

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved On : 10.09.2008

% Date of Decision : 03.10.2008

+ **WP (C) No. 2688 of 2008**

AJAY KUMAR JAIN PETITIONER
Through: Mr. Aman Lekhi, Senior Advocate with
Ms. Jaspreet S. Rai, Ms. Meenakshi Lekhi,
Mr. Rajan K. Chourasia, Mr. Syamal Kumar,
Mr. Rakesh Kumar and Mr. Rohit Nagpal,
Advocates along with petitioner in person.

- V E R S U S -

LT. GOVERNOR & ANR. RESPONDENTS
Through: Ms. Zubeda Begum, Advocate for R – 1.
Mr. A.S. Chandhiok, Senior Advocate with
Mr. Viraj R. Dattar, Ms. Bandana Shukla,
Mr. Ritesh Kumar, Ms. Shikha Bhardwaj &
Mr. Arjun Mahajan, Advs. for R – 2.

+ **WP (C) No. 2913 of 2008**

ANIL KUMAR JHA PETITIONER
Through: Mr. P.P. Khurana, Senior Advocate with
Mr. K.K. Jha and Mr. Anil Kumar Mishra,
Advocates.

- V E R S U S -

LT. GOVERNOR & ANR. RESPONDENTS
Through: Ms. Zubeda Begum, Advocate for R – 1.
Mr. A.S. Chandhiok, Senior Advocate with
Mr. Viraj R. Dattar, Ms. Bandana Shukla,
Mr. Ritesh Kumar, Ms. Shikha Bhardwaj &
Mr. Arjun Mahajan, Advs. for R – 2.

A N D

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WP (C) No. 3932 of 2008

RAJIV KUMAR GUPTA PETITIONER
Through: Mr. Pradeep Gupta with Mr. Suresh Bharti
and Ms. Laxmibai Leitanthem, Advocates.

- V E R S U S -

LT. GOVERNOR & ANR. RESPONDENTS
Through: Ms. Zubeda Begum, Advocate for R – 1.
Mr. A.S. Chandhiok, Senior Advocate with
Mr. Viraj R. Dattar, Ms. Bandana Shukla,
Mr. Ritesh Kumar, Ms. Shikha Bhardwaj &
Mr. Arjun Mahajan, Advs. for R – 2.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The over-burdened judicial system of our country faces a problem of absence of adequate strength of Judges. The problem is compounded by vacancies remaining unfilled for considerable periods of time. The anxiety of the Hon'ble Supreme Court to ensure that the vacancies do

not remain unfilled gave rise to certain directions in Malik Mazhar Sultan & Anr. v. U.P. Public Service Commission & Ors., 2007 (2) SCALE 159. It is the consequence and interpretation of these directions, which has given rise to the present litigation.

2. The Registrar of the High Court of Delhi published an advertisement in newspapers on 19.05.2007 for holding of written examination for direct recruitment to Delhi High Judicial Service (hereinafter referred to as 'DHJS' for short). The date of the written examination was scheduled as 22.07.2007. Insofar as the vacancies to be filled up were concerned, it was provided in the advertisement as under :-

“The number of vacancies likely to be filled in is 20, out of which 3 are reserved for Scheduled Castes and 4 are reserved for Scheduled Tribes.”

3. The petitioners in these writ petitions qualified the written examination for which results were declared on 11.12.2007 and were called for the viva voce. The final results were declared on 03.01.2008. It is the case of the petitioners that as per the final result declared, 43 candidates in the General category had qualified and 1 candidate in the category of Scheduled Caste (hereinafter referred to as 'SC' for short). The petitioners ranked at position No. 14, 15 and 20

respectively. The consent letter for appointment was, however, issued only to the first 13 candidates in the General category and the sole candidate in the SC category.

4. The grievance of the petitioners is that the exact number of vacancies in the advertisements was never disclosed and that the respondents were obliged to fill up all the vacant posts existing on the date of the appointment. Not only that, the respondents were required to maintain a select list published in the order of merit of double the number of vacancies notified. It is the case of the petitioners that these directions contained in the judgment in Malik Mazhar Sultan & Anr.'s case (supra) had not been complied with. The directions were in the form of a mandate of the Supreme Court under Article 141 of the Constitution of India (hereinafter referred to as 'Constitution' for short).
5. A further grievance raised by the petitioners is that the vacancies in the category of Scheduled Tribes (hereinafter referred to as 'ST' for short) candidates had not been filled up since 2001 and only one vacancy in SC category had been filled up. It is, thus, stated in the petition(s) that the respondents were required to de-reserve the vacancies available and to fill up the

vacancies with General category candidates for the efficacy of the judicial system. In support of this plea, a reference has been made to the advertisement published by the High Court of Madhya Pradesh inviting applications for General, SC, ST and Other Backward Classes (hereinafter referred to as 'OBC' for short) category and providing for the eventuality of sufficient number of suitable candidate not being available in SC, ST and OBC categories, the said posts would be de-reserved.

6. In the counter affidavit, it has been stated that the number of vacancies, which existed on 19.05.2007, were notified and advertised. There was, thus, only 20 posts existing as on 19.05.2007. The records also show that the position was no different as on 31.03.2007 (*the significance of this is considered later on*). The respondents plead that the directions contained in Malik Mazhar Sultan & Anr.'s case (supra) would have no application to the respondents. The rationale for this plea is that the premise of the directions contained in the said judgment is the prescription of quota for promotion on the principle of merit-cum-seniority from the subordinate judicial service to the higher judicial service of 25% by limited departmental competitive examination and only

25% by direct recruitment. This direction was originally passed by the Supreme Court in All India Judges Association v. Union of India & Ors., 2002 (4) SCC 247. In pursuance to that direction, the Delhi Higher Judicial Service Rules were amended by the Delhi High Court to bring them in conformity with the directions passed by the Supreme Court and the draft amended Rules were forwarded to the Government of National Capital Territory of Delhi on 11.04.2005 for approval and notification. Some observations of the Finance Department of the Govt. of NCT of Delhi were thereafter conveyed to the High Court and the requisite decision of the Full Court was in turn conveyed to the Govt. of NCT of Delhi on 23.04.2007. However, the amended Rules have not come into force with the result that the vacancies are being filled in to the Higher Judicial Service as per the existing Rules, which provide for two-third of the vacancies to be filled in through merit-cum-seniority amongst the eligible Judicial Officers while remaining one-third are to be filled in by direct recruitment from the Members of the Bar. In terms of the amended Rules, this quota of one-third would be reduced to one-fourth. In the existing Rules, there is no provision made for making of a panel / select list.

7. Another aspect emphasized is that an exception has been carved out in respect of the Delhi High Court by observations in Malik Mazhar Sultan & Anr.'s case (supra) that since Delhi Judicial Service (hereinafter referred to as 'DJS' for short) Examinations are being conducted regularly twice a year, the existing practice can continue. The respondents plead that the objective of the Supreme Court directions was to ensure timely filling up of vacancies by the best qualified and suitable candidates, which could have been achieved only by regular competitive examinations and screening test. This has already been achieved by such regular examinations held in Delhi. Therefore, no provision was required to be made taking into account further anticipated vacancies or to prepare a select list in view of the regular by-yearly DJS Examinations. A reference has also been made to the observations in Malik Mazhar Sultan & Anr.'s case (supra) to the effect that till the amendment of the Rules are made, the selection process must continue under the existing Rules. In a nutshell, the plea is that the directions cannot be broken up into two parts and, thus, would become applicable only once the amended Rules came into force making the recruitment process to DHJS through 50% promotion, 25% through

competitive examination and 25% through direct recruitment.

8. In order to appreciate the rival submissions, it is necessary to deal with the judgment of the Supreme Court and the observations made therein in Malik Mazhar Sultan & Anr.'s case (supra). The judgment begins by noting that in All India Judges Association's case (supra), directions had been issued for speedy filling up of vacancies in furtherance of the objective of an independent and efficient judicial system. Such a system would require a better average of judge-population ratio and at least the availability of Judges for whom the posts had been notified. It was, thus, observed, "*In this light, it becomes all the more necessary to take all possible steps to ensure that vacancies in the courts are timely filled*". The Supreme Court was conscious of the fact that amendment to the Rules had not been made for a number of High Courts and, thus, observed in para 5 as under :-

"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 concerned authorities as per the existing Judicial Service Rules in the respective States/Union Territories. ..."

9. A reading of the aforesaid, in our considered view, really leaves no manner of doubt that the directions have been

issued in Malik Mazhar Sultan & Anr.'s case (supra) on the presumption that till such amendment to the Rules are made, the filling up of vacancies cannot stop and, thus, the selection should be made as per the existing Rules. The directions have been made on the said premise.

10. The schedule and methodology for filling up the vacancies in respect of the Higher Judicial Service and the Subordinate Judicial Service have been set out in para 7 of the said judgment. It is not necessary to go into the methodology of filling up of vacancies in the cadre of District Judges in respect of 50% to be filled up by promotion or for the appointment to the Subordinate Judicial Service by direct recruitment. The relevant portion is as under :-

“7. For filling up of vacancies in the cadre of District Judges, accepting the proposal to which none has objected, except in the manner hereinafter noticed, we direct as under :-

A. For filling of vacancies in the cadre of District Judge in respect of

- (a) Twenty five per cent vacancies to be filled by direct recruitment from the Bar; and
- (b) Twenty five per cent by promotion through limited competitive examination of Civil Judges (Senior Division) not having less than five years of qualifying service.

S.No.	Description	Date
1.	Number of vacancies to be notified by the High Court. 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 elevation to the High Court, death or otherwise, say ten per cent of the number of posts, d) vacancies arising due to deputation of judicial officers to other department may be considered as temporary vacancy.	31 st March
2.	Advertisement inviting applications from eligible candidates	15 th April
3.	Last date for receipt of application	30 th April
4.	Publication of list of eligible applicants List may be put on the website	15 th May
5.	Despatch/issue of admit cards to the eligible applicants	16 th May to 15 th June
6.	Written Examination Written examination may be a) objective questions with multiple choice which can be scrutinized by the computer; and b) subjective/narrative	30 th June
7.	Declaration of results of written examination 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	16 th August
8.	Viva Voce	1 st to 7 th September
9.	Declaration of final select list and communication to the appointing 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 c) Select list shall be valid till the next select list is published	15 th September
10.	Issue of appointment letter by the competent authority for all existing vacant posts as on date	30 th September
11.	Last date for joining	31 st October

11. The aforesaid schedule requires the High Court to notify the vacancies as on 31st March of the year concerned.

The vacancies are to include the following :-

- (a) existing vacancies;
- (b) future vacancies that may arise within one year due to retirement;
- (c) future vacancies that may arise due to elevation to the High Court, death or otherwise, say 10% of the number of posts; and
- (d) vacancies arising due to deputation of Judicial Officers to other Departments to be considered as temporary vacancies.

Not only that, the declaration of final select list and communication to the appointing authority, as set out at S.No. 9 aforesaid, requires the select list to be published in order of merit, which should be of double the number of vacancies notified and the select list is to be valid till the next select list is published. S.No. 10 makes it clear that the appointment letter is to be issued by the competent authority for all existing posts as on that date.

12. Para 12 of the judgment, on which reliance has been placed by the respondents, reads as under :-

“12. Insofar as Delhi is concerned, it has been stated that entire selection process is conducted by the High Court and examination is held twice a year for the Delhi Judicial Service. The High Court may, accordingly, amend the aforesaid time schedule so as to conduct the selection process twice in a year and the revised schedule shall be placed on the record of

this case. For the present, the Delhi High Court is permitted three months' time for publication of final result after the written examination."

(emphasis supplied)

13. The aforesaid observations, in our considered view, are clearly in the context of the examination for DJS, which is held twice a year. The same can hardly apply to DHJS since the examinations are not held twice a year. DHJS Examination was held in the year 2001 and thereafter the Examination has been held in the year 2006 and then in 2007 (which is the Examination in question). Thereafter, no other Examination has been notified.
14. The matter did not rest at this since further observations were made in paras 14 and 15 of the said judgment as under :-

"14. The select list prepared for all categories of officials shall be valid till the next select list is published.

15. We further direct that ten per cent of unforeseen vacancies would be in respect of sanctioned posts and not vacancies occurring in a particular year."

(emphasis supplied)

15. In the aforesaid context, the respondents sought to contend that the general principles of service jurisprudence, as contained in different judgments of the Apex Court for filling up of vacancies, cannot be lost sight of. In this behalf, a reference was made to the judgment

in Harjinder Singh Sodhi v. State of Punjab & Ors., (1996) 6 SCC 322 where it was observed that the vacancies for which merit should be considered has to be limited to the vacancies arising in the relevant year.

16. In State of Bihar & Ors. v. Secretariat Assistant Successful Examinees Union 1986 & Ors., (1994) 1 SCC 126, it was observed that the candidates empanelled on the basis of the examination held were entitled to appointment only against the vacancies available up to the last day of the calendar year following year of announcement of the vacancies and not against the vacancies available on the date of publication of the result or later.
17. In State of Bihar & Anr. v. Madan Mohan Singh & Ors., 1994 Supp (3) SCC 308 where observations were made that the process of recruitment in pursuance to an examination comes to an end as soon as the vacancies are filled up and if the same list has to be kept alive for purposes of filling up all other vacancies, it would be deprivation of rights of other candidates, who would have become eligible subsequent to the said advertisement and the selection process.
18. The last judgment in that behalf referred to is of Prem Prakash v. Union of India & Ors., 1984 (Supp) SCC 687.

There was denial of appointment after selection and inclusion in the merit list and, thus, the candidates, who were wrongly denied appointment, were directed to be appointed against the vacancies declared in subsequent year for fresh appointment. It was held that in doing so, there would be denial of appointment to the newly-selected candidates in order to make room for already selected candidates, which was neither fair nor justified.

19. We have given our thought to the controversy in question. The directions contained in Malik Mazhar Sultan & Anr.'s case (supra) came to be passed on account of the peculiar problem faced in non-filling up of judicial posts, which was an impediment in expeditious disposal of disputes. Thus, larger public interest weighed with the Hon'ble Supreme Court in issuing the directions even if some directions were somewhat in deviation from the general principles of service jurisprudence. These directions are covered by the mandate of Article 141 of the Constitution and are, thus, binding on the High Courts. Thus, these directions are strictly liable to be followed and reference to the aforesaid judgments by the respondents cannot defeat the specific directions made by the Supreme Court in the context of the controversy in question.

20. We are also unable to appreciate the submission of the respondents that till the amended Rules come into being, the directions would have no application. The Supreme Court had made it clear that till the amendments in pursuance to All India Judges Association's case (supra) came into being, the selection would be conducted as per the existing Rules. There was nothing in the judgment to come to the conclusion that till the amended Rules came into being, the directions are not to be complied with. The observations made in the initial portion of para 7 have to be read with what is said before that in the initial portion of para 5 of the said judgment. A reading of the same, thus, makes it amply clear that if the Rules have been amended, then 25% vacancies to be filled by direct recruitment and 25% by promotion through limited competitive examination would be filled up the manner provided in para 7 of the judgment and in case the Rules are pending consideration, the vacancies would be filled up as per the Rules in force.
21. We also consider appropriate at this stage to refer to the observations made in para 12 of the said judgment, which are clearly applicable only to DJS as observed aforesaid and not to the Examination of DHJS in view of the indisputed fact that the wordings in para 12 are clear

“Delhi Judicial Service” and referred to the *“Examination held twice a year for the same”*. There was and there is no twice a year Examination for DHJS.

22. Once the aforesaid conclusion is reached, the question arises as to how the directions passed by the Hon'ble Supreme Court ought to have been implemented. The counter affidavit of the respondents shows that there were 20 vacancies in existing as on 19.05.2007 (the date of the advertisement) and the position is no different as on 31.03.2007. Thus, S.No. 1 of para 7 shows that the number of vacancies to be notified by the High Court including existing vacancies as on 31.03.2007 is 20, which have been duly notified. However, while notifying vacancies, the High Court was also required to take into consideration the future vacancies as envisaged in sub-paras (b), (c) and (d) of S.No. 1 aforesaid. This has not been done. S.No. 10 makes it clear that the declaration of final list and communication to the appointing authority, which is to result in the appointment letter, should be for *“all existing vacant posts as on date”*. Thus, the vacancies up to the date of appointment are clearly taken care of by S.No. 10. Not only that, clause (b) of S.No. 9 mandates that the select list should be of double the number of vacancies notified. Once again, no select

list was published. The select list is to be valid till the next select list is published as per clause (c) of para 9. However, this, in our considered view, does not mean that till the next examination is held, the earlier select list would continue to operate. This is so since the directions have been issued on the basis that the examination schedule envisages one examination each year. This is also in consonance with the judgment cited by the respondents and, thus, the select list would have a life of one year till the date the next examination as envisaged. Normally, there has to be a select list for a calendar year, but, in the present case, the directions of the Supreme Court envisage the process starting from 31st March and, thus, the one year would be from 31st March of a year to the next 31st March. In view of the aforesaid, apart from 20 vacancies, which were filled in by the respondents, the vacancies arising up to the declaration of results and its notification should have been included and a select list / panel should have been prepared in terms of the directions aforesaid to take care of the vacancies arising up to 31.03.2008 as the vacancies arising after 31.03.2008 are not to be reckoned for purposes of such appointment. The word used in the advertisement for number of vacancies to be filled in is "*likely*".

23. In respect of the aforesaid, we had called for the relevant data from the respondents. The data shows that there was one vacancy arising on 31.08.2007 on account of elevation to the Bench of this Court. This vacancy was, thus, required to be taken into consideration in terms of S.Nos. 1, 9 and 10 of the directions aforesaid. There are three more vacancies, which arose on 12.03.2008 on account of 10 posts created for ACMMs Courts. These vacancies consisted of 2 General and 1 SC candidate. These vacancies were also, thus, required to be accommodated through the process of a select list / panel prepared by the respondents, which was never so prepared. We may notice at this stage that since only 1 SC candidate qualified, who was appointed, the result of the aforesaid is that 3 more General candidates were required to be appointed in the process of the Examination held in the year 2007. Two of the aforesaid petitioners are at S.Nos. 14 and 15 respectively – the first being Mr. Ajay Kumar Jain and the other being Mr. Anil Kumar Jha. The name of Mr. Ajay Kumar Jain should have, in fact, been included in the select list originally published itself against the vacancy, which arose on 31.08.2007 while the results were declared on 03.01.2008. Mr. Anil Kumar Jha at S.No. 15 would have

been the beneficiary from the select list on account of the vacancies arising on 12.03.2008. The third petitioner Mr. Rajiv Kumar Gupta, however, is at S.No. 20. It is only in the eventuality of person(s) senior to him not accepting the appointment on the offer being made, would his turn come against the third such General vacancy.

24. We may note that though a plea was incorporated in the writ petition about de-reservation of the SC and ST posts, which had not been filled in, it is not in dispute that no process for such de-reservation has been followed nor does the advertisement in question contain a declaration as in the case of the advertisement of Madhya Pradesh High Court. In any case, during the course of hearing, no such plea was pressed.
25. A writ of mandamus is issued directing the respondents to process the filling up of three (3) General category vacancies in terms of the directions aforesaid and the needful be done within a period of one month from today.
26. The parties are left to bear their own costs.

SANJAY KISHAN KAUL, J.

October 03, 2008
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MOOL CHAND GARG, J.