

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE ARINDAM MUKHEREJEE.

W.P.A 21883 of 2024

With

CAN 1 of 2025

CAN 2 of 2025

AISWARYA RAJYA RAI & ORS.

VS.

THE HON'BLE HIGH COURT, CALCUTTA SERVICE
THROUGH THE LEARNED REGISTRAR GENERAL & ORS.

For the petitioner	:	Mr. Biswaroop Bhattacharya, Mr. Pratik Majumder, Ms. Neelanjana Ghorai.Advocates
For The High Court Administration	:	Mr. Jaydip Kar, Sr. Adv., Mr. Saikat Bnaerjee, Mr. Gourav Das, Mr. Shirsho BanerjeeAdvocates
For the State	:	Mr. Dipanjan Dutta Ms. Paromita Malakar
For the PSC	:	Ms. Piyali Sengupta Mr. Souvik GhoshAdvocates
For the Applicants	:	Mr. Billwadal Bhattacharyya Sr. Adv. Mr. Sayak Chakraborti, Mr. Anish Kumar Mukherjee, Ms. Megha Datta, Mr. Wrickbrata Roy, Mr. Tamoghna PramanickAdvocates (CAN 1 of 2025 & CAN 2 of 2025)
Heard On	:	13.12.2024 & 16.12.2024

Judgment on : 18th March, 2025.

Arindam Mukherjee, J.:

The petitioners are 7 (seven) in number. They had participated in the West Bengal Judicial Service Examination (hereinafter referred to as the 'said examination'), 2022, the advertisement in respect whereof was published on 30th December, 2022. The petitioners have filed the writ petition on 29th August, 2024 to challenge the selection process conducted for the said examination, inter alia, on the ground that the exact number of vacancies available to be filled up through the said examination was not advertised on 30th December, 2022, as a consequence whereof the chances of the petitioners in getting appointment got reduced, though the name of the petitioners are included in the select list published by the West Bengal Public Service Commission (hereinafter referred to as 'PSC') on 14th May, 2024.

A. The Case of the Petitioners in Brief:-

- 1) The petitioner nos. 1, 2 and 3 belong to general category, the petitioner nos. 4, 5 and 6 belong to Scheduled Caste (SC), whereas petitioner no. 7 belongs to Scheduled Tribe (ST), category. It is the case of the petitioner that the said examination was conducted to fill up 12 'Clear Vacancies' and 17 'Anticipated Vacancies', occurring in the cadre of Civil Judge (Junior Division). As per the advertisement under the 'clear vacancy' category there are 8 unreserved (in short 'UR') vacancies, 1 (one) SC, 1 (one) ST and 1 (one) Other Backward Classes – A (in short 'OBC-A'), and 1 (one) OBC-B. Under 'anticipated vacancies', there are 10 (UR), SC-2,

ST-1, OBC-A – 2, OBC-B – 1 and PwBD – 1. PSC after conducting the said examination had published a select list comprising of 54 candidates. The petitioners have been respectively placed in serial nos. 29, 27, 22, 42, 46, 51 and 49 of the said select list. This indicates that the petitioners have respectively achieved the said ranks in the examination. After publication of the ‘select’ list the PSC prepared the list recommending the successful candidates for appointment on 14th May, 2024. Recommendation list was in 2(two) parts, a set of candidates as according to their rank and reserved category have been recommended to fill up the ‘clear vacancy’ and other set according to their rank has been recommended for being appointed against the ‘anticipated vacancy’. Up to this stage the petitioners have not raised any protest regarding the selection process or the manner and in the way the said examination was conducted and/or held.

- 2) The petitioner no. 3 made an application under Right to Information Act, 2005 (in short ‘RTI Act’) to the Public Information Officer, West Bengal Judicial Department and also to Registrar General, of this Court (hereinafter referred to for the sake of consequence referred to as ‘R.G.’), inter alia, seeking information as to how many ‘anticipated’ and ‘clear’ vacancies are available as on 31st December, 2022 for the post of Civil Judge (Junior Division) in West Bengal.
- 3) The story of the petitioners’ starts from here. The petitioners say that in reply to the query made under the RTI Act, the said Public Information Officer and Deputy Secretary to the Government of West Bengal Judicial Department, by a letter dated 1st August, 2024 informed the petitioners

that as on 31st December, 2022 there were 23 'clear vacancies' and 24 'anticipated vacancies'. The said information appears to have been provided in terms of a letter issued by the R.G. on 27th June, 2023. The Deputy Registrar (Administration) and Public Information Officer of this Court by a reply dated 5th August, 2024 has informed the petitioner no. 3 that as on 31st December, 2022 there were 28 'clear vacancies' in the cadre of Civil Judge (Junior Division). The number of 'anticipated' vacancies was, however, not provided as a query was vague. On the basis of these two replies it is submitted by the petitioners that there was a fault at the very inception of holding the examination as the correct number of vacancies were not advertised. It is the case of the petitioner that on 31st December, 2022, as appears from two different sources that the 'Clear Vacancy' was either 23 or 28. So, the 'clear vacancy' on 30th December, 2022 being only a day ahead must have been more than 12 'clear vacancies' as advertised. The correct vacancy position, was, therefor, not advertised on 30th December, 2022. Having not done so, the chances of the petitioners in getting public employment has been reduced which has infringed their respective rights. It is also the case of the petitioners that the Hon'ble Supreme Court in various judgments, the last one which is reported in **2024 (2) SCC 269 [Vivek Kaisth & Anr. Vs. State of Himachal Pradesh & Ors.]** has directed the parties to advertise the exact number of vacancies available on the date of advertisement inviting the applications about the selection/recruitment process. So that the applicants are made aware of the exact number of vacancies available.

- 4) The petitioners say that in view of the aforesaid the respondents and each one of them have acted in breach of such mandate. The entire selection process, therefor, is flawed and is required to be rectified by either holding a fresh examination by cancelling the present or by increasing the number of 'anticipated vacancies available to be filled up by the said examination. The number of vacancies in the cadre of Civil Judge (Junior Division) is not correctly advertised and as such the cadre strength shall remain short and the litigants in the state will be deprived.
- 5) The petitioners also say that even though they have participated in the selection process without demur or protest but the fact of there being more than the number of vacancies declared under the advertisement which can or could have been filled through the said selection process was not known to the petitioners at the time when they have participated in the selection process. The bar of estoppel in challenging the selection process imposed on a candidate who has participated in the selection process without any demur and on finding to be unsuccessful turns around and challenges the selection process is based on the principle of having waived a known right. In the instant case, the facts on the basis whereof the challenge has been thrown to the selection process was not available to the petitioners at the time of participating in the examination and, as such, the question of waving a known right for being estopped to challenge the selection process cannot and does not arise in the instant case. More so, when the selection process is tainted with illegality a candidate even after participating in the selection process without any

demur or protest can challenge the same. The petitioners have set aside in the count two judgments respectively reported in **2019 (20) SCC 17** **[Dr. (Major) Meeta Sahai Vs. State of Bihar & Ors.]** and **2020 (20) SCC 209 [Ramjit Singh Kardam and Ors. Vs. Sanjeev Kumar & Ors.]** relied upon these two judgments the petitioners say that the embargo as held in judgment reported in **2010 (12) SCC 576 [Manish Kumar Shahi Vs. State of Bihar & Ors.]** is not applicable in the instant case.

- 6) The writ petition is, therefor, not maintainable in the instant case, even though they have participated in the selection process without any demur or protest.
- 7) The petitioners in course of argument have also referred to the reports filed by the High Court Administration and PSC as also the documents annexed thereto, to demonstrate the discrepancies in the statements of the respondents regarding the computation of the vacancies and advertising the same for being filled up by the 2022 Examination. The petitioners have also by filing an exception to the reports have tried to demonstrate the so called inconsistencies in the stand of the respondents in computing the vacancies. Relying upon such discrepancies and inconsistencies as alleged the petitioners have challenged the whole basis of the selection process.
- 8) The petitioners have also relied upon the judgment reported in **2001 (10) SCC 237 [Srikant Rripathi & Ors. Vs. State of U.P. & Ors.]** to suggest that the Court in an appropriate case can direct for re-calculation and re-adjust the vacancies in support of their alternative

argument that the vacancies declared can be altered to accommodate more of the aspiring candidates through the 2022 selection process.

B. The Case of the PSC in Brief:-

- 1) It is submitted on behalf of the PSC that they have received the instructions to hold the said examination from the Judicial Department, Government of West Bengal, who in turn was informed about the 'clear' and 'anticipated' vacancies available to be filled up through the said selection process as notified by the High Court. The PSC has no involvement in assessing the vacancies or declaring the same. The vacancies notified have been advertised through the advertisement dated 30th December, 2022. The PSC, is, therefor, not in a position to comment on the exact vacancies said to be in existence on the date of advertisement as alleged by the petitioner.

C. The Case of the High Court Administration in Brief:-

- 1) It is submitted on behalf of the High Court Administration that the 'clear' and 'anticipated' vacancies were correctly assessed and notified by the High Court in its administrative side by January, 2022 as directed by the Hon'ble Supreme Court in the judgment reported in **2008(17) SCC 703 [Malik Mazhar Sultan (3) & Anr. Vs. Uttar Pradesh Public Service Commission and Ors.]**. The advertisement was made on 30th December, 2022 on the basis of the notified vacancies. Due to the time taken for complying with the procedural requirements between January 2022 and December 2022, some 'anticipated vacancies' may have crystallised into 'clear vacancy' or there may have some future vacancies which have arisen to promotion etc., subsequent to the date of notifying the vacancies but

the same does not render the advertisement made on 30th December, 2022 to be an invalid one as urged by the petitioners. The vacancies on being notified by the High Court Administration was intimated to the Judicial Department for holding the said examination. The Judicial Department in turn instructed the PSC to advertise and hold the said examination. This process or procedure is the normal one followed every year. There is, as such no fault on the part of the part of the High Court Administration in either notifying the vacancies or informing the same to the concerned authority for holding the said examination. The 'clear' and 'anticipated' vacancies available on January, 2022 were notified. The vacancies notified under the said two categories as on January, 2022 were the correctly computed vacancies and, as such, the process or the conduct of the said examination cannot be flawed on the ground that further vacancies arose between January 2022 and December 2022 when the advertisement was actually published. Assuming without admitting that the contention of the petitioners that the number of vacancies increased between January 2022 and December, 2022 to be correct then also the date of notifying the vacancies have to be considered and not the date of the advertisement has to be taken into consideration.

2) It is also the case of the High Court Administrative that it will be apparent from the reports filed in these proceedings and the documents annexed thereto that there was no flaw in notifying the vacancies or advertising the same for holding the said examination. It is also contended by the High Court Administration that the writ petition at the instance of the writ petitioners is not maintainable as each of them had

participated in the selection process without any demur and is now on being unsuccessful are falling back to challenge the same. In this regard, the reliance has been placed in the Hon'ble Supreme Court's judgment reported in **2010 (12) SCC 576 [Manish Kumar Shahi Vs. State of Bihar & Ors.]**.

- 3) It is also submitted on behalf of the High Court Administration that the writ petition should, therefor, be dismissed.

D. Case of the State Respondents in Brief:-

- 1) The State respondents say that the job of notifying the vacancies is entrusted to the High Court in terms of the direction given in **Malik Mazhar Sultan (3)** (supra). The State respondents have no role in calculating or notifying the vacancies. The State respondents have only carried out the direction with regard to the vacancies as notified by the High Court and had in turn instructed the PSC to advertise and hold the said examination and to conduct the selection process to fill up the notified vacancies.
- 2) There is not illegality or in-transparency in holding the selection process and, as such, the writ petition, therefor, should be dismissed.

Factual Analysis and Conclusion:-

- 1) After hearing the parties and considering the materials on record, I find that the case of the petitioner can be divided into two parts. The first part is that the petitioner participated in the selection process as per the advertisement in the preliminary examination as also in the main

examination on being successful in the preliminary examination and thereafter in the interview. The West Bengal Public Service Commission (in short 'PSC') published the list containing the name so 54 candidates who qualified on the basis of results on 13th May, 2024. This was followed by a list of recommended candidates as per their respective rank for being given appointment which was published on 14th May, 2024. Uptil this stage none of the petitioners raised any dispute by questioning the selection process or of like nature. Upto this stage, there is no dispute raised from the side of the petitioners.

- 2) Pursuant to the publication of the recommendation list, the petitioners made applications under Right to Information Act, 2005 (hereinafter referred to as 'RTI Act') on or about 26th July, 2024 i.e., after expiry of two months from the publication of the recommendation list on 14th May, 2024. The reply to the query under RTI Act was given by the RTI Cell of Government of West Bengal on 1st August, 2024 while by the Public Information Officer of this Court on 5th August, 2024. Only thereafter the writ petition was filed on 29th August, 2024.
- 3) The reply from the Judicial Department dated 1st August, 2024 is based on the letter of the Registrar General (in short 'R.G.') of this Court dated 27th June, 2024. The letter of the R.G. is admittedly dated prior to the letter under RTI. So, the said letter cannot be construed to be letter supplying information sought for by the Judicial Department, Government of West Bengal pursuant to the letter from petitioner under RTI. Moreover, in the letter of the RG it was clarified that the 23 clear and 24 anticipated vacancies were for the Judicial Service Examination

for the year 2023 which was, however, not reflected in letter of the Judicial Department. The Public Information Officer of this Court, however, in his reply letter dated 6th August, 2024 it was stated that the clear vacancy as on 31st December, 2022 was 28 while the anticipated vacancies could not be clarified as no date or cut-off date was specified in the query.

- 4) It appears that taking advantage of the two answers under RTI Act, the petitioners have filed this writ petition to claim that in the event of 47 vacancies were notified along with the vacancies already notified on 30th December, 2022 then the petitioner would have got the opportunity to join going by their respective marks in the selection list.
- 5) Before considering the claim of the petitioners, it is necessary to under the ratio laid down in **2008(17) SCC 703 (Malik Mazhar Sultan (3) & Anr. Vs. Uttar Pradesh Public Service Commission & Ors.)** The relevant portion of **Malik Mazhar (3)** (supra) is set out hereunder for better appreciation of the facts.

“5. Before we issue general directions and the time schedule to be adhered to for filling vacancies that may arise in subordinate courts and District Courts, it is necessary to note that selections are required to be conducted by the authorities concerned as per the existing Judicial Service Rules in the respective States/Union Territories. We may, however, note that, progressively, the authorities concerned would consider, discuss and eventually may arrive at a consensus that the selection process be conducted by the High Court itself or by the Public Service Commission under the control and supervision of the High Court. In this regard, considerable progress has already been made. Reference can be made to the decision taken in a conference held between the Chief Justices and Chief Ministers, minutes whereof show that in some of the States, selection of subordinate judicial officers at all levels of Civil Judges is already being made by the High Courts. Some States, where selection is still being made by the Public Service Commission, were agreeable to entrust the selection to the High Courts whereas Chief Ministers/Ministers of Himachal Pradesh, West Bengal, Punjab and Kerala were of the view that the present system may continue but the decision taken jointly was that in the said States (Himachal Pradesh, West Bengal, Punjab and Kerala) setting up of question papers and evaluation of answer sheets be entrusted to the High Court. Further decision taken was that in other States where selection of subordinate judicial officers is not being done by the High Courts, such selection be entrusted to the High Courts by amending the relevant rules. In this connection,

with the affidavit filed on behalf of the Calcutta High Court, a copy of the letter dated 15-9-2006, addressed by the Registrar General of the said Court to the Secretary, Judicial Department, Government of West Bengal, has also been annexed. That letter refers to the aforesaid decision taken in the conference of Chief Ministers and Chief Justices held on 11-3-2006 requesting the State Government for effecting suitable amendment in the recruitment rules in terms of the decision in the conference aboveresferred. At this stage, however, these are not the issues for our consideration. As already indicated, the selection is to be conducted by authorities empowered to do so as per the existing rules.

6. Though no submission was made by any learned counsel appearing for any State Government that the constitution of Selection Committee by the Chief Justice of the High Court to monitor the timely appointment of Judges at subordinate/district level would amount to interference with the independent functioning of the State Public Service Commission, but some State Governments in their responses have indicated so. In view of what we have already noted about the appointments to be made in accordance with the respective Judicial Services Rules in the States, the apprehension of interference seems to be wholly misplaced. A Committee constituted by the Chief Justice of the High Court to ensure that the vacancies are timely filled and the problem of delay in dispensation of justice is tackled to some extent can under no circumstances be said to be interference with the independent functioning of the authorities under the Rules or of independent functioning of the State Public Service Commission.

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

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

a) twenty-five per cent vacancies to be filled by direct recruitment from the Bar; and

(b) twenty-five per cent by promotion through limited competitive examination of Civil Judges (Senior Division) not having less than five years of qualifying service.

Sl. No.	Description	Date
1.	Number of vacancies to be notified by the High Court. Vacancies to be calculated including (a) Existing vacancies. (b) Future vacancies that may arise within one year due to retirement. (c) Future vacancies that may arise due to elevation to the High Court, death or otherwise, say ten per cent of the number of posts. (d) Vacancies arising due to deputation of judicial officers to other departments may be considered as temporary vacancy.	31st March
2.	Advertisement inviting applications from eligible candidates.	15th April
3.	Last date for receipt of application.	30th April
4.	Publication of list of eligible applicants. List may be put on the website.	15th May
5.	Dispatch/Issue of admit cards to the eligible applicants.	16th May

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| | <i>to</i> |
| | <i>15th June</i> |
| 6. Written examination. | <i>30th June</i> |
| <i>Written examination may be</i> | |
| <i>(a) objective questions with multiple choice which can be scrutinised by the computer; and</i> | |
| <i>(b) subjective/narrative.</i> | |
| 7. Declaration of result of written examination | <i>16th August</i> |
| <i>(a) Result may be put on the website and also published in the newspaper.</i> | |
| <i>(b) The ratio of 1:3 of the available vacancies to the successful candidates be maintained.</i> | |
| 8. Viva voce. | <i>1st to 7th September</i> |
| 9. Declaration of final select list and communication to the appointing authority | <i>15th September</i> |
| <i>(a) Result may be put on the website and also published in the newspaper.</i> | |
| <i>(b) Select list be published in order of merit and should be double the number of vacancies notified.</i> | |
| <i>(c) Select list shall be valid till the next select list is published.</i> | |
| 10. Issue of appointment letter by the competent authority for all existing vacant posts | <i>30th September as on date.</i> |
| 11. Last date for joining. | <i>31st October</i> |

B. For filling up of vacancies in the cadre of District Judge in respect of fifty per cent vacancies to be filled by promotion

<i>Sl. No.</i>	<i>Description</i>	<i>Date</i>
1.	<i>Number of vacancies to be notified by the High Court.</i>	<i>31st March</i>
	<i>Vacancies to be calculated including</i>	
	<i>(a) Existing vacancies.</i>	
	<i>(b) Future vacancies that may arise within one year due to retirement.</i>	
	<i>(c) Future vacancies that may arise due to elevation to the High Court, death or otherwise, say ten per cent of the number of posts.</i>	
2.	<i>Publication of list of eligible officers</i>	<i>15th May</i>
	<i>(a) The list may be put on the website.</i>	
	<i>(b) Zone of consideration should be 1:3 of the number of vacancies.</i>	
3.	<i>Receipt of judgments from the eligible officers.</i>	<i>30th May</i>
4.	<i>Viva voce</i>	<i>15th</i>
		<i>to</i>
		<i>31st July</i>

Criteria

- (a) ACR for last five years;*
(b) evaluation of judgments furnished; and
(c) performance in the oral interview.

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| 5. | <i>Declaration of final select list and communication to the appointing authority</i> | 31st August |
| | (a) Result may be put on the website and also published in the newspaper. | |
| | (b) Select list be published in order of merit and should be double the number of vacancies notified. | |
| 6. | <i>Issue of appointment letter by the competent authority for all existing vacant posts as on date.</i> | 30th September |
| 7. | <i>Last date for joining.</i> | 31st October |

C. For filling up of vacancies in the cadre of Civil Judge (Senior Division) to be filled by promotion

- | <i>Sl. No.</i> | <i>Description</i> | <i>Date</i> |
|----------------|--|-------------|
| 1. | <i>Number of vacancies to be notified by the High Court.</i> | 31st March |
| | <i>Vacancies to be calculated including</i> | |
| | (a) Existing vacancies. | |
| | (b) Future vacancies that may arise within one year due to retirement. | |
| | (c) Future vacancies that may arise due to promotion, death or otherwise, say ten per cent of the number of posts. | |
| 2. | <i>Publication of list of eligible officers</i> | 15th May |
| | (a) The list may be put on the website. | |
| | (b) Zone of consideration should be 1:3 of the number of vacancies. | |
| 3. | <i>Receipt of judgments from the eligible officers.</i> | 30th May |
| 4. | <i>Viva voce.</i> | 1st |
| | | to |
| | | 16th August |

Criteria

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|----|---|----------------|
| | (a) ACR for last five years; | |
| | (b) evaluation of judgments furnished; and | |
| | (c) performance in the oral interview. | |
| 5. | <i>Declaration of final select list and communication to the appointing authority</i> | 15th September |
| | (a) Result may be put on the website and also published in the newspaper. | |
| | (b) Select list be published in order of merit and should be double the number of vacancies notified. | |
| 6. | <i>Issue of appointment letter by the competent authority for all existing vacant posts as on date.</i> | 30th September |
| 7. | <i>Last date for joining.</i> | 31st October |

D. For appointment to the posts of Civil Judge (Junior Division) by direct recruitment

- | <i>Sl. No.</i> | <i>Description</i> | <i>Date</i> |
|----------------|--|--------------|
| 1. | <i>Number of vacancies to be notified by the High Court.</i> | 15th January |

Vacancies to be calculated including

(a) Existing vacancies.

(b) Future vacancies that may arise within one year due to retirement.

(c) Future vacancies that may arise due to promotion, death or otherwise, say ten per cent of the number of posts.

2. *Advertisement inviting applications from eligible candidates.* 1st February
3. *Last date for receipt of application.* 1st March
4. *Publication of list of eligible applicants.* 2nd April
The list may be put on the website.
5. *Dispatch/Issue of admit cards to the eligible applicants.* 2nd

to

30th April
6. *Preliminary written examination* 15th May
Objective questions with multiple choice which can be scrutinised by computer.
7. *Declaration of result of preliminary written examination* 15th June
(a) Result may be put on the website and also published in the newspaper.
(b) The ratio of 1:10 of the available vacancies to the successful candidates be maintained.
8. *Final written examination* 15th July

Subjective/Narrative.
9. *Declaration of result of final written examination* 30th August
(a) Result may be put on the website and also published in the newspaper.
(b) The ratio of 1:3 of the available vacancies to the successful candidates be maintained.
(c) Dates of interview of the successful candidates may be put on the internet which can be printed by the candidates and no separate intimation of the date of interview need be sent.
10. *Viva voce.* 1st

to

15th October
11. *Declaration of final select list and communication to the appointing authority* 1st November
(a) Result may be put on the website and also published in the newspaper.
(b) Select list be published in order of merit and should be double the number of vacancies notified.
12. *Issue of appointment letter by the competent authority for all existing vacant posts as on date.* 1st December
13. *Last date for joining.* 2nd January of the following year

8. These directions would not be applicable to the judiciary in the Sikkim High Court in view of a very small cadre of judiciary in that State.

9. We request the Chief Justice of each High Court to constitute a committee of two or three Judges to monitor and oversee that timely selection and appointment of judicial officers is made. The Chief Justice is further requested to constitute a special cell in the name of "Selection and Appointment" in the High Court or under such other name as the learned Chief Justice may consider proper with an officer of the rank of Registrar for assisting the Committee and the Chief Justice for complying with the aforesaid time schedule.

10. The Registrar of the aforesaid Selection and Appointment Committee shall send to the Registrar General of this Court by 31st January every year report as regards the filling up of vacancies with copies to Minister for Law and Justice in the Central Government and the Law Minister of the State concerned. The Registrar would also bring it to the notice of the Committee and the Chief Justice, any deviation from the time schedule.

16. List of candidates eligible to appear in the examination and final list shall also be published in the local newspaper and be personally intimated to the officers, in addition to the same being placed on the website.

17. The High Courts/State Governments/Union Territories shall be at liberty to apply to this Court for variation in the time schedule in case of any difficulty having regard to the peculiar geographical and climatic conditions in the State or other relevant considerations. However, till such time a different time schedule is permitted, the aforesaid time schedule shall be adhered to and appointments made accordingly."

6) Further directions were given by the Supreme Court in **2009 (17) SCC**

24 (Malik Mazhar Sultan & Anr. Vs. Uttar Pradesh Public Service Commission & Ors.). This judgment is referred to as 2009 **Malik Mazhar** for convenience. The relevant paragraphs of 2009 **Malik Mazhar** are set out hereunder:-

"IA No. 56

1. On 4-1-2007 [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703 : (2010) 1 SCC (L&S) 942] , this Court had given certain directions regarding the selection and appointment of members of the subordinate judicial officers in various courts. In the tabular form, the number of vacancies are notified by the High Court/Public Service Commission. It was directed that the further vacancies that may arise due to elevation or death or otherwise, 10% of the posts shall be notified and this is referred at para 15 of the order; it is further stated: (Malik Mazhar case [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703 : (2010) 1 SCC (L&S) 942] , SCC p. 711)

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

2. It has been pointed out by the counsel appearing for the various High Courts that 10% of the sanctioned posts are notified in some States. A large number of posts are to be notified whereas there was corresponding number of vacancies to be filled if the candidates are selected in the

select list. There may be an expectation for such candidates to get appointment and this creates unwanted litigation by the candidates and it is prayed that the existing vacancies alone be notified along with the anticipated vacancies that may arise in the next one year and some candidates also be included in the wait list prepared by the High Courts/PSCs.

3. In supersession of the order passed by this Court on 4-1-2007 [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703 : (2010) 1 SCC (L&S) 942] , this Court directs that in future the High Courts/PSCs shall notify the existing number of vacancies plus the anticipated vacancies for the next one year and some candidates also be included in the wait list. To this extent earlier order is modified.”

- 7) In West Bengal, the High Court conducts the Higher Judicial Service Examination i.e. for recruitment of District Judge entry level. However, in case of appointment to the posts of Civil Judge (Junior Division) the High Court only notifies the clear and anticipated vacancies following the direction given in **Malik Mazhar (3)** (supra). The clear and anticipated vacancies are sent to the Judicial Department of the Government of West Bengal who in turn directs the West Bengal Public Service Commission (in Short ‘PSC’) to conduct the examination and forward the selection list recommending appointment to the Government. In the selection process for the year 2022, the High Court in compliance with the direction given in the **Malik Mazhar (3)** (supra) informed the Judicial Department, Government of West Bengal about the ‘clear’ and ‘anticipated vacancies’ to be filled up by the selection process of 2022 by January, 2022. The Judicial Department of Government of West Bengal in turn informed PSC in July 2022 to hold the examination. PSC published the advertisement on 30th December, 2022. The procedural delay, therefor, is not attributable to the High Court.

- 8) The matter could have rested at this stage by holding that the petitioners after having anticipated in the selection process without any demur cannot fall back and challenge the selection criteria on being unsuccessful as held in **2010 (12) SCC 576 (Manish Kumar Shahi Vs. State of Bihar and Ors.)**, paragraph 16 whereof appearing at page 584 of SCC is set out hereunder:-

“16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in Madan Lal v. State of J&K [(1995) 3 SCC 486 : 1995 SCC (L&S) 712 : (1995) 29 ATC 603] , Marripati Nagaraja v. Govt. of A.P. [(2007) 11 SCC 522 : (2008) 1 SCC (L&S) 68] , Dhananjay Malik v. State of Uttaranchal [(2008) 4 SCC 171 : (2008) 1 SCC (L&S) 1005] , Amlan Jyoti Borooah v. State of Assam [(2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] and K.A. Nagamani v. Indian Airlines [(2009) 5 SCC 515 : (2009) 2 SCC (L&S) 57]”

The view expressed in **Manish Kumar Shahi** (supra) has been consistently followed by the Hon'ble Supreme Court. A recent judgment has considered such view and have carved out certain exceptions which

is reported in **2020 (20) SCC 209 (Ramjit Singh Kardam and Ors. Vs. Sanjeev Kumar & Ors.)**.

- 9) The matter, however, did not stop at this stage because of the replies under the RTI Act as referred to hereinabove and in view of the ratio laid down in **2019 (20) SCC 17 [Dr. (Major) Meeta Sahai Vs. State of Bihar & Ors.]** cited by the petitioners to contend that by participating in the selection process, the participant only accepts the prescribed procedure and not the illegality in it. According to the petitioners, since they have challenged the illegality they are not estopped on having participated in the selection process to challenge the same. The ratio laid down in **Ramjit Singh** (supra) also supports the petitioners' case on facts to maintain the writ petition.
- 10) The petitioners have urged that according to the reply given by the Judicial Department, the vacancies available on 31st December, 2023 were 23 'clear vacancies' and 24 'anticipated vacancies'. Although, this reply was based on the letter of RG which clearly says that these 47 vacancies (23+24) were for the year 2023 but the letter of the Judicial Department did not mention the same as on 31st December, 2022 were for the year 2023. The letter of the Deputy Registrar (Administration) says that there were 28 'clear vacancies' on 31st December, 2022. There is every likely hood that 5 vacancies which were 'anticipated vacancies' as per the letter of RG may have fructified as 'clear vacancies' between 27th June, 2023 being the date of the letter of RG and 25th August, 2024 being the date of the letter of the Deputy Registrar (Administration).

I, therefor, did not find any abnormality in these letters of which any judicial interference is required.

- 11) The petitioners, however, have relied upon the judgments reported in **2024 (2) SCC 269 (Vivek Kaisth & Anr. Vs. State of Himachal Pradesh & Ors.)** and **2021 (3) SCC 755 High Court of Kerala Vs. Reshma A & Ors.** to contend that as on 30th December, 2022 when the advertisement was made there were vacancies over and above the 29 vacancies (12 ‘clear’ and 17 ‘anticipated’) and as such these additional vacancies were existing vacancies on the date of advertisement. These vacancies, therefor, were not future vacancies and as such ought to have been advertised. Having not done so the chance of the petitioners to be appointed got reduced. More vacancies would have opened the avenue of the petitioners being appointed. The petitioners under Article 14 of the Constitution were infringed. The vacancy position, therefor, should be altered to make way for the petitioners for being appointed.
- 12) The petitioners have, in course of their argument missed out a vital word “notified” as expressed in **Malik Mazhar (3)** (supra). The vacancies are to be notified by the High Court by 15th January of each year. It does not speak of advertising the vacancies. As per **Malik Mazhar (3)** (supra) what has to be notified by the High Court is the ‘clear’ and ‘anticipated vacancies’ as clarified in 2009 **Malik Mazhar** (supra). This is followed by “advertisement” inviting application from eligible candidates. The date for “advertisement” is also different from the date of notifying the vacancies by the High Court as will be evident from **Malik Mazhar (3)**

(supra). The notified vacancies are those on the basis of which the examination is to be held. The date of notifying the vacancies and advertising the same is likely to have a gap in between within which on the retirement of a Judicial Officer an anticipated vacancy may crystallize into a 'clear vacancy'. In order to eliminate any confusion with regard to 'anticipated vacancies' fructifying into 'clear vacancy', the number of vacancies and its category as on the date when it is notified becomes paramount and not line position of vacancies when the same is advertised for the examination.

- 13) In the instant case, the High Court has notified the 'clear' and 'anticipated vacancies' by January 2022. Since the examination is conducted by PSC the advertisement was published on 30th December, 2022 as discussed hereinabove. The vacancies which arose subsequent to the vacancies being notified by the High Court, therefor, has been construed as future vacancies and not existing vacancies at the time of the advertisement published on 30th December, 2022. This is further clear from the letter of RG annexed at page 50 (Annexure P-6) of the writ petition wherein it is stated that 23 (vacancies) and 24 (anticipated) aggregating to 47 vacancies were for the Judicial Service Examination, 2023. The Administrative Committee of this Court in its meeting held on 11th May, 2022 which is annexed to the report affirmed by the RG on 7th November, 2024 (Annexure R-3) also clarifies the vacancy position to be 29 (12+17) for the West Bengal Judicial Service Examination 2022. The letter of the RG dated 19th October, 2023 which is annexed at page 6

(Annexure R-1) of the report affirmed by RG on 17th November, 2024 also says that there were 23 'clear vacancies' and 31 'anticipated vacancies' aggregating to 54 vacancies were to be notified for the West Bengal Judicial Service Examination 2023. The High Court administration, therefor, always maintained the stand that the vacancies arising after having notified the vacancies for the year 2022 examination were future vacancies to be filled up by the subsequent examination. This is also in line with the views expressed in **Malik Mazhar (3)** (supra) and **Vivek Kaisth** (supra) and **Reshma A** (supra). It is also settled position in law as held in **2017 (1) SCC 457 [Srikant Roy & Ors. Vs. State of Jharkhand & Ors.]** and **2021 (3) SCC 755 [High Court of Kerela & Reshma A & Ors.]** that appointment beyond the declared vacancies is impermissible. This also takes negates the argument of the petitioners that the vacancy position can or should be altered.

- 14) So far as the arguments advanced by the petitioners in the context of the lay notes described by the respondent nos. 1 to 4 are concerned, I also do not find much substance to hold that vacancies post notification by the High Court were existing vacancies and not future vacancies. It appears from the lay note dated 3rd January, 2022 annexed at page 7 (Annexure R-2) of the report affirmed by RG on 17th November, 2024, it appears that there are 406 sanctioned posts under Civil Judge (Junior Division)/ Judicial Magistrate cadre, out of which 374 were filled up. The difference between 406 and 374 (406-374) gave rise to 32 vacancies. 1(one) vacancy out of 32 vacancies was kept reserved in view of order passed in W.P. No.

18836 (W) of 2010 and as such 31 vacancies were available. Out of these 31 vacancies 26 vacancies were filled by the 2022 examination. In the year 2021 a total of 14 vacancies were notified out of which 5 were 'clear vacancies' while 9 were 'anticipated vacancies'. The report of RG affirmed on 17th November, 2024 in paragraph 5C thereof gives the break up as to how 9 'anticipated vacancies' were arrived at. It will also appear from the said report as also other documents disclosed in these proceedings that vacancies arise mainly from three channels. Firstly, by promotion from Civil Judge (Junior Division) to Civil Judge (Senior Division). Secondly due to retirement or death etc. in Civil Judge (Senior Division) level which is filled up from the feeder post i.e. Civil Judge (Junior Division) thereby giving rise to the vacancies at the feeder post. Thirdly, when suitable candidates are not available at District Judge (Entry Level) from Direct recruitment or from the limited competition channel (Jump Promotion) whereby such vacancies are filled up from normal promotes by applying the provisions of Rule 26 of the West Bengal Judicial (Condition of Service) Rule, 2004 thereby creating upward movement from the Civil Judge (Senior division) Level which in turn percolates to the Civil Judge (Junior Division) level thereby creating vacancies at the lowest level to be filled up by the West Bengal Judicial Service Examination for a particular year. It is also often noticed that the promotion order is published towards later half or towards end of the year. Chain of transfer is not fully worked out prior to 15th January of the next. In such a situation the vacancies to be created due to such promotion does not fructify into 'clear' or anticipated vacancies at the

beginning of the next year as a reason thereof some of the vacancies are treated as future vacancies. There may appear some ambiguity at the first blush when the computation of clear, anticipated and future vacancies are considered in an isolated manner but on a holistic study with in depth analysis leave no iota of doubt in respect of correct computation of the vacancies. In the instant case, on an in depth study, I find that correct number of vacancies for the West Bengal Judicial Service Examination, 2022. I am also unable to agree with the version of the petitioners that there were more than 29 vacancies in subsistence when the vacancies notified in January, 2022 for being filled up by the Judicial Service Examination for that year.

- 15) In the aforesaid facts and circumstances, by applying the ratio as laid down in **2022 (4) SCC 294 [Mohd. Mustafa vs. Union of India & Ors.]** regarding judicial review and its scope I am unable to find any ground to interfere in the matter on the invitation of the petitioners.

The writ petition 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.21883 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 19th September, 2024 which was lastly extended on 16th December, 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 petitioners stay of operation of the judgment and order is prayed for.

The prayer is considered and rejected.

(Arindam Mukherjee, J.)