Vivek Kaisth vs The State Of Himachal Pradesh on 20 November, 2023

Author: Sudhanshu Dhulia

Bench: Sudhanshu Dhulia, C.T. Ravikumar

2023 INSC 1007 REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS.6233-6234 OF 2023
(ARISING OUT OF SLP (C) NOS.15522-15523 OF 2021)

VIVEK KAISTH & ANR. …APPELLANTS

Versus

THE STATE OF HIMACHAL PRADESH & ORS. …RESPONDENTS

WITH
CIVIL APPEAL NO.6236 OF 2023
(@ SLP(C) No.2464/2022)

CIVIL APPEAL NO.6235 OF 2023
(@ SLP(C) No.21162/2021)

CIVIL APPEAL NO.6237 OF 2023
(@ SLP(C) No.4873/2022)

JUDGMENT

SUDHANSHU DHULIA, J.

1. The appellants before this Court have challenged the Judgment dated 20.09.2021 passed by the Division Bench of the High Court of Himachal Pradesh (in Civil Appeal Nos.6233-6234 of 2023, Vivek Kaisth and Akansha Dogra respectively), by which the appointment of the appellants to the post of Civil Judge (Junior Division) has been quashed. There are presently four appeals before us. The other three appeals are of the appellants (in connected appeals), who were also candidates for the post of Civil Judge (Junior Division) for the year 2013 in the State of Himachal Pradesh, and have also challenged the selection process as well as the appointment of the present appellants, though for different reasons. We propose to dispose of these appeals by a common order. All the same, when we refer to the facts in the present case, our reference would be confined to the facts as contained in Civil Appeal No.6233 of 2023 and Civil Appeal No.6234 of 2023.

2. An advertisement was issued on 1st February, 2013 whereby the Himachal Pradesh Public Service Commission (hereinafter referred to as "State Commission"), invited applications from eligible candidates against eight vacancies for the post of Civil Judge (Junior Division) in Himachal Pradesh Judicial Service. Out of the total eight vacancies, six were "existing vacancies" and two were "anticipated vacancies". The preliminary examination for these posts was held on 12.05.2013 of which the results were declared on 15.06.2013. The candidates, who had qualified preliminary examination participated in the main written examination which was held between 15th July, 2013 to 18th July, 2013. Eighty candidates qualified in the written examination and were ultimately called for the interview, which was held on 07th and 08th October, 2013. Finally, following candidates were selected and the list was published on the website of the Commission and in the newspaper on 08.10.2013. It is as under:

Sr. No. Roll No. Name of the Candidate Category Clear Cut Vacancies

1. 1025 Ms. Anshu Chaudhary General

2. 2006 Sh. Nishant Verma Sch. Caste

3. 1670 Ms. Pratibha Negi Sch. Tribe

4. 2185 Ms. Anita Sharma Sch. Tribe

5. 2172 Sh. Baljeet O.B.C.

6. 1431 Sh. Jitender Kumar O.B.C. Anticipated Vacancies

1. 1126 Ms. Abha Chauhan General

2. 1319 Sh. Ajay Kumar General

3. The names of the two appellants who are before this Court, did not figure in the above list and their names were included later vide notification dated 27.12.2013 issued by the State Government. Himachal Pradesh High Court has held these two selections, and consequently the appointments to be illegal and these have been quashed. These two appellants are now before us in challenge to the judgement of the High Court dated 20.09.2021.

We have to examine the validity of the selection and appointment of these two appellants to the post of Civil Judge (Junior Division), and whether they should now be unseated from their judicial office.

4. After the publication of the results for the eight vacancies on 08.10.2013, as referred above, an exercise was evidently undertaken at the level of the State Government, where an information was sought from the Registrar General of the Himachal Pradesh High Court as to the correct position of existing vacancies in the state judicial service in the cadre of Civil Judge (Junior Division). This

letter dated 19.10.2013 is as under: -

> "No. Home-B(B)6-4/2006-VI-6 Government of Himachal Pradesh Department Home From:
>
> The Additional Chief Secretary (Home) to the Government of Himachal Pradesh Shimla-171001.
>
> Dated: 19th October, 2013 Sub: Recommendation to the posts of Civil Judge (Jr. Division) in the light of the directions dated 04.01.2007 of Hon'ble Supreme Court in Malik Mazhar Sultan's case.

Sir, I am directed to refer to the subject cited above and to enclose herewith a copy of letter Number3- 50/2012-PSC(E-I) dated 11 October, 2013 received from Secretary, HP Public Service Commission vide which select list of 08 candidates (06 against clear cut and 02 against anticipated vacancies) for the appointment as Civil Judge (Jr. division) has been sent to this department. Before proceeding further in this behalf, you are requested, on the administrative side, kindly to send category wise details of all existing vacancies in the cadre of Civil Judge (Jr. Division) to this department at the earliest.

Yours faithfully, Enclosures: As above [Devinder Saraswati] Deputy Secretary (Home) to the Government of Himachal Pradesh Phone No. 0177-2626450"

5. In its reply the Registrar General of the High Court of Himachal Pradesh vide its letter dated 30.10.2013 addressed to the Additional Chief Secretary (Home) to Government of Himachal Pradesh wrote as under: -

> ".....
>
> With reference to your letter No. Home-B(B)6/2006-VI-6-74 dated 19.10.2013, on the captioned subject, I have been directed to inform you that the existing vacancy position in the cadre of Civil Judge (Junior Division) is as under:-

Sr. No.	Category	Roster Point	Number of Vacancies
1	UR	42, 29, 30, 55, 56 and	6

> It is informed that Roster Point No. 55, 56, 11 were not included in the requisition of the posts to be notified during 2013 by the Registry as that post has fallen vacant on 18.04.2013 due to creation of two new pots of Civil Judges (Jr. Division) at Solan and Amb and one post due to discharge from service of Shri Sunish Aggarwal, Civil Judge (Junior Division)-cum-JMIC, AMMI on 19.09.2013."

6. A meeting was meanwhile held at the State level on 21.10.2013 to discuss the selection of Judicial Officers in the ongoing process of 2013 and the number of vacancies on which such selection could be made. The meeting which was held on 21.10.2013, was attended by the following officers: -

> 1. Sh. A.C. Dogra, Registrar General, High Court of Himachal Pradesh
>
> 2. Sh. Sandeep Bhatnagar, IAS, Secretary, Himachal Pradesh Public Service Commission
>
> 3. Sh. Devinder Saraswati, Deputy Secretary (Home) to the Government of Himachal Pradesh

> 7. As we can see, in the said meeting, officers nominated by the Government of Himachal Pradesh, State Public Service Commission and the High Court of Himachal Pradesh were present. This Committee (we will refer to it as Committee, only for the sake of convenience), notes that earlier only 8 candidates were included in the select list, though a few more should have been included, considering the vacancies in view of the directions of the Himachal Pradesh High Court in Shweta Dhingra v. State of H.P. & Ors. (2011) SCC OnLine HP 3566. It then recommended that Akansha Dogra and Vivek Kaisth who are in the merit list of candidates in the general category and Meenakshi and Parvez who are in the Scheduled Caste and Scheduled Tribe category respectively should also be included in the select list.
>
> 8. The logic was that that recommendations have been made for only existing and anticipated vacancies, whereas it ought to have been made for additional posts, which would be 2/3rd of the actual and anticipated vacancies as directed in Shweta Dhingra (supra).

The minutes of the meeting dated 21.10.2013 read as under:

> "The contents of judgment in CWP No. 3135/20111 were gone through wherein it has been directed that the H.P. Public Service Commission will publish a revised Select List of the candidates from the year 2010 merit list by including 2/3 of the actual and anticipated vacancies. It was further directed that the Hon'ble High Court, Govt. of H.P. and the H.P. Public Service Commission shall jointly take up the exercise of preparation of select list immediately after the publication of the merit list and this exercise shall be completed within two weeks of the publication of the merit list every year.

2. The Govt. (in the Department of Home) has sent a requisition for filling up 08 vacancies of Civil 1 Shweta Dhingra vs State of Himachal Pradesh [(2011) SCC OnLine HP 3566] dated 03.09.2011 Judge (Jr. Division) for 2013. The category-wise break up of vacancies is as under: -

Clear Cut Vacancies: - 06 (General-01, SC-01, ST-02 & OBC-02) Anticipated Vacancies: - 02 (General)

3. On completion of the recruitment process of H.P. Judicial Service Examination, 2013 for filling up of the above mentioned vacancies, the H.P. Public Service Commission prepared the result and published the merit list on the website of the Commission and newspapers of 08.10.2013. The H.P. Public Service Commission recommended the following candidates to the Govt. of H.P. on the publication of the merit list: -

Sr. No.	Roll No.	Name of Candidate	the Category
Against Clear Cut Vacancies			
1	1025	Ms. Anshu Chaudhary	General
2	2006	Sh. Nishant Verma	Sch. Caste
3	1678	Ms. Pratibha Negi	Sch. Tribe
4	2185	Ms. Anita Sharma	Sch. Tribe
5	2172	Sh. Baljeet	OBC
6	1431	Sh. Jitender Kumar	OBC
Against Anticipated Vacancies			
1	1126	Ms. Abha Chauhan	General
2	1319	Sh. Ajay Kumar	General

The result of HPJS Examination, 2013 was perused by the Committee and keeping in view of the directions of Hon'ble High Court of H.P. to prepare the selection list by including 2/3 of the actual and anticipated vacancies, Ms. Akanksha Dogra, Roll No. 20969, Sh. Vivek Kaisth, Roll No. 1299 candidates of general category, Ms. Meenakshi, Roll No. 1386 (Sch. Caste Category) and Sh. Parvez, Roll No.1139 (Sch. Tribe Category) can be kept in the select list as no other candidate from OBC category had qualified the HPJS Examination – 2013. Accordingly, it was decided to include the name(s) of Ms. Akanksha Dogra, Roll No. 2099, Sh.

Vivek Kaisth, Roll No. 1299 candidates of general category, Ms. Meenakshi, Roll No.1386 (Sch. Caste Category) and Sh. Parvez, roll No. 1139 (Sch. Tribe Category) candidates in the select list and the Commission should publish the select list accordingly."

9. In Shweta Dhingra (supra) the Division Bench of the Himachal Pradesh High Court was dealing with the selection of Civil Judge (Junior Division) in the State for the year 2010, and it was of the opinion that apart from clear and anticipated vacancies, the Commission should prepare a select list of some additional candidates. This entire exercise therefore for the appointment of few more judicial officers was done in the present case, with the belief that this is what ought to have been done in terms of the directions of the Himachal Pradesh High Court in Shweta Dhingra (supra), and we must therefore reproduce the directions given in that case. We reproduce most of this order in order to get a proper perspective:

> 2. The Apex Court in Malik Mazhar Sultan (3) v. Uttar Pradesh Service Commission has issued the guidelines with regard to the filling up of the vacancies to the post of Civil Judge (Junior Division) by direct recruitment.

The vacancies have to be notified by 15th January every year. The vacancies include existing vacancies on account of retirement and future vacancies and which may arise on account of promotion, death or otherwise. It is also held in the judgment that the select list will operate till the select list for the subsequent year comes into operation.

Still further, it is directed that the select list should be published in the order of merit and should be double of the vacancies notified. This direction was subsequently modified by the Apex Court by the order dated 24th March, 2009 to the effect that the select list should contain the existing number of vacancies and the anticipated vacancies for the succeeding year and should include some candidates in the waiting list.

Unfortunately, the select list published by the Public Service Commission was only for the clear cut vacancies of five and three anticipated. No doubt, the said list is in the order of merit. As far as the facts of the instant cases are concerned, there is no dispute with regard to the select list on the aspect of communal rotation, so that we need not go into that aspect at this stage, we may refer the same for future guidelines later in this judgment.

3. .....

4. Steps for recruitment for the year 2011 have already been initiated. We find that six clear cut vacancies have been notified (2-SC, 2-ST and 2-OBC). Six are anticipated (2- General, 1-ST and 3-OBC). The Public Service Commission, it is expected would be publishing the select list by the end of October, 2011. Therefore, the select list already prepared/to be duly prepared is to operate till the select list of 2011 is published. There will be a direction to the High Court to intimate all the available vacancies as on 15th October, 2011 to the Commission and the Government on or before 17th October, 2011. Steps for filling up for those vacancies shall be taken by the Commission and the Government from the select list of 2010 and the appointments shall be made before 29th October, 2011.

5. It is informed that the select list happened to be limited to the clear cut vacancies and actual number of anticipated vacancies in view of the directions already issued by the Government in

2008-09. We find that the Government had issued such instructions in order to avoid unnecessarily (Sic unnecessary) litigation. But apparently, the Government has not taken note of directions issued by the Apex Court, which is already referred to above. Therefore, there will be a direction to the Public Service Commission to publish a revised select list of the candidates from the year 2010 merit list by including 2/3 of the actual and anticipated vacancies.

6. The select list and the merit list are two concepts. The merit list is the list of candidates ranked according to their score in the examination-cum-interview. The select list is one which is prepared according to the communal roster.

7. Pursuant to the judgment of this Court in CWP No. 3828 of 2009, titled Hakikat v. State of H.P., the roster is now to be maintained by the High Court;

earlier it was maintained by the Government. Since the select list is to be published by the Public Service Commission, there will be direction to the High Court, Government and the Public Service Commission to jointly take up this exercise of preparation of select list immediately after the publication of the merit list and this exercise shall be completed within two weeks of the publication of the merit list, every year. Thereafter, the Public Service Commission shall publish the select list.

Once the select list is published, the appointment shall be strictly made according to the said list prepared on the basis of merit- cum-communal rotation."

10. The directions given by the Division Bench of the High Court in paragraphs 5 and 7 are important. The first direction is regarding the additional vacancies, which were to be 2/3rd of the actual and anticipated vacancies and second direction was the joint exercise to be undertaken by the State Commission, State Government and the High Court in determining and filling these vacancies. This also explains why the joint exercise was undertaken on 21.10.2013 by the three-member Committee, which we have already referred to, in the preceding paragraphs.

11. What is not clear though, is why in addition to clear and anticipated vacancies further vacancies i.e., 2/3rd of clear and anticipated vacancies were to be published. If that had to be a waiting list then such a direction could not have been given after the selections were over. In any case, there was no pressing urgency for picking new vacancies for the selection year 2013, after the selection was over and result had been announced.

12. Be that as it may, in the case at hand, consequent to the joint meeting and the decision taken therein the Additional Chief Secretary (Home) vide his letter dated 25.11.2013 wrote to the Secretary Public Service Commission as under: -

> "……
>
> I am directed to refer to the letter No. 3- 50/2012-PSC(E-1) dated 11th October, 2013 on the subject cited above and to say that as per this Department requisition 8 (eight) posts of Civil Judge (Jr. Division)-cum-JMIC has been recommended by the

> Commission. In the meantime, 2 (two) additional post of (Jr. Division)-cum-JMIC has been created for Civil Court at Solan and Amb (Una).
>
> Besides, one Civil Judge-(Jr. Division)- cum-JMIC, Amit was dismissed from the Government service on 19.09.2013. As such three more posts of (Jr. Division) have become available in the Department. As per his letter No. HHC/GAZ/14-49/74-VI-30012 dated 30th October, 2013 (photocopy enclosed for ready reference) the Registrar General, H.P. High Court has informed that roster point 55, 56 & 11 were not included in the previous requisition of the posts to be notified during the year 2013 by the Registry of Hon'ble High Court.
>
> Keeping in view of above position you are requested to sponsor three more candidates from the select list against roster point 55, 56 & 11 from the unreserved category at the earliest."

13. Ultimately, however, only two names from the general category who were next in the order of merit were made available for the select list which were of Vivek Kaisth and Akansha Dogra (appellants before this Court), who were recommended for appointment as Civil Judge (Jr. Division) by the State Public Service Commission. Appointment letters were thereafter issued to the appellants on 27.12.2013 and they were appointed as Civil Judge (Jr. Division) under the general category. The two appellants were then sent for training in the judicial academy. The Himachal Pradesh High Court subsequently posted them as Civil Judge (Jr. Division) in different districts. After completing their period of probation and having completed around 9 years of service as Civil Judge (Jr. Division), both the appellants have also been promoted to the next higher post of Civil Judge (Sr. Division), which was done on 23.03.2023.

14. The first question which comes to our mind is whether the directions of the Himachal Pradesh High Court in Shweta Dhingra (supra), were at all in line with the decision of this Court in Malik Mazhar Sultan (3) and Another v. U.P. Public Service Commission and Others (2008) 17 SCC 703 (hereafter referred to as "Malik Mazhar"). We will discuss that in a while, but since at the root of it all lies the directions given by this court in Malik Mazhar, it would be necessary at this stage to refer to this decision of the Apex Court in order to get a clear perspective of the matter.

The main purpose for the directions given by this Court in Malik Mazhar was to timely fill judicial vacancies in the States. This Court had fixed a time period to be followed by each High Court so that the existing judicial vacancies are filled without any delay. Judicial services in States start from the cadre of Civil Judge (Junior Division), who are also called Judicial Magistrates, when they work on the criminal side. In Malik Mazhar, it was directed that all "vacancies" of Civil Judge (Junior Division) shall be notified by the 15th January of that year. The vacancies were to be as follows: -

> "(a) Existing vacancies.
>
> (b) Future vacancies that may arise within one year due to retirement.

> (c) Future vacancies that may arise due to promotion, death or otherwise, say ten per cent of the number of posts." The third category which was the "future vacancies", that may come due to reasons other than retirement, were to be 10% of the cadre strength, as this was clarified in the judgment.

"We further direct that ten per cent of unforeseen vacancies would be in respect of sanctioned posts and not vacancies occurring in a particular year." Then there was a timeline for receiving the applications, holding preliminary examination, main examination and prompt declaration of results and also viva voce to be held between 1st October to 15th October. By 1st November, the results were to be declared and appointment letters were to be issued. Latest by 2nd January, the incumbent must join the post.

15. The following was the time table drawn by the Supreme Court in Malik Mazhar, for making these appointments:

> "For appointment to the post of Civil Judge (Junior Division) by direct recruitment S.No. Description Date 1 Number of vacancies to be notified by the High Court. 15th January Vacancies to be calculated including
>
> (a) Existing vacancies.

(b) Future vacancies that may arise within one year due to retirement

(c) Future vacancies that may arise due to promotion, death or otherwise, say ten per cent of the number of posts. 2 Advertisement inviting applications from eligible candidates. 1st February 3 Last date for receipt of application 1st March 4 Publication of list of eligible applicants. 2nd April The list may be put on the website.

5 Dispatch/Issue of admit cards to the eligible applicants. 2nd to 30th April 6 Preliminary written examination 15th May Objective questions with multiple choice which can be scrutinised by computer.

7 Declaration of result of preliminary written examination 15th June

(a) Result may be put on the website and also published in the newspaper.

(b) The ratio of 1:10 of the available vacancies to the successful candidates be maintained 8 Final written examination 15th July Subjective/Narrative.

9 Declaration of result of final written examination 30th August

(a) Result may be put on the website and also published in the newspaper.

(b) The ratio of 1:3 of the available vacancies to the successful candidates be maintained.

(c) Dates of interview of the successful candidates may be put on the internet which can be printed by the candidates and no separate intimation of the date of interview need be sent. 10 Viva voce. 1st to 15th October 11 Declaration of final select list and communication to the appointing 1st authority November

(a) Result may be put on the website and also published in the newspaper.

(b) Select list be published in order of merit and should be double the number of vacancies notified.

12	Issue of appointment letter by the competent authority for all existing vacant posts as on date.	1st December
13	Last date for joining.	2nd January of the following year

16. The Court further requested the Chief Justice of each High Court to constitute a committee of two or three Judges to monitor the selection process so that timely selection of judicial officers can be made. There were other directions as well. The difficulty, however, was to figure out the number of vacancies to be advertised. As far as (a) existing vacancies and (b) future vacancies which were to come within one year due to retirement were concerned, there was no difficulty in anticipating these vacancies. It is the third category which was given in "C" as "future vacancies" that created some confusion in different States as there could be no clarity of what these vacancies would be or how they were to be calculated. Ultimately, a three Judge Bench of this Court in Malik Mazhar Sultan and Another v. Uttar Pradesh Public Service Commission and Others (2009) 17 SCC 24 (hereafter referred to as "Malik Mazhar-2") clarified this aspect in its order dated 24.03.2009 as follows:

> "1. On 4-1-2007 [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703 : (2010) 1 SCC (L&S) 942] , this Court had given certain directions regarding the selection and appointment of members of the subordinate judicial officers in various courts. In the tabular form, the number of vacancies are notified by the High Court/Public Service Commission. It was directed that the further vacancies that may arise due to elevation or death or otherwise, 10% of the posts shall be notified and this is referred at para 15 of the order; it is further stated: (Malik Mazhar case [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703 : (2010) 1 SCC (L&S) 942] , SCC p. 711) "15. We further direct that ten per cent of unforeseen vacancies would be in respect of sanctioned posts and not vacancies occurring in a particular year."
>
> 2. It has been pointed out by the counsel appearing for the various High Courts that 10% of the sanctioned posts are notified in some States. A large number of posts are to be notified whereas there was corresponding number of vacancies to be filled if the

> candidates are selected in the select list. There may be an expectation for such candidates to get appointment and this creates unwanted litigation by the candidates and it is prayed that the existing vacancies alone be notified along with the anticipated vacancies that may arise in the next one year and some candidates also be included in the wait list prepared by the High Courts/PSCs.
>
> 3. In supersession of the order passed by this Court on 4-1-2007 [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703 : (2010) 1 SCC (L&S) 942] , this Court directs that in future the High Courts/PSCs shall notify the existing number of vacancies plus the anticipated vacancies for the next one year and some candidates also be included in the wait list. To this extent earlier order is modified." (emphasis supplied)
>
> 17. In other words, subsequent to the clarification by a three Judge Bench of this Court in Malik Mazhar-2, the third category earlier created in Malik Mazhar, did not exist any longer. Therefore, the directions given by the Division Bench of the Himachal Pradesh High Court in Shweta Dhingra (supra) in our opinion, were not necessary, and the reliance upon these directions by the three-

member Committee in the present case were misplaced since the 'vacancies' had already been advertised. If at all, it was necessary such an exercise should have been undertaken before the vacancies were advertised on 01.02.2013.

18. We may also refer here to the 2004 Rules of Himachal Pradesh known as Himachal Pradesh Judicial Service Rules, 2004. The Rules were amended to bring them in tune with the directions of this Court in Malik Mazhar. After the amendment, the number of vacancies which were to be notified as per the Himachal Pradesh Judicial Service Rules were as follows:

> (a) existing vacancies;
>
> (b) future vacancies that may arise within one year due to retirement; and
>
> (c) future vacancies that may arise due to promotion, death or otherwise, say ten percent of the number of posts.

The clarification made by this Court about the number of vacancies to be notified in Malik Mazhar-2 was perhaps not noticed while making changes in the above Rules. As such, the vacancies as given in the 2004 Rules are not in tune with what this Court had defined as 'vacancies' in terms of Malik Mazhar-2. In any case if more vacancies had to be advertised, over and above the existing and anticipated vacancies then this could only have been done prior to the advertisement i.e., February 1, 2013.

19. All the same, even if there is an apparent dichotomy between what the Service Rules suggest and what is mandated by this Court in Malik Mazhar this must be resolved by making a harmonious

interpretation between the Service Rules and Articles 14 and 16 of the Constitution of India, as held by this Court in High Court of Kerala v. Reshma A. and Others (2021) 3 SCC

755. The importance of the Service Rules cannot be belittled. The directions given in Malik Mazhar too emphasise that appointments have to be made as per the Service Rules of each State, as the procedure of selection and appointment may vary between different states. This Court was conscious of this aspect. The concern of this Court was for timely recruitment to fill the judicial vacancies. Removing any doubt on a conflict between the directions in Malik Mazhar and Service Rules, this Court in Reshma A. (supra) explained as under:

> "59. ..... The object and purpose of this Court in the decision in Malik Mazhar (3) [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703] was to ensure the expeditious filling up of judicial vacancies in the State Judicial Services. It was in this perspective, that the Court set down strict timelines for compliance. At the same time, it is evident that the decision did not provide for essential aspects such as eligibility, modalities for conducting the examination and the application of reservations in making appointments to State Judicial Services. Hence, a significant field in regard to the process of selection and appointments to the judicial services is not covered by the decision in Malik Mazhar (3) [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703] for which one has to fall back upon construing the rules governing the State Judicial Service in question." In Malik Mazhar, this Court had dealt with any probable conflict of duties on interference with the independent functioning of State Commissions where it reiterated its sole purpose of timely filling up of judicial vacancies. This is what it said:
>
> "6. Though no submission was made by any learned counsel appearing for any State Government that the constitution of Selection Committee by the Chief Justice of the High Court to monitor the timely appointment of Judges at subordinate/district level would amount to interference with the independent functioning of the State Public Service Commission, but some State Governments in their responses have indicated so. In view of what we have already noted about the appointments to be made in accordance with the respective Judicial Services Rules in the States, the apprehension of interference seems to be wholly misplaced. A Committee constituted by the Chief Justice of the High Court to ensure that the vacancies are timely filled and the problem of delay in dispensation of justice is tackled to some extent can under no circumstances be said to be interference with the independent functioning of the authorities under the Rules or of independent functioning of the State Public Service Commission."
>
> 20. In Reshma A. (supra) while dealing with a situation where there was an almost similar dichotomy between the Kerala Judicial Service Rules and the directions given in Malik Mazhar, this Court was of the opinion that in such cases, it is better to seek harmony between the two and held that "A better line of approach is to seek an interpretation which will bring harmony between them." Without going into the

> details of the Reshma A. (supra) case, the problem which arose there was that the Service Rules in Kerala required the "merit list" to be "twice" the number of "probable vacancies".

After the first half of the candidates from the list were given appointments on the notified vacancies, the remaining candidates of the list, i.e., nearly half, claimed appointment on vacancies which came subsequently i.e., subsequent to the notification of vacancies. The claim of these candidates was based on a provision of Service Rules [Rule 7(2)]2 which stipulated that the list shall be valid for "one year", and therefore since the merit list was still a valid list, appointments could be made on these vacancies, was the case of the petitioners before the Kerala High Court. Their claim 2 Rule 7 (2)"The merit list prepared by the High Court shall be forwarded for the approval of the Governor. The list approved by the Governor shall come into force from the date of the approval and shall be valid till the notified vacancies and the vacancies that may arise within one year from the date of approval of the list, are filled up or a fresh list comes into force, whichever is earlier." was accepted by the learned Single Judge in writ petition as well as in Appeal before the Division Bench. The Kerala High Court was thus here before this Court, in Reshma A (supra). Indeed, a literal interpretation of sub-rule (2) of Rule 7 would give a right of consideration to the petitioners who were before the Kerala High Court, but that would be against service jurisprudence as that would amount to making appointments on vacancies which were not advertised, vacancies which came up after the notified date on which would also rest the claim of such candidates who gained eligibility subsequently and had a right of consideration. Hence, this exercise would principally be in violation of Articles 14 and 16 of the Constitution of India. This is how this Court resolved the issue:

> "71.1. Undoubtedly, the validity of Rule 7(2) was not in question before the High Court. The counsel for the respondents argued that it does not lie in the province of the appellant to raise a doubt about the validity of its own rules, more particularly Rule 7(2). It is necessary to note that Mr V. Giri, learned Senior Counsel appearing on behalf of the appellant did not suggest or argue that Rule 7(2) should be held to be invalid. The submission of the learned Senior Counsel is that the expression "probable" denotes an addition/deduction which has to be made due to the imponderables of service such as death, resignation and promotion. The submission of the appellant is that a literal interpretation of Rule 7(2), without reference to the constitutional requirement of not operating a select list beyond the notified vacancies, would render the Rule violative of Articles 14 and 16 and such an interpretation should be avoided. In other words, his submission was that a constitutional interdict cannot be overcome in the manner it has been suggested by the respondents and a harmonious interpretation of the judicial service rules in the light of the directions in Malik Mazhar Sultan (3) [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703 : (2010) 1 SCC (L&S) 942] should have been resorted to by the High Court. We are in agreement with this line of submissions, based as it is on the precedent of this Court.
>
> 71.2. It is a settled principle of service jurisprudence that when vacancies are notified for conducting a selection for appointments to public posts, the number of

> appointments cannot exceed the vacancies which are notified. The answer to this submission, which has been proffered by the respondents is that under Rule 7(1) a probable number of vacancies is required to be notified and since an exact number is not notified, there is no constitutional bar in exceeding the 37 probable vacancies that were notified in 2019. The difficulty in accepting the submission is simply this : it attributes to the expression "probable number of vacancies" a meaning which is inconsistent with basic principles of service jurisprudence, the requirement of observing the mandate of equality of opportunity in public employment under Articles 14 and 16 and is contrary to the ordinary meaning of the expression. Black's Law Dictionary [11th Edn.

(Thomson Reuters West, 2019).The definition of "Probable" in the 4th Edn., Revision 6 (1971) of the Black's Law Dictionary was:"Having the appearance of truth; having the character of probability; appearing to be founded in reason or experience ...; having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; Apparently true yet possibly false."] defines the expression "probable" as:

> "Probable : likely to exist, be true, or happen" "Probable number of vacancies", as we have seen, is based on computing the existing vacancies and the vacancies anticipated to occur during the year. It also accounts for the possibility of inclusion of some of the candidates that are in the wait list. However, the expression "probable" cannot be interpreted as a vague assessment of vacancies that is not founded in reason and can be altered without a statutorily prescribed cause. To allow the concept of probable number of vacancies in Rule 7(1) to trench upon future vacancies which will arise in a succeeding year would lead to a serious constitutional infraction. Candidates who become eligible for applying for recruitment during a succeeding year of recruitment would have a real constitutional grievance that vacancies which have arisen during a subsequent year during which they have become eligible have been allocated to an earlier recruitment year. If the directions of the High Court are followed, this would seriously affect the fairness of the process which has been followed by glossing over the fact that vacancies which have arisen during 2020 will be allocated for candidates in the select list for the year 2019. Such a course of action would constitute a serious infraction of Articles 14 and 16 and must be avoided. 71.3. To reiterate, the submission of the appellant which we are inclined to accept is not that Rule 7(2) is invalid but that a harmonious interpretation of Rules 7(1) and (2) must be adopted that is consistent with the Article 142 directions in Malik Mazhar Sultan (3) [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703 : (2010) 1 SCC (L&S) 942] to bring the rules in accord with the governing principles of constitutional jurisprudence in matters of public employment."

> 21. Appointments cannot be made over and above the vacancies which have been advertised, except in an emergency situation or for some unforeseen reasons, in public interest or when a policy decision is taken by the State Government in this regard, as held by this court in Gujarat State Dy. Executive Engineers' Assn. v. State

of Gujarat (1994) Supp 2 SCC 591.

> 22. In Hoshiyar Singh v. State of Haryana (1993) Supp. 4 SCC 377, this Court had held that Public Service Commission cannot recommend more names than what have been advertised and any appointment, which is made in excess to the vacancies, which have been advertised would be arbitrary. The reason being that such selection/appointment would deprive those candidates who are not eligible for appointment at the time these posts were advertised but had become eligible in the subsequent year would be deprived of competing against such posts. This decision has been followed in a catena of other judgments by this Court.

Reference may be made here to some of these decisions, such as State of Bihar v. Secretariat Asstt. Successful Examinees' Union (1994) 1 SCC 126 and State of Bihar v. Madan Mohan Singh (1994) Supp 3 SCC 308.

23. The common thread that runs in all the above judgments is that appointments cannot be made over and above the vacancies which were advertised i.e., clear and anticipated vacancies, even though the Public Service Commission may have prepared a longer merit list than it was required to do.

24. In Malik Mazhar-2, this Court had directed that a waiting list of candidates should also be prepared. Evidently in the present selection process there was no "waiting list". There ought to have been one. However, the absence of a waiting list has not caused any difficulty as all the eight candidates who were selected gave their joining and were consequently appointed. The purpose of a waiting list is that when selected candidates are unable to join the post for any reason whatsoever, the post should not remain vacant and this shortfall of candidates can be met from the candidates who are in the waiting list. The candidates who are in the waiting list have also qualified the examination in every respect, but they are just lower down in the merit and for this reason they could not make it to the final select list of candidates. But they are just short of it and that is why they are in the waiting list. The purpose of a "waiting list" is only to fill the shortfall of "clear and anticipated vacancies."

25. What constitutes a "waiting list" and what its purpose is has been explained by this Court in Gujarat State Dy. Executive Engineers' Association (supra) as follows:

> "8. Coming to the next issue, the first question is what is a waiting list?; can it be treated as a source of recruitment from which candidates may be drawn as and when necessary?; and lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High Court. A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the

> competent authority prepares a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. But once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. He has no vested right except to the limited extent, indicated above, or when the appointing authority acts arbitrarily and makes appointment from the waiting list by picking and choosing for extraneous reasons.
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> 9. A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound.

This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service." This was reiterated by this Court in Surinder Singh & Ors. v. State of Punjab & Anr. (1997) 8 SCC 488:

> "Candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative."

26. In Rakhi Ray & Ors. v. High Court of Delhi & Ors. (2010) 2 SCC 637, the practice of making appointments on future vacancies from the waiting list was held to be wrong. "In case the vacancies notified stand filled up, the process of selection comes to an end. Waiting list, etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more"3.

27. We are referring to the position of law on "waiting list" because one of the arguments of the appellants (in connected appeals) before us is that, since in any case there was a direction in Malik Mazhar-2 for having a "waiting list", therefore the names of those two appellants ought to have been considered as names from the "waiting list". In our opinion, this cannot be done, as the question would still remain whether selection/appointment can be made on vacancies, which were never advertised, apart from the fact that this would in any case go against the very concept of a 'waiting list' that we have explained above. The vacancies on which the appointments have been made could not be anticipated Para 12 at the time of advertisement (February 1st, 2013), and hence these vacancies were not advertised. These two vacancies were in fact, created on 18.03.2013 i.e., after the notification of vacancies on 01.02.2013. These were the "future vacancies", which earlier could fall under the "C" category given in Malik Mazhar but were deleted in Malik Mazhar-2. These vacancies technically could only be filled next year and should have been notified by January 15th, 2014 as per the directions in Malik Mazhar. The argument of the appellants (in connected appeals), particularly against the present appellants, that had there been a waiting list they could have been considered for appointment in that category for these vacancies, in our opinion, is a complete misunderstanding of the concept of a "waiting list".

28. To sum up the position of law as it stands, once clear and anticipated vacancies have been advertised, appointments can only be made on these vacancies. Vacancies which could not be anticipated before the date of advertisement, or the vacancies which did not exist at the time of advertisement, are the vacancies for the future i.e., next selection process. Malik Mazhar mandates yearly selection/appointment on the post of Civil Judge (Junior Division). There is a time line fixed, and 'vacancies' have to be declared on January 15th of each year. The process has to be completed by October of the same year. Once this is followed, as it ought to be, the object sought to be achieved (under the guidelines given in Malik Mazhar), of timely filling of judicial vacancies is achieved.

29. In the case at hand, it is clear that the appointment of the appellants (Vivek Kaisth and Akansha Dogra) was made on posts which were not advertised and in fact did not even exist at the time when the advertisement was made. The anomaly made in the selection/appointment of these two candidates is quite apparent.

30. The appointment of the appellants was challenged before the Himachal Pradesh High Court by respondent No.4 herein. Respondent No.4 (Shri Kuldeep Sharma), who was also one of the candidates, in the merit list of candidates along with the appellants, obviously did not question the existence of these two vacancies but only that these vacancies ought to have been advertised along with the initial 8 vacancies. Initially, only three posts for general category candidates were advertised, against which nine candidates were called for the interview, as per the Rules on 1:3 ratio

and he being low in the order of merit was not called for the interview. His argument was that, if five posts were to be advertised as it ought to have been, then fifteen candidates would have been called for the interview which would have included him and he therefore had a fair chance of making it to the select list. According to him, the belated decision of the inclusion of two seats was not fair. Respondent no. 4, however, in our opinion had no case for his appointment since these two vacancies could not have been advertised earlier, as these vacancies did not exist at that time. Similarly, another writ petition was also filed before the High Court claiming violation of reservation etc. due to the inclusion of two seats! Their case was that the two Schedule Tribe candidates should have been selected on the general seats, and the two seats vacated by them would have given to the reserved candidates. The claim of these appellants (in connected appeals) for their appointments on the posts is again based on the fact that these two vacancies ought to have been advertised earlier is again wrong. The High Court has allowed the writ petition filed by respondent No.4 to the extent that it held that the appointment of the appellants was in violation of the law in as much as they were not appointed either on the existing vacancies or anticipated vacancies but they were appointed on "future vacancies" which were never advertised. It is true that the vacancies which were advertised were only 8, including those on the reserved posts. The High Court, however, did not grant any relief to the present appellants, or the other candidates in other connected petitions. Their writ petitions were dismissed.

31. In the preceding paragraphs of the present order, we have already clarified the position of law and therefore, in our opinion, the High Court was right in holding this position, which is the settled position of law. What the High Court missed was the context, the facts and the circumstances of the case.

32. A Judge is a Judge of facts, as much as he is a Judge of law. The position of law we have already explained in the preceding paragraphs, which has been correctly followed by the Himachal Pradesh High Court. Now let us see the context of the case and its facts. Today, when we are delivering this judgment the two appellants have already served as Judicial Officers for nearly 10 years. Meanwhile, they have also been promoted to the next higher post of Civil Judge (Senior Division). In this process of their selection and appointment (which has obviously benefitted them), nothing has been brought to our notice which may suggest any favouritism, nepotism or so-called blame as to the conduct of these two appellants, in securing these appointments. The High Court in fact notes this factor. While placing the blame on the State Commission it records that "..... there is nothing on record suggestive of the fact that any mala fides were behind the selection of respondents Nos.4 and 6....."

33. The two appellants had qualified the examination and were in the merit list. Should we quash their appointment and unseat them from judicial service, is the question. The same question was there before the High Court and it expressed its inability to protect the appointment of the appellants for two reasons. The first reason was that since it had determined a finding of illegality in the appointment, it saw no reason to continue with these appointments on grounds of hardship and equity, as that could only be done only under Article 142 of the Constitution of India and these powers the High Court did not have. The second reason given was that in any case the balance of equity would lie in favour of the petitioner (i.e. respondent No. 4 before High Court), and not the

present appellants. The reasons given were as follows :

> "Having carefully perused aforesaid judgments rendered by Hon'ble Apex Court, which have been otherwise taken note above this Court finds that though in the aforesaid cases, selection of the petitioners therein was held to be not in accordance with law but their selection was protected by Hon'ble Apex Court, while exercising power under Article 142 of the Constitution of India, which power is firstly not available with this Court, and secondly, in the case at hand, there is active challenge to the selection of the respondents Nos. 4 and 6 by the petitioners herein, whose rights are equally important as that of the aforesaid respondents and, in case respondents Nos. 4 and 6 are allowed to continue on their posts, same would result in infringement of right of the petitioners to participate/being considered in the selection process for the posts in question, and while balancing equalities, the party which is fighting for a just cause, its right (Sic rights) are to be protected and not of the party, which is beneficiary of an illegality committed by the selecting /appointing authorities."

34. The appellants were not entitled for any equitable relief in view of the High Court as they were the beneficiaries of an illegality committed by the Selection/appointing authority. But then it failed to take this question further, which in our opinion, it ought to have done. What the High Court never answered was as to how much of this blame of "illegal" selection and appointment would rest on the High Court (on its administrative side). Undoubtedly, with all intentions of timely filling of the vacancies, the High Court still cannot escape the blame. From the very initiation of adding future vacancies after the select list was published, the High Court has been privy to the selection/appointment process. The decision of the three-member committee which included representatives of the High Court (dated 21.10.2013) to initially add four more posts to the vacancies, and the fact that the High Court never had any objection to the additional appointments, although these appointments were made under its watch, are significant facts. After these appointments were made, it was the High Court which posted these officers in different districts in the State under Article 235 of the Constitution of India. It then trained them as Judicial Officers. Not one note, letter, or an objection of any kind has been placed before us which can give even the slightest hint that the High Court, at any point of time, had objected to these appointments! The objection has only come for the first time in form of additional affidavits before the High Court in the writ proceedings when the validity of these two appointments was challenged. The additional affidavit filed by the Registrar General of the High Court before the Division Bench of the High Court says that these appointments were not made in consultation with the High Court. This, however, does not reflect the correct position, to say the least. The High Court has placed the entire blame on the post selection exercise undertaken by the State Commission. This is not the correct position, though undoubtedly the Commission as the selecting authority must ultimately bear the brunt, yet the blame must be shared equally by the State Government and the High Court.

35. Having gone through the pleadings of the appellants and that of the respondents, we are of the considered view that there has been a violation of the process in making selection/appointment of the appellants, in as much as the vacancies on which the appellants were appointed were never

advertised, and strictly speaking these vacancies cannot be termed as "anticipated vacancies" for the simple reason that these vacancies were only created on 18.04.2013 i.e. after the selection process had begun and advertisement was issued on 01.02.2013.

36. What is also important for our consideration at this stage is that the appellants in the present case have been working as Judicial Officers now for nearly 10 years. They are now Civil Judge (Senior Division). These judicial officers now have a rich experience of 10 years of judicial service behind them. Therefore, unseating the present appellants from their posts would not be in public interest. Ordinarily, these factors as we have referred above, would not matter, once the very appointment is held to be wrong. But we also cannot fail to consider that the appellants were appointed from the list of candidates who had successfully passed the written examination and viva voce and they were in the merit list. Secondly, it is nobody's case that the appellants have been appointed by way of favouritism, nepotism or due to any act which can even remotely be called as "blameworthy". Finally, they have now been working as judges for ten years. There is hence a special equity which leans in favour of the appellants. In a recent Constitution Bench decision of this Court in Sivanandan C.T. and Ors. v. High Court of Kerala and Ors. (2023) SCC OnLine SC 994 though the finding arrived at by this Court was that the Rules of the game were changed by the High Court of Kerala by prescribing minimum marks for the viva voce, which were not existing in the Rules and therefore in essence the appointment itself was in violation of the Rules, yet considering that those persons who had secured appointments under this selection have now been working for more than 6 years it was held that it would not be in public interest to unseat them. It was stated in Para 58 as under: -

> "58. The question which now arises before the Court is in regard to the relief which can be granted to the petitioners. The final list of successful candidates was issued on 6 March 2017. The candidates who have been selected have been working as District and Sessions Judges for about six years. In the meantime, all the petitioners who are before the Court have not functioned in judicial office. At this lapse of time, it may be difficult to direct either the unseating of the candidates who have performed their duties. Unseating them at this stage would be contrary to public interest since they have gained experience as judicial officers in the service of the State of Kerala. While the grievance of the petitioners is that if the aggregate of marks in the written examination and viva-voce were taken into account, they would rank higher than three candidates who are respondents to these proceedings, equally, we cannot lose sight of the fact that all the selected candidates are otherwise qualified for judicial office and have been working over a length of time. Unseating them would, besides being harsh, result in a situation where the higher judiciary would lose the services of duly qualified candidates who have gained experience over the last six years in the post of District Judge." And therefore, one of the directions in the said case was as under:
>
> '60. XXX XXX

> (vi) In terms of relief, we hold that it would be contrary to the public interest to direct the induction of the petitioners into the Higher Judicial Service after the lapse of more than six years. Candidates who have been selected nearly six years ago cannot be unseated. They were all qualified and have been serving the district judiciary of the state. Unseating them at this stage would be contrary to public interest. To induct the petitioners would be to bring in new candidates in preference to those who are holding judicial office for a length of time. To deprive the state and its citizens of the benefit of these experienced judicial officers at a senior position would not be in public interest." The case at hand is on a similar footing if not better than the petitioners in the above case.

37. We therefore uphold the findings of the High Court on law as to the flaw in the process of selection, which followed post October 8, 2013, after declaration of results. All the same, for the reasons stated above, in order to do complete justice and in exercise of our powers under Article 142 of the Constitution of India, we set aside the order of the High Court as far as it quashes the selection and appointment of the appellants. To that extent, these appeals succeed and are hereby allowed.

38. As we have not touched the findings of the High Court on law and it was indeed the correct position of law, the remaining Civil Appeals No. 6237 of 2023, 6235 of 2023 and 6236 of 2023 (filed by Meenakshi, Parvez and Ashitosh Thakur respectively) are hereby dismissed.

39. We also make it clear that the present litigation which the appellants have gone through will not come in way of these judicial officers in any manner, as far as their judicial career is concerned. They shall be treated at par with the other appointees on the post of Civil Judge (Junior Division) for that year. Pending applications, if any, are also disposed of.

.....J. [C.T. RAVIKUMAR] .....J. [SUDHANSHU DHULIA] New Delhi.

November 20, 2023.