

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE ARINDAM MUKHEREJEE.

W.P.A 16722 of 2024

with

CAN 1 of 2025

CAN 2 of 2025

IVANA HOSSAINI.

VS.

THE STATE OF WEST BENGAL & ORS.

For the petitioner	:	Mr. Firdous Samim, Ms. Gopa Biswas, Ms. Payel Shome, Ms. Sampriti Saha. Advocates
For The High Court Administration	:	Mr. Kallol Basu, Mr. Ayushman Dasgupta. Advocates
For the State	:	Mr. Sirsanya Bandopadhyay, Mr. Debopriya Karan Advocates
For the PSC	:	Ms. Piyali Sengupta Mr. Souvik Ghosh Advocates
For the Applicants	:	Mr. Billwadal Bhattacharyya Sr. Adv. Mr. Sayak Chakraborti, Mr. Anish Kumar Mukherjee, Ms. Megha Datta, Mr. Wrickbrata Roy, Mr. Tamoghna Pramanick Advocates (CAN 1 of 2025 & CAN 2 of 2025)

Heard on : 19.09.2024 & 26.09.2024

Judgment on : 18th March, 2025.

Arindam Mukherjee, J.:

A. Case of the Petitioner:-

- 1) The petitioner participated in the West Bengal Judicial Service (Preliminary) Examination, 2022 in terms of the notice issued by West Bengal Public Service Commission (in short, 'PSC'), on 30th December, 2022 being advertisement no.19/2022 (hereinafter referred to as the 'said advertisement'). The petitioner belongs to Other Backward Class (in short, 'OBC') –'A'. On being successful in the preliminary examination the petitioner was also successful in the main written examination and was called for the interview. Subsequent thereto the petitioner has been placed in the select list prepared and published by PSC on 13th May, 2024 as serial no.36 which signifies that the petitioner got 36th Rank in the merit list.
- 2) The petitioner says that as per the advertisement the total vacancies are 29 in number out of which 12 are 'Clear Vacancies' while 17 are 'anticipated vacancies'. In 'Clear Vacancy' the unreserved seats (in short, 'UR') are 8 Scheduled Caste (SC) 1, Scheduled Tribe (ST) 1, OBC – 'A'-1, OBC – 'B'-1. Under the 'Anticipated Vacancy' UR-10, SC-2, ST-1, OBC-'A'-2, OBC-'B'-1 and PwBD-1.
- 3) The petitioner says that she has been placed in the select list as serial no.36 (rank), so there are 35 persons before her in the merit list who

belong to various category. The petitioner further says that as per the recommendation list prepared and published by PSC on 14th May, 2024, the PSC has bifurcated the list of the recommended candidates from the select list. Twelve recommendations have been made separately against the 'Clear Vacancies' while seventeen recommendations have been made separately against the 'Anticipated Vacancies', instead of preparing a continuous list on the basis of the position in the 'Select list' by taking 18 (8+10) UR vacancies, 3 SC (1+2), 3 OBC-A (1+2), 2ST (1+1), 2 OBC-B (1+1) and 1 PwVD at a time without first filling up the 'Clear Vacancies' and then the 'Anticipated Vacancies'. PSC according to the petitioner should have considered all the 18 (8+10) vacancies under 'UR' Category at a go instead first recommending 8 candidates as per merit from the 'select' list. The petitioner says that Nilu Siddique who is an OBC-'B' candidate and is 8th in rank in the select list as per marks obtained has been rightly considered against the unreserved vacancy since she had obtained higher marks than 'UR' candidates by following the ratio laid down in **2022 (11) SCC 779 [Bharat Sanchar Nigam Limited & Anr. Vs. Sandeep Choudhary & Ors.]** candidates like Nilu Siddique is commonly referred to as "own merit candidate". The said Nilu Siddique, therefor, did not avail any reservation as an OBC-'B' candidate.

- 4) Similarly, Bushra Banu who is 12th in rank and an OBC -'A' candidate ought to have been considered after the three unreserved candidates

placed as 9th, 10th and 11th in the 'Select' list. Bushra Banu, therefore, would have filled up the 12th vacancy under 'UR' category out of 18 vacancies and not the OBC-A vacancy under 'Clear Vacancy' category. In the same manner Rahul Sk. placed as serial no. 33 in the 'Select list' would have filled up the only OBC-A vacancy available under 'Clear Vacancy' which would allow Fauzia Ahmed (rank 34) to occupy the first vacancy of OBC-A against 'Anticipated Vacancy'. The petitioner being ranked 36 should have been recommended for appointment against the 2nd (second) OBC-A vacancy under 'Anticipated Vacancy' category.

- 5) The petitioner further says that PSC by bifurcating the select list into two parts thereby recommending the two sets of candidates from the select list separately against clear and the anticipated vacancies, have acted illegally, arbitrarily and contrary to the settled legal procedure. PSC has also not followed the 100 point roster as appears in schedule – I of the “West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976” (hereinafter referred to as, the '1976 Act') as also the provision of “The West Bengal Backward Classes (Other than Scheduled Castes and Scheduled Tribes) (Reservation of Vacancies) in Services and Posts Act, 2012”. The recommendation list prepared by PSC and published on 14th May, 2024 should be set aside and/or quashed and a fresh list should be prepared from out of select list in the manner as indicated by the petitioner.

6) The petitioner also says that the way and in the manner the recommendation list has been prepared by PSC came to the petitioner's knowledge only after 14th May, 2024 and as such, the petitioner had participated in the selection process without any demur and protest. It cannot, however, be said that the petitioner after being unsuccessful has turned around and challenged the selection process. The petitioner has not challenged the selection process but the act of PSC while preparing the recommendation list. The petitioner has no grievance even against the select list prepared and published by PSC on 13th May, 2024. The petitioner has come to know about recommendation list against which the petitioner ventilates her grievances only after having participated in the selection process. The petitioner, therefor, cannot be said to have been stopped from challenging the selection process. The petitioner, therefor, entitled to maintain this writ petition in view of the ratio laid down in **2020 (20) SCC 209**[*Ramjit singh Kardam & Ors. Vs. Sanjeev Kumar & Ors.*] and **2019(20) SCC 17** [*Dr. (Major) Meeta Sahai Vs. State of Bihar & Ors.*].

7) It is submitted by the petitioner that the writ petition, therefor, should be allowed.

B. The Case of the PSC:-

1) It is submitted by PSC that the procedure followed by PSC while preparing recommendation list is correct process and as per the settled provisions of law. The petitioner has obtained 681 marks and as such

has not come within the consideration zone for appointment against either UR or OBC-‘A’ category. As a result whereof, her name does not figure in the final list of candidates recommended for appointment. Admittedly, three other candidates belonging to OBC- ‘A’ category have obtained higher marks than the petitioner and their names have been thus recommended for appointment. Moreover, according to PSC, the selection process was conducted as per the requisition made by the Judicial Department, Government of West Bengal. In the requisition, separate lists have been stipulated for ‘Clear Vacancies’ and ‘Anticipated Vacancies’. Keeping in line with such requisition the recommendations have been made.

C. The case of the High Court Administration:-

- 1) It is submitted on behalf of the High Court Administration that the role of High Court in its administrative side is limited only to notify the vacancies as directed by the Hon’ble Supreme Court reported in **2008(17) SCC 703 [Malik Mazhar Sultan (3) & Anr. Vs. Uttar Pradesh Public Service Commission and Ors.]** and the subsequent orders passed by the Hon’ble Supreme Court in this connection. After notifying the vacancies under ‘clear’ and ‘anticipated’ category, the matter is sent to the Judicial Department, Government of West Bengal for taking necessary steps to hold the West Judicial Service Examination, 2022. The appointments of the Judicial Officers are also given by the Government of West Bengal with the limited involvement of the High Court.

2) The High Court Administration has no role either in the preparation of 'select list' or the 'final list' by which the names of successful candidates are recommended for appointment. It is, however, submitted by the High Court Administration that the writ petition is not maintainable since the petitioner has participated in the selection process without any demur and protest and on being unsuccessful has fallen back to challenge the selection process. This is impermissible in view of ratio laid down in Judgment reported in **2010 (12) SCC 576 [Manish Kumar Shahi Vs. State of Bihar & Ors.]**.

3) The writ petition, therefor, should be dismissed.

D. Case of the State Respondents:-

- 1) It is submitted by the State respondents that there is no illegality in conducting the Examination. The candidates have been selected in a fair and transparent manner on the basis of marks obtained by them. None of the candidates as per select list has any grievance regarding their marks or in the way their examination has been conducted. The vacancies under 'Clear Vacancy' and 'Anticipated Vacancy' category are required to be filled up separately from the select/merit list. This is the correct approach as per the present scheme of affairs and the law. The mode of preparing the recommendation list as suggested by the petitioner would lead to anomalous situation.
- 2) The writ petition, therefor, should be dismissed.

E. Factual Analysis and Conclusion:-

- 1) The single point urged by the petitioner is that there should have only one list prepared by PSC for the purpose of recommending the names of the successful candidates in a continuous manner instead of splitting the same into two parts i.e. one set of candidates being recommended against the 'Clear Vacancies' and the other set against the 'Anticipated Vacancies' on the basis of the marks obtained by the candidates in the main examination and interview from out of the candidates who participated in the West Bengal Judicial Service Examination 2022. Initially a single select list of 54 candidates was prepared and published by PSC on 13th May, 2024 on the basis of the marks obtained by the said candidates. This is a single and a continuous list wherein the names of the 54 successful candidates have been arranged serially according to the marks obtained by each of them. However, the list of candidates recommended for appointment has been made separately from out of the select list against the clear and anticipated vacancies on the basis of the marks obtained and vacancy position. The list was published by PSC on 14th May, 2024. In the recommendation list PSC has first taken 12 'Clear Vacancies', out of which as per the advertisement there were 8 (eight) Unreserved (UR) seats , 1 Schedule Caste (SC), 1 Schedule Tribe (ST), Other Backward Class (OBC-A) 2 and OBC-B – 1. The first 8 (eight) candidates as per merit (marks obtained) were placed against the 8 (eight) UR vacancies. In the 8 (eight) UR

vacancies, one candidate namely Nilu Siddique was placed against the 8th UR vacancy though she belongs to OBC-B category as “own merit candidate” on the basis of her marks. After the 8 (eight) UR vacancies were exhausted 1 (one) seat of OBC-A seat was filled up by Bushra Banu who is holding the 12th rank on the basis of marks obtained and being the first amongst OBC-A candidates. Similarly, Deep Biswas ranked 13th and first amongst SC candidates fills up the only SC seat available under ‘Clear Vacancy’ Shreya Ghosh ranked 15th in the merit list and 2nd amongst OBC-B candidates fill up the only seat under OBC-B as Bushra Banu has been considered as “own merit candidate”. Dikila Sherpa who is ranked 47th in the merit list and first amongst ST candidates fills up the only ST seat under ‘Clear Vacancy’. After exhausting the recommendation against the ‘Clear Vacancies’ PSC has taken up the task to recommend candidates against the ‘Anticipated Vacancies’. There are 10 (ten) UR seats, 2 (two) SC, 1 (one) ST, 2 (two) OBC-A and 1 (one) OBC-B seats under ‘Anticipated Vacancies’. PSC has taken at the first instance, the 10 UR vacancies and has placed candidates from no.9 in the select list i.e. on merit as 1 to 10 save those who have found place in the list recommended against the ‘Clear Vacancy’. It starts with Haardikaa Rajdev who is in the 9th position as per marks in the select list and ends with Priyarthi Roy. Priyanka Kushwaha an OBC-B candidate who is placed in 17th rank as per merit in the select list has found place against 1 (one) of the UR vacancies under ‘anticipated vacancies’ as “own merit candidate”. In the same

manner, the 2nd and 3rd ranked SC candidates, second ranked ST candidate, the 3rd and 4th ranked OBC-A candidates, the 2nd ranked OBC-B candidates and one PwBD candidate were recommended for appointment against the respective reserved vacancies under anticipated vacancies category.

2) It is the case of the petitioner that it was necessary to prepare a single list like the select list for filling up clear and anticipated vacancies. The petitioner says that the procedure to fill up the vacancies in a 100 point roster as provided in Schedule- I of the West Bengal Schedule Castes and Schedule Tribe (Reservation of Vacancies in Services and Posts) Act, 1976 (hereinafter referred to as the '1976 Act') is required to be followed. In terms of the said Schedule there is no provision for bifurcation of the list to fill up the 'clear' and 'anticipated' vacancies. It should be single and common one. The procedure followed by PSC is, therefor, illegal and unsustainable.

3) The petitioner also says that under UR category there are 8 vacancies as 'Clear Vacancies' and 10 UR vacancies as 'anticipated vacancies'. Thus, a total of 18 vacancies under UR category. It is the petitioner's case that at the first instance all the 18 UR vacancies should have been taken up together for being filled up by the first 18 candidates as per merit provided in the select list. This would have allowed. Nilu Siddique, Bushra Banu who has been recommended to fill up OBC -A vacancy to fill up two of the UR vacancies appearing under clear and anticipated category, being in 8th and 12th position as per the select list.

Similarly, Haardikaa Rajdev who is in serial no.9 as per the select list would have filled up the 9th vacancies in UR category after Nilu Siddique followed by Pooja Singh and Sharbani Ghosal. The serial no.12 and no.13 would have gone respectively to Bushra Banu and Deep Biswas, an SC candidate while serial no.14 would have gone to Debarati Ghosh, Serial no.15 to Shreya Ghosh who is also an OBC-B candidate. The 16th, 17th and 18th vacancies under UR category would have respectively gone to Kasturi Dutta, Priyanka Kushwaha and Namrata Chakraborty. Priyanka Kushwaha, who is an OBC-B candidate would have gone as an own merit candidate. The candidates under OBC-A, OBC – B and SC category on having been considered as own merit candidate would have allowed the OBC-A, OBC-B and SC seats/vacancies to be filled up by candidates in each of such category placed below the “own merit candidate” in the select list as per their rank and marks. The vacancy of Bushra Banu, Deep Biswas, Shreya Ghosh and Priyanka Kushwaha would have therefor, remained vacant to be filled up by other OBC – A, OBC – B and SC candidate as per their respective position in the select list. This would have allowed Ivana Hossaini, the petitioner who is ranked 36 in the select list and belongs to OBC-A, a berth in one of the vacancies earmarked for OBC-A category under the ‘Anticipated Vacancy’ category.

- 4) Before going into the petitioner’s argument on merit, the maintainability aspect of the petitioner is required to be dealt with. After considering the ratio laid down in **Meeta Sahai** (surpa) and **Ramjit Singh** (supra) I

find that the select list and the recommendation list were published subsequent to the petitioner participating in the examination. The right which the petitioner claims as a consequence whereof the question of giving up a known right does not appear in this case. I am, therefore, unable to accept the ratio laid down in ***Manish Kumar Shahi*** (supra) while applying the same to the facts of the case.

- 5) In order to deal with the petitioner's arguments on merit, one has to first consider the words "Cadre Strength", "post" and "vacancies". Cadre Strength is always measured by the number of posts comprising the cadre. The cadre which has fallen for consideration is Civil Judge (Junior Division), the Cadre Strength whereof is 406. The entry to this cadre is only through direct recruitment as per the vacancies that may arise from time to time. The right to be considered for appointment can only be claimed in respect of a post in the given cadre as held in **2017(1) SCC 457 [Srikant Roy & Ors. Vs. State of Jharkhand & Ors]**. The percentage or quota in a cadre has to be worked out in relation to number of posts which forms the Cadre and has no relevance to the vacancy that would occur. Since the Cadre in question is filled up only through one source i.e. direct requirement, there is no percentage or quota for promotees, direct recruitment or limited competition which is there when the entry to a cadre is from different sources. In the cadre which has fallen for consideration in the instant case, only the posts are earmarked on the basis of the percentage of reservation. So, the vacancies are ascertained at the first instance

which gives an indication of number of post lying vacant. Then comes the process of identifying as to how many of the vacancies relate to reserved post and under which category. The vacancies are notified by the High Court under two categories as per **Malik Mazhar Sultan (3)** (supra) judgment as 'clear' and 'anticipated vacancies'. 'Clear Vacancies' indicate that these number of posts in the cadre in lying vacant. 'Anticipated Vacancies' mean as to how many of the posts in the cadre are likely to fall vacant within a time frame. The High Court, therefor, in its minutes of the Administrative Committee, only notifies the vacancy position by specifying 'clear' and 'anticipated' vacancy as required under **Malik Mazhar Sultan (3)** (supra). It is only at the advertisement stage it is clarified as to how many o the vacancies are UR and reserved and under which category of reservation the vacancies are or are likely to fall vacant. It is, therefor, provided in the advertisement that the applicant should clearly specify as to which category the applicant belongs to i.e. unreserved, reserved, if reserved under which category with supporting documents. At the end of the selection process it may be found that a candidate under the reserved category has competed as "own merit candidate" in accordance with the ratio laid down in **Sandeep Choudhary** (supra). In such a case, the said candidate is shown to have not taken the benefit of reservation. It is also settled position of law that no appointment in excess of the vacancy can be made as also in excess of the reserved vacancies. Only in the case where a candidate who had applied under a reserved

category is selected as “own merit candidate”, he or she is placed under UR category and a reserved candidate below such candidate in the merit list is placed against the reserved vacancy.

6) Thus, the Schedule - I under the 1989 Act which sets an example of 100 vacancies in a cadre is required to be adhered to at the stage of giving the actual appointment to place the candidates in their respective categories after having selected on merit basis and not at the stage of preparing the list recommending the candidates. This is more so, as the vacancy position shown in the roster in Schedule-I speaks of the first vacancy to go to SC candidate. Unless the own merit candidates are identified, the candidate who will fill up the SC vacancy does not get crystallized. The bifurcation of list for recommending candidates for being given appointment is, therefore, not dehors the schedule as contended by the petitioner.

7) It is also necessary to understand the connotation ‘Clear Vacancy’ and ‘Anticipated Vacancy’ before going into the second part of the petitioner’s argument on merits. As held in **2021 (3) SCC 755 [High Court of Kerala vs. Reshma A. & Ors.]**, ‘Clear Vacancy’ is the existing number of vacancies which is an objective fact known to a particular High Court. **Malik Mazhar Sultan (3)** (supra) mandate the High Court to notify the ‘Clear Vacancies’ (existing number of vacancies) plus the ‘Anticipated Vacancies’ for the next one year. On the other hand, those vacancies which arise as a part of normal exigencies of service in the ensuing year due to factors such as promotion, death or resignation

from service. Although, these exigencies are common to a service but the vacancies arising therefrom cannot be predicted with precision. These are 'Anticipated Vacancies'. 'Anticipated Vacancy' is loosely referred to as probable vacancies which are expected or likely to arise in the ensuing year but are not exiting ones. 'Anticipated Vacancies' also include some vacancies arising due to imponderable event during the recruitment process. Anticipated vacancies, therefor, are those which are expected and likely to arise but are not clear vacancies which factually exists. Anticipated vacancies are therefor, fluid in nature with volatile character. During the recruitment process it may or may not arise. Like in the case in hand, there are 17 'Anticipated Vacancies'. There may be an occasion that ultimately all the 17 vacancies may not fructify to existing vacancies during the time span. In that case appointments are given in respect of the post which actually fell vacant at the time of giving appointment as per the existent rules. If the contention of the petitioner is accepted to be the correct proposition it will lead to an anomalous situation which can be explained by citing an example. In a hypothetical situation at the end it is found that all the 10 UR vacancies under 'Anticipated Vacancy' category does not fall vacant. Then an own merit candidate who is placed against UR vacancy under Anticipated category may not get appointment while a reserved category candidate placed against a reserved vacancy under 'Clear Vacancy' category may get the job though he/she is placed below the

own merit candidate under the same reserved category although, placed below in the select (merit) list.

- 8) If we take the example of Bushra Banu who is placed in 12 position as per the select list. If she is considered as an own merit candidate to fill up one of the vacancies under UR category against 'Anticipated Vacancies' and at the end of the year it so happens that 4 (four) vacancies under UR category against 'Anticipated Vacancies' does not arise, then Bushra Banu will not be getting an appointment, though she is the first candidate on merit in OBC-A category while on the other hand, OBC-A candidate say for example Rahul Sk. placed as number 33 in the select list would fill up the only OBC-A vacancy against 'Clear Vacancy' category. Similarly, Shreya Ghosh, Priyanka Kaushwaha would in terms of the logic given by the petitioner fill up vacancies on own merit under the UR category against 'Anticipated Vacancies' may not get the job while candidates placed below them in the merit list will get the appointment. Thus, there is every likelihood that a candidate placed down in the merit list will get an assured berth for being appointed while candidates higher in the merit list may not get an appointment.
- 9) The logic given by the petitioner is not only absurd as far from the actual reality. This procedure, if followed would not only create an anomalous situation but also anarchy to the subject recruitment process.

- 10) The writ petition fails and is accordingly dismissed. The interim order stands vacated. The respondents shall be free to proceed to give appointment as per the recommendation list published by PSC on 14th May, 2024.

RE:- CAN 1 of 2025

This is an application for addition as party respondent in the writ petition made by 8 applicants who claim that their names figure in the final list prepared by West Bengal Public Service Commission (PSC) for recommending appointment in connection with the West Bengal Judicial Service Examination 2022. This application was filed on 17th February, 2025 that is much after the hearing of the writ petition was concluded. Since I have dismissed the writ petition being WPA No.16722 of 2024 by a detailed judgment, this application has lost its force and is as such disposed of without passing any order as prayed for therein.

RE: CAN 2 of 2025

This is an application for vacating the interim order dated 21st August, 2024 which was lastly extended on 19th September, 2024. This application has been filed by 8 applicants who have also filed the application being CAN 1 of 2025 for addition of party. This application has been filed on 17th February 2025 that is much after the judgment was reserved. Since I have dismissed the writ petition by detailed

judgment this application has also lost its force and is accordingly disposed of without passing any order as prayed for therein.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(Arindam Mukherjee, J.)

Later:

On behalf of the petitioner stay of operation of the judgment and order is prayed for.

The prayer is considered and rejected.

(Arindam Mukherjee, J.)

[Amitava/Milan]