The High Court Of Kerala vs Reshma A. And Ors. Etc. on 11 January, 2021

Equivalent citations: AIRONLINE 2021 SC 11

Author: D.Y. Chandrachud

Bench: D.Y. Chandrachud, Indira Banerjee, Sanjiv Khanna

Repor

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos. 3974-3975 of 2020
Special Leave Petition (Civil) Nos. 11798-11799 of 2020

High Court of Kerala …Appellant

Versus

Reshma A. & Others Etc. …Respondents

1

PART A

JUDGMENT

Dr Dhananjaya Y Chandrachud, J A. Background B. Submissions of the parties C. Kerala Rules, 1991 D. Malik Mazhar Sultan (3) E. Committee of Judges: Kerala High Court F. Harmonizing Rule 7(2) of the Kerala Rules, 1991 with Malik Mazhar Sultan (3) G. Harmonizing Rule 7(2) of the Kerala Rules, 1991 with Articles 14 and 16 of the Indian Constitution H. Factual Analysis and Conclusion A Background 1 A judgment of a Division Bench of the High Court of Kerala dated 26 August 20201 forms the subject of the appeal. The High Court has affirmed a judgment of its Single Judge2 by holding that appointments to the post of Munsiff-Magistrate in the judicial service of the state can be beyond the number of probable number of vacancies advertised in the notification inviting applications. The High Court held, on Writ Appeal 994/2020 and 998/2020 (High Court of Kerala) Writ Petition (Civil) 10007/2020 and 10361/2020 (High Court of Kerala) PART A a literal reading of Rule 7(2) of the Kerala Judicial Service Rules, 19913(as amended in 2019), that vacancies which arise within a year of the approval of the select list by the Governor should be filled up from amongst candidates on the list even though this exceeds the number of probable vacancies which were notified, unless a fresh list is notified within a year. The consequence of the decision is that vacancies attributable to the next selection year – 2020 – have to be filled up from the select list drawn for the previous selection year, 2019.

2 A notification was issued by the High Court4 on 1 February 2019 inviting applications for appointment to the posts of Munsiff-Magistrate in the Kerala Judicial Service, against regular vacancies and against a carry-forward called 'No Candidates Available (NCA)'. Thirty-seven "probable" vacancies were notified including one vacancy reserved for persons with disabilities, for appointment by direct recruitment and recruitment by transfer. Eight vacancies were notified under the NCA category. The notification is reproduced below:

"Kerala Rules 1991" "Appellant" PART A PART A

3 A preliminary examination was held on 26 March 2019 and the result was declared on 19 July 2019. The main examination was held on 31 August 2019 and 1 September 2019 and the result was declared on 21 December 2019. Interviews were conducted between 8 and 25 January 2020 and the merit list was published on 20 February 2020. After the competitive examination, a list of candidates qualified for selection was prepared and was published on 20 February 2020. The merit list prepared by the appellant was approved by the Governor and was notified by the Government of Kerala through a gazette notification dated 07 May 2020. By way of this notification, 32 candidates were appointed as Munsiff-Magistrate trainees by direct recruitment for the year 2019 against regular vacancies and 5 candidates were subsequently appointed against NCA. All the selected candidates are undergoing training.

4 Two petitions were filed under Article 226 of the Constitution before the High Court, Writ Petition No. 10007 of 2020 and Writ Petition No. 10361 of 2020 in May 2020, claiming that as on 07 May 2020 and thereafter, several vacancies had arisen for the post of Munsiff-Magistrate, which were not specified in the notification inviting applications. The respondents, who were the original petitioners, claimed that in accordance with Rule 7(2) as amended with effect from 14 January 2019, all vacancies which arise for a period of one year after the approval of the merit list by the Governor, are to be filled from the approved merit list. The submission was that appointments of

Munsiff-Magistrates must not be limited to thirty-two vacancies and must take into account all other vacancies that have arisen or which may arise till 6 PART A May 2021, that is, within one year from the date on which the merit list dated 7 May 2020 was notified.

5 Opposing these submissions, the High Court of Kerala, the appellant herein, contended that appointment to vacancies in the judicial service of the state is regulated by the Kerala Rules, 1991 and by the directions and timelines fixed by this Court under Article 142 of the Constitution in Malik Mazhar Sultan (3) v. Uttar Pradesh Public Service Commission5 ("Malik Mazhar Sultan (3)"). Relying on Malik Mazhar Sultan (3), the appellant argued that the notification inviting applications is issued for only those vacancies that are available till 31 December of the year in which the notification is issued and only these notified vacancies can be filled up by the recruitment process of a given year.

6 During the pendency of the petitions, a fresh notification dated 30 June 2020 was issued by the appellant inviting applications to 47 probable regular posts of Munsiff-Magistrate. A corrigendum dated 30 July 2020 was issued deleting the term 'probable' from the number of regular vacancies notified. 7 The Single Judge of the High Court, by a judgment and order dated 9 July 2020, held that Rule 7(2) provides that vacancies existing and arising within one year from the date of approval of the merit list by the Governor are to be filled up from the select list, unless a fresh list comes into force before the lapse of a year. The Single Judge held that since a special rule governs the selection and (2008) 17 SCC 703 PART A appointment of candidates to a post, the appellant- as the High Court of Kerala on its administrative side, could not deny appointment on the ground that the recruitment would not fall within the timelines prescribed in Malik Mazhar Sultan (3). Denial of appointment to the additional vacancies would, in the view of the Single Judge, violate Articles 14 and 16 of the Constitution. The Single Judge further held that in case the appointments in accordance with the Kerala Rules, 1991 are not in consonance with the directions of this Court, the appellant would have to seek permission or furnish an explanation before this Court. Rejecting the contention of the appellant that no vacancy in excess of the thirty-seven specified in the notification can be filled up, the Single Judge held that only a probable number of vacancies was specified in the notification. The writ petitions were allowed and the appellant was directed to forward an additional list of candidates from the merit list dated 20 February 2020 to the Governor for approval and appointment to the posts of Munsiff-Magistrate.

8 This judgment and order of the Single Judge was affirmed by the Division Bench in appeal. The Division Bench held that amended Rule 7(2) provides that the approved list is valid for the notified vacancies and the vacancies arising within one year from the date of approval by the Governor or till a fresh list comes into force. Consequently, the merit list approved on 7 May 2020 would be valid for vacancies till 6 May 2021 or till a fresh list comes into force, whichever is earlier. The Division Bench further held that the operation of the Kerala Rules, 1991 for selection and appointment was not in contradiction with the guidelines laid down in Malik Mazhar PART B Sultan (3) as this Court had noticed that selections were to be made according to the existing judicial service rules in the States/Union Territories. According to the Division Bench, the intent of Malik Mazhar Sultan (3) was not to interfere with statutory rules, but only to lay down guidelines for expeditious filling up of judicial vacancies. The Division Bench held that the term 'probable' vacancies in the notification

inviting applications indicated that there was a possibility of variance between the actual and advertised vacancies and the advertised vacancies could be reduced or enhanced. Thus, vacancies in excess of those notified could be filled up. 9 Two issue fall for determination in this appeal:

> (i) Whether Rule 7 of the Kerala Rules, 1991 is contrary to the directions of this Court in Malik Mazhar Sultan (3); and
>
> (ii) Whether the respondents and similarly placed candidates who find place in the merit list approved by the Governor can be appointed to vacancies arising within one year from the date of approval of the merit list, in excess of those specified in the notification.

B Submissions of the parties

10 Mr V Giri, learned senior counsel appearing on behalf of the appellant, has made the following submissions:

i Rule 7(2) of the Kerala Rules, 1991 as amended in 2019, if interpreted

> to fill up all vacancies arising within one year of its approval, would be PART B inconsistent with the directions of this Court in Malik Mazhar Sultan (3);

ii The respondents cannot be appointed to vacancies arising within one year from the date of approval of the merit list by the Governor, in excess of the vacancies notified;

iii In Malik Mazhar Sultan (3), this Court directed that after completion of the recruitment process, appointment letters for vacant posts are to be issued on 1 December of every recruitment year and the last date of joining shall be 2 January of the following year. Thus, for every recruitment year the vacancies to be considered are as on 1 December to enable the appointees to join on 2 January of the following year; iv The direction contained in the order of this Court dated 4 January 2007 in Malik Mazhar Sultan (3), which provided that 10% of the posts shall be notified for vacancies that may arise due to elevation, death or otherwise, was superseded by this Court in a subsequent order dated 24 March 2009. In the subsequent order, this Court provided that the High Courts shall notify the existing number of vacancies and anticipated vacancies for the next one year. Thus, the vacancies notified for any selection year are the vacancies existing on 15 January of that year plus anticipated vacancies for that year and a few vacancies which may arise due to death, resignation, promotion or otherwise;

v Recruitment commenced for the year 2020 and included the vacancies PART B existing at the beginning of the year and anticipated vacancies till 31 December 2020;

vi The term 'probable' denotes addition or deduction to be made on account of vacancies arising due to death, retirement, appointment of an incumbent to a superior post, among other reasons, for which the additional category has been provided in Malik Mazhar Sultan (3); vii A literal interpretation of Rule 7(2) would lead to a violation of Articles 14 and 16 as appointments would be made in excess of the vacancies notified which is contrary to the directions of this Court in Rakhi Ray v. High Court of Delhi [(2010) 2 SCC 637]; Prem Singh & Ors v. Haryana State Electricity Board & Ors [(1996) 4 SCC 319]; and Bedanga Talukdar v. Saifudaullah Khan & Ors [(2011) 12 SCC 85]; and viii A harmonious interpretation of the Kerala Rules, 1991 along with the directions of this Court in Malik Mazhar Sultan (3) would imply that vacancies arising in a recruitment year should be filled up by the merit list in that year only and yearly selection must be conducted. 11 Opposing these submissions, Mr P S Patwalia, and Mr V Chitambaresh, learned Senior Counsel and Ms Bina Madhavan, learned Counsel appearing on behalf of the respondents contended that:

> i About fifty vacancies subsist after the appointments were issued on 7 PART B May 2020 and forty-seven vacancies are advertised in the notification dated 30 June 2020 for appointments for the year 2020; ii The term 'probable' has been consciously deleted from the notification for 2020, by the corrigendum issued on 30 July 2020 as the term 'probable' implies that the number of vacancies is projected and not definite;
>
> iii Selection and appointment to judicial posts has to be conducted strictly in adherence to existing judicial service rules as held in Malik Mazhar Sultan; Rakhi Ray; and in Hirandra Kumar v. High Court of Judicature at Allahabad (2019 SCC Online SC 254); iv The amendment to Rule 7(2) of the Kerala Rules, 1991 was made with specific reference to Malik Mazhar Sultan (3) and has been discussed in the impugned judgment;
>
> v The amendment to Rule 7(2) mandates that the merit list approved by the Governor is to remain in force for a period of one year during which all vacancies which arise are to be filled up from the merit list, or until a new list comes into force, whichever is earlier. This amendment is a significant departure from the previous rule which only mandated that the list remains in force for three years or until a fresh list is prepared and did not contemplate filling up of vacancies arising after the approved list;
>
> vi Appointments from a subsisting merit list can be made against vacancies arising after the merit list is notified, as held in Virender S PART C Hooda v. State of Haryana6;
>
> vii The Kerala Rules, 1991 have not been challenged as violative of Articles 14 and 16 of the Constitution and the High Court cannot contend that the its own rules violate Articles 14 and 16; viii There has been an inordinate delay of over two years in filling up the judicial vacancies. In case the vacancies are not filled up by using the merit list for Selection Year 2019, they will remain vacant till early 2023; and ix A harmonious interpretation of Rule 7(2) of the Kerala Rules, 1991 and the dictum in Malik Mazhar

Sultan (3) would indicate that all vacancies existing on the date of appointment must be filled up.

12 We will now consider the rival submissions.

C Kerala Rules, 1991

13 The Kerala Judicial Service Rules 19917 came into force with effect from 1 January 1992. The Kerala Rules 1991 have been issued under the authority of the Governor of Kerala in exercise of powers conferred by Articles 234 and 235 of the Constitution and the provisions of Section 2(1) of the Kerala Public Services Act 1968. The Notification by which they were issued, SRO No. 1621/91, terms them as (1999) 3 SCC 696 “the Kerala Rules 1991” PART C “Special Rules in respect of the Kerala Judicial Service”. Rule 3 specifies that the service shall consist of two categories:

> “Category (I) : Subordinate Judges I Chief Judicial Magistrates Category (2) : Munsiff-Magistrate.” 14 The Governor of the State is the appointing authority for category (2). Rule 5 provides that appointment to the post of Munsiff Magistrate shall be made by direct recruitment and by transfer in the manner provided in sub-Rule (3). Originally, Rule 7 in its unamended form was cast in the following terms:
>
> "7. Preparation of lists of approved candidates and reservation of appointments:
>
> (1) The High Court of Kerala shall, from time to time, hold examinations, written and oral, after notifying the probable number of vacancies likely to be filled up and prepare a list of candidates considered suitable for appointment to category (2). The list shall be prepared after following such procedure as the High Court deems fit and by following the rules relating to reservation of appointments contained in rules 14 to 17 of Part II of the Kerala State and Subordinate Services Rules, 1958.
>
> (2) The list consisting of not more than double the number of probable vacancies notified 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 remain in force for a period of three years or until a fresh approved list is prepared, whichever is earlier."

15 Sub-rule (1) of Rule 7 required the Appellant to hold examinations “after notifying the probable number of vacancies likely to be filled up”. Under Sub-rule (2), a list consisting of not more than double the number of probable vacancies notified had to be forwarded for the approval of the Governor. The list approved by the PART C Governor was to remain in force for a period of three years or until a fresh approved list is prepared, whichever is earlier.

16 On 19 January 2019, the Kerala Judicial Service (Amendment) Rules 2018 were notified in the Kerala Gazette. As a result of the amendment, the last sentence of Rule 7(1) was substituted in the following terms “5. The last sentence in Rule 7(1) be substituted by the following:□"The selection shall be on the basis of competitive examination at two successive stages. At the first stage, a Preliminary screening examination is to be conducted to find out the true aspirants for the posts and to make the Main examination more competitive. In the Preliminary examination, the ratio of 1:10 of the notified vacancies to the successful candidates be maintained. At the second stage, there shall be a Main examination consisting of a written examination and a viva voce. The main (written)examination shall have four papers with 100 marks each at a total of 400 marks, based on the syllabus prescribed by the High Court from time to time. The number of candidates for the viva voce shall not ordinarily exceed three times of the notified vacancies. The maximum mark for viva voce shall be 50. The cut off mark in the viva voce is 40% for the general and Other Backward Class candidates and 35% for the SC/ST candidates. The merit list shall be prepared on the basis of aggregate marks secured by the successful candidates in the Main (written) examination and viva voce. For the preparation of the merit list and select list, rules 14 to 17 of Part II of the Kerala State and Subordinate Services Rules 1958 shall be followed."

Similarly Rule 7 (2) was substituted by the following provision:

> “6. Rule 7(2) of the existing Rules be substituted by the following:-
>
> "(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 PART D 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."

17 As we have seen above, under the unamended Rule 7(2), there was a stipulation that a list approved by the Governor will remain in force for a period of three years or until a fresh list is prepared (the three years stipulation had earlier been substituted by SRO 660/2006). As a result of the amendment which came into effect in 2019, it has been stipulated that the list approved by the Governor shall be valid till the notified vacancies and the vacancies that may arise within one year from the date of the approval of the list are filled up or a fresh list comes into force, whichever is earlier.

```
D         Malik Mazhar Sultan (3)


18        The existence of unfilled vacancies in posts falling within the district judic
```

across the country has been considered by this Court in Malik Mazhar Sultan (3) v. U P Public Service Commission (“Malik Mazhar Sultan (3)”)8. In the judgment, which was delivered on 4 January 2007, comprehensive directions were issued in regard to the mode of determining vacancies and the manner in which the selection would have to be conducted every year. The

judgment of this Court envisages an annual exercise for selection to posts in the judicial service of each state. While issuing directions, the two judge Bench consisting of Chief Justice YK Sabharwal (2008) 17 SCC 703 PART D and Justice CK Thakker noted that nearly five years had elapsed since the decision of this Court in All India Judges' Association v. Union of India9 ("All India Judges' Association"). In the earlier decision, the Court had envisaged that existing vacancies at all levels in the district judiciary should be filled, if possible, by 31 March 2003. Despite this aspiration, the backlog of judicial vacancies remained unfilled. The problem, as the Court perceived it, was that:

> "1. It was about five years back that this Court directed that existing vacancies in the subordinate courts, at all levels, should be filled, if possible, latest by 31-3-2003, in all the States. This direction is contained in All India Judges Assn. (III) v. Union of India [(2002) 4 SCC 247: 2002 SCC (L&S) 508]. It has been noticed that an independent and efficient judicial system is one of the basic structure of our Constitution. If sufficient number of Judges are not appointed, justice would not be available to the people thereby undermining the basic structure. The judicial system has been facing the problem arising out of delay in dispensation of justice for which one of the major causes is insufficient number of Judges when compared to either the large number of cases pending or in relation to the average Judge-

population ratio going by the number of Judges available in various other democracies in the world [Ed.: See also Beating the Backlog: Less Talk, More Actions by Dr. A.M. Singhvi, (2007) 2 SCC J-9]. In this light, it becomes all the more necessary to take all possible steps to ensure that vacancies in the courts are timely filled." While issuing these directions and the time schedule which must be adhered to in making judicial appointments for filling up vacancies, the Court dealt with the submission that its directions would impinge on the role and functions of the Public Service Commissions which were tasked with judicial appointments in states. Dealing with the submission, the court observed that:

> (2002) 4 SCC 247 PART D "5... it is necessary to note that selections are required to be conducted by the authorities concerned as per the existing Judicial Service Rules in the respective States/Union Territories." 19 This Court observed that progressively, a consensus would have to be arrived at so that the selection process for appointments to the district judiciary would be conducted by the High Courts or by the Public Service Commission under the control and supervision of the High Courts. The Court issued detailed directions specifying timelines for appointments of District Judges; Civil Judges (Senior Division) and Civil Judges (Junior Division). For appointment to the post of Civil Judge (Junior Division) by direct recruitment, the following time schedule was stipulated in the judgment of this Court:
>
> "7... D. For appointment to the posts of Civil Judge (Junior Division) by direct recruitment Sl. Description Date No.
>
> 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.

PART D

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 November authority

(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 1st December vacant posts as on date.

13. Last date for joining. 2nd January of the following year " 20 All Chief Justices of the High Courts were directed to constitute committees to oversee the process of selection and appointment of judicial officers and to set up a special cell within the High Court to look after the process. The judgment of this Court envisages that appointment letters would be issued by the State Governments within a month of the receipt of the recommendations from the High Courts/State Public Service Commissions. Paragraph 15 of the judgment contains a further direction that:

> "15....ten per cent of unforeseen vacancies would be in respect of sanctioned posts and not vacancies occurring in a particular year." PART D

21 While the Court granted liberty to the High Courts and to the Governments of the States or, as the case may be, Union Territories to apply for a variation of the time schedule in the event of difficulties arising due to peculiar geographical and climatic conditions and other relevant considerations, the time schedule which was indicated in the judgment was directed to "be adhered to and appointments made accordingly" until it was varied.

22 In the State of Kerala, certain proceedings took place in relation to the selection and appointment of Munsiff Magistrates from the select list which was prepared in 2013. The notification for 2013 for selection of Munsiff Magistrates was published after taking into account additional posts of 30 Gram Nyaylayas and 27 Special Magistrate Courts. Pursuant to the notification, 66 candidates were selected. For selection in 2013, the appellant had notified 74 probable vacancies for general recruitment and 7 for NCA. In calculating the 74 vacancies, the appellant took into account the establishment of the above Gram Nyaylayas and Munsiff Magistrate' Courts. A select list of 66 candidates was approved by the Governor and on 31 October 2014 and 1 November 2014, all the 66 candidates were appointed as Munsiff Magistrate trainees. It so happened that after the 74 vacancies were notified, 30 Gram Nyaylayas were not established as anticipated, as a result of which a reduction of 30 anticipated vacancies occurred in the total number of notified vacancies. Apparently, 13 NCA slots were also required to be kept vacant. 23 The appellant moved this Court in IA 141/2015 for exempting it for conducting the selection for 2014 and 2015 and for permission to fill up the vacancies of 2015 PART D from the then existing 66 candidates within the 2013 selection. The IA came up before this Court together with reports filed by various High Courts on compliance with the Malik Mazhar Sultan (3) directions. By an order dated 27 October 2015, the following order was passed on the IA:

> After hearing learned Amicus Curiae and learned counsel for the High Court of Kerala, we are of the firm view that the prayer in the application cannot be granted." Accordingly, I.A. No. 141 of 2015 is dismissed."

24 The appellant was directed to file an "appropriate status report/affidavit before this Court on or before 20 November 2015". The plea of the appellant for exemption from conducting the annual selection process, in light of the excess candidates in the previous years, was firmly rejected.

25 The significance of these events for the controversy in the present case lies in appreciating the submission of the appellant that the requirement of an annual selection process and adherence to the timelines specified has been considered to be sacrosanct by this Court. It was on this basis that the application filed by the High Court for exempting it from carrying out a selection for 2014-15 was rejected. 26 The stand out feature which emerges from the judgment in Malik Mazhar Sultan (3) is that the object and purpose of this Court in issuing the directions was to ensure that unfilled vacancies which continue to be the bane of the judicial system across the country would be filled up by adhering to fixed time-lines and by adopting PART D an annual process for selection to judicial posts. It was with this object that detailed timelines were spelt out in the decision. Punctilious compliance was sought, save and except where for exceptional reasons, an extension was granted by this Court. Since the pronouncement of that decision, this Court has consistently monitored compliance across the country by all the High Courts. Faced with an unfavorable judge to population ratio, the effort of this Court has been to ensure that at least the available posts in the district judiciary are filled up. 27 Another facet which needs to be mentioned at this stage is that in the decision which was rendered on 4 January 2007 in Malik Mazhar Sultan (3), this Court had directed that the number of vacancies to be notified by the High Court for the annual selection would be calculated by including:

(i) Existing vacancies;

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

(iii) Future vacancies which may arise due to promotion, death or otherwise "say 10 per cent of the number of posts".

Existing vacancies are known. Vacancies arising due to retirement are also known, because the date of retirement is fixed by the date of birth, coupled with the age of retirement under service rules. The third category recognizes the imponderables of service: vacancies inevitably arise due to promotion, death or resignation and such other factors whose precise number cannot be predicted in advance. In computing the probable vacancies for the next year, the number of posts which may fall vacant PART D due to uncertain events such as death, resignation and promotion cannot be determined with precision. Yet they have to be taken into account for the selection year. Hence, in the original judgment, this Court contemplated that about 10 per cent of the number of posts would cover contingencies of future vacancies arising due to "promotion, death or otherwise". This category was dealt with in a subsequent decision10 which was rendered on 24 March 2009 by a three judge Bench presided over by the learned Chief Justice KG Balakrishnan (as he was then). The precise reason for modifying the 10 per cent stipulation was explained in the order of this Court "2. It has been pointed out by the counsel appearing for the various High Courts that 10 per cent 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." (emphasis supplied) In view of the above

submission of the High Courts, this Court modified the earlier judgment in terms of the following directions:

> "3. In supersession of the order passed by this Court on 4.1.2007, 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 Malik Mazhar Sultan and anr. vs. Uttar Pradesh Public Service Commission & Ors., (2009) 17 SCC 24 PART E year and some candidates also be included in the wait list. To this extent earlier order is modified." (emphasis supplied)

28 Hence, in computing the vacancies to be notified annually by the High Court, the three factors to be borne in mind would be

(i) the existing number of vacancies;

(ii) the anticipated vacancies for the next year; and

(iii) some candidates to be included in the wait-list.

E Committee of Judges: Kerala High Court

29 In the course of its judgment in the present case, the Division Bench of the

High Court has adverted to the report of its Committee of Judges, which ultimately led to the amendment of the Kerala Rules 1991. Prior to the amendment, Rule 7(2) envisaged that the list which was approved by the Governor would remain in force for a period of three years or until a fresh approved list is prepared, whichever is earlier. Bearing in mind the directions in Malik Mazhar Sultan (3), the Committee of Judges opined in its report that:

> "20. It is further submitted that as per rule 7(2) of the Kerala Judicial Service Rules, 1991, the list approved by the Governor shall come into force from the date of the approval and shall remain in force for a period of three years or until a fresh approved list is prepared, whichever is earlier. As per the directions in the Malik Mazhar Sultan Case, the select list prepared for all categories of officials shall be valid till the PART F next select list is published. It is also held therein that recruitment is to be conducted every year.
>
> 21. In view of the direction of the Hon'ble Supreme Court, the existing provision regarding the validity period of the merit list contained in rule 7 (2) is to be modified to the effect that the merit list shall be valid till the next select list is published"." (emphasis supplied) The amendment of Rule 7(2) was notified. However, while doing so Rule 7(2) was couched in language which could mean that the existing select list will cover the probable vacancies notified and in addition, the vacancies arising

within a year of the approval of the Governor or till the next select list is published, whichever is earlier.

F Harmonizing Rule 7(2) of the Kerala Rules, 1991 with Malik Mazhar Sultan (3) 30 The appellant has essentially adopted a two–pronged submission in these proceedings. The first limb of the submissions is that Rule 7(2) has to be read together with the directions in Malik Mazhar Sultan (3) which in its tabulated timelines set out in the order dated 4 January 2007 provides the manner in which vacancies are to be notified annually on 15 January. The appellant emphasises that the direction regarding further vacancies that may arise due to promotion, death or otherwise, 10 per cent of the posts shall be notified was expressly superseded by the subsequent order dated 24 March 2009 by providing that in future the High PART F Courts could notify the existing number of vacancies plus anticipated vacancies and some candidates would also be included in the wait-list. On this basis, the appellant indicates that the breakup of vacancies notified on 1 February 2019 comprised of • Existing vacancies – 6 [including one PwD] • Anticipated vacancies till 31.12.2019 - 27 • 10% vacancies added - 4 • Total vacancies notified - 37 According to the appellant, the merit list is to contain no more than double the number of notified vacancies. Hence, the merit list for 2019 contains 69 persons who alone were qualified. The appellant states that the select list was prepared after applying the rules of reservations contained in Rules 14 to 17 of Part-II of the Kerala State and Subordinate Services Rules, 1958. The select list contained the names of 32 persons for appointment against regular vacancies, after applying the rules of reservation. The merit list did not contain persons who belonged to particular reservation categories for 5 vacancies, which is why the select list contained 32 persons for appointment against regular vacancies and 5 persons who were appointed against NCA vacancies carried over from the previous year. According to the appellant, Rule 7(2) as amended with effect from 14 January 2019 must be read in accordance with Malik Mazhar Sultan (3) which provides for an annual selection. This submission of the appellant is that if Rule 7(2) is interpreted to mandatorily operationalize the approved list until 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 PART F list comes into force whichever is earlier- would run contrary to the decision of this court in Malik Mazhar Sultan (3).

31 The second limb of the submissions of the appellant is that if Rule 7(2) is read in a literal manner, it would run afoul of Articles 14 and 16 of the Constitution. Hence, the appellant submits that the rule should not be interpreted in a manner that would render its validity open to serious doubt. The appellant has commenced recruitment for selection year 2020 by a notification dated 30 June 2020. This notification includes the vacancies existing at the beginning of 2020 plus vacancies anticipated to arise till 31 December 2020 plus 10 per cent. What should rightly form the subject matter of the selection year 2020 cannot, according to the submission, be brought within the purview of selection year 2019. That is to say, vacancies which arise

beyond 31 December 2019 (the recruitment year in question) are actually in excess of the notified vacancies for 2019. Vacancies which exist on the date of the notification for the year 2020 (to be computed as on 15 January 2020) and vacancies which arise till 31 December 2020 have to be notified for the selection year 2020. Such vacancies cannot be filled up from the merit list for 2019, as they have not- and could not, have been notified in 2019. This, in the submission of the appellant, is the only interpretation which would subscribe to the principle of equality in matters of public employment governed by Articles 14 and 16 of the Constitution. The appellant has adopted the position that it is under a duty to abide by a process which is fair, just and constitutionally compliant. PART F 32 In the submission of the appellant, where a selection is conducted for notified vacancies and the select list is operated beyond the notified vacancies which arise subsequent to the selection year, the constitutionally guaranteed right of persons who become eligible during the interregnum to be considered for appointment to the post of Munsiff Magistrate would be infringed. The word 'probable' denotes an addition or deduction to cover imponderables by way of the death of an incumbent, resignation or the appointment of an incumbent to a superior category by hierarchical promotion or otherwise. This category is provided for by the addition of 10 per cent, as provided in Malik Mazhar Sultan (3). The appellant submits that on a literal construction of Rule 7(2), the addition of vacancies which arise during selection year 2020 for the purpose of operating the select list of 2019 would involve it in an infraction of Articles 14 and 16. Such a consequence, according to it, should be obviated by adopting a harmonized reading of Rule 7(2) with the principles which have been enunciated in Malik Mazhar Sultan (3).

33 Opposing the two-pronged submission of the appellant, the respondents have submitted that

(i) Rule 7(2) does not infringe the principles which were enunciated in Malik Mazhar Sultan (3); and

(ii) There is no infraction of Articles 14 and 16 when the statutory rules contemplate that the select list will be operated for the vacancies which were notified as well as vacancies which arise within one year of the date of the PART F approval of the select list by the Governor or until a fresh list is drawn up, whichever is earlier.

34 While analyzing the two-pronged submission of the appellant, it must be noted at the outset that the Kerala Rules 1991 govern appointments to the Kerala Judicial Service. The decision in Malik Mazhar Sultan (3) recognizes that Judicial Service Rules prevail in every State. Selections to the Judicial Service have to be conducted by the authorities by adhering to the rules which have been framed in the respective States. The Kerala Rules 1991 trace their authority to both- a constitutional and statutory power. SRO No. 1621/1991 by which the Rules were issued makes this clear in its prefatory recital:

"S.R.O. No. 1621/91: - In exercise of the powers conferred by Articles 234 and 235 of the Constitution of India and sub- section (1) of section 2 of the Kerala Public Services Act, 1968 (19 of 1968) and in supersession of all the existing rules on the subject, the Governor of Kerala hereby makes the following Special Rules in respect of the Kerala Judicial Service..." The decision in Malik Mazhar Sultan (3) notices that "selections are required to be conducted by the authorities concerned as per the existing Judicial Service Rules in the respective States/Union Territories. Emphasizing this, the judgment of the Court specifically dealt with the objection that the constitution of Selection Committees by the Chief Justices of the High Court to monitor the timely appointment of judges in the district judiciary at all levels would amount to an inference with the independent functioning of the Public Service Commissions. The Court held that the PART F apprehension was "wholly misplaced", "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"11. The decision in Malik Mazhar Sultan (3) was intended to deal with a specific problem namely, unfilled judicial vacancies in the district judiciary. The solution that was envisaged was in terms of a regulated process governed by specific timelines under which an annual exercise would be carried out for filling up the posts. Article 234 of the Constitution provides that:

"234. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State." Article 23512 vests in the High Court control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State. The High Court's rules governing the appointment of persons other than district judges to the judicial service of a State have constitutional authority whose source originates in Article

234. The recognition in Malik Mazhar Sultan (3) of the legal position that selections have to take place in accordance with existing Judicial Service Rules in the States, (2008) 17 SCC 703, at pages 75-76, paras 5-6 "The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law." PART F or as the case may be, Union Territories is hence in accordance with the mandate of Article 234.

35 In two subsequent decisions of this Court, we find a reiteration of the principle imparting sanctity to the Rules governing the judicial service in the States. The three judge Bench decision in Rakhi

Ray v. High Court of Delhi13 ("Rakhi Ray") involved a situation where the High Court had issued an advertisement for filling up 20 vacancies in the cadre of District Judge of which 13 were to be drawn from the general category, 3 from the Scheduled Castes and 4 from the Scheduled Tribes. All the 13 vacancies in the general category were filled up according to the merit list and the appellants who ranked below the selected candidates were not appointed. Some of the unsuccessful candidates moved the Delhi High Court with the submission that the vacancies which arose during the pendency of the selection process could also have been filled up from the select list in view of the decision in Malik Mazhar Sultan (3). This Court observed, following its earlier decisions in All India Judges' Association and Malik Mazhar Sultan (3) that "selection was to be made as per the existing Rules"14 and that "appointments have to be made giving strict adherence to the existing statutory provisions"15. Dr Justice BS Chauhan, speaking for the three judge Bench, held that appointments have to be made in view of the provisions of the Delhi Higher Judicial Service Rules 1970 which "provide for advertisement of the vacancies after being determined". Moreover, "the reservation (2010) 2 SCC 637 At page 644, para 18 at page 645, para 20 PART F policy is to be implemented, the number of vacancies to be filled up has to be determined", failing which it would not be possible to implement the reservation policy at all. Consequently, the Court held that there was no question of taking into consideration the anticipated vacancies as per the judgment in Malik Mazhar Sultan (3). Since the anticipated vacancies have not been determined in view of the existing statutory rules, and they could not be taken into consideration:

> "21. The appointments had to be made in view of the provisions of the Delhi Higher Judicial Service Rules, 1970. The said Rules provide for advertisement of the vacancies after being determined. The Rules further provide for implementation of reservation policies in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes. As the reservation policy is to be implemented, the number of vacancies to be filled up is to be determined, otherwise it would not be possible to implement the reservation policy at all. Thus, in view of the above, the question of taking into consideration the anticipated vacancies, as per the judgment in Malik Mazhar Sultan (3) case [(2008) 17 SCC 703: (2007) 2 Scale 159] , which had not been determined in view of the existing statutory rules could not arise.
>
> 22. In view of the above, we do not find any force in the submissions that the High Court could have filled vacancies over and above the vacancies advertised on 19-5-2007, as per the directions issued by this Court in Malik Mazhar Sultan (3) case [(2008) 17 SCC 703 : (2007) 2 Scale 159] ." 36 Rakhi Ray involved a situation where candidates who were not successful in seeking appointment to the vacancies which were advertised, attempted to gain appointment as District Judges by the inclusion of additional vacancies, over and above those which were notified. This court turned down the request, holding that such a course of action was not permissible, both in terms of the judicial service PART F rules and the mandate of Articles 14 and 16 (the latter aspect will be explored a little later in this judgment).
>
> 37 The next decision which needs to be referred to at this stage is Hirandra Kumar v. High Court of Judicature at Allahabad16 ("Hirandra Kumar"). Hirandra Kumar

> involved a situation under the rules governing the UP Judicial Service, where a minimum and maximum age limit could be relaxed in the case of SC/ST candidates. The age limit was prescribed with reference to the first day of January of the year following the year in which the notice inviting applications is published.

Before this Court, the submission of the appellants was that based on the decision in Malik Mazhar Sultan (3), a candidate who applies for recruitment to the Higher Judicial Service may be granted age relaxation since the candidate has crossed the prescribed age limit between the last date of recruitment and the current. Rejecting this submission, the Court, speaking through one of us (Dr Justice DY Chandrachud) held:

> "16. Under Rule 12, a minimum age criterion of 35 years and a maximum age limit of 45 years is stipulated which is relaxable by three years for Scheduled Caste and Scheduled Tribe candidates. The age limit is prescribed with reference to the first day of January of the year which follows the year in which the notice inviting applications is published.
>
> 17. The submission which was urged on behalf of the petitioners is based on the decision of this Court in Malik Mazhar Sultan (supra). While formulating a time schedule for the filling up of vacancies both in the Higher Judicial Service and at all other levels in the district judiciary, this Court was cognizant of the fact that recruitment rules are in operation in 2019 SCC Online SC 254 PART F all the States and Union Territories. Bearing this in mind, this Court observed:
>
> "5. Before we issue general directions and the time schedule to be adhered to for filling vacancies that may arise in subordinate courts and District Courts, it is necessary to note that selections are required to be conducted by the authorities concerned as per the existing Judicial Service Rules in the respective States/Union Territories. We may, however, note that, progressively, the authorities concerned would consider, discuss and eventually may arrive at a consensus that the selection process be conducted by the High Court itself or by the Public Service Commission under the control and supervision of the High Court."
>
> 18. The directions which have been issued in Malik Mazhar Sultan (supra) are being monitored by this Court. The Allahabad High Court has been submitting progressive reports which are monitored by this Court for compliance. The purpose of the directions in Malik Mazhar Sultan (supra) was to ensure that vacancies in the district judiciary are not left unfilled over long periods of time, undermining the efficacy of the judicial system. Equally, the Court was cognizant of the fact that each High Court has its recruitment rules. It is in view of that background that the general implementation of the directions which have been issued is being continuously monitored.

19. The real issue is as to whether the decision in Malik Mazhar Sultan (supra) can be construed as leading to a vested right in a candidate who applies for recruitment to the HJS to assert that they may be granted an age relaxation by virtue of the fact that between the last date of recruitment and the current, the candidate has crossed the prescribed age limit.

20. The directions in Malik Mazhar Sultan (supra) are intended to address the issue of vacancies in the district judiciary. Those directions do not override the prevailing rules which govern selections to the HJS in the States and the Union Territories nor do they create an enforceable right in any candidate for selection or to assert a right to age relaxation in violation of the rules. So long as the rules hold the field, a candidate in order to be eligible, must fulfil the PART G requirements of age and other conditions which are prescribed by the Rules." 38 In Rakhi Ray, the submission which did not find acceptance was that anticipated vacancies should be considered over and above the vacancies which were notified in the advertisement for making appointments. In Hirandra Kumar candidates who sought an age relaxation on the ground that they had crossed the age limit after the last recruitment met with a similar fate, with this Court holding that compliance with the age limit prescribed in the Judicial Services Rules cannot be obviated. We are thus unable to subscribe to the wider submission of the appellant that the directions in Malik Mazhar Sultan (3) will prevail over the provisions contained in Rule 7(2). A better line of approach is to seek an interpretation which will bring harmony between them.

G Harmonizing Rule 7(2) of the Kerala Rules, 1991 with Articles 14 and 16 of the Indian Constitution 39 The second limb of the submissions urged by the appellant now requires analysis. The appellant has asserted that reading the provisions of Rule 7(2) in a literal context would involve, as Mr V Giri, learned Senior Counsel submitted "a frontal assault" on the provisions of Articles 14 and 16 of the Constitution. In fairness to the learned Senior Counsel, it is necessary to record that it is not the submission of the appellant that Rule 7(2) is invalid. The submission is that it must be interpreted in a manner that will save the rule from a challenge that it violates the principle of equality of opportunity in matters of public employment. Essentially, the PART G submission is based on the fundamental precept that where a public authority notifies a determined number of vacancies for recruitment, appointments to posts covered by the notification cannot be in excess of the vacancies that are notified.

The submission is that if the select list of 2019 is operated by filling up vacancies which arise for 2020, this will seriously erode the rights of candidates who become eligible in 2020, since this will result in a corresponding reduction of vacancies for the later year.

40 In order to analyze the issue, it becomes necessary to advert to the line of precedent through which the constitutional principle has emerged. In Prem Singh v. Haryana State Electricity Board17, based on the advertisement dated 2 November 1991, the Board decided to fill up 62 vacant posts of

Junior Engineer by direct recruitment, 15 posts were reserved for SC and ST candidates, 6 for Backward Classes and 9 for ex-servicemen. The Selection Committee selected 212 candidates and recommended the names. The Board, considering the latest vacancy position as on 11 February 1993, decided to fill up 147 posts. Two questions fell for determination by this Court:

> (i) Whether it was open to the Board to prepare the list of 212 candidates and to appoint 137 out of that list when the number of posts advertised was only 62;

and

(ii) Whether the appellant was justified in quashing the selection of all 212 candidates and appointments of 137 persons.

(1996) 4 SCC 319 PART G After adverting to the precedent on the subject18, Justice GT Nanavati speaking for Bench of two judges held:

> "25...the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case." (emphasis supplied) The Court held that since the selection process was initiated for 62 clear vacancies and, at that time anticipated vacancies were not taken into account, the Board was not justified in making more than 62 appointments. But the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of "retirement etc" by the time the selection process was completed. This Court held that it would not be equitable to invalidate all the appointments made Subhash Chander Sharma v. State of Haryana: (1984) 1 SLR 165 (P&H); Ashok Kumar Yadav v. State of Haryana: (1985) 5 SCC 417 : 1986 SCC (L&S) 88: 1985 Supp (1) SCR 657; A V Bhogeshwarudu v. A.P. Public Service Commission: JT (1989) 4 SC 130: (1990) 1 LLN 6: (1989) 59 FLR 749 (SC); Hoshiar Singh v. State of Haryana: 1993 Supp (4) SCC 377:1994 SCC (L&S) 249: (1994) 26 ATC 325; State of Bihar v. Secretariat Asstt. Successful Examinees' Union 1986: (1994) 1 SCC 126: 1994 SCC (L&S) 274; Gujarat State Dy. Executive Engineers' Assn. v. State of Gujarat: 1994 Supp (2) SCC 591: 1994 SCC (L&S) 1159 PART G on posts in excess of 62. However, appointments which were made against future vacancies – in this case on newly

created posts, would have to be held to be invalid.

While moulding the relief, this Court observed that 13 posts had become vacant because of retirement and 12 posts because of deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated and the Board had due to oversight not taken them into consideration while a requisition was made for filling up 62 posts. As regards the posts which fell vacant due to deaths, this Court taking what it described as a "lenient view" did not quash the appointments made against them. Hence, appointments made by the Board on posts beyond 87 (the original 62 posts for which selection was advertised and the 25 additional posts which fell vacant during selection process due to deaths and retirement) were invalidated.

41 The decision in Rakhi Ray which is by a Bench of three learned judges has been adverted to in a different context earlier. In that case, as we have noticed, the High Court had notified an advertisement to fill up 20 vacancies in the cadre of District Judge. All the 13 vacancies in the general category were filled up according to the merit list. Unsuccessful candidates belonging to the general category however asserted that additional vacancies which came up during the pendency of the selection process should also be filled up from the same select list. In this context, while analyzing the constitutional requirements of Article 14 and Article 16, Dr Justice BS Chauhan, speaking for the three judge Bench, observed:

> PART G "7. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated from and such a deviation is permissible only after adopting policy decision based on some rationale", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, is not permissible in law. (Vide Union of India v. Ishwar Singh Khatri [1992 Supp (3) SCC 84 : 1992 SCC (L&S) 999 : (1992) 21 ATC 851] , Gujarat State Dy. Executive Engineers' Assn. v. State of Gujarat [1994 Supp (2) SCC 591 : 1994 SCC (L&S) 1159 : (1994) 28 ATC 78] , State of Bihar v. Secretariat Asstt. Successful Examinees Union 1986 [(1994) 1 SCC 126 : 1994 SCC (L&S) 274 : (1994) 26 ATC 500 : AIR 1994 SC 736] , Prem Singh v. Haryana SEB [(1996) 4 SCC 319 : 1996 SCC (L&S) 934] and Ashok Kumar v. Banking Service Recruitment Board [(1996) 1 SCC 283 : 1996 SCC (L&S) 298 : (1996) 32 ATC 235 : AIR 1996 SC 976] .)" (emphasis supplied) In the view of the Court:
>
> "12. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity,

inexecutable and unenforceable in law. 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 PART G list/waiting list becomes meaningless and cannot be pressed in service any more." (emphasis supplied) In Bedanga Talukdar v. Saifudaullah Khan19, another two judge Bench of this Court consisting of Justice Altamas Kabir and Justice SS Nijjar held:

"29...In our opinion, it is too well settled to need any further reiteration that all appointments to public office have to be made in conformity with Article 14 of the Constitution of India. In other words, there must be no arbitrariness resulting from any undue favour being shown to any candidate. Therefore, the selection process has to be conducted strictly in accordance with the stipulated selection procedure. Consequently, when a particular schedule is mentioned in an advertisement, the same has to be scrupulously maintained. There cannot be any relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved. Such a power could be reserved in the relevant statutory rules. Even if power of relaxation is provided in the rules, it must still be mentioned in the advertisement. In the absence of such power in the rules, it could still be provided in the advertisement. However, the power of relaxation, if exercised, has to be given due publicity. This would be necessary to ensure that those candidates who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in advertisement without due publication would be contrary to the mandate of equality contained in Articles 14 and 16 of the Constitution of India."

42 The decision in Prem Singh has been followed by a Bench of two learned judges in Anurag Kumar Singh v. State of Uttarakhand20. In that case, the Public Service Commission advertised 38 posts of Assistant Prosecuting Officers for a year (2011) 12 SCC 85 (2016) 9 SCC 426 PART G of recruitment comprising of 12 months commencing from first day of July of the calendar year. The Public Service Commission however, held a selection for 74 posts, 37 additional posts having been created subsequently. The High Court set aside the action, holding that the selection pursuant to an advertisement can only be for clear vacancies and anticipated vacancies, but not for future vacancies. Justice L Nageswara Rao, speaking for the Bench of two learned judges of this Court, observed that the rules referred only to the recruitment year. The Bench observed that "only the number of vacancies that are advertised can be filled up" and if the advertisement gives liberty to the Government to vary the number of posts this power could not be exercised for filling up future vacancies. The Court held that during the pendency of the proceedings a large number of persons would have become eligible for selection to the posts which were advertised and their right to be considered for appointment was guaranteed by Articles 14 and 16 of the Constitution. In the view of the Court, there would be an infraction of such a right if the additional posts are not filled up by a fresh selection. Hence the Court held that the selection pursuant to the advertisement should be confined only to the posts that were advertised and the additional posts which were created after the expiry of the recruitment year would have to be filled up by the issuance of an advertisement afresh.

PART G 43 A more recent decision in Rahul Dutta v. State of Bihar21 related to the post of Civil Judge (Junior Division). Rule 5(A)-(3) of the Bihar Civil Service (Judicial Branch) (Recruitment) Rules 1955 stipulated that:

> "(3) Eligible candidates for the written examination shall be selected on the basis of the result of the Preliminary Test, to the extent of 10% of the total number of appeared candidates, rounded off to the nearest hundred; and all candidates obtaining equal marks as the last candidate's shall also qualify for the written examination;" The Rule provided that only 10 per cent of the total number of candidates who appeared at the preliminary test were to be called for the written examination rounded off to the nearest hundred. The Court held that this stipulation in Rule 5A was contrary to the decision in Malik Mazhar Sultan (3). Moreover, the determination of 10 per cent of the total number of candidates who had appeared in the preliminary examination for being called for the final written examination was arbitrary and unreasonable, particularly, in view of the ratio of 1:10 prescribed in Malik Mazhar Sultan (3). The restriction of candidates to 10 per cent of those who had appeared at the preliminary test was held to curtail the competitive field unreasonably.

44 Having considered each of these judgments, we must notice that all of them involve factual situations which may not be identical with the facts of the present case. Precedent does not always rest on all fours. We have noticed earlier that, in (2019) 5 SCC 158 PART G the present case, the High Court while issuing its advertisement for recruitment specified 37 as a 'probable' number of vacancies. The meaning which must be attributed to the expression 'probable' will be considered shortly hereafter. At this stage we must recapitulate some of the salient aspects of the decisions which we have cited above. In Prem Singh the advertisement which was issued by the Haryana State Electricity Board was for filling up 62 vacant posts of Junior Engineers while as many as 138 candidates came to be appointed. In this backdrop this Court held that it was not open to the Board to travel beyond clear and anticipated vacancies. In other words, while clear and anticipated vacancies could be taken into consideration while issuing an advertisement for commencing the selection process, future vacancies could not be considered. While moulding the relief, this Court maintained the selection for the 62 vacancies which were advertised and 25 additional vacancies which arose during the selection process due to promotions and deaths, but not beyond that. The decision in Rakhi Ray involved a situation whether the High Court had advertised 20 vacancies of District Judges of which 13 were in the general category all of which were filled up. This Court rejected the contention of those among the general category candidates whose position in the merit list was below the 13 selected candidates that they were entitled to selection on the basis of the vacancies which occurred during the pendency of the selection process, based on Malik Mazhar Sultan (3). This Court held that vacancies over and above those which were notified could not be filled up, save and except in a rare and exceptional situation. Absent an exceptional situation an exercise to fill up vacancies over and above those which were notified would be PART G arbitrary. The decision in Anurag Kumar Singh involved a requisition by the State of Uttarakhand to the Public Service Commission for selection of 38 Assistant Prosecuting Officers. Despite the advertisement which was for filling up 38 posts, an additional 37 posts were sought to be filled up

which had been created subsequently. This was held to be impermissible, as violating the guarantees of Articles 14 and 16. The decision in Rahul Dutta of two judges has held that restricting the field of a written examination to 10 per cent of the candidates who appeared at the preliminary examination is violative of the dictum in Malik Mazhar Sultan (3) besides being arbitrary on the ground that it unreasonably restricts the field of competition.

45 The constitutional principle which finds recognition in the precedents of this Court is that the process of selection in making appointments to public posts is subject to the guarantees of equality under Article 14 and of equality in matters of public employment under Article 16. The process of selection must comport with the principles of reasonableness. Where the authority which makes a selection advertises a specific number of posts, the process of selection cannot ordinarily exceed the number of posts which have been advertised. While notifying a process for appointment, the authority may take into consideration the actual and anticipated vacancies but not future vacancies. Anticipated vacancies are the vacancies which can be reasonably contemplated to arise due to the normal exigencies of service such as promotion, resignation or death. Hence, in notifying a given number of posts for appointment, the public authority may legitimately take into account the number PART H of vacancies which exist on the date of the notification and vacancies which can reasonably be accepted to arise in the exigencies of the service. While the exact number of posts which may fall vacant due to circumstances such as promotion, resignation or death may be difficult to precisely determine the authority may make a reasonable assessment of the expected number of vacancies on these grounds. However, future vacancies conceptually fall in a distinct class or category. Future vacancies which arise during a subsequent recruitment year cannot be treated as anticipated vacancies of a previous selection year. Vacancies which would arise outside the fold of the recruitment year would not fall within the ambit of anticipated vacancies. For it is only the vacancies, actual and anticipated which would fall within the course of the selection or recruitment year that can be notified when the selection process is initiated. These are constitutional principles to which statutory edicts are subordinate.

H Factual Analysis and Conclusion

46 In the present case, the essential aspect on which we need to dwell is the

meaning of the expression “probable”, in the context of Rule 7(1). The essence of the present case will depend upon the manner in which the statutory rules are interpreted. That indeed is the central task in deciding the appeal. Intrinsic to the process of interpreting the rules is the meaning which is to be ascribed to the expression “the probable number of vacancies”. Rule 7(1) requires the appellant to first notify “the probable number of vacancies” likely to be filled up and thereafter, to PART H hold examinations both written and oral. The selection process results in the preparation of a list of candidates considered suitable for appointment as Munsiff- Magistrates. Sub-rule (2) of Rule 7 stipulates that a list of not more than double the number of “probable vacancies notified” has to be forwarded for the approval of the Governor. As it stood after its amendment in 2006, the second sentence of Sub-rule (2) provided a term of validity for the list which is approved by the Governor. This was to be three years or until a fresh approved list is prepared, whichever takes place earlier. By

the amendment to the Rules on 19 January 2019, the last sentence of sub-Rule (1) has been substituted and sub- Rule (2) has been substituted in its entirety. Sub-Rule (1) prior to its amendment did not specify the modalities for holding the competitive examinations. Following the amendment, Rule 7(1) stipulates that the selection is a two-stage process, on the basis of a competitive examination. The first stage consists of a preliminary screening examination. In the preliminary examination, a ratio of 1:10 of the "notified vacancies to the successful candidates is to be maintained". The object is to ensure a broad and competitive field of candidates who will be called for the second stage of the main examination. The main examination consists of a written examination and viva voce; the former consisting of four papers each with 100 marks based on a prescribed syllabus. The number of candidates for the viva voce is not to ordinarily exceed three times "the notified vacancies". A cut off in the viva voce is provided for general candidates and OBC candidates (40%) and SC/ST candidates (35%). A merit list is then prepared on the basis of aggregate marks secured by candidates in the main written examination and the viva voce. In preparing the merit list and select PART H list, Rules 14 to 17 of Part II of Kerala Subordinate Service Rules 1958 have to be observed.

47 After its amendment in 2019, Rule 7(1) as it stands speaks in the first instance of the notification of "the probable number of vacancies likely to be filled up". Rule 7(1) also refers to "notified vacancies" in two places, the first in the context of maintaining the ratio between the vacancies which are notified and successful candidates while the second refers to the proportion between the notified vacancies and the number of candidates called for the viva voce. Now sub-Rule (2) of Rule 7 which has been substituted in its entirety as a result of the amendment provides the tenure over which the merit list which has been approved by the Governor would be valid. As we have seen, before its amendment, sub-Rule (2) of Rule 7 provided for a tenure for the list approved by the Governor for a period of three years or until a fresh approved list is prepared whichever is earlier. This tenure is now modified by the amendment brought about by the substitution of Rule 7(2). The modified tenure for the list approved by the Governor indicates that the list will be valid "till the notified vacancies and 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. Thus, we find that the expression 'notified vacancies' which has been used at two places in sub-Rule (1) of Rule 7 finds a presence also in substituted Rule 7(2). Now what is material to note is that it is Rule 7(1) which provides for the initial notification by which a probable number of vacancies is notified. The 'notified vacancies' also determine the ratio of 1:10 in the preliminary PART H examination and the number of candidates called for the interview. Sub-Rule (2) of Rule 7 does not have any bearing on the notification of the vacancies under Sub- rule (1) but it provides for the period of time over which the list approved by the Governor is to remain valid.

48 The Kerala Rules 1991 preceded the judgment in Malik Mazhar Sultan (3). The amendment which came into force on 19 January 2019 is evidently after the decision of this Court. The effort, as a matter of statutory interpretation, must be to harmonize the directions which were issued by this Court in Malik Mazhar Sultan (3) which are relatable to the jurisdiction of this Court under Article 142 of the Constitution and the statutory rules. Undoubtedly, this Court has noticed in that decision that there were rules in force in the States and the Union Territories governing the selection to their judicial service. While issuing directions in regard to the maintenance of timelines and for the

modalities to be followed in an annual selection, this Court clarified that this would not impinge upon the independence of the Public Service Commission or the role of the High Courts in the States. In the subsequent decisions in Rakhi Ray and Hirandra Kumar, this Court has specifically negatived the attempts made by candidates that did not qualify in terms of the rules governing selection to the judicial service to seek appointment merely on the basis of the observations in Malik Mazhar Sultan (3). Rakhi Ray involved a situation where candidates who did not qualify for the notified vacancies of District Judge in Delhi claimed appointment on the basis of the vacancies which had arisen during the process of selection. Their plea was turned down on the ground that once PART H vacancies have been notified, no candidate could seek appointment beyond the extent of the vacancies which were advertised. Hirandra Kumar was a decision of this Court where candidates for the higher judicial service examination claimed an exemption from the age limit set out in the State Judicial Service Rules on the ground that after the date of the last examination for recruitment, they had become age barred. This effort was again negatived by the decision of this Court which held candidates down to the requirement of complying with the rules and selection process of the State Judicial Service. These two decisions would indicate that a candidate who does not qualify in terms of the judicial service rules prevailing in the State (or Union Territory) cannot seek a mandamus which is founded on a breach of the rules. The observation in Rakhi Ray and Hirandra Kumar that the decision in Malik Mazhar Sultan (3) did not override the State Judicial Service Rules must therefore be construed in an appropriate sense. The object and purpose of this Court in the decision in Malik Mazhar Sultan (3) 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 other 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 Sultan (3) for which one has to fall back upon construing the rules governing the state judicial service in question. But a stand out feature which emerges from the decision in Malik Mazhar Sultan (3) must PART H equally be emphasized. The judgment of this Court enunciates, in no uncertain terms, that the process of selection to the state judicial services has to take place on an annual basis. As the orders passed by this Court on the IAs by the appellant indicate, the requirement of yearly selection does not ordinarily brook exception. The court however reserved to itself the power to exempt in a given situation a State or Union Territory from compliance with the time schedule or extend time where peculiar local conditions require the grant of such an exemption or extension. The significant aspect of the decision in Malik Mazhar Sultan (3) is that the recruitment process is initiated each year with a notification of vacancies by the appellant and culminates in the appointment of candidates and their joining service. Once the process of selection is annual, the notification of probable or anticipated vacancies has to be for the selection year. The expression ‘probable’ means what is anticipated, expected and likely. The expression thus comprehends the existing vacancies and those which are anticipated due to retirement, promotion, death or resignation and to which some vacancies can be added to incorporate imponderable events during the recruitment process. In construing the rules by the State Judicial Service, more particularly the process of notifying the probable vacancies, an effort must be made to harmonize the rules with the object, intent and purpose underlying the directions that were issued under Article 142 in Malik Mazhar Sultan (3). This exercise becomes necessary for another reason. In the

present case, Rule 7(1) refers to "notifying the probable number of vacancies likely to be filled up". However, Rule 7(1) does not expressly indicate what is meant by this expression. The ambit of that phrase should receive content and meaning based on what was envisioned in PART H Malik Mazhar Sultan (3). The decision of this Court indicates that by 15 January every year the number of vacancies is to be notified by the appellant. The manner in which the vacancies are to be calculated is also stipulated. In making appointments to the post of Civil Judge (Junior Division) by direct recruitment the vacancies are to be calculated by including

(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. Originally, in the judgment of this Court dated 4 January 2007, the third category [(c) above] was to consist of "say 10 per cent of the number of posts". Subsequently, by the order dated 24 March 2009, the stipulation was varied as a consequence of which, it has been envisioned that in future the High Courts/Public Service Commissions "shall notify the existing number of vacancies plus the anticipated vacancies for the next one year and some candidates also to be included in the wait- list". The existing number of vacancies is an objective fact which is known to the particular High Court. Anticipated vacancies are those which arise as a part of the normal exigencies of service in the ensuing year due to factors such as promotion, death or resignation from service. These exigencies are normal to a service but these vacancies are difficult to predict with precision. In the original order dated 4 January 2007 in Malik Mazhar Sultan (3) category (b) consisting of "future vacancies that may arise within one year" was qualified by the expression "due to retirement". Retirements are known as an objective factor since the date on which a PART H candidate appointed to judicial service would attain the age of superannuation is known in advance. Category (c) consisting of future vacancies referred to those which may arise due to promotion, death or otherwise, the exact number being somewhat in the realm of an imponderable future event. As a result of the modification which has been brought about by the order of this Court dated 24 March 2009, the first category of existing vacancies is maintained as it is. The second category consists of anticipated vacancies "for the next one year". This category would incorporate vacancies which were likely to arise on account of retirement as well as those which may be anticipated in the ordinary course due to the exigencies of service such as promotion, resignation or death of candidates within the service. Significantly, the last category incorporates the principle that "some candidates also be included in the wait-list". The inclusion of some candidates in the wait-list is to ensure the availability of candidates in the event that additional vacancies occur during the course of the year due to the exigencies of service. But significantly, the entire process which is contemplated by the decision in Malik Mazhar Sultan (3) is an annual process. Hence, the vacancies which are to be notified in the advertisement which is issued by the High Court are relatable to the recruitment year for which a selection is carried out. Malik Mazhar Sultan (3) does not incorporate future vacancies, that is those which lie beyond the recruitment year for which the selection is to be made.

49 Now while giving meaning and content to the provisions of Rule 7(1) of the Kerala Rules 1991 as amended, it would be appropriate to harmonize the ambit of PART H the expression "notifying the

probable number of vacancies" on the basis of the Article 142 directions in Malik Mazhar Sultan (3). This would not do violence to the provisions of Rule 7(1), since Sub-rule 1 does not define what is meant by probable vacancies. Moreover, as we have already explained, Rule 7(2) deals with tenure of the approved list while the determination of the probable number of vacancies falls within the ambit of Rule 7(1). Hence, in determining the probable number of vacancies likely to be filled up, the particular High Court has to take into account:

(i) The existing number of vacancies;

(ii) Anticipated vacancies during the year arising due to retirements and othe

exigencies of service including promotion, death and resignation; and

(iii) Some candidates are to be included in the wait-list. The ambit of the probable number of vacancies in Rule 7(1) must be based on this assessment. In fact, as noted earlier, this was exactly what was done by the appellant.

50 The submission which has been urged on behalf of the respondents, which found acceptance by the High Court was that since the tenure of the approved list is for a period of one year from the date of the approval of the Governor or the publication of a fresh list, whichever takes place earlier, the vacancies which have arisen between 7 May 2020 (the date of the approval of the Governor) and 6 May 2021 (the expiry of one year from the date of approval) must also be added in to PART H form a part of the selection for 2019. There are significant problems in accepting this line of interpretation which has found acceptance by the High Court. 51 Firstly, this line of interpretation requires the appointing authority to take into account vacancies which have arisen in the subsequent recruitment year 2020 in making appointments in pursuance of the selection for recruitment year 2019. This, as a matter of first principle, is impermissible. The determination of probable vacancies in terms of Rule 7(1) is a determination which is based on the vacancies which are projected during the course of that recruitment year, in this case 2019. This exercise cannot cover, consistent with the mandate of Art 14 and Art 16, future vacancies of a subsequent year of selection. Nor does Rule 7(1) bring vacancies of a future year within the computation of probable vacancies. 52 Secondly, adopting the interpretation which has been suggested on behalf of the respondents would lead to serious anomalies. As we have seen, a notification was issued by the appellant in the month of June 2020 for the 2020 recruitment. The consequence of accepting the arguments of the respondents would be that posts which have to be allocated for recruitment against the existing and anticipated vacancies for 2020 would have to be reduced by allocating them to recruitment year 2019. The appellant has expressly determined and notified the vacancies which have arisen for 2020. The respondents argued that though the original notification referred to a probable number of vacancies the corrigendum deleted the expression 'probable'. This, in our view, is not a matter of moment since the essence of the controversy lies in interpreting the provisions of the Rules as they stand. If the PART H respondents were right in their submission, this would require the appellant to progressively remove from the ambit of the vacancies which are notified for the subsequent recruitment year, the vacancies which are allocated to the previous year on the basis of a supposed interpretation of Rule 7(2). This would clearly be impermissible and bring uncertainty to the

recruitment for subsequent years. It will cause serious prejudice to candidates who qualify in terms of eligibility during the recruitment process of 2020 by reducing the number of probable vacancies and adding them to the previous recruitment cycle.

53 The third anomaly which arises from the interpretation, which has been suggested by the respondents and which has been accepted by the High Court, was noticed by the High Court itself in the course of its judgment. If Rule 7(2) were to be given overriding importance without reading it in juxtaposition with the determination of the probable number of vacancies under Rule 7(1), the issue is until what period of time would vacancies arising after the date of approval by the Governor have to be factored into account. Some of the petitioners before the High Court, as indeed some of them in the written submissions before this Court, indicated that the number of vacancies as existing on the date of the approval of the Governor should form the basis of making appointments. The High Court rejected these arguments in the following observations:

> "9. Immediately we have to notice that we cannot go mid-way to direct appointment to vacancies arising till the date of approval. We either decline the relief or grant it as permissible under the rules. The date of approval is only relevant to determine the validity period of the list, as per the rules. We cannot give the date of approval any significance other than PART H that prescribed in the rules. Which if allowed would literally be a half baked cake, neither good for consumption nor completely worthless to be thrown out. We would not rest ourselves on such sticky premise of uncertainty." The High Court was correct in comprehending that it could not accept a half-way measure merely because it suited the interest of some of the candidates who would be appointed if the vacancies which had arisen up to the date of approval were taken into account. Noticing this anomaly, the High Court by its impugned judgment went the entire extent by issuing the following directions:
>
> "38... We direct the appellant to prepare a select list from the approved merit list including those vacancies which arise as on today and those anticipated till 06.05.2021 or any other date on which the appellant expects the next list to be published." In its conclusion, the High Court also observed:
>
> "We dismiss the Writ Appeals, directing the High Court to forward a select list in accordance with the rules 14 to 17 of Part II of the KS&SSR, 1958 from the approved merit list." The plain consequence of the decision of the High Court would be that vacancies which have arisen during 2020 would be allocated to 2019. This could only be done if the vacancies for 2020 were anticipated to arise during 2019, which is not the case.

54 The fourth difficulty in accepting the line of approach of the High Court rests on constitutional principles. Undoubtedly, the validity of Rule 7(2) was not in PART H question before the High Court. 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 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) 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. 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 PART H 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 Dictionary22 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 isn't 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 11th Edition (Thomson Reuters West, 2019).
>
> The definition of 'Probable' in the 4th edition, 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." PART H infraction of Articles 14 and 16 and must be avoided. 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) to bring the rules in accord with the governing principles of constitutional jurisprudence in matters of public employment.

55 Fifthly, at this stage, we must also advert to another serious aspect which arises from the judgment of the High Court. The High Court noticed in the course of its analysis that the acceptance of the submission of the respondents would lead to the appellant, on its administrative side, having to carry out piece-meal training for candidates who are appointed to vacancies arising in the year after approval of the merit list. The approval of the Governor was received on 7 May 2020. If vacancies which arise between 7 May 2020 and 6 May 2021 are to be reckoned in making appointments for the 2019 process, the training of candidates who are appointed against the subsequent vacancies would take place piece-meal and in a sporadic manner after the initial batch of recruits has been sent on training. Upon receipt of the approval of the Governor, candidates to whom appointment orders were issued joined their training and are in fact in the midst of their training. The High Court without venturing a solution to this imbroglio came out with a suggestion in paragraph 29 of this judgment, which is extracted below:

> "29. There could arise one problem insofar as the High Court having to carry out training, piece meal, of the recruits appointed to the vacancies arising in the one year after the PART H approval of the merit list. This could be solved by selecting for training even persons whose vacancies have not arisen, in anticipation. When appointments are made in June 2020 in accordance with Rue 7(2) it could only be regularly made to vacancies that actually arose till that date. The High Court then would be faced with the problem of appointing fresh recruits in the enabling year to arising vacancies who also would have to be given training for one year which may put the training process into jeopardy. We only observe that the High Court on its administrative side in consultation with the Government could device a procedure through which training could be commenced even for successful candidates, finding a place in the merit list, who could be appointed to the anticipated vacancies, which vacancies definitely would arise by the time their training is completed. This can especially be managed since the validity of the list go beyond one year from the date of approval of the merit list and the training can commence only after the approval of the merit list. The selection of recruits to anticipated vacancies for undergoing training could also be made subject to the vacancy arising and the new list coming into force with continuance in training on a stipend till a regular appointment is made to the vacancy. We do not intent these observations to be in the nature of a direction and are only our thoughts, expressed aloud." The solution which the High Court has indicated is, as it clarified, not in the nature of a direction but "only our thoughts, expressed allowed". The solution suggested by the High Court is that candidates may be selected and sent for training even against vacancies which have not arisen, in anticipation of vacancies arising in future. The High Court observed that when appointments were made in June 2020, they could only be regularly made

> to vacancies that actually arose until that date. The High Court took notice of the fact that on its administrative side, appointment of fresh recruits to vacancies which would arise in the ensuing year would put the training process into jeopardy. However, it suggested that in consultation with the PART H government, a procedure could be devised by which training could be commenced for candidates against vacancies which have still not arisen and which would arise in the future. The High Court even suggested that the trainees appointed against possible future vacancies could be paid a stipend. The solution which has been suggested by the High Court is plainly unacceptable. Persons are sent on training on being appointed to the judicial service and there cannot be two categories of trainees, one of whom receives a stipend since the vacancies for which they have been selected are yet to arise. Moreover, there will be a serious discontent if not all the candidates who are sent on training in expectation of future vacancies can be accommodated in service. We have emphasized the above aspect, for the simple reason that the High Court was cognizant of the serious problems which would result in the administration if its decisions were to hold the field. The suggestion by the High Court that the administration must send on training, candidates for whom there are no vacancies in the service is contrary to law. In the event that some of the candidates who are sent on training cannot be absorbed at a future date for want of vacancies, it would lead to a serious dissatisfaction and be unfair to the candidates who were sent for training. This would also cause a burden on the exchequer requiring it to pay a stipend to persons who are yet to be recruited to the judicial service, there being no present vacancies to accommodate them.

56 During the course of the submissions, reliance has been placed on behalf of the respondents on the decision of this Court in Virendra S Hooda v. State of PART H Haryana23. This was a case where the Haryana Public Service Commission issued an advertisement for recruitment to the Executive Branch of the Haryana Civil Service. The advertisement covered 12 posts, 7 of which were in the general category and 5 were reserved. A written examination was held following which the results were published. The appellants were in the list of candidates whose results were declared but did not place sufficiently high to be appointed to the Civil Service (Executive Branch). They were given alternate posts. The writ petitions filed by the appellants were dismissed by the High Court and when the matter reached this Court, they were granted liberty to file fresh writ petitions for getting appointments on the basis of two circulars of 1957 and 1972 which laid down the procedure to be adopted for selection against all notified additional vacancies which arise within six months from the recommendation of the names. The High Court rejected the claim again but this Court eventually took the view that when a policy was declared by the State as to the manner of filling up the post and the policy is declared in terms of the rules, the instructions not being contrary to the rules, the State ought to follow them. Now significantly, the administrative instructions which were referred to were subsequently repealed by legislation with retrospective effect. The validity of the law was upheld by this Court in Virender Singh Hooda v. State of Haryana24, though appointments made already in pursuance of the directions of this Court were left undisturbed. The first decision in Virender Singh Hooda would have to be read in the context of the facts of the case. Significantly, this Court did not have occasion to (1999) 3 SCC 696 (2004) 12 SCC 588 PART H consider the earlier

decision including the principle that appointments cannot be made, consistent with Articles 14 and 16, in excess of notified vacancies. This principle was reiterated in Prem Singh (supra) which was prior to the decision in Virender Singh. Be that as it may, we are of the view that in the above facts the decision in Virender Singh Hooda will not assist the respondents and would have to be confined to the peculiar circumstances in that case. 57 The respondents urged, on the basis of Annexures A-1 to A-3 produced before the High Court along with the statement filed on 18 August 2020, and referred to in the appendix to the impugned judgment, that more than 37 vacancies actually existed as on 31 December 2019 and therefore the select list could be operated for a larger number of vacancies. We are unable to subscribe to this submission. The respondents participated in the selection process on the basis of 37 probable vacancies. Moreover, it has been submitted on behalf of the appellants that, Annexure A-2 appended to the submissions would indicate that the total number of vacancies as on 31 December 2019 were shown to be 43, which included 37 regular vacancies and 8 NCA vacancies. Out of the 37 regular vacancies only 32 could be included in the select list for the year 2019 because as against 5 vacancies candidates were not available against the reserved turn. Those five vacancies have been treated as NCA vacancies for 2020 and have been included in the list of vacancies for the succeeding year. The 37 regular vacancies and 8 NCA vacancies were notified for the year 2019, in accordance with the break up provided in Malik Mazhar Sultan (3). It has been stated that 45 vacancies notified for selection year PART H 2019 included 4 vacancies under the 10 per cent addition that had to be made for every year. However, only two of the four vacancies had actually arisen and hence the figure of 43. On this basis, it has been submitted that there is no discrepancy in the figures which were given in the statement filed before the High Court and the statement filed on additional affidavit before this Court. 58 Finally, it has been urged on behalf of the respondents that the recruitment process for the year 2020 has been delayed as a result of the onset of the Covid-19 pandemic. A recruitment notification was issued in the month of June 2020. It has been submitted that the actual process of selection would take about one year following which candidates would have to be sent on training. Hence it has been submitted that candidates for recruitment year 2020 would be in a position to actually commence judicial duties only in early 2023. Having come to the conclusion that the judgment of the High Court is erroneous, we are of the view that it would be impermissible to grant relief to the respondents purely on this basis. The respondents have no vested right to appointment for the 2019 selections. They cannot claim any right, or even equity, on the ground that the selection for the subsequent year may be delayed. Vacancies for 2020 must be allocated to candidates who are duly selected in pursuance of the recruitment process for 2020. Candidates who have ranked lower in the 2019 selection and were unable to obtain appointments cannot appropriate the vacancies of a subsequent year to themselves. To allow such a claim would be an egregious legal and constitutional error. PART H 59 For the reasons which we have indicated, we are of the view that the judgment of the High Court cannot be sustained. We accordingly allow the appeals and set aside the impugned judgment and order of the Division Bench of the High Court of Kerala dated 26 August 2020. The writ petitions filed by the respondents before the High Court shall stand dismissed. There shall be no order as to costs. 60 Pending applications, if any, stand disposed of.

……J [Dr Dhananjaya Y Chandrachud]

……J [Indira Banerjee] New Delhi;

January 11, 2021.