo copy of the said application has been handed over to the Court and the same be treated as part of the records. The application dated 4.7.87 is extracted as under :-

To

The Supdt. of Polcie (RSV), West
Agt, Tripura
Through proper Channel

Sub : - Prayer for appear before ASI (UB) Part-II Law examination.

Sir,

I have the honour to State that myself willing to appear before ASI(UB) Part-II examination. This referred to your letter No. 195441-81/F. 8-A(13)/RSV(WD)/87 Dt. 26/6/87. My particulars given below:

(1) Name and designation : C/1118 Shyamal Sarkar,
(2) Place of Posting : Jatrapur P.S. W/Tripura.
(3) Part/Parts in which intends : Part II
to appear
(4) Whether already passed in : No.
(5) If so, particulars of exami-
nation In which Part-II was
qualified/and score in the same
(6) Whether already qualified in : Yes, 15/10/1979. Marks obtain
elementary drill and viva voce 32 vide PHQ No. 5465/79/
of Part-I and if so, the particulars DPC(ASI)IGP/Con/79
of examination in which qualified
in above items and score for the
same
(7) Date of appointment/promo : 7.12.1970
tion to different ranks

(8) Date of Birth : 30.12.1950
(9) Whether SC/ST/UN : Un-reserved.
(10) Signature of the candidate : Shyamal Sarkar.
(11) Number of Major/Minor Re- : Service book follows Major-
wards (separately) earned 15 Minor-4
(12) Number of Major/Minor : Do Major - Nil
punishment (separately) Minor - Nil
Incurred

Yours faithfully,
C/1118 Shyamal Sarkar
Jatrapur P.S. Dt. 4.7.87
Submitted
Sd/-5.7.87
Officer-In-charge,
JATRAPUR P.S.
West Trlpura.
No. 1811/OYPB/87"

10A-This application clearly shows that the petitioner had opted to appear in Part-II Examination of 1988-89 perhaps with expectation to improve his merit position.

11. On the other hand, Mr. A. Chakraborty, learned senior Counsel for the petitioner has strenuously argued that the said application praying to appear in Part-11 examination is non-est inasmuch as the said application was submitted only on 4.7.87 much before the issuance of Memorandum dated 10.11.87 incorporating Clause (4) inviting option. Referring to the reply filed in the affidavit-In-opposition to the State-Respondents, learned senior counsel has claimed that the petitioner was compelled to appear in the Departmental Part-II examination by issuing W.T. /Crash message and as a petty constable he had no other alternative but to appear in the said departmental examination.

12. On the face of the divergent arguments of the learned counsel of the parties it is seen that the Memorandum dated 10.11.87 provides that the Chairman of DPC may obtain fresh option from the candidates for appearing in the departmental examination for promotion to the rank of ASI as per proforma given earlier vide Memorandum dated 18.6.87. Keeping in view the said clause of the Memorandum dated 10.11.87, I find that the petitioner was not compelled to appear in the said Part-II examination but he opted of his own to appear in the Part-II examination by making the application dated 4.7.87, wherein he has mentioned his particulars in the form of proforma as evident from the application itself. The W.T/Crash message sent to the petitioner was only to make him available for appearance in the departmental Part-II examination. Once he appeared voluntarily in the departmental examination he cannot come now with a plea that he was compelled to appear. Accordingly, I fully disagree to accept this contention made by the petitioner.

13. It is seen on perusal of the records that the petitioner did not qualify in the departmental examination both in Part-I and Part-II to make him eligible for promotion to the post of ASI. When the selection for promotion is to be made on merit through appearance in the departmental examination a candidate who could not come out successfully in the said examination, has no right to claim for promotion. Since the promotion to the post of ASI purely based on merit in terms of Memorandum dtd. 3.1.81 and 10.11.87, the petitioner is not entitled to claim promotion on the basis of seniority as well as length of service waiving the appearance in the departmental examination. In the instant case, the petitioner once appeared in the examination and having been failed he has no right to claim promotion to the post of ASI.

14. Mr. Saha, learned senior Government Advocate for the State-respondents has also pleaded that since the petitioner has appeared in the examination in terms of Memorandum dated 3.1.1981 and 10.11.1987 he is governed by the terms and conditions of those Memorandum until and unless the legality and validity of those Memorandum is challenged. In the instant case, the petitioner has not challenged the legality and validity of those Memorandum. Instead the petitioner''s claim is that he ought to have given 3 marks against the length of service in terms of Memorandum dated 3.1.1981. The learned counsel for the respondents has stated that the petitioner is entitled to the said marks as per length of service and accordingly, 2 marks added to his Part-I examination in 1988, but since he scored only 151/2 marks in Part-II examination in 1988 he failed to reach the aggregate of 60% as he obtained only 491/2 in aggregate in 1988-89 examination. Had he not appeared in 1988 examination he could have go 60 marks in aggregate with the break up of 32+2 = 34 in Part-I and 26 in Part-II secured in 1979 examination as noted in the counter affidavit. I have duly considered the submission of the learned senior Government Advocate and 1 am of the view that there is substance in the said submission and accordingly, the same is acceptable.

15. In support of his submission Mr. Saha, learned senior Government Advocate has cited several decisions of the Apex Court as well as High Courts and those cases are as follows :-

(1) In Biswa Ranjan Banerjee v. Union of India & Others, reported in 2000( 1) SLR 790 (a case from Calcutta High Court) it was observed that passing of departmental promotion examination is sj''ne qua non and failure to pass such examination does not entitle the incumbent for promotion.

(2) In G.C. Dhiman v. The State of Himachal Pradesh and others, reported in 1979(1) SLR 532 (a case from Himachal Pradesh High Court) it was held that while promotion on the basis of merit the petitioner shall not entitle to claim promotion simply because he was found eligible and senior to his colleague. It was further ruled in the said case that administrative instruction regarding promotion are found to be followed by the executive on the basis of generally accepted policy decision.

(3) The Orissa High Court in N. K. Panda v. Union of India & Others, reported in 1977(2) SLR 589 held that when selection was to be made on merit not on seniority if the petitioner was not found suitable on consideration of his service record when opposite party has selected on the basis of service record, the petitioner could not make any legal demand against such selection.

(4) The Apex Court in Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others, opined that when appointment is made as per decision of the selection committee on the comparative merit of the candidates, the said appointment cannot be interfered by the Court.

(5) In another case, reported in Union of India and Another Vs. N. Chandrasekharan and Another, the Supreme Court has indicated that when promotion was effected by selection through written test, interview and assessment of ACR and candidates were also made aware of the procedure of promotion before appearing in the written test and DPC, the same cannot be challenged as arbitrary or violative of Article 14 of the Constitution raising the plea that marks allotted to interview and ACR was unduly disproportionate or that authorities cannot fix minimum marks to be secured at interview of in ACR.

16. Having regard to the aforesaid decision, I am of the view that the ratio of those decisions are applicable in the instant case and accordingly, I am in respectful agreement with the submission of the learned senior Government Advocate appearing on behalf of the State-respondents. In the case in hand, the petitioner is well aware of the procedure for promotion contemplated in the aforesaid Memorandum and accordingly, he appeared in the Part-II examination by applying his own option. Having failed in the said promotional examination, the petitioner now cannot claim for his promotion by saying that he should be promoted in accordance with his performance in 1979 examination by adding marks earmarked for length of service to get his aggregate mark for making him eligible for promotion.

17. Mr. A Chakraborty, learned senior counsel for petitioner has contended that the petitioner has been serving as Constable since 1970, but till date he has been denied his due promotion to the post of ASI and he has pleaded that the petitioner"s case be considered for promotion without considering the result of departmental examination held in 1988-89. On the facts and circumstances of the case, with all respect I am disinclined to accept the submission of the learned counsel for the petitioner. It is no gainsaying that the petitioner last appeared in the departmental examination of Part-II in 1988-89 and he failed to come out successfully in the said examination, rather obtained very less marks for consideration his promotion. It is settled position of law that when promotion is made by a selection process in terms of existing rules and administrative instruction, the incumbent having found himself unqualified cannot claim for such promotion. It is not the case of the petitioner that he has challenged the Memorandum dated 3.1.1981 and 10.11.1987 by which the procedure has been laid down for holding the departmental examination for promotion rather he claims for consideration of his promotion under the

said Memorandum.

18. I have given my thoughtful consideration to the rival submission of the parties and in the light of the aforesaid judicial decision and having regard to the facts and circumstances of the case presented before me, I am of the considered view that the petitioner, being aware of the procedure of promotion and having appeared in the departmental examination held for such purpose is not entitled for promotion to the post of ASI without passing the departmental examination. Accordingly. I find no merit in this writ petition and the same merits dismissal.

19. However, since the petitioner approached this Court in the year 1992 and during such long pendency of the case as well as also at the time of hearing, this Court has not been informed as regards to the present position whether the petitioner had been promoted in the meantime, I feel that the ends of justice would be satisfied if the competent authority is directed to look into the matter and if, in the meantime, the petitioner is found to be eligible for promotion as per law, his case be considered and accordingly, I hereby direct the authority to do the same.

20. For the aforesaid reasons, discussions and directions, this petition is disposed of. However, I pass no order as to costs.