

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7751 of 2020

Jyoti Joshi D/o Ashok Kumar Joshi Resident of near Suj Factory, P.P.C.L. Colony, Dehri on Sone, District- Rohtas at present R/o Near Sarswati Vidyalaya, Dhanraj Singh Path, Punaichak, Bailey Road, Patna.

... .. Petitioner

Versus

1. The State of Bihar Through the Principal Secretary, General Administration Department, Bihar, Patna.
2. The High Court Judicature at Patna through its Registrar General.
3. The Bihar Public Service Commission through its Chairman.
4. The Chairman, the Bihar Public Service Commission, Patna.
5. The Secretary The Bihar Public Service Commission, Patna.
6. The Joint Secretary-cum- Examination Controller Bihar Public Service Commission, Bihar, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. P. K. Shahi, Sr. Advocate Mr. Satyendra Pandey, Advocate
For the Res. No. 2	:	Mr. Piyush Lall, Advocate
For the State	:	Mr. Saroj Kumar Sharma, AC to AAG 3
For the BPSC	:	Mr. Sanjay Pandey, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 09-02-2022

Brief background of the case

The petitioner in this case is claiming appointment to the post of Civil Judge (Junior Division) in Bihar Judicial Service. She appeared in the 30th Bihar Judicial Service Competitive Examination, 2018 (hereinafter referred to as 'the Competitive Examination') pursuant to an Advertisement bearing no. 06 of



2018 (Annexure '1' to the writ application) published by the 3rd respondent namely the Bihar Public Service Commission, Patna (hereinafter referred to as 'the Commission') to fill up the 349 posts of Civil Judge (Junior Division).

2. The Commission has prepared a combined merit list of 351 candidates which has been made available to the petitioner on her request under Right to Information Act, 2005 (Annexure '4' to the writ application). The name of this petitioner is appearing at Serial No. 180 in the combined merit list/select list. She belongs to unreserved category of candidates. From Annexure '1' to the writ application, it would appear that out of 349 vacancies notified, 175 vacancies are for the unreserved category candidates. A 35 per cent lateral reservation is available for the female candidates, therefore, 62 vacancies in unreserved category shall go to the female candidates. The admitted position is that the Commission made recommendations to fill up all the vacancies and a final select list (hereinafter referred to as 'final select list') was sent to the General Administrative Department vide Letter No. 90 dated 02.12.2019. The last candidate in general category who found place in the final select list to fill up the notified vacancy meant for the unreserved category had obtained 517 marks and was standing at Serial No. 173 in the combined merit list. Since the petitioner had secured



516 marks (written-456 + interview- 60) was standing at merit position no. 180, she could not get a place in the final select list which was recommended for the appointment.

Reliefs prayed in the writ petition

3. In the aforementioned background the petitioner filed the present writ application praying for the following reliefs:-

“(I) To issue an appropriate order/s, direction/s including a writ preferably in the nature of CERTIORARI for quashing the Final selection list prepared for reserved category in unreserved category whereby and where under altogether 36 reserved category candidates have been considered for appointment to the post of Civil Judge (Junior) Division in pursuance of advertisement No. 06/2018 published by the respondent Bihar Public Service Commission, Patna to fill up the vacancy of 349 post of Civil Judge (Junior) Division under the Bihar Judicial Service through competitive examination (hereinafter referred to as 30th Bihar Judicial Service (Main) Competitive Examination, 2018.

(II) To direct the respondents to appoint the petitioner to the post of Civil Judge (Junior Division) who has obtained total 516 marks (456 in written examination and 60 in interview) having placed her name at serial No. 180 in the merit list by the respondent Bihar Public Service Commission, Patna (hereinafter referred to as B.P.S.C. in short.)



(III) To any other relief/s to which the petitioner may be found entitled in the facts and circumstances of the case.”

4. Initially it was the contention of the petitioner that the 3rd respondent has wrongly and illegally prepared the final select list by placing the reserved category candidates in unreserved category. This writ application seems to have been presented in the Registry on or about 11.09.2020. By filing a supplementary affidavit the petitioner contended that a person who avails the benefits of reservation system at the preliminary stage cannot be allowed the benefit of reservation for the purpose of selection while preparing the final select list.

(Swati Chaturvedi's case)

5. It, however, appears that during pendency of the writ application, a learned Co-ordinate Bench of this Court was considering a writ application being C.W.J.C. No. 3952 of 2020 filed by one Swati Chaturvedi who had secured 517 marks and was placed at Serial No. 174 in the combined merit list. She claimed her appointment on the ground that she had obtained identical marks as that of the last candidate selected on the post and certain recommended candidates did not join the post, so some of the posts had remained unfilled. The Hon'ble Division Bench vide its judgment dated 01.03.2021 held that “admitted position is that 6



posts are still vacant due to non-joining of the selected candidates and the present petitioner is the next candidate having the identical marks of 517 as that of last candidate who has been selected under the unreserved category”.(emphasis supplied). The Hon’ble Division Bench held that in the light of the judgment of the Hon’ble Supreme Court in the case of **Malik Mazhar Sultan (3) And Another Versus Uttar Pradesh Public Service Commission and Others** reported in **(2008) 17 SCC 703 and (2009) 17 SCC 24** (hereinafter referred to as ‘**Malik Mazhar Sultan (3)**’) and the order passed in **Manoj Kumar Tiwari Vs. The State of Bihar & Ors.** (CWJC No. 14921/2019) the petitioner would be entitled for the relief as sought.

6. Accordingly, the directions were issued to the State Government to send the requisition for one post for the petitioner namely Swati Chaturvedi. The 3rd respondent was directed to send the recommendation for appointment on the post of Civil Judge (Junior Division).

(Additional Relief prayed by the Petitioner)

7. Armed with this judgment, the petitioner in the present case filed an interlocutory application being I.A. No. 01 of 2021 seeking to add one more relief. The petitioner added the additional relief as under:-



“(i) For issuance of an appropriate writ (writs), order (orders) in the nature of mandamus to direct the respondents to appoint the petitioner on the vacant post due to non-joining of candidates in the 30th Bihar Judicial Services Examination in view of the order dated 01.03.2021 passed in CWJC No. 3952 of 2020 passed by this Hon’ble Court. That the petitioner has secured 516 marks and her rank is 180 in the merit list and she is the next candidate in line who is ought to be appointed on the vacant posts as per the merit list.”

Submission of the Petitioner

8. The petitioner contended that due to non-joining of 7 candidates in which 6 of them belonged to the unreserved category, this Hon’ble Court has already passed an order in CWJC No. 3952 of 2020 in favour of one of the candidates who was next in line in the merit list. It has been contended that still 5 vacant posts are available for appointment and the petitioner having secured 180 rank in the merit list would be next in line because the next two candidates standing at Sr. Nos. 176 and 177 have already been appointed in the reserved category. In this regard, the petitioner had filed a representation dated 26.12.2019 before the Additional Chief Secretary, General Administrative Department, Government of Bihar and before the Joint Secretary-cum-



Examination Controller of the Commission (6th respondent) (Annexure '9' and '10' to the interlocutory application).

9. The State of Bihar, the Commission and the Patna High Court were granted time to file counter affidavit on 25.03.2021 and again on 20.09.2021 on the Interlocutory Application No. 01 of 2021, learned counsel for the State was called upon to respond to the issues raised in the interlocutory application. Pursuant to this order, the State filed its first supplementary counter affidavit.

10. Mr. P.K. Shahi, learned Senior Counsel assisted by Mr. Satyendra Pandey, learned counsel representing the petitioner has confined his submissions on the line of the judgment of the Hon'ble Division Bench of this Court in **Swati Chaturvedi's** case. Learned Senior Counsel has contended that in the admitted position where there are 5 vacancies in unreserved category, the vacant posts are required to be filled up from amongst the candidates available in the combined merit list, in order of merit. It is submitted that the recruitment to the Civil Judge (Junior Division) is governed by Bihar Civil Service (Judicial Branch) (Recruitment) Rules, 1955 (hereinafter referred to as 'the Recruitment Rules') as amended up to date. In addition the guidelines and the directions of the Hon'ble Supreme Court in



Civil Appeal No. 1867 of 2006 (**Malik Mazhar Sultan (3)**) must be followed. According to him, the spirit of the 'Recruitment Rules' and the judgment of the Hon'ble Apex Court in the Case of **Malik Mazhar Sultan (3) (Supra)** would go a long way to show that for all those posts which could not be filled up, steps be taken to ensure that all the posts are duly filled up.

11. Learned Senior Counsel submits that one of the specific directions of the Hon'ble Apex Court in the case of **Malik Mazhar Sultan (3) (Supra)** is that the select list for all categories of candidates shall be valid till the publication of next selection list. It is his submission that the endeavor is to fill up all the available vacancies from the qualified candidates and no notified vacancies should remain unfilled despite availability of the eligible and qualified candidates.

12. Learned Senior Counsel has placed reliance on the judgment of the Hon'ble Supreme Court in the WP(C) No. 71 of 2019 (**Rahul Dutta Ors. versus State of Bihar and Ors.**) which is a case relating to 30th Bihar Judicial Service Competitive Examination (Advertisement no. 06 of 2018) itself. In this case, the Hon'ble Supreme Court has struck down Rule 5A of the Recruitment Rules because the said rule was found in violation of



what has been laid down by the Hon'ble Supreme Court in the case of **Malik Mazhar Sultan (3) (Supra)**.

13. It is next contended that the ratio of the judgment of the Hon'ble Division Bench in the case of **Swati Chaturvedi (Supra)** would be applicable in the present case as well.

14. Learned Senior Counsel points out that like the present case, in the case of **Swati Chaturvedi** also the State respondents had relied upon the clause 16 of the Memorandum No. 2374 dated 16.07.2007 of General Administrative Department and circular dated 5th April, 1955 to submit that if any candidate fails to join the post, the said post will go to the next recruitment year, but the said contention was rejected by the Hon'ble Division Bench and it has been held that the circular of 2007 has lost its force in view of the decision rendered in **Malik Mazhar Sultan case (3) (Supra)**. The identical matter came for consideration before the Hon'ble Division Bench of this Court in **Manoj Kumar Tiwari (Supra)** and the same has been taken note of to draw strength in the case of Swati Chaturvedi. It is contended that the rules relating to appointment/recruitment of a Civil Judge (Junior Division) can only be made by the Governor of Bihar in consultation with the High Court of Judicature at Patna and the Bihar Public Service Commission in terms of the mandate of Article 234 of the



Constitution of India, therefore, clause 16 of the Memorandum no. 2374 dated 16.07.2007 of the General Administrative Department and the circular dated 5th April 1955 of the Appointment Department, Government of Bihar would not confirm to the requirement of the Article 234 of the Constitution of India, therefore, those circulars would not be applicable in respect of the appointment of Civil Judge (Junior Division).

15. Learned Senior Counsel submits that the Recruitment Rules lay down the eligibility criteria and the eligibility criteria may be amended only in accordance with law. According to him, the Recruitment Rules nowhere talks of any cutoff marks for any category of candidates. It merely provides a qualifying marks in interview and according to this, those candidates who are called for interview and have obtained 35 per cent marks in interview are eligible and taken to be qualified to get a place in the combined merit list. Once they are qualified and got a place in the combined merit list, the notified vacancies are to be filled up from amongst the candidates in the combined merit list in order of merit.

16. According to him, in the present case no conscious decision was taken by the employer to fix a cutoff marks either in the advertisement or at any other stage. It is the marks obtained by



the last candidate whose name was recommended for appointment against the last available vacancy in the category of unreserved category which has been deemed to be the cutoff marks in the general category. It is submitted that in the 29th Bihar Judicial Service Competitive Examination (Advertisement No. 01 of 2016) the cutoff marks for general category candidates was 505 marks only. Last person appointed on the post of Civil Judge (Junior Division) had only obtained 505 marks. In order to strengthen his submission, he has placed Annexure '7' to the supplementary affidavit showing that the total marks obtained by the last candidate in unreserved category 29th Bihar Judicial Service was 505 marks only. It is submitted that the Commission had no power to fix cutoff marks in absence of any conscious decision to that effect by the employer and the Recruitment Rules does not talk of fixation of a cutoff mark. This has been noticed by Hon'ble Division Bench of this Court in the case of **Manoj Kumar Tiwari (supra)**.

17. It is lastly contended that in the present admitted position where 6 vacancies are still existing and only 4 candidates are ahead the petitioner in the merit position and the combined select list is still existing, this Court may direct the State of Bihar to requisition the candidates available against the vacant seats and



the Commission may be directed to make recommendations accordingly.

Stand of the Respondent No. 2

18. The case has been contested mainly on behalf of the High Court of Judicature at Patna through its Registrar General (respondent no. 2). Mr. Piyush Lall, learned counsel representing respondent no. 2 submits that the Recruitment Rules are totally silent on filling up the vacant post by drawing a supplementary list, therefore, it may be taken that the Recruitment Rules does not permit for filling up of the post which remained vacant due to non-joining of the candidates from amongst the final select list. According to him, in such circumstance the judgment of the Hon'ble Apex Court in **Malik Mazhar Sultan (3) (Supra)** would not hold the fort.

19. Learned counsel submits that the last candidate in unreserved category who filled up the vacancy meant for general category had obtained 517 marks and the same has been taken as the cutoff marks. Under the circumstances, according to him, the petitioner who has obtained 516 marks i.e. less than the cutoff marks does not acquire any indefeasible right to claim appointment against the vacancies. Learned counsel though does not dispute that there are 6 vacancies available because of non-joining of the



candidates who had been recommended by the Commission in the select list, contested the claim of the petitioner saying that the judgment of Hon'ble Apex Court in **Malik Mazhar Sultan (3) (Supra)** cannot be construed in a manner so as to violate the Recruitment Rules itself. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Union of India and Ors versus S. Vinod Kumar and Ors.** reported in **(2007) 8 SCC 100** to submit that the cutoff marks fixed by the Commission based on the marks obtained by the last candidate in the general category who was recommended for selection cannot be said to be arbitrary and it does not offend the principles of equality as contained under Article 14 of the Constitution of India.

20. Learned counsel further relied upon the judgment of the Hon'ble Apex Court in the case of **Surendra Narain Singh and Ors. Versus the State of Bihar and Ors.** reported in **(1998) 5 SCC 246**. It is contended that in the said case the Hon'ble Supreme Court considered the scheme of Rules 19 and 20 of the Recruitment Rules and held that in absence of candidates from SC/ST fulfilling the criteria of qualifying marks, the only course open to the BPSC was to prepare the supplementary list of the candidates from the general category from the existing merit list to fill the 33 vacancies. Learned counsel has contended that once a



select list is made and the same is submitted to the Governor, under Rule 20 of the Recruitment Rules the Commission may submit a supplementary list only and only if the list of nominees submitted under Rule 19 does not contain an adequate number of candidates belonging to Scheduled Castes and the Scheduled Tribes who may be appointed to the vacancies reserved for them. Learned counsel submits that such course is not available in case of unreserved category of candidates.

21. Mr. Lall has also relied on the judgment of the Hon'ble Supreme Court in the case of **High Court of Kerala versus Reshma A. and Ors.** reported in **(2021) 3 SCC 755**. It is his submission that in paragraph '44' of the said judgment the Hon'ble Supreme Court rejected the wider submission of the appellant in the said case that directions in **Malik Mazhar Sultan (3) (supra)** will prevail over the Recruitment Rules, though in the said case the provision contained in Rule 7(2) of the Kerala Judicial Service Rules 1991 (hereinafter referred to as the 'Kerala Rules') was harmonized on the anvil of Articles 14 and 16 of the Constitution of India.

22. Mr. Lall has lastly contended that the judgment of the Hon'ble Division Bench of this Court in **Swati Chaturvedi (Supra)** is *per incuriam* because judgment reported in **(2021) 3 SCC 755** rendered by the Hon'ble Supreme Court could not be brought to the notice of the Hon'ble Division Bench of this Court.



Submission on behalf of the BPSC

23. In course of argument, this Court called upon Mr. Sanjay Pandey, learned counsel representing the Commission to take a stand as to whether any conscious decision was taken by the employer or the BPSC in consultation with the employer to fix a cutoff marks. Learned counsel has categorically submitted in totally unambiguous words that there is no conscious decision to fix a cutoff marks. The stand of the Commission is that the marks obtained by the last candidate who filled up the vacancy notified has been treated to be the cutoff marks. The merit list has been simply run down to fill up the available vacancies. It is the stand of the Commission that it is a recommending body as per the requisition of the State Government and also as per the order of the Hon'ble High Court. The counter affidavit no where states that there was any decision to fix a cutoff marks, thus, admittedly there was no decision not to recommend a candidate who secured less than the cutoff marks, thus, admittedly there was no decision not to recommend a candidate who secured less than the cutoff marks.

Stand of the State

24. Mr. Saroj Kumar Sharma, learned counsel for the State has endorsed the submissions advanced by Mr. Lall, learned



Advocate for Respondent No. 2. I would, however, refer the statements made in the counter affidavit and two supplementary counter affidavits filed on behalf of the State. In the counter affidavits the State Government has relied upon the department circular dated 16.07.2007 which provides that if a candidate/candidates did not submit his/their joining within the stipulated time period or for any case, the vacancies are not fulfilled, the remaining vacancies will be carried forward in next requisition.

25. Respondent no. 1 has also referred the circular dated 5th April, 1955 which suggests that the appointments may be made from a list and from the candidates prepared after consultation with the Bihar Public Service Commission which may be considered valid up to a date not exceeding one year from the date on which the recommendation was made by the Commission. A stand has been taken that one year has expired and the circulars are applicable in the matter of the petitioner. The recommendation of 30th Bihar Judicial Service Commission was sent in February 2020 and one year eight months have already expired since the submission of the panel. The State respondent no. 1 is fully aware of the judgment of the Hon'ble Division Bench of this Court in the case of **Swati Chaturvedi (supra)** is evident from the statements



made in paragraph '11' of the 1st supplementary counter affidavit. In the 2nd supplementary counter affidavit, respondent no. 1 has quoted some part of the judgment of Hon'ble Supreme Court rendered on 24.03.2009 in the case of **Malik Mazhar Sultan (3) (Supra)** with regard to the notification of existing number of vacancies. The anticipated vacancies for next one year and then some candidates to be included in the wait list. It is stated that the recommendation of 30th Bihar Judicial Service was made available to the petitioner in December 2019 and a large chunk of 299 candidates have been given appointments in January 2020 by the State Government. 41 candidates joined the Bihar Judicial Service in February 2020 and now one year ten months have elapsed since the joining of the first batch of the candidates. It is next stated that the 31st Bihar Judicial Service Recruitment against the vacancy is in the last leg of completion. The result of 31st Bihar Judicial Service main examination is likely to be published soon. In paragraph '9' of the supplementary counter affidavit, it is stated that the number of vacancies have already been advertised for 31st Bihar Judicial Service Examination and the preliminary and main examination have been conducted by the Bihar Judicial Service Commission. It is stated "hence the vacancies which falls vacant after the recommendation of 30th Bihar Judicial Service has



already covered in the 31st Bihar Judicial Service. Curtailment of the seats now will diminish the prospects of those candidates who have appeared in the next recruitment process”.

26. Apparently, this Court finds that several spelling mistakes and grammatical errors in the affidavits of the State make the sentences completely vague and ambiguous. It is not stated as to up-to which date the vacancies available were requisitioned and when the Advertisement for 31st Bihar judicial Service Competitive Examination was published ? It no where says how and when the posts fell vacant and whether the vacant posts were available to be included in the Advisement of 31st Bihar Judicial Service Competitive Examination. Let it be recorded that in course of argument learned counsel for the State did not press this aspect of the matter. Mr. Lall, learned Advocate attempted to submit this part of the affidavit but was unable to take a certain stand.

Consideration

27. The first and foremost question which has fallen for consideration before this Court is as to whether in absence of a specific provision under the Recruitment Rules providing for filling up of the vacancies which are available due to non-joining of the recommended candidates, the respondents are justified in not filling up them from the combined merit list/select list of



qualified candidates. In another words, whether the State respondents are obliged to fill up all the available vacancies as above from the combined select list in order of merit in the light of the judgment of the Hon'ble Supreme Court in the case of **Malik Mazhar Sultan (3) (Supra)** particularly when there is no rule under the Recruitment Rules specifically prohibiting filling up of the vacancies available due to non-joining of the candidates from the final select list.

28. The relevant 'Rules' which have fallen for consideration are contained in Rule 15 to Rule 23 of the 'Recruitment Rules' which are reproduced hereunder for a ready reference:-

“15. (a) The Commission shall have discretion to fix the qualifying marks in any or all the subjects at the written examination, in consultation with the Patna High Court.

(b) The minimum qualifying marks for candidates belonging to the Scheduled Castes and the Scheduled Tribes shall not be higher than 35 per cent unless the number of such candidates qualifying at the written test according to the standards applied for other candidates is considerable in excess of the number of candidates required to fill all the vacancies reserved for the Scheduled Castes and the Scheduled Tribes:

Provided that in determining the suitability of a particular candidate for appointment, the total marks obtained at the written examination and not the marks obtained in any



particular subject or subjects, shall be taken into consideration.

(c) There shall be no qualifying marks for the *viva voce* test.

16. The Commission shall consult the Chief Justice of the Patna High Court confidentially in the matter of selection of examiners for the Law papers prescribed for the written examination.

17. On the basis of the marks obtained at the written examination, the Commission shall arrange for *viva voce* test of the candidates who have qualified at the written examination according to rule 15:

Provided that in exceptional circumstances and with the prior approval of Government, the Commission may, at their discretion, admit candidates of the Scheduled Castes and the Scheduled Tribes to the *viva voce* test even though they may not have obtained the minimum qualifying marks at the written test.

18. The Chief Justice may appoint an officer to represent the High Court at the *viva voce* test. The officer so appointed shall be present at the *viva voce* test and shall advise the Commission on the fitness of the candidates from the point of view of special qualifications for the Service, but he will not be responsible for the selection of the candidates. The Commission in forwarding their recommendations shall draw the attention of Government to any matter in regard to which they differ from the officer so appointed.

19. The marks obtained at the *viva voce* test shall be added to the marks obtained at the written examination. The names of candidates will then be arranged by the Commission in order of merit. If two or more candidates obtain equal marks in the aggregate, the order shall be



determined in accordance with the marks secured at written examination. Should the marks secured at written examination of the candidates concerned be also equal, then the order shall be decided in accordance with the total number of marks obtained in the optional papers. From the list of candidates so arranged, the Commission shall nominate such number of candidates as may be fixed by the Governor in order to their position in the list. The nomination so made shall be submitted to the Governor by such date in each year as the Governor may fix.

20. The Commission shall, while submitting their recommendation under Rule 19, consider the claims of qualified candidates belonging to the Scheduled Castes and the Scheduled Tribes. If the list of nominees submitted under Rule 19 does not contain an adequate number of candidates belonging to the Scheduled Castes and the Scheduled Tribes who may be appointed to the vacancies reserved for them, the Commission shall submit a supplementary list nominating a sufficient number of such candidates as in their opinion attain the required standard of qualifications and are in all respects suitable for appointment to the Service.

21. Success at the examination confers no right to appointment unless Government are satisfied, after such enquiry as may be considered necessary, that the candidate is suitable in all respects for appointment to the Service. The final selection of candidates shall be made by the Governor from amongst those nominated by the Commission.

22. Candidates selected for written or *viva voce* test will present themselves at their own expense at a time and place of which they will be informed in due course.



23. A consolidated result of the examination will be prepared by the Commission and a copy of the marks obtained both at the written and the *viva voce* tests, as well as copy of the printed table of the consolidated results, shall be supplied individually to each candidate, soon after the results are compiled and the list referred to in Rule 19 is submitted to the Governor.”

29. In the case of **Surendra Narain Singh (supra)** a question came for consideration before the Hon’ble Supreme Court as to whether it was permissible under Rule 20 of the 1955 Rules to appoint general candidates against 33 vacancies which were initially reserved for SCs/STs but sufficient reserved candidates did not become available in the 15th Examination held by the Bihar Public Service Commission under the Bihar Judicial Service (Recruitment) Rules 1955.

30. After discussing the Recruitment Rules which were framed under Article 234 of the Constitution of India for appointment of Munsifs, the Hon’ble Supreme Court held in paragraphs ‘15’ and ‘16’ as under:-

“**15.**Countering this submission, it was urged on behalf of the respondents that having regard to the scheme of Rules 19 and 20 of 1955 Rules it would be erroneous to restrict the meaning of the words “such candidates” to the SC/ST categories. If the contention of the appellants is accepted then the BPSC will be violating the criteria as regards minimum qualifying marks prescribed by it in



consultation with the High Court and this course would not be permissible. Since the candidates from SC/ST were not available for fulfilling the criteria of qualifying marks, the only course open to the BPSC was to prepare the supplementary list of the candidates from the general category from the existing merit list to fill in the 33 vacancies.”

“16. Upon careful consideration of the rival contentions on interpretation of Rule 20, we are of the considered view that the expression “such candidates” in Rule 20 cannot be given the restricted meaning to include only SC/ST candidates in the supplementary list. The merit list prepared by the BPSC nominating 33 candidates therefrom unmistakably indicated that the BPSC prepared the merit list of 241 candidates who qualified under Rule 19 of whom only candidates of SC/ST could be nominated. No other qualified candidate of SC/ST was available in the said merit list. There is no provision under the Rules which enables the BPSC to recall or hold fresh written examination and viva voce and any exercise in that behalf would be contrary to 1955 Rules. Despite the proviso to Rule 17 no SC/ST candidate could qualify by securing the minimum marks of 30% prescribed by the BPSC in consultation with the High Court. In the facts and circumstances of the case, the expression “such candidates” in Rule 20 would be referable to the candidates who figure in the merit list prepared by the BPSC and out of this merit list a supplementary list of candidates under Rule 20 was required to be prepared who in the opinion of the BPSC have attained the required standard of qualifications and are in all respects suitable for the appointment of service. This may even include SC/ST candidates. Any other construction would result



into keeping the 33 posts reserved for SC/ST vacant and consequently there would have been shortage of Munsifs to man the judiciary. It is not the contention of the appellants that SC/ST candidates were available in the merit list who fulfill the qualifying marks yet they were not nominated in a supplementary list. It must be remembered that the judiciary being a vital organ to administer the law, any further relaxation may cause a damage to the institutional structure. For these reasons, in our considered opinion the expression “such candidates” appearing in Rule 20 cannot be given restricted meaning. The supplementary list has to contain the names of the candidates from the merit list. Once the merit list is prepared, the same cannot be modified and the same has to remain in force until the supplementary list is prepared to fill in the advertised posts but without any compromise as regards merit. While submitting the supplementary list the BPSC shall nominate a sufficient number of such candidates, i.e., candidates from the merit list who in its opinion have attained the required standard of qualifications and are in all respects suitable for appointment to the service. In this view of the matter, we must hold that 33 candidates nominated by the BPSC in a supplementary list drawing from the merit list could not be assailed on any ground. Consequently Respondents 3 to 34 who belong to earlier vacancies of 15th Examination held under the 1955 Rules would be placed senior in the seniority list to the candidates who were appointed under the 1974 Rules. As regards the other set of appellants in Civil Appeals Nos. 1385-86 of 1991, since their placement in the merit list was below these respondents, they cannot claim seniority over them.”



31. Hence, from reading of the judgment of the Hon'ble Supreme Court in the case of **Surendra Narain Singh (supra)** it is crystal clear that in the given circumstance the supplementary list has to contain the names of the candidates from the merit list. There is no bar under the Recruitment Rules that a supplementary list for the vacancies occurring due to non-joining of recommended candidates cannot be prepared from amongst the merit list to fill up the posts falling under unreserved category.

32. In **All India Judges' Association & Others Vs. Union of India & Others** reported in **(2002) 4 SCC 247** the Hon'ble Apex Court directed that existing vacancies in the subordinate courts at all levels should be filled, if possible latest by 31-3-2003, in all the States. The aim and object of such direction was to establish an independent and efficient judicial system which is the basic structure of the Constitution of India. The Hon'ble Apex Court noticed that the judicial system had been facing the problem arising out of delay in rendering justice as one of the major causes happened to be the inefficient number of judges. The Hon'ble Supreme Court was looking for timely steps to be taken by the stake holders for determination of vacancies, issue of advertisement, conducting of examinations, interview, declaration of final results and issue of orders of appointment. It is



in this context that in the case of **Malik Mazhar Sultan (3)** (**supra**) the Hon'ble Supreme Court issued a general direction and time schedule to be adhered to for filling vacancies. For filling up the vacancies in the cadre of Civil Judge (Junior Division) by direct recruitment the Hon'ble Supreme Court lay down a time frame in the following words :-

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

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 promotion, death or otherwise, say ten per cent of the number of posts.	15th January
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. The list may be put on the website.	2nd April
5.	Dispatch/Issue of admit cards to the eligible applicants.	2 nd 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 1st December



authority for all existing vacant posts as on date.

13. Last date for joining. 2nd January of the following year

33. In paragraph '14' of the said judgment the Hon'ble Supreme Court held that select list prepared for all categories of officials shall be valid till the next select list is published. Thus, the select list, according to this judgment, remain valid even after the last date of joining. Further it was directed that ten per cent of unforeseen vacancies would be in respect of sanctioned posts and not vacancies occurring in a particular year. In the judgment reported in **(2009) 17 SCC 24** the direction as contained in paragraph '15' of **Malik Mazhar Sultan (3) (supra)** with regard to ten per cent of unforeseen vacancies was modified to the following effect:-

“**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**, 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.”

34. The modified order talks of a wait list. In terms of the Hon'ble Supreme Court the merit list should be prepared double to the number of vacancies and it has to survive till publication of next merit list. In the case of **Rahul Dutta & Ors.**



Vs. The State of Bihar & Ors reported in **(2019) 5 SCC 158**

Rule 5A (3) of the Recruitment Rules came for consideration.

Rule 5A (3) as existed reads as under:-

“5A (3) Eligible candidates for the written examination shall be selected on the basis of the result of the Preliminary Test, to the extent of 10% of the total number of appeared candidates, rounded off to the nearest hundred; and all candidates obtaining equal marks as the last candidate’s shall also qualify for the written examination;

Provided that in the event of candidates from the reserved categories, other than the General category, falling short of the percentages fixed for them in the State Government Services under the relevant Act vis-a-vis the total number of successful candidates in the Preliminary Test, so many candidates from those categories shall be additionally included, to the extent of the deficit, as per their respective merit, in the list of the successful candidates to take the written examination.”

35. It was contended before the Hon’ble Supreme Court in the said case that the Rule provided that only 10 per cent of the total number of candidates who appeared at the preliminary test were to be called in the written examination rounded up to the nearest 100. The Hon’ble Supreme Court held that Rule 5A was contrary to the decision in the case of **Malik Mazhar Sultan (3) (supra)**. The provision was held arbitrary and unreasonable particularly in view of the ratio of 1:2 prescribed in **Malik Mazhar Sultan (3) (supra)**. The Hon’ble Supreme Court was of



the view that the restrictions of candidates to 10 per cent of those who had appeared at the preliminary test shall curtail the competitive field unreasonably.

36. Mr. Piyush Lall has argued on the strength of the observations of the Hon'ble Supreme Court in paragraph '44' of the judgment in the case of **High Court of Kerala versus Reshma A. and Others** reported in **(20021) 3 SCC 755**. I, therefore, would examine the facts of the said case and the ratio of the judgment of the Hon'ble Supreme Court.

The appointment on the post of Munsif Magistrate in the Judicial Service of the State of Kerala is governed by the Kerala Judicial Service Rules 1991 (hereinafter referred to as the 'Kerala Rules'). The Kerala Rules were amended w.e.f. 14.01.2019. A notification was issued by the High Court of Kerala inviting applications for appointment to the posts of Munsif Magistrate against regular vacancies and against a carry-forward called "No Candidates Available (NCA)". Thirty-seven "probable" vacancies were notified including one vacancy reserved for persons with disabilities, for appointment by direct recruitment and recruitment by transfer. Eight vacancies were notified under the NCA category. After completion of written examination and interview results



were published on 20-2-2020 and a list of candidates qualified for selection was prepared and was published on the same date.

The merit list prepared by the High Court was approved by the Governor and was notified by the Government of Kerala through a Gazette Notification dated 7-5-2020. By way of this Notification, 32 candidates were appointed as Munsif Magistrate trainees by direct recruitment for the year 2019 against regular vacancies and 5 candidates were subsequently appointed against NCA. All the selected candidates were undergoing training. At this stage two petitions were filed in the Hon'ble High Court claiming that as on 7-5-2020 and thereafter, several vacancies had arisen for the post of Munsif Magistrate, which were not specified in the notification inviting applications. The respondents, who were the original petitioners, claimed that in accordance with Rule 7(2) as amended with effect from 14-1-2019, all vacancies which arise for a period of one year after the approval of the merit list by the Governor, are to be filled from the approved merit list. In other words it was contended that the appointments of Munsif Magistrates should not be limited to 32 vacancies and must take into account all other vacancies that had arisen or may arise till 6-5-2021, that is, within one year from the date on which the merit list dated 7-5-2020 was notified.



37. At this stage, it would be relevant to take note of the Rule 7(2) of the Kerala Rules as it stood prior to amendment as under:-

“7.....(2) The list consisting of not more than double the number of probable vacancies notified shall be forwarded for the approval of the Governor. The list approved by the Governor shall come into force from the date of the approval and shall remain in force for a period of *three years* or until a fresh approved list is prepared, whichever is earlier.”

38. On 19.01.2019 Kerala Rules were amended. Rule 7(2) was substituted by the following provision:-

“(2) The merit list prepared by the High Court shall be forwarded for the approval of the Governor. The list approved by the Governor shall come into force from the date of the approval and shall be valid till the notified vacancies and the vacancies that may arise within one year from the date of approval of the list, are filled up or a fresh list comes into force, whichever is earlier.”

39. The unamended Rule 7(2) provided that the list approved by the Governor will remain in force for a period of three years or until a fresh list was prepared but as a result of the amendment it was provided that the list approved by the Governor shall be valid till the notified vacancies and the vacancies that may arise within one year from the date of the approval of the list are filled up or a fresh list comes into force, whichever is earlier.



40. In the aforementioned background, the learned Single Judge of the High Court of Kerala held that since a special rule governs the selection and appointment of candidates, the High Court of Kerala on its administrative side, could not deny appointment on the ground that the recruitment would not fall within the timelines prescribed in **Malik Mazhar Sultan (3) (supra)**. Denial of appointment to the additional vacancies would, in the view of the Single Judge, violate Articles 14 and 16 of the Constitution. This judgment and order of the learned Single Judge was affirmed by the Hon'ble Division Bench in appeal. The Hon'ble Division Bench held that amended Rule 7(2) provided that the approved list is valid for the notified vacancies and the vacancies arising within one year from the date of approval by the Governor or till a fresh list comes into force. Consequently, the merit list approved on 7-5-2020 would be valid for vacancies till 6-5-2021 or till a fresh list comes into force. The Division Bench further held that the operation of the Kerala Rules, 1991 for selection and appointment was not in contradiction with the guidelines laid down in **Malik Mazhar Sultan (3)** as this Court had noticed that selections were to be made according to the existing judicial service rules in the States/Union Territories. The Division Bench, held that the intent of **Malik Mazhar Sultan (3)**



was not to interfere with statutory rules, but only to lay down guidelines for expeditious filling up of judicial vacancies.

41. The Hon'ble Supreme Court framed two issues for consideration. The first question framed was whether Rule 7 of the Kerala Rules, 1991 is contrary to the directions of this Court in **Malik Mazhar Sultan (3)**.

42. While examining the aforesaid issue the Hon'ble Apex Court discussed its judgment in **Malik Mazhar Sultan (3) (supra)** ; **Rakhi Ray v. High Court of Delhi** reported in **(2010) 2 SCC 637** and **Hirandra Kumar V. High Court of Allahabad** reported in **(2020) 17 SCC 401**. The Hon'ble Apex Court took note of paragraph '5' of the **Malik Mazhar Sultan (3) (supra)** which reads as under :-

“5..... 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.”

43. Thereafter, the Hon'ble Supreme Court in order to harmonise Rule 7(2) of the Kerala Rules with **Malik Mazhar Sultan (3) (supra)** held that “the recognition in **Malik Mazhar Sultan (3)** of the legal position that selections have to take place in accordance with existing Judicial Service Rules in the States, or as the case may be, Union Territories is hence in accordance with the mandate of Article 234.”



44. The Hon'ble Supreme Court found a reiteration of the principle imparting sanctity of the Rules governing the Judicial Service in the States. In the three-Judges Bench decision in **Rakhi Ray** (supra) the High Court had issued an advertisement for filling up 20 vacancies in the cadre of District Judge of which 13 were to be drawn from the general category, 3 from the Scheduled Castes and 4 from the Scheduled Tribes. All the 13 vacancies in the general category were filled up according to the merit list and the appellants who ranked below the selected candidates were not appointed. Some of the unsuccessful candidates moved the Delhi High Court with the submission that the vacancies which arose during the pendency of the selection process could also have been filled up from the select list in view of the decision in **Malik Mazhar Sultan (3) (supra)**. It is in these circumstances the Hon'ble Supreme Court observed that selection was to be made as per the existing Rules and that "appointments have to be made giving strict adherence to the existing statutory provisions". It was held that since the anticipated vacancies have not been determined in view of the existing statutory Rules, they could not be taken into consideration. Thus, the Hon'ble Supreme Court found that **Rakhi Ray** involved a situation where candidates who were not successful in seeking appointment in the vacancies which were



advertised, attempted to gain appointment as District Judges by the inclusion of additional vacancies, over and above those which were notified.

45. Again in the case of **Hirandra Kumar (supra)** there was a situation where under the Uttar Pradesh Judicial Service Rules a minimum and maximum age-limit could be relaxed in the case of SC/ST candidates. The age-limit was prescribed with reference to the first day of January of the year following the year in which the notice inviting applications is published. The submission before the Hon'ble Supreme Court on behalf of the appellants was that based on the decision in **Malik Mazhar Sultan (3)**, a candidate who applies for recruitment to the Higher Judicial Service may be granted age relaxation since the candidate has crossed the prescribed age-limit between the last date of recruitment and the current. This contention was rejected by the Hon'ble Supreme Court.

46. In the case of **High Court of Kerala (supra)** the Hon'ble Supreme Court also considered another issue as to whether Rule 7(2) of Kerala Rules is a frontal assault on the provisions of Articles 14 and 16 of the Constitution. The submission was that if the select list of 2019 is operated by filling up vacancies which arise for 2020, this will seriously erode the



rights of candidates who become eligible in 2020, since this will result in a corresponding reduction of vacancies for the later year. Going by the precedent and referring the judgment of the Hon'ble Supreme Court in the case of **Prem Singh V. Haryana SEB** reported in **(1996) 4 SCC 319**, the Hon'ble Supreme Court held that "the High Court of Kerala while issuing its advertisement for recruitment specified 37 as a "probable" number of vacancies. The Hon'ble Supreme Court observed that "the constitutional principle which finds recognition in the precedents of this Court is that the process of selection in making appointments to public posts is subject to the guarantees of equality under Article 14 and of equality in matters of public employment under Article 16. The process of selection must comport with the principles of reasonableness. Where the authority which makes a selection advertises a specific number of posts, the process of selection cannot ordinarily exceed the number of posts which have been advertised. While notifying a process for appointment, the authority may take into consideration the actual and anticipated vacancies but not future vacancies. Anticipated vacancies are the vacancies which can be reasonably contemplated to arise due to the normal exigencies of service such as promotion, resignation or death. Hence, in notifying a given number of posts for



appointment, the public authority may legitimately take into account the number of vacancies which exist on the date of the notification and vacancies which can reasonably be expected to arise in the exigencies of the service.....”. As regards the Kerala Rules it was held that “Kerala Rules, 1991 preceded the judgment in **Malik Mazhar Sultan (3)**. The amendment which came into force on 19.01.2019 is evidently after the decision of the Court. The effort, as a matter of statutory interpretation, must be to harmonize the directions which were issued by this Court in **Malik Mazhar Sultan (3)** which are relatable to the jurisdiction of this Court under Article 142 of the Constitution and the statutory rules. Undoubtedly, this Court has noticed in that decision that there were rules in force in the States and the Union Territories governing the selection to their judicial service. While issuing directions in regard to the maintenance of timelines and for the modalities to be followed in an annual selection, this Court clarified that this would not impinge upon the independence of the Public Service Commission or the role of the High Courts in the States.”

47. Further the Hon’ble Supreme Court observed in paragraph ‘59’ in the case of **High Court of Kerala (supra)** as under:-



“59. These two decisions in *Rakhi Ray*⁵ and *Hirandra Kumar*⁸ would indicate that a candidate who does not qualify in terms of the judicial service rules prevailing in the State (or Union Territory) cannot seek a mandamus which is founded on a breach of the rules. The observation in *Rakhi Ray*⁵ and *Hirandra Kumar*⁸ that the decision in *Malik Mazhar Sultan (3)*¹ did not override the State Judicial Service Rules must therefore be construed in an appropriate sense. The object and purpose of this Court in the decision in *Malik Mazhar Sultan (3)*¹ was to ensure the expeditious filling up of judicial vacancies in the State Judicial Services. It was in this perspective, that the Court set down strict timelines for compliance. At the same time, it is evident that the decision did not provide for other essential aspects such as eligibility, modalities for conducting the examination and the application of reservations in making appointments to State Judicial Services. Hence, a significant field in regard to the process of selection and appointments to the judicial services is not covered by the decision in *Malik Mazhar Sultan (3)*¹ for which one has to fall back upon construing the rules governing the State Judicial Service in question.”

In the case of **Manoj Kumar Tiwari Vs. The State of Bihar and Ors. (C.W.J.C. No. 14921 of 2019)** a Division Bench of this Hon’ble Court was considering the case of the petitioner who had secured 125.2 marks. The Patna High Court in its administrative side took a stand that the last candidate Nalin Kumar Pandey who have been offered appointment had

1. *Malik Mazhar Sultan (3) V. U. P. Public Service Commission*, (2008) 17 SCC 637 : (2010) 1 SCC (L & S) 942
5. *Rakhi Ray v. High Court of Delhi*, (2010) 2 SCC 637 : (201) 1 SCC (L&S) 652
8. *Hirandra Kumar v. High Court of Allahabad*, (2020) 17 SCC 410 : 2019 SCC OnLine SC 254



obtained 125.4 marks and since the marks of the petitioner were 125.2, therefore, the High Court decided not to reduce the merit as against the last candidate who had been selected. The said stand of the Patna High Court was challenged by the petitioner with reference to the Recruitment Rules and particularly the Rule as published in the advertisement saying that “a candidate will qualify for appointment if the candidate secures at least 45% marks in each theory paper and 50% in aggregate, in written test (theory paper) and *viva-voce*, taken together.”

48. The Hon’ble Division Bench held as under:-

“There is no dispute between the parties that this is the prescription of the rule and, therefore, a candidate qualifies for appointment, if he has 50% in aggregate, both in the written test and *viva-voce*, taken together. It is also not in dispute that the maximum marks combined aforesaid is 250 and the 50% thereof is 125.”

49. The Hon’ble Division Bench, therefore, found no reason to eliminate the petitioner keeping in view the fact that the vacancy against the said advertisement exists and no further process has been undertaken so as to make the vacancy non-available.

50. The judgment in **Manoj Kumar Tiwari** (supra) has been also discussed in the case of **Swati Chaturvedi** (supra). In the case of **Swati Chaturvedi** an another Hon’ble Division Bench of this Court considered the identical objections of the State



(respondent no. 1) citing its circular of 1977. The Hon'ble Division Bench noticed that there were existing vacancies and the writ petitioner was next in the merit list to move if the left over vacancies are to be filled up. She had secured equal marks i.e. 517 which was secured by the last candidate who have been recommended for appointment. No doubt on facts the petitioner in this case has secured '516' marks, that is, less than Swati Chaturvedi but it is the ratio of the judgment which would guide us. A reading of the judgment of the Hon'ble Division Bench of this Court in the case of **Manoj Kumar Tiwari (supra)** and **Swati Chaturvedi (supra)** would go a long way to show that the ratio of the judgments are that the notified vacancies if remained unfilled because of non-joining of the candidates who were recommended for appointment, those vacancies are to be filled up from amongst the candidates who have qualified and are next in the combined merit list/select list, in order of merit. For filling up such vacancies a mandamus may be issued and it would not be contrary to either the Recruitment Rules governing the appointment of the Civil Judge (Junior Division), it will also not be in conflict with the directions of the Hon'ble Supreme Court in the case of **Malik Mazhar Sultan (3) (supra)**.



51. To me, it is crystal clear that the present is not a case like that of the **Rakhi Ray (supra)**, **Hirandra Kumar (supra)** or **Reshma A. (Supra)** wherein those candidates were looking for their appointment either against the additional vacancies, future vacancies or on the basis of a rule such as Rule 7(2) of the Kerala Rules which was not confirming the test of Articles 14 and 16 of the Constitution. The High Court of Kerala had allowed the writ petition by construing Rule 7(2) as amended and by holding that the same will prevail but in ultimate analysis the Hon'ble Supreme Court allowed the Special leave Petition of the High Court of Kerala. The emphasis of the judgment in **Reshma A. (supra)** is to harmonize the Rule with the directions of the Hon'ble Supreme Court in **Malik Mazhar Sultan (3) (supra)**.

52. In this Case the petitioner has duly qualified fulfilling the eligibility criteria and she has been placed in the combined merit list/select list. She has secured 516 marks and in this case there is no conscious decision to fix any cut off marks. I agree with the submissions advanced on behalf of the petitioner that under the existing Recruitment Rules the Commission had no power to fix any cut off marks. In it's counter affidavit the Commission is completely silent on this aspect of the matter and in



course of argument learned counsel for the Commission has admitted that there is no conscious decision to fix any cut off marks, what has been done is to declare that the marks obtained by the last candidate in general category who has been recommended for appointment is taken as a cut off marks.

53. Nothing has been brought to the notice of this Court to show that the Commission on it's own could have fixed a cutoff marks and excluded those candidates who had secured less than the cutoff marks. In the case of **S. Vinod Kumar (supra)** there was a conscious decision by Railway (the employer) to fix a cutoff marks and this power to fix the cutoff marks was never questioned. Apparently, the facts in issue in the present case are completely different from that of **S. Vinod Kumar (supra)**.

54. On behalf of the Patna High Court on it's administrative side no material has been placed to show that there was any conscious decision not to appoint a candidate who has secured less than 517 marks. There is no whisper to that effect in their counter affidavit to the writ petition as well as interlocutory application. I have seen that a similar kind of contention as to cutoff marks raised in the case of **Manoj Kumar Tiwari (supra)** was rejected by the Hon'ble Division Bench of this Court. I have also noticed that the judgment of the Hon'ble Division Bench in



Swati Chaturvedi (supra) was assailed before the Hon'ble Supreme Court in Special Leave to Appeal (C) No. 11174 of 2021 (The State of Bihar Vs. Swati Chaturvedi & Ors.) which has been dismissed in limine vide order dated 30.07.2021.

55. By way of last minute effort, Mr. Lall, learned Advocate for the High Court has submitted before this Court that the judgment of Hon'ble Division Bench in **Swati Chaturvedi (supra)** is *per incuriam* because the judgment of Hon'ble Supreme Court in the case of **Reshma A. (supra)** was not cited. I do not find any reason to get impressed with the plea. The judgment in **Reshma A. (supra)** clearly says that the Rules are to be harmonized with the directions of the Hon'ble Supreme Court. This is what has been done in **Swati Chaturvedi (supra)**. Reference in this regard be made to the following paragraphs of the judgment in **Swati Chaturvedi's case:-**

“15. Learned counsel for the High Court has placed reliance on Rule-19 and 21 of the Bihar Civil Services (Judicial Branch) (Recruitment) Rules, 1955, and submits that it depends upon the nomination of the candidates comes from the Bihar Public Service Commission. However, all the rules has to be read down in terms of the ratio laid down in the decision of Malik Mazhar Sultan (supra).”



56. In the present case, the petitioner and those in the combined merit list/select list are duly qualified candidates. The vacancies which are required to be filled up are neither additional nor future vacancies, therefore, the views expressed by Hon'ble Supreme Court in **Rakhi Ray (supra)** and other similar line of cases were in a completely different facts situation. This plea of Mr. Lall is, thus, also liable to be rejected.

57. I, therefore, take a view that the petitioner has made out a case for issuance of a writ of mandamus directing the respondents to fill up the remaining vacant posts notified vide Advertisement No. 06/2018 which could not be filled up due to non-joining of candidates who were recommended for appointment.

58. At this stage, I am compelled to observe that the State of Bihar (respondent no. 1) has filed it's counter affidavit, first supplementary counter affidavit and second supplementary counter affidavit in a most casual manner. Once again the State has relied upon the same circulars which were considered earlier by the Hon'ble Division Bench in **Swati Chaturvedi (supra)** case and their Lordships while specifically dealing with the stand of the State held that the government resolution which has been placed on the records by the State is not applicable to the judicial



service rather it may be applied to the general service and in view of the specific consideration and directions of the Hon'ble Supreme Court in the case of **Malik Mazhar Sultan (3)** the contention of the State Government is required to be rejected. It was also held that such resolution has no statutory force. Despite this specific consideration and rejection of the contention of the State, once again the State has taken the same plea. When learned counsel for the State was called upon to explain this aspect of the matter, there was no reply. Learned counsel simply submitted that he endorses the stand of the Patna High Court. Although, learned counsel for the State has not submitted that there is no existing vacancy, I have noticed that towards the end of the second supplementary counter affidavit in a completely vague manner it is stated in paragraph '9' that the number of vacancies (not disclosed) have been advertised for 31st Bihar Judicial Service, the preliminary and mains examination have been conducted, hence the vacancies which fell vacant after the recommendation of the 30th Bihar Judicial Service have already been covered in the 31st Bihar Judicial Service. The counter affidavits besides having several spelling mistakes and grammatical errors are completely vague and incoherent. The State says in it's first supplementary counter affidavit that the Commission made recommendation for



appointment in December 2019, appointment letters were issued in January 2020 and some of the candidates have joined in February, 2020. It is not disclosed as to up-to which date the candidates were given time to join. The date on which the department sent its requisition for Advertisement of 31st Bihar Judicial Service Competitive Examination is not mentioned, the date of Advertisement is also not mentioned and the number of vacancies notified thereunder is also not mentioned but in a vague manner an inference has been drawn using the word 'Hence'. I have found that the Advertisement for 31st Bihar Judicial Service Competitive Examination was published on 09.03.2020. It is not known when the requisition was sent for publication but what has been admitted by the respondents in the case of **Swati Chaturvedi (supra)** is clear from the judgment of the Hon'ble Division Bench rendered on 01.03.2021, the respondents have admitted in the said case that there were '6' vacancies existing. This Court has been informed that after dismissal of Special Leave Petition, respondents have taken steps to appoint Swati Chaturvedi.

59. This is nothing but an attempt to create a kind of confusion in the mind of the Court. The vacancies have fallen out of the notified vacancies because some of the candidates had not joined, unless the recommendations made for those posts are



cancelled by publication of the notifications, the posts would not have fallen vacant. In the present case the records would show that vide Annexures '8' and '9' which are the draft notifications dated 03.03.2020 and 10.12.2020 respectively of the General Administrative Department and were sent for publication and thereby the seven recommendations were cancelled because those seven candidates did not join. The State has not disclosed anywhere as to when those notifications were published. It is evident from the records that four vacancies occurred after 03.03.2020 and three vacancies again occurred on 10.12.2020. Admittedly, the combined merit list/select list is still valid. It is against these vacancies that Swati Chaturvedi and now the petitioner are claiming appointments. Reference in this regard be made to paragraph '17' of the judgment in **Swati Chaturvedi (supra)**. The respondents clearly admitted to have six posts still vacant and the same is recorded in paragraph '17'. There is no pleading that what are recorded in paragraph '17' of the judgment are an error of record. The combined merit list/select list is still in existence is an admitted position.

60. Being a constitutional Court sitting under Article 226 of the Constitution of India, this Court possesses powers to issue writs for the enforcement of the fundamental rights in Part



III of the Constitution of India or “for any other purpose”. In the case of **Maharashtra Chess Association Versus Union of India and Others**. Reported in **(2020) 13 SCC 285** the Hon’ble Supreme Court has, while looking into the scope of the writ jurisdiction of the High Court, observed as follows:-

“11. Article 226(1) of the Constitution confers on High Courts the power to issue writs, and consequently, the jurisdiction to entertain actions for the issuance of writs⁵. The text of Article 226(1) provides that a High Court may issue writs for the enforcement of the fundamental rights in Part III of the Constitution, or “for any other purpose”. A citizen may seek out the writ jurisdiction of the High Court not only in cases where her fundamental right may be infringed, but a much wider array of situations. Lord Coke, commenting on the use of writs by courts in England stated:

“The Court of King's Bench hath not only the authority to correct errors in judicial proceedings, but other errors and misdemeanours [...] tending to the breach of peace, or oppression of the subjects, or raising of faction, controversy, debate or any other manner of misgovernment; so that no wrong or injury, public or private, can be done, but that this shall be reformed or punished by due course of law....”⁶

5. “226. *Power of High Courts to issue certain writs*.—(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

6. *James Bagg's case*, (1572) 11 Co Rep 93b : 77 ER 1271



“12. Echoing the sentiments of Lord Coke, this Court in *U.P. State Sugar Corpn. Ltd. v. Kamal Swaroop Tondon*⁷ observed that: (SCC p. 53, para 35)

“35. ... It is well settled that the jurisdiction of the High Court under Article 226 of the Constitution is equitable and discretionary. The power under that Article can be exercised by the High Court “to reach injustice wherever it is found”.”

“13. The role of the High Court under the Constitution is crucial to ensuring the rule of law throughout its territorial jurisdiction. In order to achieve these transcendental goals, the powers of the High Court under its writ jurisdiction are necessarily broad. They are conferred in aid of justice. This Court has repeatedly held that no limitation can be placed on the powers of the High Court in exercise of its writ jurisdiction. In *A.V. Venkateswaran v. Ramchand Sobhraj Wadhvani*⁸ a Constitution Bench of this Court held that the nature of power exercised by the High Court under its writ jurisdiction is inherently dependent on the threat to the rule of law arising in the case before it: (AIR p. 1510, para 10)”

“10. ... We need only add that the broad lines of the general principles on which the court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court.”

7. (2008) 2 SCC 41 : (2008) 1 SCC (L&S) 352

8. (1962) 1 SCR 753 : AIR 1961 SC 1506



“The powers of the High Court in exercise of its writ jurisdiction cannot be circumscribed by strict legal principles so as to hobble the High Court in fulfilling its mandate to uphold the rule of law.”

“14. While the powers the High Court may exercise under its writ jurisdiction are not subject to strict legal principles, two clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self-imposed. It is a well-settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute. If a High Court is tasked with being the final recourse to upholding the rule of law within its territorial jurisdiction, it must necessarily have the power to examine any case before it and make a determination of whether or not its writ jurisdiction is engaged. Judicial review under Article 226 is an intrinsic feature of the basic structure of the Constitution⁹.

61. It is well settled that a writ court may in order to grant appropriate relief, mould the relief keeping in mind the larger

9. *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625; *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577



public interest. Reference in this regard may be made to the judgments of the Hon'ble Supreme Court in the case of **Competent Authority v. Barangore Jute Factory**, reported in **(2005) 13 SCC 477** followed in the case of **Special Agricultural Produce Market Committee For Fruits and Vegetables, Golimangla Vs. N. Krishnappa and Others.** reported in **(2017) 13 SCC 239**. In the present case I have noticed that it is in the larger interest of strengthening the judicial system that the Hon'ble Apex Court has issued general directions for filling up the vacancies. The whole endeavour of the Hon'ble Supreme Court is to ensure that all the existing vacant post are filled up. I am thus, inclined to mould the relief in the present case by directing the State respondents to fill up all the posts lying vacant due to non-joining of the recommended candidates and consider the case of the petitioner as well as others who are above the petitioner in the combined merit list/select list against the Advertisement No.06 of 2018.

62. In result, I direct the State Government to send the requisition for all the posts which have remained vacant due to non-joining of the recommended candidates and the Bihar Public Service Commission (3rd Respondent) and it's authorities are directed to recommend the name of the candidates from the



combined merit list/select list in order of merit for appointment on the post of Civil Judge (Junior Division) against Advisement No. 06 of 2018.

63. This writ application stands allowed.

(Rajeev Ranjan Prasad, J.)

(Ashwani Kumar Singh, J:- I agree.

(Ashwani Kumar Singh, J.)

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AFR/NAFR	AFR
CAV DATE	04.01.2022
Uploading Date	09.02.2022
Transmission Date	

