

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE**

RESERVED ON: 17.04.2023
DELIVERED ON: 28.04.2023

CORAM:

**THE HON'BLE MR. ACTING CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**A.P.O. NO. 220 OF 2019
I.A. NO. G.A./01/2019 (OLD NO. GA/2957/2019)**

**ATANU CHAKRABORTY
VERSUS
HIGH COURT OF CALCUTTA AND OTHERS**

**OCO NO. 01 OF 2020
THE HIGH COURT AT CALCUTTA AND ANOTHER
VERSUS
ATANU CHAKRABORTY AND OTHERS**

Appearance:-

**Mr. Surajit Samanta, Adv.
Mr. Ranajit Chatterjee, Adv.
Mr. Subhrangshu Panda, Adv.
Mr. Prasenjit De, Adv.
Mr. Aniruddha Mitra, Adv.
Mr. Biswajit Samanta, Adv.
Mr. P.K. Mondal, Adv.**

**Ms. Ira Bhattacharjee, Adv.
Ms. Mithu Singha Mahapatra, Adv.**

....for the Appellant/Writ Petitioner.

**Mr. Jaydip Kar, Sr. Adv.
Mr. Siddhartha Banerjee, Adv.
Mr. Sudipta Nayan Ghosh, Adv.**

.....for the High Court Administration.

**Mr. Anindya Lahiri, Adv.
Mr. Samrat Dey Paul, Adv.**

....For the respondent No. 4

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, ACJ.)

1. This intra Court Appeal and the cross-objection are directed against the order passed in the learned Single Bench in WP No. 38 of 2018. The said writ petition was filed by the appellant for insurance of writ of mandamus to direct the official respondents to republish the overall results of candidates for recruitment to the post of District Judge (Entry Level) by excluding the names of the 4th and 5th respondents from the list of empanelled candidates and all consequent changes in the merit position of the remaining candidates; to direct the official respondents to recall/ rescind/ modify the decision of the Hon'ble Selection Board as contained in the minutes dated 9th September, 2009 in so far as the same restricts the validity of the panel till the declaration of vacancies for next year; to recall/ rescind/ cancel the notification dated 28th October, 2009 in so far as it excludes the names of the Respondent Nos. 4 and 5 and to direct the official respondents to give appointment and posting to the

writ petitioner as District Judge (Entry level) in West Bengal Judicial Services in any available vacancy.

2. The facts leading to the filing of the writ petition are as hereunder. Notification was issued on 31.03.2009 by the Registrar General of this Court notifying 131 vacancies in the cadre of District Judge (Entry level) in the West Bengal Judicial Services to be filled up in the year 2009 in accordance with the directions of the Hon'ble Supreme court in the case of **Malik Mazhar Sultan's**. Pursuant to such notification, advertisement was published on 15.04.2009 declaring that 16 vacancies out of the 131 vacancies are to be filled up by way of direct recruitment from the Bar in accordance with Rule 24(1)(a) of the West Bengal Judicial (Conditions of Service) Rules, 2004.
3. The said notification/ advertisement stated that a competitive examination will be held in Kolkata in last week of June, 2009 and it shall be a two-stage process comprising the total marks of 600, consisting of written test of 5 papers of 100 each to be answered within 3 hours and the pass marks on each subject will be 40 and in addition to that the candidates must obtain 50 on aggregate in order to be successful in the written test and further 100 marks are reserved for viva voce and personality test and the pass marks for viva voce and personality test will be 40. It was further notified that the selection board shall call such number of successful candidates in the written test for viva voce and personality test as it thinks fit strictly according to the merit list prepared on the basis of aggregate marks obtained by those candidates but such number in no case should exceed twice the number of

vacant posts. Further, the notification stated that the High Court reserves the right to relaxing the eligibility criteria and qualifying the marks for each subject or aggregate, if required. The final merit list will be published on the basis of the total marks obtained by the successful candidates in the written test and the viva voce and personality test. The other criteria fixed in the notification may not be of much relevance to decide the present appeal. Several candidates had applied for the said post which included the writ petitioner and the Respondents 4 and 5. Ultimately the writ petitioner was unsuccessful and not selected and the 4th respondent was selected and unfortunately the 5th respondent passed away.

4. The writ petition was filed contending the action of the Selection Board (consisting of three Hon'ble Judges of this Court) to call 3 candidates for viva voce and personality test even though they did not qualify in the written test by relaxing the criteria of pass mark as stipulated in the advertisement dated 15.04.2009 was arbitrary, illegal and violative of Articles 14, 16 and 21 of the Constitution.
5. Further, no reason has been disclosed by the High Court as to why it was necessary to permit three candidates who are unsuccessful in the written test to appear in the viva voce. It was submitted that 19 candidates had qualified to appear in the viva voce and personality test and there being no benchmark/cutoff for the viva voce and personality test, there would not have been any difficulty to fill up the 16 notified vacancies even without permitting the three unsuccessful candidates to appear in the viva voce and personality test by

relaxing the norms. The private respondent filed GA No. 1608 of 2019 in WP 38 of 2018 by raising a preliminary objection regarding the maintainability of the writ petition stating that the writ petitioner had filed a writ petition under Article 32 of the Constitution of India before the Hon'ble Supreme Court which was dismissed by order dated 11th January 2016 and therefore, the present writ petition is barred by the principles of res judicata. It was further contended that the writ petition is liable to be dismissed on the ground of inordinate delay and laches as the writ petition has impugned the recruitment made to the post of District Judge (Entry level) initiated in 2009 by preferring the writ petition in the year 2018.

6. The High Court administration had also filed their affidavit-in-opposition contending that the writ petition is not maintainable as the writ petitioner seeks to challenge the communications and orders passed in 2009 in the year 2018 after a delay of 9 years. That the writ petition is hit by the principles of res judicata since the writ petitioner had agitated all issues raised in the writ petition before the Hon'ble Supreme Court in IA No. 6 of 2010 filed in WP(C) 46 of 2007 which was dismissed as not pressed by order dated 29th August, 2011 and thereafter filed IA No. 7 of 2007 to recall the said order which application was dismissed as utterly misconceived. That apart, the petitioner filed a writ petition under Article 32 of the Constitution of India in WP(C) No. 1 of 2016 for similar prayer which has been prayed for in the present writ petition and the writ petition was dismissed holding that the Court was not inclined to entertain the writ petition. Further, it was contended that since the writ petitioner has

participated in the recruitment process without any objection and had appeared till the stage of viva voce and waited for the declaration of the final results and the notification of posting in respect of the successful recruits from the Bar which was published on 28th October, 2009 before approaching the Hon'ble Supreme Court by filing IA No. 6 of 2010 on 7th July, 2010 is estopped from challenging the recruitment process. In other words, it was contended that the writ petitioner had accepted the relaxation of the conditions and has taken a chance in competing in the viva voce test and after he was unsuccessful, has approached different forums at a very belated stage and if the writ petitioner is allowed to agitate the issues at this juncture it would be contrary to the principles of estoppel by acquiescence. The writ petitioner has filed an affidavit-in-reply in effect reiterating his original stand terming the action of permitting the three candidates to appear in the viva voce to be illegal and that he could not have raised any objection to the illegal action till the merit list of 16 candidates was published. The learned Single Bench after considering the submissions made on either side appears to have called for the records of the recruitment process and noted that the decision to award a maximum of 2 marks to the candidates who have been unsuccessful in one of the papers or in aggregate, held the same to be in excess of the power of relaxation contained in the relevant advertisement which reserved to the High Court the right to relax the eligibility criteria and qualifying marks in each subject or aggregate, if required. After noting the decision of the Selection Board, the learned Single Bench opined that the order granting the relaxation

does not record any reasons for such relaxation, it is entirely an unreasoned one never seeking to record why relaxation of 2 marks from the stipulated pass marks was done by the Selection Board. Further, the learned Writ Court pointed out that even if in the advertisement it was mentioned that right to relax eligibility criteria could be exercised, if required, it is a settled principle of law that when a power is given to an authority to be exercised only if that was required, such power cannot be exercised unless the requirement is fulfilled. The learned Writ Court had referred to the decisions of the Hon'ble Supreme Court wherein it was held that appointing Authorities are required to apply their mind while exercising the discretionary jurisdiction to relax the age limit. After making such observations, the Court then proceeded to consider as to what relief the writ petitioner was entitled to taking note of the facts placed by the High Court administration. The learned Writ Court came to a conclusion that the writ petition is barred by inordinate delay and laches and accordingly the writ petition was dismissed.

7. Mr. Surajit Samanta, learned Advocate appearing for the appellant would adopt the observation made by the learned Single Bench with regard to the manner in which the Selection Board took a decision to relax to award a maximum of 2 marks to be his argument. It is submitted that once the Court had come to the conclusion that reasons are not being recorded by the Selection Board, relief as prayed for by the writ petitioner ought to have been granted. Further, it is submitted that when the Writ Court found glaring infirmities in the decision of the selection board ought to have granted relief

sought for in the writ petition. Thus, it is submitted that the only question would be whether there is merely a delay. The learned Writ Court ought to have been seen that unequals have been treated as equals. By referring to minutes of the meetings of the selection board held on 9th September, 2009, it is submitted that it has been recorded in the said meetings that in view of the order dated 13th January, 2009 passed by the Hon'ble Supreme Court in WP(C) No. 46 of 2007 (***West Bengal Judicial Services Association Versus Registrar General, High Court at Calcutta & Anr.***) for the time being only 16 persons from the panel will be appointed and the fate of the other two successful candidates in the panel will depend upon such further order or final decision that may be passed by the High Court in the said pending matter. As per the panel so prepared Shri Indranil Bhattacharya will be the last person empanelled in the list of successful candidate making it clear that such panel will be valid until the declaration of the vacancy for the next year. With regard to the dismissal of the writ petition, on the ground of delay, it is contended that the learned Writ Court ought to have noted in the year 2010 that the writ petitioner had filed an interim application for adding him as a party in the pending matter before the Hon'ble Supreme Court and this application was dismissed as not pressed and he filed an application for recalling the said order in the year 2012 and after the dismissal of the said recalling petition, he had filed a writ petition under Article 32 of the Constitution of India which was dismissed on 11.01.2016 after which within 2 years he has filed the present writ petition and the writ petition ought not to have been dismissed only on the

ground of inordinate and unreasonable delay. It is further submitted that it may be construed as a case of pursuing a remedy before a wrong forum and in any event when the decision of the Selection Board had referred to the writ petition filed by the West Bengal Judicial Services Association, the petitioner had approached the Hon'ble Supreme Court seeking to implead himself in the said writ petition and after dismissal of those petitions as well as the dismissal of the writ petition filed under Article 32 of the Constitution, the appellant had approached this Court and filed the writ petition. It is thus submitted that a wrongful benefit has been conferred on the private respondents and such wrong should not be permitted to continue. By way of concluding submissions, the learned Advocate submitted that even as on date vacancies are available and the writ petitioner can be accommodated in one of such vacancy without affecting the rights of the other candidates.

8. The learned Senior Advocate appearing on behalf of the High Court submitted that the High Court has filed a cross-objection on account of certain observations made by the learned Single bench though ultimately the writ petition was dismissed on the ground of delay. Firstly it is submitted that the claim made by the writ petitioner is a stale claim and rightly not entertained by the learned Writ Court. It is submitted that the writ petitioner is guilty of forum shopping having moved the Hon'ble Supreme Court for identical relief and after having been unsuccessful, cannot maintain the present writ petition. Further, the cause of action for the present writ petition is identical to that of the cause of action for the petition filed by the writ petitioner before the Hon'ble Supreme

Court and therefore, is estopped from seeking any relief before this Court. Further, it is submitted that the writ petition is liable to be dismissed on the ground of res judicata as the prayer sought for in the writ petition filed under Article 32 of the Constitution and the prayer in the present writ petition is identical except for a slight difference in the language/ drafting and lastly, it is submitted that the writ petitioner having participated in the selection process is deemed to have waived his right and not entitled to question the process. With regard to the merits of the matter, the learned Senior Counsel has drawn the attention to the relevant clause in the advertisement which empowered the High Court to grant relaxation. Referring to the chart giving the result of the written test dated 21st August, 2009, it is submitted that the total percentage of the marks was never increased and the decision was only with regard to permit such of those candidates who have secured 2 marks lesser than the minimum marks to participate in the viva voce and personality test. Therefore, the decision of the Hon'ble Selection Board headed by the then Hon'ble the Chief Justice is inconsonance with the notification and does not suffer from want of jurisdiction. It is further submitted that the panel of 18 candidates were drawn to remain valid from 21.10.2009 till August 2010 and posting orders were issued. However, on 09.04.2010 a fresh advertisement calling for applications for recruitment to the post of District Judges (Entry Level) for 23 vacancies was published. Therefore, the said panel of 18 candidates though to remain valid till August 2010, the remaining panel cannot be operated on or after the issuance of the fresh advertisement i.e. on or after 09.04.2010. The application

filed by the writ petitioner seeking impleadment in the proceedings before the Hon'ble Supreme Court was much after the 23 vacancies were notified by the advertisement dated 09.04.2010. Further it is submitted that the order passed by the Hon'ble Supreme Court dated 13.01.2009 in WPC No. 46 of 2007 was for a direction to fill up the 16 posts of District Judges (Entry Level) by direct recruitment which was noted in the said order. It is submitted that the writ petition filed before the Hon'ble Supreme Court was for a similar relief and on the same cause of action which was dismissed with the reasons and therefore the present writ petition was not maintainable. It is further submitted that when the writ petition itself has been held to be not maintainable, the remarks/observation passed by the learned single bench were not warranted more particularly when the decision of the Selection Board was approved by the Full Court. It is submitted that the decision of the Selection Board taken on 28.08.2009 was uploaded in website of the High Court and this decision was taken by three senior most judges of this Court and was also circulated to the Hon'ble Full Court and approved. The writ petitioner despite having knowledge of the said decision of the Selection Board instead of objecting, participated in the selection process without protest and appeared for the viva voce and personality test. Further it is submitted that the writ petition in WPC No. 46 of 2007 which was pending before the Hon'ble Supreme Court in which the writ petitioner filed IA No. 06 of 2010 pertained to the roaster and gradation list of District Judges of the State of West Bengal and had nothing to do with the selection process initiated by the Court in 2009.

9. Mr. Anindya Lahiri, learned advocate appearing for the fourth respondent pointed out that the fourth respondent had filed an application in G.A No. 1608 of 2019 wherein the issue regarding maintainability of the writ petition was raised to be decided as preliminary issue. Referring to the reliefs sought for in the petition filed under Article 32 of the Constitution of India before the Hon'ble Supreme Court and the reliefs sought for in the present writ petition it is submitted that the same were for identical reliefs and once the writ petition filed under Article 32 of the Constitution of India was dismissed the writ petitioner is estopped from filing fresh writ petition on the same cause of action and the present writ petition is barred by the principles of res judicata. It is submitted that it is relevant to note that what was filed by the writ petitioner before the Hon'ble Supreme Court was not a Special Leave Petition but a writ petition under Article 32 of the Constitution and the same having been dismissed assigning reasons, it has to be placed on a different pedestal and not on the same pedestal on which dismissal of special leave petitions are considered. Further it is submitted that the writ petitioner participated in the viva-voce and personality test and was aware of all the facts and he cannot turn around and make a belated challenge to the selection which had already been completed. The learned advocate has drawn our attention to the supplementary affidavit-in-opposition filed on behalf of the fourth respondent wherein the averments made by the writ petitioner in paragraphs 8 and 9 of the writ petition with regard to the declaring of results of the writ examination on 21.08.2009 has been specifically pleaded and in paragraph 8(c) of the

affidavit-in-opposition the fourth respondent had specifically pleaded that the writ petitioner has continued to participate in the recruitment process without any objection and had appeared in the viva-voce and personality test and waited for the declaration of the final result and notification of posting in respect of the successful incumbents from the Bar published on 28.10.2009 and therefore he is estopped from challenging the recruitment process or any orders passed in the recruitment process. It is further submitted that averments in the supplementary affidavit-in-opposition the fourth respondent has dealt with paragraph 4 of the affidavit-in-reply filed by the writ petitioner to the affidavit-in-opposition of the fourth respondent stating that he had no occasion to scan the website till the viva-voce was over and panel was published on or around 09.09.2009. It is submitted that the list of candidates qualified for viva-voce and personality test along with the candidates from the judicial service was uploaded in the official website of the High Court on 28.08.2009 itself as could be seen from the website even as on today and therefore the writ petitioner cannot deny that he did not have any knowledge about the impugned notification before he participated in the viva voce and personality test. It is further submitted that the writ petitioner is conveniently avoiding to deal with the issue regarding the publication of the result in the website for reasons best known. That apart, the notification issued by the High Court dated 28.08.2009 clearly states all the details and therefore, the writ petitioner had full knowledge and only in the year 2010 he filed the petition for impleading himself in the writ petition pending before the Hon'ble Supreme

Court which was altogether on a different issue. Therefore, it is submitted that the writ petition was liable to be dismissed on the ground of estoppel, delay and laches, acquiescence as well as on merits. It is further submitted that even in IA No. 06 of 2010, the writ petitioner did not challenge either the recruitment process or the selection of candidates but merely prayed for impleadment in the said writ petition which was not pressed on 29.08.2011 and the subsequent application filed for recalling the order was dismissed on 23.07.2012. Therefore, effectively from September 2009 to July 2012 i.e. for more than three years, the writ petitioner did not challenge either the selection process or the selection of the two candidates rather participated in the selection process and appeared in the viva voce and personality test being fully conscious about the decision taken by the Selection Board. Therefore, the writ petitioner cannot plead ignorance after having been unsuccessful in the selection process. It is submitted that for such reason, the writ petitioner cannot turn around and question the selection process. In support of such contention, reliance has been placed on the decision of the Hon'ble Supreme Court reported in **2017 9 SCC 478**. Further it is submitted that neither the application filed under Article 32 of the Constitution nor in the present writ petition, it was the case of the writ petitioner that he did not have knowledge of the decision of the Selection Board as on the date of the viva voce and came to know about it later. In fact, the writ petitioner has tried to improve his case in the reply after this point was specifically taken in the affidavit filed on behalf of the High Court administration, but such case is not consistent with the stand

of the writ petitioner either in the Article 32 petition or the writ petition. Therefore, the writ petition deserves to be dismissed.

10. It is further submitted that the present writ petition was filed on 12.01.2018 after a period of almost nine years challenging the selection process. Reliance was placed on the decision of the Division Bench of this Court in the case of the ***Provincial Daughters of the Cross St. Vincent's and Others Versus Mrs. Hasi Sen and Others*** in FMA No. 1372 of 2017 and MAT No. 13 of 2017 wherein it was held that there is a public policy behind all statutes of limitation and a claim based on the infraction of fundamental rights ought not to be entertained, if made beyond the period fixed by the Limitation Act for enforcement of the right by way of suit. Though it was not held that Limitation Act applies in terms, observed that ordinarily the period fixed by Limitation Act is to be taken to be a true measure of time within which the person can be allowed to raise a plea successfully under Article 226 of the Constitution. It is further submitted that entertaining a writ petition beyond the maximum period of limitation would impede the well-founded public policy and would be contrary to the settled proposition of law. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court **2002 2 SCC 448** and **2010 12 SCC 471** in the said decisions, the Hon'ble Supreme Court has held that delay in challenging promotion and seniority list ought to be rejected as it seeks to disturb the vested right as "fence sitter" cannot be allowed to raise the dispute or challenge the validity of the order after its conclusion. It is submitted that the private respondents are now in the rank of District Judge

and have put several years of service and if the writ petition is to be entertained, it would unsettle a settled position. Further it is reiterated that the case on hand is classical case of forum shopping and on this ground the writ petition is liable to be dismissed. To support such submission, reliance was placed on the judgment of the Hon'ble Supreme Court reported in **2018 1 SCC 156**. Further it is reiterated that the writ petition also suffers from cause of action estoppel. The cause of action under Article 32 petition and the cause of action based on which the present writ petition was filed are identical and it is not the case of the writ petitioner that he had filed the writ petition on a discovery of any new factual matter which could not have been found by him by reasonable diligence when the Article 32 petition was filed apart from the proceedings suffers from issue estoppel. In support of such contention, reliance was placed on the judgment of the Hon'ble Supreme Court reported in **2005 7 SCC 190**. It is further submitted that the dismissal of an application under Article 32 of the Constitution even is a non-speaking order would be an absolute bar in filing a subsequent writ petition in a different forum on the self-same cause of action and self-same grounds and this is irrespective of the fact whether the order is a speaking order or a non-speaking order. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in **AIR 1965 SC 1150** and **AIR 1970 Cal 50**. Further it is submitted that finality of the litigation is also a matter of public policy, in the absence of such principle, oppression may result under the colour and pretence of law as there will be no end of litigation. The finality is therefore not technical doctrine

but a fundamental principle which sustains finality in litigation and prevent abuse in the matter of accessing the court for agitating issues which become final between the parties. This proposition is based on the decision of the Hon'ble Supreme Court in ***M. Nagabhushana Versus State of Karnataka and Others***¹ Reliance was placed on the decision of the Hon'ble Supreme Court in ***Indian Oil Corporation Limited Versus State of Bihar and Others***² wherein it was held that the principles of res judicata bars the trial of identical issue in a subsequent proceedings between the same parties; it also comes into the play when the judgment and order in a particular issue is deemed to have necessarily been filed by the implication; it brings about the finality and is therefore taken as decided. Therefore, if one writ petition is dismissed in limine by a non-speaking order, another writ petition would not be maintainable. With regard to the merits of the matter, it is submitted that the Hon'ble Selection Board consisting of three senior most judges of this court who were available atleast till 2012 before their elevation either to the Hon'ble Supreme Court or as Hon'ble Chief Justice of another High Court and they are experts in the field. Their action was approved by the Hon'ble Judges of this court through Full Court circulation. Thus, when selection is made and advised to by experts having high academic qualification and are specialized, the Courts are slow to interfere with the opinion expressed by such experts, unless there are allegations of malafides against them. In the instant case, there is no allegation of malafides against the Hon'ble Selection Board and

¹ (2011) 3 SCC 408

² (1986) 4 SCC 146

therefore the scope of judicial review is limited. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in **M.C. Gupta and Others Versus Arun Kumar Gupta and Others** ³ By placing reliance on the decision of the Hon'ble Supreme Court in **State of Uttar Pradesh and Others Versus Johri Mal** ⁴, it is submitted that the power of judicial review is not intended to assume the supervisory role or don the robes of the omnipresent. An order passed by an administrative authority exercising discretion vested in it cannot be interfered in judicial review unless it can be shown that exercise of such discretion is perverse or illegal. The decision of the Hon'ble Selection Board cannot be called perverse or illegal. The advertisement for recruitment clearly spelt out that the High Court/Selection Board had the discretion to decide the eligibility criteria and qualifying marks in each subject or aggregate. Therefore, the power to relax was preserved in the rules of the recruitment. It is submitted that it is settled law that powers of relaxation could either be for the purpose of mitigating hardships or to meet special deserving situations and such rule must be construed liberally and a narrow consideration is likely to deny benefit to the really deserving cases. The rule of relaxation therefore must get a pragmatic construction so as to achieve effective implementation of the policy of the Government. Such contention is based on the decision of the Hon'ble Supreme Court in **Ashok Kumar Uppal and Others Versus State of Jammu and Kashmir and Others** ⁵. The

³ (1979) 2 SCC 339

⁴ (2004) 4 SCC 714

⁵ (1998) 4 SCC 179

decision of the Hon'ble Supreme Court in ***State of Bihar and others Versus Md. Kalamallin*** wherein it was held that where life of select list had already expired, the order of the High Court to continue that select list is illegal and even in this judicial discretion, the High Court could not make such an order unless the constitutionality of the rule itself was questioned. With the above submissions, the learned senior counsel prayed for allowing the cross objection.

11. Mr. Surajit Samanta, learned counsel for the writ petitioner by way of reply submitted that the legal fraud perpetuated by the Selection Board should not be allowed to stand and the court should strike down the entire selection process. It is submitted that the only issue would be whether filing the petition before the Hon'ble Supreme Court under Article 32 of the Constitution would debar the writ petitioner from maintaining the present appeal. It is submitted that the petition filed under Article 32 of the Constitution was dismissed in limine by a single line non speaking order where the question of fraud by the Selection Board had not been on record which was subsequently revealed on production of the records before the Writ Court and therefore there had been no adjudication in the Article 32 petition and hence no forum shopping and/or res judicata. It is further submitted that the learned single bench did not go into the question of res judicata as according to the learned single bench, the delay in filing the writ petition was quite enormous although arguments had been advanced in this regard and judgments were also cited. With regard to the arguments that the claim made by the writ petitioner is a stale claim, it is

submitted that it would be evident that till 25.03.2014 on which date the Hon'ble Supreme Court disposed of WPC No. 46 of 2007, the writ petition would not have been maintainable in view of the minutes of the Selection Board dated 09.09.2009 which records that only 16 persons from the panel would be appointed and the fate of the other two successful candidates would depend upon such further order or final decision that may be passed by the Supreme Court in the pending matter. The petition under Article 32 of the Constitution was dismissed in limine by non speaking order on 11.01.2016 and the writ petition was filed before this Court on 12.01.2018 i.e. within two years with explanation for the delay that the senior counsel to whom the case was entrusted was suffering from ill health for the better part of 2017. In support of his contention, that doctrine of waiver has no application in the case of fundamental rights under the Constitution, the learned advocate placed reliance on the decision of the Hon'ble Supreme Court in ***Basheshar Nath Versus Commissioner of Income Tax Delhi and Rajasthan and Others***⁶. Further it is submitted that the procedural justice system should give way to conceptual justice system and efforts of the law ought to be so directed. In support of such contention reliance was placed on the decision of the Hon'ble Supreme Court in ***Rupa Ashok Hurra Versus Ashok Hurra and Another***⁷ for the proposition that fraud vitiates everything, the judgment in ***Union of India and Others Versus Ramesh Gandhi*** in criminal appeal no. 1356 of 2004 dated 14.11.2011 and ***Commissioner of Customs (Preventive) and***

⁶ AIR 1959 SC 149

⁷ (2002) 4 SCC 388

Others Versus M/s. Aafloat Textiles Private Limited in CA No. 2447 of 2007 dated 16.02.2009 were relied upon. For the proposition that dismissal of Article 32 petition in limine by a non speaking order is no adjudication and cannot result in res judicata, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in ***Khoday Distilleries Limited Versus Sri Mahadeshwara Sahakara Sakkare Karkhane Limited*** in civil appeal no. 2432 of 2019 dated 01.03.2019 and the decision in ***Daryao and Others Versus State of Uttar Pradesh and Others***⁸.

12. We have elaborately heard the learned advocates for the parties and carefully perused the materials placed on record including the notes on submissions given by the learned advocate for the appellant/writ petitioner and the learned advocate for the cross objector (High Court).
13. Before we proceed to decide the correctness of the decision rendered by the learned writ court, we wish to deal with the last argument made by the learned advocate for the writ petitioner alleging that legal fraud has been committed by the Selection Board. On a specific query made by this court to point out any such averments in the writ petition, the petitioner could not point out any such averments. Thus, for the first time alleging legal fraud cannot be permitted. The learned advocate for the appellant seeks to make such an allegation to support his proposition that the fraud vitiates every solemn act. Unfortunately, the legal principle cannot be applied in the instant case, as there is no specific pleading alleging fraud much less legal fraud nor

⁸ AIR 1961 SC 1457

any other relevant details. As pointed out earlier, the allegation of fraud is raised before this Court for the first time that too during the course of submissions and there is no pleading to the said effect. Therefore, we cannot permit the appellant to raise such a plea before this Court for the first time apart from branding such a plea to be frivolous. The decision in the case of **Ramesh Gandhi** relied on by the Advocate for the appellant can be of no assistance to the case on hand as in the facts of the said case it had been established that the accused therein intentionally or dishonestly suppressed such relevant and crucial facts which resulted in the order being passed by the Courts in favour of a company, and in the said fact situation the Hon'ble Supreme Court had referred to other judgments and held that fraud avoids all judicial acts, a judgment and decree obtained by playing fraud in the Court is a nullity. The decision in **Aafloat Textiles** relied on by the learned Advocate for the writ petitioner pertains to a case where the Special import licenses were forged documents and in such factual portion the Hon'ble Supreme Court analyzed the concept of fraud and held that special import licenses being not genuine documents and found to be forged, such documents had no existence in the eye of law. We are at loss to understand as to how these decisions can in any manner be of assistance to the case of the writ petitioner. The learned Advocate appearing for the appellant, placed reliance on the decision in **Khoday Distilleries Limited** wherein the Hon'ble Supreme Court affirmed and reiterated the conclusions in **Kunhayammed and Ors. Versus State of**

Kerala ⁹ which pertained to as to what would be the effect on an order refusing special leave to appeal whether it may be a non-speaking order or a speaking order. For the same proposition, reliance was placed on the decision in **Daryao** wherein it was held that there was no substance and the plea that the judgment of the High Court could not be treated as res judicata because under Article 226 of the Constitution of India, it could not entertain a petition under Article 32 of the Constitution.

14. Firstly, we need to take note of the facts and circumstances of the case on hand which have been brought on record in the preceding paragraphs, which at the cost of repetition is worth reiterating. After a considerable length of time after issuance of posting orders in the year 2010 the writ petitioner filed IA No. 6 of 2010 to implead himself in a pending writ petition before the Hon'ble Supreme Court in WP(C) No. 46 of 2007 filed by the West Bengal Judicial Services Association. The said writ petition which was pending before the Hon'ble Supreme Court was with regard to a different issue and the writ petitioner thought fit to seek to implead himself in the said writ petition. This application was dismissed by the Hon'ble Supreme Court on 29th August, 2011. Thereafter, the writ petitioner filed an application for recalling the said order which was dismissed by the Hon'ble Supreme Court by order dated 23.07.2012 by observing that the application is utterly misconceived. The said writ petition in WP(C) No. 46 of 2007 was disposed of by the Hon'ble Supreme Court. On 26.06.2014 the 4th respondent was ultimately confirmed in the

⁹ (2000) 6 SCC 359

relevant post. In the year 2016 the writ petitioner filed WP(C) No. 1 of 2016 before the Hon'ble Supreme Court and the copy of the said writ petition has been annexed in the paper book from which we find the grounds raised before the Hon'ble Supreme Court were identical to that of the grounds raised in the present writ petition and the prayer was also identical though differently worded. The said writ petition was dismissed by the Hon'ble Supreme Court by order dated 11.01.2016 by passing the following order "We are not inclined to entertain this writ petition, which is dismissed". To be noted that what was filed before the Hon'ble Supreme Court was not a petition for special leave but a writ petition under Article 32 of the Constitution. Thus, the order dismissing the writ petition by observing that the Hon'ble Supreme Court is not inclined to entertain the writ petition would mean that all points raised have been rejected. Therefore on the same set of facts, the writ petitioner is estopped from filing a fresh writ petition before this Court that too, on the same cause of action. It would be relevant to note at this juncture that the present writ petition was filed before this Court on 12.01.2018 (Article 32 petition dismissed on 11.01.2016) and the impugned order dismissing the writ petition was passed on 26.11.2019. As pointed out by the Hon'ble Supreme Court, in ***Chandigarh Administration and Anr. Versus Jasmin Kaur and Ors.***¹⁰ that equity aids only the vigilance and not the ones who sleep over their rights. As held by the Hon'ble Supreme Court that reasonable period within which a party has to approach a Court is certainly a variable one and depends upon the

¹⁰ (2014) 10 SCC 521

facts of each particular case. It has been held that the maximum period fixed by the legislature of time to seek relief by a suit in a Civil Court ordinarily may be taken to be a reasonable standard by which delay in seeking relief under Article 226 of the Constitution of India can be measured.

15. The relevant dates and the sequence of events clearly would show that the exercise embarked upon by the writ petitioner was hopelessly barred by delay and latches, apart from being hit by the principles of estoppel and res judicata.

16. We had also noted that the panel cannot be operated as vacancies for fresh selections what was notified in March 2010 and an advertisement was also issued in April 2010 and it is only thereafter that writ petitioner had filed IA No. 6 of 2010 in WPC No. 46 of 2007 before the Hon'ble Supreme Court. Therefore, on the said ground also the writ petitioner is liable to be non-suited. The learned Advocate appearing for the appellant placed reliance on the decision in the case of **Basheshar Nath** for the proposition for doctrine of waiver, has no application in the case of fundamental rights and Constitution. Firstly, the appellant writ petitioner should remember that the litigation commenced by him was a service matter concerning his non-selection to the post or in other words, the correctness of the decision taken by the High Court in permitting the private respondents to participate in the viva voce and personality test. Whatever rights which accrued in favour of the writ petitioner is pursuant to the rules of selection which has been clearly spelt out in the advertisement. The writ petitioner was fully aware of the powers conferred on

the High Court to modify, relax conditions. The appellant was made known that three candidates are being permitted to participate in the viva voce and personality test. Even thereafter the appellant had participated in the viva voce and personality test and after the results were declared and posting orders were issued to the other candidates, the writ petitioner woke up from deep slumber and straightaway approached the Hon'ble Supreme Court seeking to implead himself in a writ petition filed by an association concerning a different issue. Therefore, the said decision of the Hon'ble Supreme Court does not render any support to the case of the writ petitioner. The judgment in **Rupa Ashok Hurra** referred to by the learned Advocate for the petitioner was on a reference to the Constitution Bench of the Hon'ble Supreme Court to decide the question as to whether the judgment of the Hon'ble Supreme Court in a Civil Appeal can be regarded as a nullity and whether a writ petitioner under Article 32 of the Constitution of India can be maintained to question the validity of a judgment of the Hon'ble Supreme Court after the petition for review of the said judgment has been dismissed. While considering the scope and power of the Hon'ble Supreme Court, it has been observed that the Court can mould and lay down the law formulating the principles and guidelines as to adopt and adjust to the changing conditions of the society, the ultimate objective being to dispense justice. The decision can have no support to the case of the writ petitioner being purely a service matter. Thus, for all the above reasons, we hold that the appellant/ writ petitioner would not be entitled to any relief in this appeal.

17. Now we move on to the aspect as to how the writ petition ought to have been dealt with specially when the issue regarding the maintainability was raised by the High Court administration and also by the private respondent who had in fact filed a separate application for such relief. If a issue relating to the maintainability is raised, it is but appropriate for the Court or the forum to first take a decision on the said issue, this Court does not seeks to convey that it should always be decided as the preliminary issue but it definitely requires to be decided as the first among several issues. We say so because if the court is of the opinion that the petition was not maintainable then an order to the said effect could be passed and this will avoid the court from making any observations or rendering any findings in the judgment which may affect the rights of parties in the event the parties approach the appropriate forum. However in the case on hand the learned writ court though having noted the preliminary objection did not deal with the same as the first among several issues. We are clear in our mind that the issue relating to the maintainability of the writ petition ought to have been decided as the preliminary issue or as first among the several issues which the learned writ court proposed to deal with.

18. The notification was issued by the High Court on 31.03.2009 notifying 131 vacancies in the cadre of District Judges (Entry Level) the said number of vacancies included 16 vacancies which are to be filled up by direct recruitment from the Bar. An advertisement was issued on 15.04.2009 proposing to fill up 16 vacancies by direct recruitment from the Bar to the cadre of higher judicial

officer in the rank of District Judge (Entry Level) in West Bengal Judicial Service. On the very same day, another notification was issued for filing up of 26 vacancies in the cadre of District Judge (Entry Level) by way of promotion as on 16.06.2009 and 28.06.2009. Notices were issued confirming the issuance of admit card to 153 candidates including the writ petitioner for participating in the written test for direct recruitment to the post of District Judge scheduled to be held on 29.06.2009, 30.06.2009 and 07.07.2009. On 21.08.2009, the results of the written test were published showing that the writ petitioner having qualified to participate in the viva voce and personality test. On 28.08.2009 notification was issued intimating that three more candidates who have obtained two marks less than the marks in any subject or aggregate would also be called for viva voce and personality test. The results were subsequently published in which the writ petitioner stood in the 17th position with overall assessment of 307.33 marks. On 28.10.2009 posting orders were issued for 16 directly recruited District Judges. On 20.03.2010 notification was issued by the High Court intimating that 90 vacancies in the cadre of District Judge will be filled up by recruitment. On 09.06.2010 an advertisement was issued for filling up of 23 vacancies in the cadre of District Judge (Entry Level) by direct recruitment and 45 vacancies by promotion. After all these events occurred, the writ petitioner approached the Hon'ble Supreme Court and filed an application in IA No. 06 of 2010 in WPC No. 46 of 2007. In this application, the prayer sought for by the writ petitioner was to implead himself in the writ petitioner filed by the West Bengal Judicial Services Association. Admittedly,

the said application for impleadment was dismissed as not pressed by the Hon'ble Supreme Court on 29.08.2011. Thereafter in April, 2012 the writ petitioner filed another application to recall the order dated 29.08.2011 dismissing the application for impleadment as not pressed. This application was dismissed by the Hon'ble Supreme Court by order dated 25.07.2012 holding that the application is utterly misconceived. Thereafter the writ petitioner filed a writ petition before the Hon'ble Supreme Court under Article 32 of the Constitution. On 02.12.2015, the said writ petition was dismissed by the Hon'ble Supreme Court on 11.01.2016 prior to that of 25.02.2014 the writ petition filed by the West Bengal Services Association in WPC No. 46 of 2007 was disposed of, and the present writ petition was filed on 12.12.2018. The above dates and events will clearly show that the present writ petition is hopelessly barred by the delay and latches. The writ petitioner cannot be heard to say that he was prosecuting the matter before the wrong forum more so when he was practicing as an advocate at the relevant time was as a law officer of a Municipal Corporation. The person who is fully aware of his rights and duties cannot plead any ignorance of law nor he can say that he was bonafidely prosecuting the matter before a different forum/s. More importantly on or after the issuance of the notification dated 09.04.2010 calling for applications to be fill up 23 vacancies of District Judge (Entry Level) by direct recruitment the earlier panel though was ordered to be kept alive till August 2010 cannot be operated. The legal battle commenced by the writ petitioner by filing IA No. 06 of 2010 was much after the fresh advertisement was issued on 09.04.2010.

Therefore even at that stage the writ petitioner was not entitled to maintain the challenge.

19. The next aspect which is to be noted is that the prayer sought for in the writ petition filed under Article 32 of the Constitution of India is identical to that of the prayer sought for in the present writ petition. Though there may be slight difference in the language/drafting. More importantly the cause of action was identical and there was no fresh material brought on record by the writ petitioner in the present round of litigation. Therefore on an after the dismissal of the writ petitioner filed under Article 32 of the Constitution, by a reasoned order, the second round on the same cause of action is clearly barred by the principles of res judicata.

20. Nextly, the writ petitioner could not have maintained the challenge to the selection process that to with regard to the decision of the Selection Board to award two marks to the candidates to enable them to participate in the viva voce after he having participated in the selection process with full knowledge that these candidates are being extended this benefit to enable them to participate in the viva voce and personality test. Thus, the writ petitioner is deemed to have waived all his alleged rights to question the selection process. That apart, the Selection Board in its wisdom and taking note of the special deserving situations took the decision to permit such of those candidates who were short by one or two marks to participate in the viva voce and personality test. This power was conferred on the Selection Body and the writ petitioner was aware of the same and participated in the selection process. Therefore the

decision of the Selection Board to extend such benefit to permit the candidates to participate in the viva voce and personality test is well within the jurisdiction of the Board. That apart, the decision of the Board was placed before the Hon'ble Chief Justice who in turn directed the matter to be placed before the Hon'ble Full Court and the same was approved. Thus, it cannot be stated that the decision was taken in arbitrary manner nor the decision suffers from the vice of lack of jurisdiction. The writ petitioner cannot contend that he has not seen the website of the High Court nor the notification issued by the High Court which clearly stated that six candidates who were short by either one or two marks have been permitted to participate in the viva voce and personality test, in which test the writ petitioner also participated and therefore cannot contend that he was unaware of the notification issued by the High Court. As rightly pointed out, in the affidavit filed in the writ petition, this aspect has been accepted by the writ petitioner stating that he is surprised that by notification dated 28.08.2009 the private respondents were called for viva voce and personality test. Thus, at several stages of the matter, the writ petitioner did not diligently prosecute the matter rather having been fully aware of his rights had embarked upon the exercise by filing the application before the Hon'ble Supreme Court and thereafter the writ petition under Article 32 of the Constitution and after dismissal of the said writ petition by a reasoned order after two years the present writ petition was filed. The posting orders of the 16 District Judges were issued on 28.10.2009 and the writ petitioner now seeks to dislodge the said selection at this juncture and by then from such of those

candidates who were recruited as District Judge (Entry Level) several of the candidates are now the Hon'ble Judges of the High Court at Calcutta. Thus, the present attempt of the writ petitioner cannot be entertained as the writ petition is not only a stale claim, the writ petitioner is estopped from filing the present writ petition on the very same cause of action after being unsuccessful before the Hon'ble Supreme Court. The writ petitioner having been fully aware that those candidates were permitted to attend the viva voce and the personality test and after having the knowledge of the same having participated in the selection process is deemed to have waived all his alleged rights to question the selection. That apart, the writ petition is also hit by the principles of res judicata.

21. With regard to the merits of the selection process, we find that the Selection Board acted wholly within the jurisdiction, the decision taken is evident from minutes of the meeting recorded which cannot be stated to be minutes without reasons. The decision of the Selection Board was approved by the Hon'ble Full Court and thereafter the list of selected candidates was published and posting orders were issued. In such circumstances had the learned writ court decided the maintainability issue, as a preliminary issue, ultimately which was held against the writ petitioner, no occasion would have arisen for making any observations on the manner in which the Selection Board had conducted its proceedings. We are in agreement with the learned writ court in dismissing the writ petition on the ground of delay and laches apart from our view that it is a stale claim, the appellant waived what little

rights he would have had and the writ petition is hit by the principles of estoppel and res judicata. That apart, we have already held that the decision of the selection board as approved by the Hon'ble Full Court as being well within its jurisdiction and cannot be termed to suffer from any vice of lack of jurisdiction. Therefore all observations made by the learned writ court on the manner in which the Selection Board had proceeded needs to be eschewed and accordingly eschewed in its entirety.

22. In the result, the appeal filed by the writ petitioner is dismissed and the cross objection is allowed. No costs.

(T.S. SIVAGNANAM)
ACTING CHIEF JUSTICE

I Agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A- SACHIN/PRAMITA)