

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K. NARENDRA

FRIDAY, THE 21ST DAY OF AUGUST 2015/30TH SRAVANA, 1937H

WP(C).No. 12732 of 2015 (R)

PETITIONER:

V.S. SUNIL KUMAR, S/O. R. SURENDRAN,
CHAITHANYAM, T.C. 19/44-4
THELIBHAGAM, THIRUMALA, THIRUVANANTHAPURAM-695006.

BY ADVS. SRI. RENJITH THAMPAN (SR.)
SRI. ARAVINDA KUMAR BABU T.K.

RESPONDENT(S):

1. STATE OF KERALA
REPRESENTED BY CHIEF SECRETARY, SECRETARIAT
THIRUVANANTHAPURAM-695001.

2. THE HIGH COURT OF KERALA
REPRESENTED BY ITS REGISTRAR GENERAL, 682031.

3. THE REGISTRAR (RECRUITMENT AND COMPUTERISATION)
HIGH COURT OF KERALA, ERNAKULAM-682031.

R1 BY SR. GOVERNMENT PLEADER SRI JOE KALLIATH
R2&3 BY ADV. SRI. ELVIN PETER P.J.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 18.8.2015, ALONG WITH WPC. 13445/2015, WPC. 13521/2015, WPC. 14780/2015 & WPC. 14957/2015, THE COURT ON 21-08-2015, DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

- P1 : TRUE COPY OF THE NOTIFICATION IN RESPECT OF RECRUITMENT NO.10/14.
- P2 : TRUE COPY OF THE RELEVANT EXTRACT OF THE RANKED LIST.
- P3 : TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE R2 HEREIN IN WPC 23647/2009 (R1 THEREIN).
- P4 : TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE R1 HEREIN IN WPC 23467/09 (R2 THEREIN).
- P5 : TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY R3 HEREIN IN WPC 6763/14.
- P6 : TRUE COPY OF THE GO(MS)NO.285/2012 HOME DT.14-11-12.
- P7: COPY OF QUESTIONNAIRE SUBMITTED BY ADV.SRI R.U.VIJAYAKRISHNAN TO THE PUBLIC INFORMATION OFFICER OF THIS COURT.
- P8: COPY OF REPLY NO.PIO/358/2015 ISSUED BY THE PUBLIC INFORMATION OFFICER OF THIS COURT TO SRI R.U.VIJAYAKRISHNAN
- P9: COPY OF GO(MS)NO.136/201/HOME DT.2.7.15.

RESPONDENTS' EXHIBITS:

EXT.R2(A):COPY OF ORDER NO.106675/C3/2014/HOME DT.17.6.2015 ISSUED BY THE GOVERNMENT.

TRUE COPY

P.S.TO JUDGE

dsn

ANIL K.NARENDRA, J

**W.P.(C)Nos.12732, 13521, 13445,
14780 & 14957 of 2015**

Dated this the 21st day of August, 2015

JUDGMENT

The common issue that arises for consideration in this batch of Writ Petitions is as to the legality of Notification No.REC4-6803/2014 dated 24.2.2014 issued by the 3rd respondent, inviting applications for appointment as District and Sessions Judge in the Kerala State Higher Judicial Service by direct recruitment from the Bar, insofar as it notifies only 4 anticipated vacancies for the year 2014.

2. W.P.(C)No.12732 of 2015 is treated as the leading case. The Exhibits are referred to in this judgment, unless otherwise mentioned, as they appear in W.P.(C)No.12732 of 2015.

3. In exercise of the powers conferred by Article 233 and the proviso to Article 309 of the Constitution of India, the Government in consultation with this Court made the Kerala State Higher Judicial Service Rules, 1961 (hereinafter referred to as 'the Special Rules'). The Kerala State Higher Judicial Service consists of

the following categories, namely;

- (1) Supertime Scale District and Sessions Judge,
- (2) Selection Grade District and Sessions Judge, and
- (3) District and Sessions Judge including Additional District Judge.

4. Going by the Note to Rule 1, the number of posts in category (1) shall be limited to 10% and that in category (2) shall be limited to 25% of the cadre strength of the posts in all the three categories put together. Rule 2 of the Special Rules prescribes the method of appointment. As per clauses (a) and (b) of Rule 2, appointment to category (1) shall be made by promotion from category (2) and appointment to category (2) shall be made by promotion from Category (3). As per clause (c) of Rule 2, appointment to category (3), namely, District and Sessions Judge including Additional District judge, shall be made as follows;

- (i) 50% of the posts in the category shall be filled up by appointment by transfer from category 1 (Subordinate Judges/Chief Judicial Magistrates) in the Kerala State Judicial Service on the basis of merit and ability, seniority being considered only where merit and ability are equal.
- (ii) 25% of the posts in the category shall be filled by appointment by transfer based on a limited competitive

examination and viva voce and on the basis of merit and ability from category 1 (Subordinate Judges/Chief Judicial Magistrates) in the Kerala State Judicial Service with not less than five years of substantive service as such;

(iii) 25% of the posts in the category shall be filled by direct recruitment from the Bar on the basis of aggregate marks/grade obtained in a competitive examination and viva voce conducted by this Court.

5. The 3rd respondent issued Ext.P1 notification dated 24.2.2014 inviting online applications for the Kerala State Higher Judicial Service Examination-2014, from qualified candidates for appointment as District and Sessions Judge, by direct recruitment from the Bar. The number of vacancies notified in Ext.P1 notification is 4 anticipated vacancies. The petitioners in this batch of Writ Petitions submitted application pursuant to Ext.P1 notification and have participated in the process of selection and their names are included in Ext.P2 list of candidates in the order of merit (hereinafter referred to as 'the merit list'), who have qualified in the Kerala State Higher Judicial Service Examination-2014 held for the selection of District and Sessions Judges, by direct recruitment from the Bar. The 3rd respondent published Ext.P2 merit list on 10.4.2015.

6. Since Ext.P1 notification was under challenge in W.P. (C)Nos.6763 of 2014 and 7492 of 2014, it was made clear in Ext.P2 that, the merit list will be subject to the results of the Writ Petitions challenging the selection process. It was also made clear that, the final select list shall be subject to the availability of notified vacancies and the rules of reservation and rotation provided under Rules 14 to 17 of Part II of the Kerala State and Subordinate Service Rules, 1958 (hereinafter referred to as 'KS&SSR') and also subject to the approval of the same by the Governor of Kerala. During the course of arguments, it was brought to my notice that, W.P.(C)No.6763 of 2014 was dismissed as 'not pressed' and W.P.(C)No.7492 of 2014 was dismissed as 'infructuous', on 23.6.2015, since the petitioners in those Writ Petitions could not find a place in Ext.P2 merit list.

7. In the present batch of Writ Petitions, the petitioners are mainly challenging Ext.P1 notification dated 24.2.2014, insofar as it notifies only 4 anticipated vacancies of District and Sessions Judge, under 25% quota meant for direct recruitment from the Bar, for the year 2014.

8. In W.P.(C)No.12732 of 2015 filed by one V.S.Sunil

Kumar, who is Sl.No.9 in Ext.P2 merit list, the reliefs sought for are as follows;

- (i) a writ of certiorari or any other writ, order or direction to quash Ext.P1 notification so far as it notifies only 4 anticipated vacancies;
- (ii) declare that the action of the 2nd and 3rd respondents in notifying only 4 anticipated vacancies even when there were 12 other vacancies in existence at the time of issuance of Ext.P1 notification is highly arbitrary and unsustainable;
- (iii) further declare that as there was 12 vacancies in existence at the time of issuance of Ext.P1 notification that notification itself will suffice the purpose and there is no necessity to notify those posts for fresh selection;
- (iv) issue a further declaration that in the light of Ext.P6 no further sanction from the Government is necessary to fix the cadre strength of the District and Sessions Judges;
- (v) issue a writ of mandamus or any other writ, order or direction commanding and compelling the 2nd and 3rd respondents to fill up the 12 vacancies also from the present ranked list, Ext.P2;
- (vi) issue such other writ, order or direction restraining the respondents from filling up the 12 vacancies set apart for direct recruits by any other mode.

9. The petitioner would contend that, as on the date of issuance of Ext.P1 notification, i.e., as on 24.2.2014, the cadre strength of District and Sessions Judge was 146 and not 99 as

contended by the respondents. If that be so, the action of the 3rd respondent in issuing Ext.P1 notification, notifying the number of vacancies as 4 anticipated vacancies, cannot be sustained. The petitioner would contend further that, the total number of permanent posts of District and Sessions Judge in the Kerala State Higher Judicial Service is 146, if the posts available in 38 Fast Track Courts in the State, which were made permanent by converting those courts as Additional District and Sessions Courts with the existing infrastructure and staff strength, vide Ext.P6 Government order dated 14.11.2012, and also the posts available in 6 Family Courts, 2 Special Courts for trying offences under the Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Act and 1 Special Court for trial of cases relating to atrocities on Women and Children are reckoned. The petitioner would point out that, the Administrative Committee of this Court in its meeting held on 11.6.2013 resolved to request the Government to fix the cadre strength of District and Sessions Judge as 146 and the decision of the Government in this regard is pending. In support of this contention, the petitioner would rely on Ext.P3 counter affidavit filed by the 1st respondent herein in

W.P.(C)No.23647 of 2009, a Writ Petition arising out of a previous notification issued by the 3rd respondent for appointment as District and Sessions Judge, under 25% quota meant for direct recruitment from the Bar; Ext.P4 counter affidavit filed by the 2nd respondent herein in W.P.(C)No.23647 of 2009; and also Ext.P5 counter affidavit filed by the 3rd respondent herein in W.P.(C) No.6763 of 2014, a Writ Petition arising out of the present notification, namely, Ext.P1 notification issued by the 3rd respondent. The petitioner would also contend that, though the issue in W.P.(C)No.23647 of 2009 was taken up before the Apex Court, the Apex Court left open the rights of the candidates to raise challenge against that notification and in effect the issue has not been settled so far. According to the petitioner, if the cadre strength is taken as 146, the 25% quota meant for direct recruitment from the Bar will be 36. As on the date of issuance of Ext.P1 notification there were only 18 direct recruits in the 25% quota meant for direct recruitment from the Bar. 7 vacancies were kept unfilled as No Candidate Available (NCA) turns. Hence the total number of vacancies available as on the date of issuance of Ext.P1 notification under the 25% quota for direct

recruitment from the Bar was 12 and not 4 anticipated vacancies, as notified in Ext.P1 notification and in such circumstances, the candidates included in Ext.P2 merit list are entitled for appointment against those vacancies as well. The petitioner would contend that, as on the date of Ext.P1 notification 12 persons from the category of Subordinate Judge/Chief Judicial Magistrate in the Kerala State Judicial Service were occupying the post of District and Sessions Judge, in excess of the quota meant for appointment by transfer from that category. In order to substantiate the aforesaid contentions, the petitioner would rely on Ext.P8 information received from the Public Information Officer of this Court, under the Right to Information Act, 2005.

10. W.P.(C)No.13521 of 2015 is filed by one Leena C., who is Sl.No.12 in Ext.P2 merit list. The petitioner would contend that, the cadre strength of District and Sessions Judge as on the date of Ext.P1 notification was 155, if the number of the District Judges working as Presiding Officers in 4 Labour Courts, Kerala Co-operative Tribunal, Tribunal for Local Self-Government Institutions, and also the District Judges working as Kerala Legislature Secretary, Kerala Law Secretary and Law Officer of

the Kerala State Electricity Board, are taken into consideration. When the cadre strength of District and Sessions Judge is 155, the 25% quota meant for direct recruitment from the Bar will be 39. As on the date of issuance of Ext.P1 notification there were only 18 direct recruits in the 25% quota meant for direct recruitment from the Bar. 7 vacancies were kept unfilled as No Candidate Available (NCA) turns. Hence the total number of vacancies available as on the date of issuance of Ext.P1 notification under the 25% quota for direct recruitment from the Bar was 21 and not 4 anticipated vacancies, as notified in in Ext.P1 notification and in such circumstances, the candidates included in Ext.P2 merit list are entitled for appointment against those vacancies as well. The petitioner would rely on Ext.P7 information received from the Public Information Officer of this Court, under the Right to Information Act, 2005 to contend that, as on date there are 146 permanent posts of District and Sessions Judge in Kerala State Higher Judicial Service, out of which 123 posts are held by those who got appointment by transfer from the category of Subordinate Judge/Chief Judicial Magistrate in the Kerala State Judicial Service. The petitioner

would contend that, since the select list should be valid till the next select list is prepared, there is no legal impediment in effecting appointment from the select list, against the existing vacancies and the vacancies arising till the next select list is published. Therefore, the petitioner sought a declaration that Ext.P1 notification to the extent of limiting the number of vacancies to 4 anticipated vacancies, ignoring the 21 vacancies existing on the basis of the cadre strength, is illegal and arbitrary. She has also sought for other consequential reliefs.

11. During the pendency of W.P.(C)No.13521 of 2015, the Government by G.O.(Ms.)No.107/2015/Home dated 29.5.2015 (produced as Ext.P8 in W.P.(C)No.13521 of 2015) fixed the cadre strength of District and Sessions Judge in the Kerala State Higher Judicial Service as 130, after excluding 16 posts from the 146 posts identified by the Administrative Committee of this Court. By way of an amendment, the petitioner has also sought for a writ of certiorari to quash Ext.P8 Government order dated 29.5.2015 and a writ of mandamus commanding the respondents to fix the cadre strength of District and Sessions Judge in the Kerala State Higher Judicial Service as 146, as proposed by the Administrative

Committee of this Court. The petitioner has also contended that, the exclusion of 16 posts from the cadre strength on the ground that 7 posts are deputation posts and that, retired District Judges are functioning in 9 Family Courts lacks bonafides and reasonableness.

12. W.P.(C)No.13445 of 2015 is filed by one Akhila Bai D.L., who is Sl.No.7 in Ext.P2 merit list. The petitioner would contend that, as on the date of Ext.P1 notification the cadre strength of District and Sessions Judge was 146 and there existed 13 clear vacancies under the 25% quota for direct recruitment from the Bar. Therefore, including 4 anticipated vacancies due to elevation of 4 District Judges, the number of vacancies available as on the date of Ext.P1 notification was 17. Instead only 4 anticipated vacancies were included in Ext.P1 notification. The petitioner has also contended that, 12 persons from the category of Subordinate Judge/Chief Judicial Magistrate in the Kerala State Judicial Service were occupying the post of District and Sessions Judge, in excess of the quota meant for appointment by transfer from that category. Therefore, the petitioner sought for reliefs similar to those in W.P.(C)No.12732

of 2015.

13. W.P.(C)No.14780 of 2015 is filed by one K.N.Ajithkumar, who is Sl.No.10 in Ext.P2 merit list. The petitioner would contend that, as on the date of Ext.P1 notification the cadre strength of District and Sessions Judge was 146 and there existed 12 clear vacancies under the 25% quota for direct recruitment from the Bar. The number of vacancies available as on the date of Ext.P1 notification was 16, including the 4 anticipated vacancies already notified in Ext.P1. Therefore, the petitioner sought for reliefs similar to those in W.P.(C) No.12732 of 2015. By way of an amendment, the petitioner has also sought for a writ of certiorari to quash G.O.(Ms.) No.107/2015/Home dated 29.5.2015 (produced as Ext.P7 in W.P. (C)No.14780 of 2015), since the Government fixed the cadre strength of District and Sessions Judge in the Kerala State Higher Judicial Service as 130, after excluding 16 posts from the 146 posts identified by the Administrative Committee of this Court.

14. W.P.(C)No.14957 of 2015 is filed by one Sindhu P., who is Sl.No.35 in merit list dated 10.4.2015. The petitioner would contend that, the cadre strength of District and Sessions

Judge as on the date of Ext.P1 notification was 146 and as such there were 13 posts under the 25% quota for direct recruitment from the Bar. Further, 4 more vacancies arose on account of elevation of 4 District Judges and 1 vacancy on account of retirement. In such circumstances, Ext.P1 notification to the extent the number of vacancies are limited to 4 anticipated vacancies cannot be sustained and all 18 vacancies are to be filled up from the merit list prepared pursuant to Ext.P1 notification. Therefore, the petitioner sought for reliefs similar to those in W.P.(C)No.12732 of 2015. By way of an amendment, the petitioner has also sought for a writ of certiorari to quash G.O.(Ms.)No.107/2015/Home dated 29.5.2015 (produced as Ext.P10 in W.P.(C)No.14957 of 2015), since the Government fixed the cadre strength of District and Sessions Judge in the Kerala State Higher Judicial Service as 130, after excluding 16 posts from the 146 posts identified by the Administrative Committee of this Court. The petitioner would also contend that, once the posts available in 38 Fast Track Courts in the State were made permanent by converting those courts as Additional District and Sessions Courts vide Government order dated 14.11.2012, it

forms part of the cadre strength, for which no separate Government order is required. The petitioner has also sought for a declaration that all permanent sanctioned posts together constitute the cadre strength of the post.

15. The 2nd and 3rd respondents have filed a counter affidavit in W.P.(C)No.13521 of 2015, which was adopted as the counter affidavit in the connected Writ Petitions, by way of an adoption memo filed by the learned Standing Counsel. The 2nd and 3rd respondents would contend that, the cadre strength of District and Sessions Judge in the Kerala State Higher Judicial Service, as on the date of issuance of Ext.P1 notification was 99. Subsequent to the fixation of cadre strength as 99, six Family Courts were established, two Special Courts for trial of offences under SC/ST (Prevention of Atrocities) Act, one Special Court for trial of cases relating to atrocities on Women and Children started functioning. In addition to this, 38 Fast Track Courts, which were established as per the recommendation of 11th Finance Commission initially for a period of five years, which was extended up to the year 2012, were made permanent by converting them as Additional District and Sessions Court, by

Ext.P6 Government order dated 14.11.2012. Thus, the total number of permanent posts that are not likely to be abolished and manned by the officers in the cadre of District Judge is 146. Rule 12(4) of Chapter II Part I of the Kerala Service Rules, 1959 (hereinafter referred to as 'KSR') defines the term 'cadre' to mean the strength of a service or part of a service sanctioned as a separate unit. As per Rule 2(18) of Part I KS&SSR, the permanent cadre of each service, class, category and grade shall be determined by the State Government. Therefore, the Administrative Committee of this Court in its meeting held on 11.6.2013 resolved to request the Government to fix the cadre strength of District and Sessions Judge at 146.

16. The 2nd and 3rd respondents would contend that, as on the date of Ext.P1 notification dated 24.2.2014, the posts to be filled up by direct recruitment from the Bar was 24, the same being 25% of the then cadre strength of 99. At the beginning of the year 2014, there were 18 directly recruited District Judges in the Kerala State Higher Judicial Service and hence 6 posts were lying vacant. One more vacancy would arise during that year due to retirement on superannuation of one District Judge, on

31.5.2014. Thus, the total number of vacancies which are to be filled up by direct recruitment from the Bar during the year 2014 was 7. But, all these 7 vacancies were to be kept unfilled as No Candidate Available (NCA) turns pertaining to previous selections, to be filled up by issuing separate notification for SIUC Nadar, OBC (Viswakarmas), Scheduled Tribe, Muslim, Scheduled Caste Converts to Christianity, Dheevera, ETB (Ezhava, Thiyya and Billavas). So as on the end of 2014, no other vacancies could be expected in the regular line to be notified as general vacancies under 25% quota meant for direct recruitment from the Bar. However, 3 or 4 vacancies were expected to arise, since there was a possibility of elevation of District Judges as Judges of this Court. Further the proposal to re-fix the cadre strength of the District Judge at 146 was pending with the Government and if the cadre strength is fixed at 146 by the Government, 12 more vacancies in the post of District Judges directly recruited from the Bar would have been arisen. However, the occurrence of these vacancies was subject to the fixation of cadre strength by the Government as proposed by this Court. Therefore, the Recruitment Committee of this Court in its meeting held on

4.2.2014 considered all these facts and resolved to notify only 4 anticipated vacancies which might arise due to the elevation of District Judges as Judges of this Court. The 2nd and 3rd respondents would contend that, since the authority to fix permanent cadre of each service, class, category and grade is the State Government and the proposal to fix the cadre strength of District Judges at 146 was pending with the Government, by notifying 4 anticipated vacancies as per Ext.P1 notification dated 24.2.2014, this Court considered only the then cadre strength of 99.

17. The 2nd and 3rd respondents would point out that, one M.Ziyad has filed W.P.(C).No.6763 of 2014 challenging Ext.P1 notification dated 24.2.2014 to the extent of notifying only 4 anticipated vacancies, contending that there existed more vacancies to be notified in view of the conversion of certain temporary posts of District Judges as permanent posts. One S.Rajendraprasad has also filed W.P.(C).No.7492 of 2014 raising a similar challenge against the said notification. By order dated 8.8.2014, this Court has directed the State Government to take necessary steps to re-fix the cadre strength of District Judge,

within six weeks. Later, the Government was granted extension of time to re-fix the cadre strength. Since Ext.P2 merit list was published during the pendency of those Writ Petitions, it was published with a rider that the same will be subject to the result of the above Writ Petitions filed challenging the selection process. The 2nd and 3rd respondents would submit that, since the matter was pending on the judicial side and the Government has been directed to take necessary steps to re-fix the cadre strength as per the interim order passed by this Court on 8.8.2014, no decision could be taken in the matter on the administrative side. Pursuant to the direction contained in the aforesaid interim order, the Government by order dated 29.5.2015 (produced as Ext.P8 in W.P.(C).No.13521 of 2015) re-fixed the cadre strength of District Judge as 130.

18. The 2nd and 3rd respondents would contend further that, through a number of decisions, the Apex Court has reiterated that only the notified vacancies are to be filled up and that the filling up of the vacancies over and above the notified vacancies amounts to violation of Articles 14 and 16 of the Constitution of India. As per the direction of the Apex Court in

Malik Mazhar Sultan (3) and another v. Uttar Pradesh Public Service Commission and others (2008 (17) SCC 703), the selection to the post of District and Sessions Judge and Munsiff-Magistrate are to be conducted every year. Therefore vacancies arising subsequent to the notified vacancies are to be filled up by the initiation of a fresh selection process. After the issuance of Ext.P8 Government order dated 29.5.2015 (in W.P. (C).No.13521 of 2015), fixing the cadre strength of District Judge as 130, the Government has clarified by Ext.R2(a) communication dated 17.6.2015 that, Ext.P8 Government order dated 29.5.2015 fixing the cadre strength of District Judge as 130 shall come into effect only from the date of order.

19. Regarding the document produced as Ext.P7 in W.P. (C).No.13521 of 2015, a reply dated 2.6.2015 issued by the Public Information Officer of this Court, the 2nd and 3rd respondents would submit that, the statement contained in Ext.P7 reply that, the number of promotees and direct recruits as on the date of Ext.P1 notification dated 24.2.2014 was 123 and 18 respectively, is an inadvertent mistake. Actually, the total number of District Judges available as on 24.2.2014 comes to

123 inclusive of 18 directly recruited District Judges. In accordance with the quota prescribed in the Special Rules, 75 District Judges appointed by transfer are holding regular posts in the cadre. The remaining 30 posts were ex-cadre posts and the probation of none of the District Judges holding such ex-cadre posts was declared as on 24.2.2014. Further, such appointments made against ex-cadre posts in excess of quota is without prejudice to the claim of the candidates directly recruited from the Bar. The quota as on 24.2.2014 for appointment by transfer and direct recruitment was worked out based on the cadre strength of 99 fixed by the Government, prior to the issuance of Ext.P8 Government order dated 29.5.2015 (in W.P.(C).No.13521 of 2015). The 2nd and 3rd respondents have also stated that, the total number of 123 District Judges mentioned above is not inclusive of the 12 retired District Judges who are serving as Family Court Judges. They have also pointed out that, the petitioners in some of the Writ Petitions have not challenged Ext.P1 notification dated 24.2.2014 notifying only 4 anticipated vacancies and hence no relief can be granted in those Writ Petitions. In so far as the petitioners in the Writ Petitions in which

Ext.P1 notification dated 24.2.2014 to the extent of notifying only 4 anticipated vacancies is under challenge are concerned, they are persons who had appeared for the selection process without any demur, who cannot turn around and challenge the notification after finding that they are included lower down in the merit list, and they are estopped from challenging the said notification by application of the principle of estoppel by conduct.

20. The petitioner in W.P.(C).No.12732 of 2015 has filed a reply affidavit. Relying on Ext.P8 reply dated 29.6.2015 received from the Public Information Officer of this Court, the petitioner would contend that, if the total number of posts occupied by the District Judges including those working as Kerala Legislature Secretary, Kerala Law Secretary, Law Officer of the Kerala State Electricity Board, etc. are taken into consideration, the total number of substantive posts would be 156. Among the 156 substantive posts of District Judge, there were only 11 direct recruits from the Bar as on the date of Ext.P1 notification, and going by the total number of substantive posts of District Judge, it should have been 39. When the Administrative Committee of this Court has recommended fixation of cadre strength of District

Judge as 146, the 2nd and 3rd respondents who could anticipate 4 vacancies mentioned in Ext.P1 notification, which purportedly arose due to proposed elevation of 4 District Judges as Judges of this Court, could have also anticipated 12 vacancies which arose due to the recommendation of the Administrative Committee to fix cadre strength as 146, being the 25% of the 47 vacancies proposed to be added to the then purported cadre strength of 99. The Apex Court in Malik Mazhar Sultan's case (3) held that, the anticipated vacancies should be calculated as 10% of the total cadre strength. If the total cadre strength is taken as 99, then also the anticipated vacancies notified in Ext.P1 notification should have been 10, being 10% of 99. The petitioner would also contend that, Ext.P8 Government order dated 29.5.2015 (in W.P. (C).No.13521 of 2015) has no relevance insofar as no separate order for fixing cadre strength is required once the Government establish permanent posts as done in Ext.P6 Government order dated 14.11.2012. According to the petitioner, once a post is established on permanent basis, that actually becomes a substantive vacancy in the permanent cadre and no separate order is necessary for including the said post in the cadre

strength. Therefore, for all practical purposes, the cadre strength can be reckoned as 156. Going by Ext.P8 reply dated 29.6.2015 received under the Right to Information Act, as on the date of Ext.P1 notification dated 24.2.2014, there were 114 sitting District Judges in the Kerala State Higher Judicial Service with 11 among them being direct recruits from the Bar. Apart from that, 35 posts of District Judges were lying vacant as on that date. That means, even as on the date of Ext.P1 notification, there were admittedly 149 substantive posts of District Judge, out of which 37 posts are to be filled up by direct recruitment from the Bar. If that be so, there was a dearth of 26 directly recruited District Judges from the Bar, as on the date of Ext.P1 notification. Going by the provisions under the KS&SSR, even a provisional promotion can be effected only against a substantive vacancy in the permanent cadre, which is discernible from Rule 31(a)(i) of Part II KS&SSR. During the pendency of the Writ Petition, the Government by Ext.P9 order dated 2.7.2015, appointed by transfer 16 Chief Judicial Magistrates/Sub Judges as District Judges in the Kerala State Higher Judicial Service, subject to the result of the Writ Petitions pending before this Court and without

prejudice to the claims of those to be directly recruited from the Bar. The petitioner would contend that, it is impossible for the respondents to make such appointment by transfer and they can make appointment only under Rule 9(c) of Part II KS&SSR to ex-cadre posts.

21. The petitioner in W.P.(C).No.13521 of 2015 has filed a reply affidavit contending, inter alia, that the power to fix the cadre strength of District Judge vests with the Administrative Committee of this Court and the Government have no authority to fix the cadre strength. Therefore, the so called request made to the Government to fix the cadre strength of District Judge is an unnecessary exercise undertaken by the 2nd and 3rd respondents. The direction issued by this Court in the interim order dated 8.8.2014 in W.P.(C).Nos.6763 of 2014 and 7492 of 2014, directing the State Government to take necessary steps to re-fix the cadre strength of District Judge, is unsustainable in view of the specific statutory provisions and will amount to dilution of the power vested with the Administrative Committee of this Court. The petitioner has also contended that, while notifying the posts, the 2nd and 3rd respondents ought to have

followed the directions issued by the Apex Court in Malik Mazhar Sultan's case in toto.

22. The petitioner in W.P.(C).No.14957 of 2015 has also filed a reply affidavit reiterating the contentions raised in the Writ Petition. It was also contended that, once the Government accepts the recommendation of the Administrative Committee of this Court made on 11.6.2013, to request the Government to fix the cadre strength of District Judge at 146, and issues a formal order, the date of the decision of the Administrative Committee should be the basis and the cadre strength recommended by the Committee should be the cadre strength as on that date. In such circumstances, the clarification issued in Ext.R2(a) Government communication dated 17.6.2015 is non-est and cannot have any force. Further, the reason stated in Ext.P8 Government order dated 29.5.2015 (in W.P.(C).No.13521 of 2015) for reducing the cadre strength from 146 to 130 cannot stand in the eye of law.

23. Heard arguments of Sri.Renjith Thampan, the learned Senior Counsel appearing for the petitioner in W.P.(C).No.12732 of 2015; Sri.T.Krishnanunni, the learned Senior Counsel appearing for the petitioner in W.P.(C).No.13445 of 2015;

Sri.K.C.Santhosh Kumar, the learned counsel for the petitioner in W.P.(C).No.13521 of 2015; Sri.K.P.Satheesan, the learned Senior Counsel for the writ petitioner in W.P.(C).No. 14780 of 2015; Sri.M.Sasindran, the learned counsel for the petitioner in W.P.(C). No. 14957 of 2015; Sri.Joe Kalliath, the learned Senior Government Pleader for the 1st respondent; and also Sri.Elvin Peter P.J., the learned Standing Counsel for the 2nd and 3rd respondents.

24. The main issue that arises for consideration in this batch of Writ Petitions is as to the cadre strength of District Judge in the Kerala State Higher Judicial Service, as on the date of issuance of Ext.P1 notification dated 24.2.2014, inviting online applications for the Kerala State Higher Judicial Service Examination-2014, from qualified candidates for appointment as District and Sessions Judge, by direct recruitment from the Bar.

25. Article 233 of the Constitution of India deals with appointment of District Judges. Clause (1) of Article 233 provides that, appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court

exercising jurisdiction in relation to such State. Clause (2) of Article 233 provides further that, a person not already in the service of the Union or of the State shall only be eligible to be appointed as District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

26. Article 235 of the Constitution, which deals with control over subordinate courts provides that, 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. Going by clause (b) of Article 236 of the constitution, the expression 'judicial service' means a service consisting exclusively of persons intended to fill the post of District Judge

and other civil judicial posts inferior to the post of District Judge.

27. In **State of West Bengal and another v. Nripendra Nath Bagchi (AIR 1966 SC 447)** a Constitution Bench of the Apex Court elaborately traced the background, history and scope of the constitutional provisions under Articles 233 and 235 relating to subordinate judiciary and held that, Articles 233 and 235 make a mention of two distinct powers. The first is power of appointments of persons, their postings and promotion and the other is power of control. In the case of the District Judges, appointments of persons to be, and posting and promotion are to be made by the Governor, but the control over the District Judge is of the High Court.

28. In **Chief Justice of Andhra Pradesh and others v. L. V. A Dixitulu and others (1979 (2) SCC 34)** a Constitution Bench of the Apex Court held that, Article 233 of the Constitution gives the High Court an effective voice in the appointment of District Judges. Clause (1) of the Article peremptorily requires that 'appointments of persons to be, and the posting and promotion of District Judges' shall be made by the Governor 'in consultation with the High Court'. Clause (2) of the Article

provides for direct appointment of District Judges from advocates or pleaders of not less than seven years standing who are not already in the service of the State or of the Union. In the matter of such direct appointments, also, the Governor can act only on the recommendation of the High Court. Consultation with the High Court under Article 233 is not an empty formality. An appointment made in direct or indirect disobedience of this constitutional mandate, would be invalid.

29. In **Madan Mohan v. State of Bihar (1999 (3) SCC 396)** the Apex Court held that, under Article 235, the High Court's control over the subordinate judiciary is comprehensive and extends over a variety of matters, including posting, promotion and grant of leave. The three words, namely, 'posting', 'promotion' and 'grant of leave' used in this article are only illustrative in character and do not limit the extent of control exercised by the High Court over the officers of the subordinate judiciary. The Apex Court held further that, transfers, promotions and confirmations including transfer of District Judges or the recall of District Judges posted on ex-cadre post or on deputation or on administrative post, etc. is also within the administrative

control of the High Court.

30. Rule 12(4) of Part I KSR defines 'cadre' to mean the strength of a service or part of a service sanctioned as a separate unit. Rule 2(18) of Part I KS&SSR provides that, the permanent cadre of each service, class, category and grade and shall be determined by the State Government. Rule 5 of Part II KS&SSR deals with method of recruitment. As per Rule 5, where the normal method of recruitment to any service, class or category is neither solely by direct recruitment nor solely by transfer but is both by direct recruitment and by transfer, (a) the proportion or order in which the Special Rules concerned may require vacancies to be filled by persons recruited direct and by those recruited by transfer shall be applicable only to substantive vacancies in the permanent cadre; (b) a person shall be recruited direct only against a substantive vacancy in such permanent cadre, and only if the vacancy is one which should be filled by a direct recruit under the Special Rules referred to in clause (a); and (c) recruitment to all other vacancies shall be made by transfer.

31. Note 1 to Rule 5 of Part II KS&SSR provides that, all permanent vacancies and temporary vacancies except those of

short duration shall be treated as substantive vacancies. Note 2 to Rule 5 provides further that, the vacancies on account of leave and deputation with a duration of less than six months shall be treated as vacancies of short duration, provided, such vacancies with a duration of three months to six months should not be treated as vacancies of short duration, if the vacancies are likely to last long or new vacancies are likely to arise. Note 3 to Rule 5, added as per SRO No.194/93 published in Kerala Gazette on 2.2.1993, mandates that, whenever a ratio or percentage is fixed for different methods of recruitment/appointment to a post the number of vacancies to be filled up by candidates from each method shall be decided by applying the fixed ratio or percentage to the cadre strength of the post to which the recruitment/transfer is made and not to the vacancies existing at that time.

32. As I have already noticed, as per Rule 1 of the Special Rules, the Kerala State Higher Judicial Service consists of three categories, namely, (1) Supertime Scale District and Sessions Judge, (2) Selection Grade District and Sessions Judge, and (3) District and Sessions Judge including Additional District Judge.

Note to Rule 1 provides that, the number of posts in category (1) shall be limited to 10% and that in category (2) shall be limited to 25% of the cadre strength of the posts in all the three categories put together. As per the method of appointment to category (3), prescribed under clause (c) of Rule 2 of the Special Rules, 75% of the posts in that category shall be filled up by appointment by transfer from Subordinate Judges/Chief Judicial Magistrates in the Kerala State Judicial Service, as provided under sub-clauses (i) and (ii) of clause (c) and the remaining 25% of the posts shall be filled by direct recruitment from the Bar. A conjoint reading of Rule 12(4) of Part I KSR and Rule 2 (18) of Part I KS&SSR make it explicitly clear that the 'permanent cadre' of category (3) of the Special Rules, namely, 'District and Sessions Judge including Additional District Judge' means the strength of that category as determined by the State Government in consultation with this Court.

33. Further, going by the mandate of Rule 5 of Part II KS&SSR, where the method of appointment to any category is both by direct recruitment and by transfer, the proportion or order in which the Special Rules require the vacancies to be filled

up shall be applicable only to substantive vacancies in the permanent cadre. A person shall be recruited direct only against a substantive vacancy in such permanent cadre, and only if the vacancy is one which should be filled by a direct recruit under the Special Rules and recruitment to all other vacancies shall be made by transfer. Note 3 to Rule 5 mandates further that, the number of vacancies to be filled up by candidates from each method shall be decided by applying the fixed ratio or percentage to the cadre strength of the post and not to the vacancies existing at that time. Therefore, any direct recruitment from the Bar to 25% of the posts in the category of District and Sessions Judge including Additional District Judge, should be against substantive vacancies in the 'permanent cadre', namely, the strength of that category as determined by the State Government in terms of Rule 2(18) of Part I KS&SSR, in consultation with this Court.

34. In **Antony v. Muraleedharan (1998 (6) SCC 630)** the Apex Court held that, if there is no substantive vacancy in the permanent cadre available, no direct recruitment can be resorted to. The direct recruits should get substantive vacancies in the

permanent cadre, while recruits by transfer can be adjusted against a permanent vacancy or a temporary vacancy depending upon the vacancy position. A person, who gets a temporary appointment or promotion, as the case may be, shall not be regarded as a probationer in that category and on account of that temporary appointment or promotion, he cannot have any preferential claim to that post. Any commencement of probation for the purpose of counting seniority must precede by an appointment in accordance with the rules.

35. As borne out from the pleadings and documents on record, the Administrative Committee of this Court in its meeting held on 11.6.2013 resolved to request the Government to fix the cadre strength of District Judge at 146 and accordingly a request was forwarded to the Government to fix the cadre strength as 146, as against the existing cadre strength of 99. In the meantime, this Court issued an interim order in W.P.(C). Nos.7492 of 2014 and 6763 of 2014, directing the Government to consider the said request and pass appropriate orders fixing the cadre strength. Pursuant to the said order, a meeting of the Secretaries of Home, Law and Finance Departments was

convened on 5.5.2015, in which it was decided that, out of the 146 posts identified by this Court and forwarded to the Government vide letter dated 31.7.2013, deputation posts and those Family Courts where retired District judges are functioning shall be excluded and the strength shall be finalised. Accordingly, the Government decided in Government order dated 29.5.2015 (produced as Ext.P8 in W.P.(C).No.13521 of 2015), to fix the cadre strength of District Judge in the Kerala State Higher Judicial Service as 130, subject to the condition that no fresh post creation will be involved. The Annexure to Government order dated 29.5.2015 contains the details of the 130 posts included in the cadre strength.

36. Therefore, the pleadings and documents on record make it explicitly clear that, the 'cadre strength', i.e., the 'permanent cadre' of District Judge as on the date of issuance of Ext.P1 notification dated 24.2.2014 was only 99. Since the 99 posts identified by this Court and accepted by the Government while fixing the cadre strength of District Judge as 99, alone are the posts in the 'permanent cadre', any direct recruitment from the Bar to 25% of the posts in the category of District Judge,

should be against the substantive vacancies in those identified posts in the 'permanent cadre'.

37. In **High Court of Judicature for Rajasthan v. Veena Verma and another (2009 (14) SCC 734)** the Apex Court in the context of sub-rule (2) of Rule 6 of the Rajasthan Higher Judicial Service Rules, 1969 held that, the posts created without a specific order under sub-rule (2) of Rule 6 are ex-cadre posts and can only be filled in by promotees, and not by direct recruitment. Rule 6 of the Rajasthan Higher Judicial Service Rules deals with strength of the service. As per sub-rule (2) of Rule 6 referred to by the Apex Court, the strength of the service as specified in Schedule I of the Rules may be varied by the Governor from time to time, in consultation with the High Court. Rule 9 provides further that, the number of persons appointed to the Service by direct recruitment shall at no time exceed one third of the total strength of service. The Division Bench of the High Court held that, creation of posts beyond the cadre strength mentioned in Schedule I automatically implies increase in the strength in service under sub-rule (2) of Rule 6 and that, whenever posts are created, the strength of the service is

deemed to have been automatically increased although there is no order under sub-rule (2) of Rule 6 in this connection amending Schedule I. The Division Bench held further that, for the purpose of direct recruitment the temporary or permanent posts created outside the cadre without amending Schedule I were also to be included while calculating the strength of the service. While setting aside the judgment of the Division Bench of the High Court, the Apex Court held that the posts created without a specific order under sub-rule (2) of Rule 6 are ex-cadre posts and can only be filled in by promotees, and not by direct recruitment.

Paragraphs 27 to 30 of the judgment read thus;

"27. We cannot agree with the view of the Division Bench of the High Court that creation of posts beyond the cadre strength mentioned in Schedule I automatically implies increase in the strength in service under sub-rule (2) of Rule 6 of the Rules. It may be noted that under sub-rule (2) of Rule 6, the strength of the service may be varied by the Governor from time to time in consultation with the High Court. No such order has been passed under sub-rule (2) of Rule 6. Without such an order it cannot be said that the strength of the service has been increased. It may be mentioned that posts can be created de hors the cadre of a service, and these are known as ex cadre posts. The posts created without a specific order under Rule 6(2) are ex

cadre posts. Hence in our opinion the temporary or permanent vacancies or posts created beyond the number of posts in Schedule I without a specific order under Rule 6 (2) varying Schedule I to the Rules are only ex cadre posts, and can only be filled in by promotees, and not by direct recruitment.

28. It may be noted that Rule 9(2) uses the words 'as far as possible'. In our opinion, this means that there is no hard and fast rule that after every three persons appointed by promotion, the fourth person has to be appointed by direct recruitment. In our opinion, the Division Bench of the High Court has given a wrong interpretation of Rule 9 (2) of the Rules by observing "it does not give a licence to the respondents to refuse to appoint every fourth person by direct recruitment on the ground that it was not possible for any other reason than the maintenance of the limit of one third of the total strength imposed by sub-rule (1) of Rule 9 on direct recruitment". In our opinion this is a wrong view taken by the Division Bench of the High Court as is evident from the words 'as far as possible' in Rule 9 (2). These words give a discretion to the authorities, and the Court cannot interfere with this discretion, unless it is palpably arbitrary.

29. In our opinion, the Division Bench of the High Court erred in law in holding that for the purpose of direct recruitment the temporary or permanent posts created outside the cadre without amending Schedule I were also to be included while calculating the strength of the service.

30. The Division Bench also erred in holding that whenever

posts are created, the strength of the service is deemed to have been automatically increased although there is no order under Rule 6(2) in this connection amending Schedule I. In our opinion, there has to be a specific order under Rule 6(2) amending Schedule I otherwise it cannot be said that the strength of the cadre has been increased. Hence, in our opinion, the temporary or permanent posts created outside the cadre cannot be taken into consideration for determining the strength of the cadre."

38. In the case on hand, the 'cadre strength', i.e., the 'permanent cadre' of District Judge as on the date of issuance of Ext.P1 notification dated 24.2.2014 was only 99, namely the 99 posts identified by this Court and accepted by the Government while fixing the cadre strength of District Judge as 99. It was in exercise of the powers conferred under Rule 2(18) of Part I KS&SSR, the Government in consultation with this Court, determined the 'permanent cadre' of the category of District Judge in the Kerala State Higher Judicial Service as 99. Thereafter, the cadre strength was re-fixed as 130, in consultation with this Court, only by Government order dated 29.5.2015 (produced as Ext.P8 in W.P.(C).No.13521 of 2015). The Annexure to Government order dated 29.5.2015 contains the details of the 130 posts included in the cadre strength. The 31

posts added to the 'permanent cadre' will remain as ex-cadre posts till the issuance of Government order dated 29.5.2015, in which no direct recruitment is permissible till that date, since the mandate of Rule 5 of Part II KS&SSR is that, a person shall be recruited direct only against a substantive vacancy in the 'permanent cadre', and recruitment to all other vacancies shall be made by transfer.

39. After the issuance of Ext.P8 Government order dated 29.5.2015 (in W.P.(C).No.13521 of 2015), fixing the cadre strength of District Judge as 130, the Government has clarified by Ext.R2(a) communication dated 17.6.2015 that, Ext.P8 Government order dated 29.5.2015 fixing the cadre strength of District Judge as 130 shall come into effect only from the date of order. Further, this Court on administrative side can only make a request to the Government to re-fix the cadre strength of District Judge and it is for the Government to pass appropriate orders on the request so made; the legality of which could be tested by this Court in the judicial side in the event of any challenge by the affected party. Therefore, merely for the reason that the Administrative Committee of this Court has requested the

Government to fix the cadre strength of District Judge at 146, it cannot be contended that, with effect from the date of such recommendation the cadre strength of District Judge would become 146.

40. Relying on the judgment of the Apex Court in **D.Ganesh Rao Patnaik and others v. State of Jharkand and others (2005 (8) SCC 454)**, the petitioners would contend that, the cadre strength of District and Sessions Judge means the entire cadre of the District and Sessions Judge, including temporary posts and in such circumstances, there is no justification to deprive the direct recruits of their share in the temporary posts in that cadre. But, the judgment of the Apex Court in D.Ganesh Rao Patnaik's case (supra) was in the context of Rule 2(a) of the Bihar Superior Judicial Service Rules, 1946, where 'cadre' means the entire cadre of the Bihar Superior Judicial Service and, therefore, there is no warrant for excluding the temporary posts. Paragraph 10 of the judgment reads thus;

"10. Before dealing with the main issue raised in the appeal, namely, the inter se seniority of direct recruits and the promotees, the first and foremost question which requires consideration is whether for calculating the one

third quota of direct recruits as provided in Rule 6, the temporary posts of Additional District and Sessions Judges have to be included or not. R.6 only says that of the posts in the cadre of the Service, two thirds shall be filled by promotion and one third by direct recruitment. Cadre is defined in sub-rule (a) of Rule 2 and it means the cadre of the Bihar Superior Judicial Service. It is important to note here that the definition of "cadre", as given in the aforesaid rule does not say that the temporary posts have not to be taken into consideration or have to be excluded nor there is any indication to that effect. "Cadre" means the entire cadre of the Bihar Superior Judicial Service and, therefore, there is no warrant for excluding the temporary posts."

41. The petitioners would rely on G.O.(P)No.64/77/Fin. Dated 19.2.1977, which provides for making a temporary post as a permanent one, as per which the posts which have been continuously in existence for a minimum period of five years will be treated as permanent posts without further orders. Since the 99 posts identified by this Court and accepted by the Government while fixing the cadre strength of District Judge as 99, alone are the posts in the 'permanent cadre', any direct recruitment from the Bar to 25% of the posts in the category of District Judge, should be against the substantive vacancies in those 99 identified posts in the 'permanent cadre'. Therefore, even if any temporary

post of District Judge became permanent after five years of its continuous existence, it will remain as an ex-cadre post till it is added to the permanent cadre' by the Government, in exercise of its powers conferred under Rule 2(18) of Part I KS&SSR, in consultation with this Court. Till such time no direct recruitment is permissible, since the mandate of Rule 5 of Part II KS&SSR is that, a person shall be recruited direct only against a substantive vacancy in the 'permanent cadre', and recruitment to all other vacancies shall be made by transfer.

42. Relying on the judgment of the Apex Court in **B.Bhaskar Rao and others v. State of Andhra Pradesh and others (1993 (3) SCC 307)** the petitioners would contend that, temporary posts can also be taken into account for the purpose of fixing the cadre strength. But, the judgment of the Apex Court in B.Bhaskar Rao's case (supra) was in the context of Rule 1 of the Andhra Pradesh State Higher Judicial Service Special Rules, which does not say that service shall consist of only permanent posts. In other words, as and when a post of District and Sessions Judge Second grade is created, permanent or temporary, it becomes part of the service under Rule 1 of the

Special Rules. The relevant portion of paragraph 4 of the judgment reads thus;

"4. On the plain reading of the Special Rules the salient features of the Service can be culled out as under:

1.Rule 1 provides for the constitution of the Service. All the posts of District and Sessions Judges Second grade created from time to time are part of the Service. The natural corollary is that the Service consists of permanent as well as temporary posts.

2. xxx xxx xxx xxx "

43. For the reasons stated above, the conclusion is irresistible that, the cadre strength, i.e., the 'permanent cadre' of District Judge in the Kerala State Higher Judicial Service, as on the date of issuance of Ext.P1 notification dated 24.2.2014, inviting online applications for the Kerala State Higher Judicial Service Examination-2014, from qualified candidates for appointment as District and Sessions Judge, by direct recruitment from the Bar, was only 99.

44. The next issue that arises for consideration is as to the legality of Ext.P1 notification dated 24.2.2014 issued by the 3rd respondent, inviting applications for appointment as District and Sessions Judge in the Kerala State Higher Judicial Service by

direct recruitment from the Bar, insofar as it notifies only 4 anticipated vacancies for the year 2014.

45. The petitioners in W.P.(C)Nos.12732 of 2015, 13445 of 2015 and 14780 of 2015 would contend that, as on the date of issuance of Ext.P1 notification, i.e., as on 24.2.2014, the cadre strength of District and Sessions Judge was 146 and not 99. If the cadre strength is taken as 146, the 25% quota meant for direct recruitment from the Bar will be 36. As on the date of issuance of Ext.P1 notification there were only 18 direct recruits in the 25% quota meant for direct recruitment from the Bar. 7 vacancies were kept unfilled as NCA turns. Hence the total number of vacancies available as on the date of issuance of Ext.P1 notification, under the 25% quota for direct recruitment from the Bar, was 12 and not 4 anticipated vacancies, as notified in Ext.P1 and in such circumstances, the candidates included in Ext.P2 merit list are entitled for appointment against those vacancies as well. The petitioners would contend further that, as on the date of Ext.P1 notification 12 persons from the category of Subordinate Judge/Chief Judicial Magistrate in the Kerala State Judicial Service were occupying the post of District and Sessions

Judge, in excess of the quota meant for appointment by transfer from that category. In order to substantiate the aforesaid contention, the petitioner in W.P.(C)No.12732 of 2015 would rely on Ext.P8 information received from the Public Information Officer of this Court, under the Right to Information Act, 2005.

46. The petitioner in W.P.(C)No.13521 of 2015 would go a step further and contend that, the cadre strength of District and Sessions Judge as on the date of Ext.P1 notification was 155, if the number of the District Judges working as Presiding Officers in 4 Labour Courts, Kerala Co-operative Tribunal, Tribunal for Local Self-Government Institutions, and also the District Judges working as Kerala Legislature Secretary, Kerala Law Secretary and Law Officer of the Kerala State Electricity Board, are taken into consideration. If the cadre strength of District and Sessions Judge is taken as 155, the 25% quota meant for direct recruitment from the Bar will be 39. As on the date of issuance of Ext.P1 notification there were only 18 direct recruits in the 25% quota meant for direct recruitment from the Bar and 7 vacancies were kept unfilled as NCA turns. Hence the total number of vacancies available as on the date of issuance of Ext.P1

notification under the 25% quota for direct recruitment from the Bar was 21 and not 4 anticipated vacancies, as notified in Ext.P1 notification and in such circumstances, the candidates included in Ext.P2 merit list are entitled for appointment against those vacancies as well. The petitioner would rely on Ext.P7 information received from the Public Relations Officer of this Court, under the Right to Information Act, 2005, in order to contend that, as on date 123 posts of District and Sessions Judge are held by those who got appointment by transfer from the category of Subordinate Judge/Chief Judicial Magistrate in the Kerala State Judicial Service. The petitioner would contend further that, since the select list should be valid till the next select list is prepared, there is no legal impediment in effecting appointment from Ext.P2 merit list, against the existing vacancies and the vacancies arising till the next select list is published.

47. Per contra, the 2nd and 3rd respondents would contend that, the cadre strength of District and Sessions Judge in the Kerala State Higher Judicial Service, as on the date of issuance of Ext.P1 notification was 99. Subsequently, six Family Courts were established, two Special Courts for trial of offences under SC/ST

(Prevention of Atrocities) Act, one Special Court for trial of cases relating to atrocities on Women and Children started functioning. In addition to this, 38 Fast Track Courts, which were established as per the recommendation of 11th Finance Commission were made permanent by converting them as Additional District and Sessions Court, by Ext.P6 Government order dated 14.11.2012. Thus, the total number of permanent posts that are not likely to be abolished and manned by the officers in the cadre of District Judge is 146. As per Rule 2(18) of Part I KS&SSR, the permanent cadre of each service, class, category and grade shall be determined by the State Government. Therefore, the Administrative Committee of this Court in its meeting held on 11.6.2013 resolved to request the Government to fix the cadre strength of District and Sessions Judge at 146. As on the date of Ext.P1 notification, the posts to be filled up by direct recruitment from the Bar was 24, the same being 25% of the then cadre strength of 99. At the beginning of the year 2014, there were 18 directly recruited District Judges in the Kerala State Higher Judicial Service and hence 6 posts were lying vacant. One more vacancy would arise during that year due to retirement on

superannuation of one District Judge, on 31.5.2014. Thus, the total number of vacancies which are to be filled up by direct recruitment from the Bar during the year 2014 was 7. But, all these 7 vacancies were to be kept unfilled as NCA turns pertaining to previous selections, to be filled up by issuing separate notification for SIUC Nadar, OBC (Viswakarmas), Scheduled Tribe, Muslim, Scheduled Caste Converts to Christianity, Dheevera, ETB (Ezhava, Thiyya and Billavas). So as on the end of 2014, no other vacancies could be expected in the regular line to be notified as general vacancies under 25% quota meant for direct recruitment from the Bar. However, 3 or 4 vacancies were expected to arise, since there was a possibility of elevation of District Judges as Judges of this Court. Further the proposal to re-fix the cadre strength of the District Judge at 146 was pending with the Government and if the cadre strength is fixed at 146 by the Government, 12 more vacancies in the post of District Judges directly recruited from the Bar would have been arisen. However, the occurrence of these vacancies was subject to the fixation of cadre strength by the Government as proposed by this Court. Therefore, the Recruitment Committee of this

Court in its meeting held on 4.2.2014 considered all these facts and resolved to notify only 4 anticipated vacancies which might arise due to the elevation of District Judges as Judges of this Court.

48. In **All India Judges Association and others v. Union of India and others (2002 (4) SCC 247)** the Apex Court directed that, recruitment to the Higher Judicial Service, i.e., the cadre of District Judges will be; (a) 25 per cent by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit cum seniority and passing a suitability test; (b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years' qualifying service; and (c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible Advocates on the basis of the written and viva voce test conducted by respective High Courts.

49. In **Maharashtra State Judges Association and others v. Registrar General, High Court of Judicature at Bombay and another (2009 (1) SCC 569)** the Apex Court noticed that, caderisation by integration of multiple categories of

posts was not suggested either in All India Judges Association (I) or (II) and what was suggested therein was merely uniformity in hierarchy, designation and jurisdictions of judicial officers in civil and criminal sides. The Apex Court observed that, Shetty Commission, as a corollary to its pay scale recommendation, recommended that there should be only three cadres: District Judges, Civil Judge (Senior Division) and Civil Judge (Junior Division), and multiple categories should be avoided. But the recommendation made in the report dated 11.11.1999 was not binding, until it was accepted by the Apex Court and rules were framed in terms of it. The said recommendation was accepted in All India Judges Association(III) by judgment dated 21.3.2002. By the said order, the Apex Court granted time up to 31.3.2003 to implement the said recommendations. Until the recommendation was accepted and rules were framed, the integration/caderisation was a nebulous concept incapable of being claimed or enforced as a right.

50. In **Malik Mazhar Sultan (3) and another v. Uttar Pradesh Public Service Commission and others (2008 (17) SCC 703)** the Apex Court laid down the general directions and

the time schedule to be adhered to for filling up vacancies that may arise in Subordinate Courts and District Courts. Before issuing such general directions and the time schedule, the Apex Court has noticed in Para.5 of the judgment that, selections are required to be conducted by the authorities concerned as per the existing Judicial Service Rules in the respective States/Union Territories. In Para.6 of the judgment, the Apex Court has observed that, since appointments are to be made in accordance with the respective Judicial Services Rules in the States, the apprehension that the constitution of Selection Committee by the Chief Justice of the High Court to monitor timely appointment of Judges at subordinate/district level would amount to interference with the independent functioning of the State Public Service Commission seems to be wholly misplaced. In Para.7 of the judgment, the Apex Court directed that, for filling up of vacancies in the cadre of District Judge, in respect of the 25 per cent vacancies to be filled by direct recruitment from the Bar, and 25 per cent by promotion through limited competitive examination of Civil Judges (Senior Division) not having less than five years of qualifying service, the number of vacancies has to be notified by

31st March. The vacancies to be calculated include (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 per cent of the number of posts, and (d) vacancies arising due to deputation of judicial officers to other departments may be considered as temporary vacancy. Declaration of final select list and communication to the appointing authority has to be made by 15th September. The select list has to be published in order of merit and should be double the number of vacancies notified. In Para.14 of the judgment, the Apex Court directed that, the select list prepared for all categories of officials shall be valid till the next select list is published. In Para.15 of the judgment, the Apex Court directed further that, 10 per cent of unforeseen vacancies would be in respect of sanctioned posts and not vacancies occurring in a particular year.

51. However, in **Rakhi Ray and others vs. High Court of Delhi and others (2010) 2 SCC 637** a Three-Judge Bench of the Apex Court explained the decision in **Malik Mazhar Sultan's case (supra)**. In **Rakhi Ray's case (supra)** the facts and

circumstances giving raise to those appeals are that, in order to fill up 20 vacancies in the cadre of District Judge, the High Court of Delhi issued an advertisement dated 19.5.2007. Out of these 20 vacancies, 13 were to be filled up from the General Category candidates; 3 from Scheduled Castes; and 4 from Scheduled Tribes. The result was declared on 3.1.2008. Appellants, who belong to General Category, found place in the merit list but much below. All the 13 vacancies were filled according to the merit list of General Category candidates. However, two posts reserved for Scheduled Castes candidates and four posts meant for Scheduled Tribes candidates could not be filled up for non availability of suitable candidates. Certain unsuccessful candidates approached the Delhi High Court on the ground that 13 vacancies came into existence between 29.2.2008 and 23.5.2008, i.e., during the pendency of the selection process, which could have also been filled up from the said select list in view of the judgment of this Court in **Malik Mazhar Sultan's case (supra)**. The High Court disposed of all the writ petitions taking a view that only three vacancies came into existence subsequent to the date of advertisement, which could have been

filled up from the said list. Out of the said three vacancies, two could be offered to General Category candidates and one to the Scheduled Caste candidate and issued direction to appoint two more candidates whose names appeared at Serial Nos.14 and 15 in General Category Merit List. Hence, the appellants before the Apex Court sought directions to the respondents for offering appointment to them also.

52. On behalf of the appellants, it was submitted that, the judgment in **Malik Mazhar Sultan's case (supra)** was delivered by the Apex Court on 4.1.2007. A large number of directions had been issued in the said case and it also formulated the calendar for conducting the examinations for filling up the vacancies in the Judicial Service. It also provided that while determining the number of vacancies, the concerned Authority would also consider alongwith the existing vacancies, as what would be the anticipated vacancies that may arise within one year due to retirement, due to elevation to the High Court, death or otherwise, say 10% of the number of posts; and to take note of the vacancies arising out of deputation of Judicial Officers to other departments. It also provided that the select list so

prepared shall be valid till new select list is published. The examination is to be conducted every year. The High Courts were directed to give strict adherence to the aforesaid schedule fixed by the Apex Court. So far as the Delhi High Court was concerned, it was provided that the High Court would amend its calendar accordingly. In view of the above, it has been submitted that while making the advertisement, the Delhi High Court had not taken note of the anticipated vacancies which could be available during the next year. As per the directions of the Apex Court, as 13 more vacancies came into existence, those vacancies must be filled up from the select list so prepared. As the appellants are in the select list they should be offered appointments.

53. Per contra, the respondents opposed the appeals contending that the law does not permit filling up the vacancies over and above the number of vacancies advertised. Only 13 vacancies of the General Category were advertised; the same had been filled up according to merit, therefore, selection process in that respect stood exhausted. The waiting list does not survive. The respondents contended further that, the appellants had not challenged the advertisement in spite of the fact that the

judgment in **Malik Mazhar Sultan's case (supra)** was delivered on 4.1.2007 and vacancies were advertised on 19.5.2007. The appellants were not aggrieved for not offering the appointment to them, as they did not even approach the High Court for any relief. The Special Leave Petitions were filed at much belated stage on 24.10.2008, though the result had been declared on 3.1.2008, and appointments had been made on 3.4.2008. Further, the directions of the Apex Court could not supersede the statutory rules as there was a direction to fill up the vacancies as per the existing statutory rules and the appointments had been made according to law.

54. In Para.7 of the judgment in **Rakhi Ray's case (supra)**, after referring to a catena of decisions, the Three-Judge Bench of the Apex Court held that, 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 and such a deviation is permissible only after adopting policy decision based on some rational, otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. In Para.12 of the judgment, the Apex Court summarised the law as follows;

“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 Article 14 and Article 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.”

In Para.13 of the judgment, the Apex Court concluded that, as 13 vacancies of the General Category had been advertised and filled

up, the selection process so far as the General Category candidates is concerned, stood exhausted and the unexhausted select list is meant only to be consigned to record room.

55. In Paras.15 to 24 of the judgment in **Rakhi Ray's case (supra)**, the Apex Court elaborately considered the submission made on behalf of the appellants that, the directions issued by the Apex Court in **Malik Mazhar Sultan's case (supra)** had to be given effect to. In Para.18 of the judgment, it was observed that, in **Malik Mazhar Sultan's case (supra)**, the Apex Court has clarified that selection was to be made as per the existing Rules and direction was issued for amending the existing laws to adopt the recommendations of Justice Shetty Commission as approved by the Apex Court for the future. Paras.20 to 22 of the judgment reads thus;

“**20.** Therefore, it is evident from the aforesaid judgment that in spite of acceptance of the recommendations made by Justice Shetty Commission, this Court insisted that the existing law/statutory rules in making the appointment of Judicial Officers be amended accordingly. In Syed T.A.Naqshbandi (supra), this Court repealed the contention which is being advanced by the learned counsel for the petitioners therein and the Court in crystal clear words held that appointments have to be made giving strict adherence

to the existing statutory provisions and not as per the recommendations made by Justice Shetty Commission. Of course, in absence of statutory rule to deal with a particular issue, the High Courts are bound to give effect to the directions issued by this Court.

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, a 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 (*supra*), which had not been determined in view of the existing statutory rules could not arise.

22. In view of 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's case (*supra*). More so, no explanation could be furnished by Shri Ranjit Kumar, learned senior counsel for the appellants as to why the appellants could not challenge the advertisement itself, if it was not in conformity with the directions issued by this court in the said case."

56. In Para.24 of the judgment in Rakhi Ray's case

(supra), the Apex Court concluded that, a person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In the instant case, once 13 notified vacancies were filled up, the selection process came to an end, thus there could be no scope of any further appointment. The appeals were accordingly dismissed. After discussing the case law the Apex Court held that, in case advertisement was not in conformity with the directions issued by the Apex Court in **Malik Mazhar Sultan's case (supra)** the appellants should have challenged the advertisement itself.

57. In **K. Lakshmi v. State of Kerala and others (2012 (4) SCC 115)** the Apex Court reiterated that, the vacancies could not be filled up over and above the number of vacancies advertised as recruitment of the candidates in excess of the notified vacancies would amount to denial of equal opportunity to eligible candidates violative of Article 14 and Article 16(1) of the

Constitution of India. Later, in **Arup Das and others v. State of Assam and others (2012 (5) SCC 559)**, the Apex Court while laying down the law that the appointments cannot be made beyond the number of advertised posts, observed that an authority cannot make any selection/appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised. The principle behind the said decision is that if that was allowed to be done, such action would be entirely arbitrary and violative of Article 14 and Article 16 of the Constitution, since other candidates who had chosen not to apply for the vacant posts which were being sought to be filled, could have also applied if they had known that the other vacancies would also be under consideration for being filled up.

58. In **State of Bihar and another v. Madan Mohan Singh and others (1994 Supp (3) SCC 308)**, a Three-Judge Bench decision of the Apex Court relied on by the 2nd and 3rd respondents, the advertisement issued by the State of Bihar dated 29.9.1989 for appointment to the post of Additional District and Sessions Judge in the Bihar Superior Judicial Service and the whole selection process that ensued were meant only to fill up 32

vacancies. On the basis of the marks secured in the written test as well as in the viva voce test, 32 candidates out of 129 candidates were selected against the existing vacancies and the High Court recommended their names in order of merit with necessary particulars for their appointment as Additional District and Sessions Judges in the quota of direct recruits. On 5.2.91 the selected candidates were asked to appear for medical test. The High Court again by letters dated 4.3.91 and 3.6.91 also requested the Government to appoint the candidate at Serial No. 33 since one more vacancy had occurred due to the retirement of one of the officers. On 24.11.90, the Full Court of the Patna High Court passed a resolution deciding that any further vacancy in the quota of the direct recruits from the Bar within the period of one year would be filled up from the merit list prepared by the High Court. On 17.7.91, the Government informed the Registrar of the High Court that the Government has decided to advertise the vacancies afresh because the vacancies of earlier year had exhausted. On a perusal of the records relating to the selection process, the Apex Court found that, the advertisement and the whole selection process that ensued were meant only to fill up 32

vacancies. Therefore, the Apex Court held that, if the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies, the merit list prepared on the basis of the written test as well as the viva voce will hold good only for the purpose of filling up those 32 vacancies and no further because the said process of selection for those 32 vacancies got exhausted and came to an end. If the same list has to be kept subsisting for the purpose of filling up other vacancies also that would naturally amount to deprivation of rights of other candidates who would have become eligible subsequent to the said advertisement and selection process.

59. In **Madan Mohan Singh's case (supra)** the Three-Judge Bench of the Apex Court has also dealt with the contention raised, relying on the decision of the Apex Court in **Kailash Chandra Sharma v. State of Haryana (1989 Suppl (2) SCC 696)** that, when there are temporary vacancies, the direct recruits should have their share of quota in respect of temporary vacancies also, which arose subsequently. The Apex Court rejected the said contention, holding that, when the particular

advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies, the merit list prepared on the basis of the written test as well as the viva voce will hold good only for the purpose of filling up those 32 vacancies and no further because the said process of selection for those 32 vacancies got exhausted and came to an end.

60. Relying on the judgment of the Apex Court in **Prem Singh and others v. Haryana State Electricity Board and others (1996 (4) SCC 319)** the petitioners would contend that, even selection of candidates in excess of the number of posts notified does not per se offend the equality guaranteed by Articles 14 and 16 of the Constitution of India. The judgment of the Apex Court in Prem Singh's case (supra) is on an entirely different factual matrix. In that case, even when 62 posts were advertised there was a backlog of 62 posts of Junior Engineers and that was through oversight not taken into consideration. Out of the said backlog of 62 posts 36 posts were of direct recruitment quota and this had come to the notice of the Board in December 1991. There was also a backlog of 24 posts belonging

to reserved category. Paragraphs 13 and 27 of the judgment read thus;

"13. The factual position in this case, as disclosed by the record, is that on 15.10.90 the Board decided to fill up 62 vacant posts of Junior Engineers by direct recruitment. On 2.11.90 the Board advertised those 62 vacant posts and invited applications by 4.12.90. In the notification of vacancies required to be issued under the Employment Exchange Act and the Rules also the vacancies notified were 62. After the posts were advertised and published but before appointments could be made 13 more posts became vacant because of retirement and 12 because of deaths. Meanwhile, the Board also created 60 new posts of Junior Engineers. The stand taken by the respondent-Board before the High Court was that by April 1993, 85 more posts had become vacant. Even when 62 posts were advertised there was a backlog of 62 posts of Junior Engineers and that was through oversight not taken into consideration. Out of the said backlog of 62 posts 36 posts were of direct recruitment quota and this had come to the notice of the Board in December 1991. There was a backlog of 24 posts belonging to reserved category. It was for these reasons that on 2.4.1993 the Secretary of the Board had written to the Chief Engineer who was the appointing authority that as the list of 212 candidates selected by the selection committee was received and as 147 posts were vacant as on 11.2.93 he should fill up all those vacant posts as directed therein. Out of the said list

the Board was able to appoint 138 candidates.

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27. In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2.11.1991 and the selection process which followed thereafter. But as 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 it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appointments which were made against future vacancies - in this case on posts which were newly created - must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be

quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the High Court was right in the view it has taken, we modify its order to the aforesaid extent.”

61. In the case on hand, in none of the Writ Petitions Ext.P1 notification dated 24.2.2014 is under challenge on the ground that the said notification was not in conformity with the directions issued by the Apex Court in **Malik Mazhar Sultan's case (supra)**. On the other hand, the only contention of the petitioners is that, the cadre strength of District and Sessions Judge as on the date of issuance of Ext.P1 notification was 146 if the total number of permanent posts is taken into account. The petitioner would contend further that, the Administrative Committee of this Court in its meeting held on 11.6.2013 resolved to request the Government to fix the cadre strength of District and Sessions Judge as 146. Therefore, the cadre strength as on the date of issuance of Ext.P1 notification should be 146. Though Ext.P1 notification to the extent of notifying only 4 anticipated vacancies was under challenge in W.P.(C)Nos.6763 of

2014 and 7492 of 2014, contending that there existed more vacancies to be notified in view of the conversion of certain temporary posts of District Judges as permanent posts, W.P.(C) No.6763 of 2014 was dismissed as 'not pressed' and W.P.(C) No.7492 of 2014 was dismissed as 'infructuous', on 23.6.2015, since the petitioners in those Writ Petitions could not find a place in Ext.P2 merit list. The petitioners in this batch of Writ Petitions approached this Court challenging Ext.P1 notification, only after the publication of Ext.P2 merit list.

62. Though in **Malik Mazhar Sultan's case (supra)** the Apex Court laid down the general directions and the time schedule to be adhered to for filling up vacancies that may arise in Subordinate Courts and District Courts, the Apex Court has noticed in Para.5 of the judgment that, selections are required to be conducted by the authorities concerned as per the existing Judicial Service Rules in the respective States/Union Territories. Later, in **Rakhi Ray's case (supra)** a Three-Judge Bench of the Apex Court explained the decision in **Malik Mazhar Sultan's case (supra)**. After referring to a catena of decisions, the Three-Judge Bench of the Apex Court held 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 and that, filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. The Apex Court reiterated the above principle in **K. Lakshmi's case (supra)** and **Arup Das's case (supra)**.

63. As I have already held, the 'cadre strength', i.e., the 'permanent cadre' of District Judge as on the date of issuance of Ext.P1 notification dated 24.2.2014 was only 99, namely the 99 posts identified by this Court and accepted by the Government while fixing the cadre strength of District Judge as 99. Later, by Government order dated 29.5.2015 (produced as Ext.P8 in W.P. (C).No.13521 of 2015) cadre strength was re-fixed as 130, in consultation with this Court, and the Annexure to the said order contains the details of the 130 posts included in the cadre

strength. The 31 posts added to the 'permanent cadre' will remain as ex-cadre posts till the issuance of the Government order dated 29.5.2015, in which no direct recruitment is permissible till that date, since the mandate of Rule 5 of Part II KS&SSR is that, a person shall be recruited direct only against a substantive vacancy in the 'permanent cadre', and recruitment to all other vacancies shall be made by transfer.

64. The fact that, the recruitment pursuant to Ext.P1 notification dated 24.2.2014 was in respect of the anticipated vacancies for the year 2014 is not in dispute. The petitioners have also not disputed the fact that, the 6 existing vacancies as on the date of issuance of Ext.P1 notification and one vacancy that would arise on 31.5.2014 due to retirement were kept unfilled as NCA turns pertaining to previous selections. As on the end of the recruitment year 2014 no other vacancies could be expected in the regular line to be notified for direct recruitment under 25 per cent from the Bar and as such the 4 anticipated vacancies due to elevation of District Judges were notified in Ext.P1 notification. The petitioners have absolutely no case that, any vacancy other than the 4 anticipated vacancies notified in

Ext.P1 occurred during the recruitment year 2014. Since the 'cadre strength', i.e., the 'permanent cadre' of District Judge continued as 99 during the recruitment year 2014 and thereafter, till the issuance of the Government order dated 29.5.2015, the contention raised by the petitioners regarding the availability more vacancies during the recruitment year in question, with reference to the ex-cadre posts, can only be rejected. Since direct recruitment is permissible only against a substantive vacancy in the 'permanent cadre', the petitioners cannot contend that, the direct recruits should have their share of quota in respect of such ex-cadre posts also. The direct recruits will get their share of quota in respect of such ex-cadre posts once those posts are added to the 'permanent cadre' by the Government, in consultation with this Court, in exercise of the powers conferred under Rule 2(18) of Part I KS&SSR. It is pertinent to note that in Ext.P9 Government order dated 2.7.2015, the appointment by transfer of 16 Sub Judges/Chief Judicial Magistrates as District Judges in the Kerala State Higher Judicial Service was made without prejudice to the claims of officers to be recruited from the Bar.

65. For the reasons stated above, the conclusion is irresistible that, there is absolutely no illegality in Ext.P1 notification dated 24.2.2014 issued by the 3rd respondent, inviting applications for appointment as District and Sessions Judge in the Kerala State Higher Judicial Service by direct recruitment from the Bar, insofar as it notifies only 4 anticipated vacancies for the year 2014. In view of the finding in this judgment that the 'cadre strength', i.e., the 'permanent cadre' of District Judge in Kerala State Higher Judicial Service, as on the date of issuance of Ext.P1 notification dated 24.2.2014 was only 99, the petitioners are also not entitled for other consequential reliefs sought for in the Writ Petitions.

66. Now the remaining issue that arises for consideration is as to the legality or otherwise of Ext.P8 Government order dated 29.5.2015 (in W.P.(C).No.13521 of 2015) to the extent of fixing the cadre strength of District and Sessions Judge in the Kerala State Higher Judicial Service as 130, after excluding 16 posts from the 146 posts identified by the Administrative Committee of this Court.

67. It is not in dispute that, the Administrative Committee

of this Court in its meeting held on 11.6.2013 resolved to request the Government to fix the cadre strength of District Judge at 146 and accordingly a request was forwarded to the Government to fix the cadre strength as 146. But, as borne out from the said Government order, in the meeting of the Secretaries of Home, Law and Finance Departments convened on 5.5.2015, it was decided that, out of the 146 posts identified by the Administrative committee of this Court, the deputation posts and those Family Courts where retired District judges are functioning shall be excluded, and accordingly the Government fixed the cadre strength of District Judge in the Kerala State Higher Judicial Service as 130. The reasons for exclusion of the deputation posts and those Family Courts where retired District judges are functioning are not discernible from the said Government order. This Court on administrative side can only make a request to the Government to re-fix the cadre strength of District Judge and it is for the Government to pass appropriate orders on the request so made. But, the legality of such an order could be tested by this Court in the judicial side, in the event of a challenge being made. Therefore, any decision taken by the Government on the

recommendation of this Court on administrative side should be supported by sound reasoning and the decision so made should be founded upon reasons legally sustainable.

68. In **Breen v. Amalgamated Engineering Union (1971 (1) All.E.R. 1148)** Lord Denning, M.R. observed that, the giving of reasons is one of the fundamentals of good administration. In **Alexander Machinery (Dudley) Ltd. v. Crabtree (1974 ICR 120)** it was observed that, failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at. A Constitution Bench of the Apex Court has laid down in **Krishna Swami v. Union of India and others (1992 (4) SCC 605)** that, undoubtedly, in a parliamentary democracy governed by rule of law, any action, decision or order of any statutory/public authority/functionary must be founded upon reasons stated in the order or staring from the record. Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus

and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21 of the Constitution of India.

69. In such circumstances, Ext.P8 Government order dated 29.5.2015 (in W.P.(C).No.13521 of 2015) to the extent of fixing the cadre strength of District and Sessions Judge in the Kerala State Higher Judicial Service as 130, by excluding 16 posts from the 146 posts identified by the Administrative Committee of this Court can only be set aside.

70. In the result, the challenge made in this batch of Writ Petitions against Ext.P1 notification dated 24.2.2014 issued by the 3rd respondent, inviting applications for appointment as District and Sessions Judge in the Kerala State Higher Judicial Service by direct recruitment from the Bar, insofar as it notifies only 4 anticipated vacancies for the year 2014, is rejected. So also the consequential reliefs sought for. Ext.P8 Government order dated 29.5.2015 in W.P.(C).No.13521 of 2015 (Ext.P7 in W.P.(C).No.14780 of 2015 and Ext.P10 in W.P.(C).No.14957 of 2015) to the extent of fixing the cadre strength of District and

Sessions Judge in the Kerala State Higher Judicial Service as 130, by excluding 16 posts from the 146 posts identified by the Administrative Committee of this Court is set aside and the 1st respondent is directed to reconsider question of inclusion of the aforesaid posts in the cadre strength of District and Sessions Judge in the Kerala State Higher Judicial Service and pass reasoned order, as expeditiously as possible, at any rate, within a period of three months from the date of receipt of a certified copy of this judgment.

In the result, W.P.(C)Nos.12732 of 2015 and 13445 of 2015 are dismissed. W.P.(C)Nos.13521 of 2015, 14780 of 2015 and 14957 of 2015 are allowed in part, by setting aside Ext.P8 Government order dated 29.5.2015 in W.P.(C).No.13521 of 2015 (Ext.P7 in W.P.(C).No.14780 of 2015 and Ext.P10 in W.P.(C).No.14957 of 2015) to the extent indicated above. The said Writ Petitions are dismissed in all other respects.

No order as to costs.

Sd/-

ANIL K.NARENDRA, JUDGE

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