



Ms. Sushma Bhende – AGP for respondent nos. 1 and 2 in all writ petitions.

Mr. Rahul Nerlekar for respondent no. 3 in WP/8210/2016, WPST/22262/2016 and WP/10576/2016.

**CORAM :- S. C. DHARMADHIKARI &  
B. P. COLABAWALLA, JJ.**

**DATED :- SEPTEMBER 14/16, 2016**

**ORAL JUDGMENT :-** (Per S. C. Dharmadhikari, J.)

1. Rule. Respondents waive service. By consent, Rule made returnable forthwith.

2. By these petitions, the petitioners challenge the legality and validity of Rule 10(8)(a) of the Maharashtra Public Service Commission Procedural Rules/Rules of Procedure. The writ petitions also seek quashing and setting aside of a letter dated 27<sup>th</sup> June, 2016 addressed by the Additional Secretary, Law and Judiciary Department, Government of Maharashtra.

3. Alternatively, a declaration is claimed that the rules of procedure, framed by the Maharashtra Public Service Commission (hereinafter referred to as “the MPSC”) do not override the Maharashtra Judicial Service Rules, 2008 (hereinafter referred to as “the Judicial Service Rules”)

4. We would take the facts, which are more or less similar to all petitions from Writ Petition No. 8210 of 2016.

5. The petitioner therein is an advocate by profession. He has stated that he is permanent citizen of India. He has completed his B. S. L. L. B. from Pune University in 2012. He came across an advertisement of the second respondent MPSC published on 3<sup>rd</sup> March, 2015. That advertisement was inserted to seek applications for appointment to the post of Civil Judge Junior Division and Judicial Magistrate First Class (hereinafter referred to as "CJJD and JMFC"). It is claimed that in all 227 posts were to be filled in.

6. Annexure 'A' to the petition is a copy of this advertisement and the petitioner states that the MPSC holds a preliminary examination and those successful thereat are permitted to go ahead and take the main examination. The petitioner claims that he appeared for the preliminary examination held on 31<sup>st</sup> May, 2015. He was successful at the same and thereafter appeared for the main examination on 4<sup>th</sup> October, 2015. He had also received a call for appearing for the interview and he attended the same. The interview was held on 15<sup>th</sup> January, 2016. In para 4 of the petition, the petitioner states that the second respondent commission declared the final result on 10<sup>th</sup> March, 2016. A

merit list of 307 candidates was displayed. The petitioner secured 131 marks out of 250. A perusal of the merit list reveals that the candidates from serial number 220 to 230 have secured same marks, namely 131. It is stated by the petitioner that the candidates have been placed in the merit list as per their seniority. The petitioner's name appears at serial number 228 in the merit list of 307 candidates. The entire list is compiled and a copy thereof is at Annexure 'C'.

7. The second respondent commission recommended the names of 227 candidates for appointment. The recommendations were duly forwarded to respondent no. 1, namely, the Government of Maharashtra appearing before us through the Secretary, Law and Judiciary Department. The third respondent to the writ petition is the Registrar General of this court. The petitioner's case is that the further process was to be carried out after the receipt of this list by the Department of Law and Judiciary. The claim of the petitioner is that the candidates appearing at serial number 228 onwards are wait-listed candidates. The list from that serial number up to 307 candidates is taken as wait-list. The petitioner then complains that though 227 candidates were to be appointed, the names of exactly 227 candidates from serial number 1 to 227 were forwarded. The names of 307 candidates were not forwarded.

8. The petitioner states that all the candidates, out of the list of recommended 227 candidates, were not likely to join. Some are bound to drop out in the further process or even if they go through, it is quite likely that they would indicate that they are not keen to join. It is in these circumstances the petitioner, relying upon the past experience and also from one of the successful lady candidate came to know that though she was at serial number 1 in the merit list, she was not desirous of accepting the appointment. The petitioner then relies upon not only her oral communication to him but also on the record of the respondents. He states that Ms. Varsha Chandrakant Zende candidate at serial number 1 provided the petitioner with a copy of letter dated 28<sup>th</sup> April, 2016, by which, she informed respondent no. 1 about her inability to accept the appointment. Annexure 'D' is copy of this letter.

9. Then, the petitioner claims that the process of documents verification and medical examination is still in progress. The petitioner visited personally the offices of respondent nos. 1 and 2 for inquiring as to whether the wait-listed or the remaining candidates would be issued any letter or invitation to join the further process, namely of documents verification and medical examination. The petitioner, even prior to receipt of a letter from Ms. Varsha Zende, forwarded his representation dated 19<sup>th</sup> April,

2016. He also filed representations dated 11<sup>th</sup> May, 2016 and 25<sup>th</sup> May, 2016. They are also compiled together as Annexure 'E'. Thereafter, the petitioner also communicated with the second respondent commission. The petitioner made a representation initially on 19<sup>th</sup> April, 2016 and followed it up by representation dated 23<sup>rd</sup> May, 2016. Finally, the petitioner received the impugned communication. The impugned communication states that the representation addressed to respondent no. 2 was forwarded by it to respondent no. 1. The State Government, through its Law and Judiciary Department, communicated to the commission on 14<sup>th</sup> June, 2016 that in terms of Resolution No. 2 of 2014 dated 22<sup>nd</sup> January, 2014, the wait-list prepared for competitive examination is in force for a period of one year from the date of declaration of result or up to the publication of subsequent advertisement for recruitment to the post, whichever is earlier. The petitioner has also averred in para 12 of the petition that the commission published advertisement on 23<sup>rd</sup> March, 2016 inviting applications from the eligible candidates for appointment to the same post, namely of CJJD and JMFC. This advertisement is for recruitment to 131 posts. The petitioner states that the first respondent, therefore, communicated and informed the petitioner that as far as the present recruitment process is concerned, the petitioner's claim cannot be considered.

10. It is in these circumstances that the petitioner invites this court's attention to the Judicial Service Rules and the Procedural Rules of the second respondent commission. Though initially no challenge was raised to these rules, what has transpired is that on moving this writ petition filed on 10<sup>th</sup> July, 2016, a Division Bench, of which one of us (S. C. Dharmadhikari, J.) was a party, on 10<sup>th</sup> August, 2016, was informed that in an identical petition and of similarly placed candidate, the subject rules (procedural) have been challenged. At that hearing, this court's attention was invited to what is styled as contradictory provision or the dichotomy between the Procedural Rules of the commission and the Judicial Service Rules. This court's attention was also invited to Rule 20 of the Judicial Service Rules as amended up to 11<sup>th</sup> February, 2016 to submit that the MPSC Rules cannot override the Judicial Service Rules. Even in cases of silence, what would prevail are the Judicial Service Rules, is the submission. Therefore, Writ Petition No. 8210 of 2016 was allowed to be amended.

11. Now we would refer to affidavits placed on record by the contesting respondents. Before that, we refer to an additional affidavit of the petitioner, in which, the petitioner states that in terms of Rule 6(3)(b) of the the Judicial Service Rules the

recruiting authority shall prepare a wait-list equal to ten percent of the number of vacancies notified for recruitment or one, which ever is higher. Rule 6(4)(a) provides that the recruiting authority shall recommend the names of selected candidates by completing the selection process. It is in these circumstances, it is urged that it was incumbent upon the second respondent to forward the entire list of 307 candidates. There is no discretion with the recommending authority or the recruiting authority, namely the second respondent to keep back or not forward the rest of the names.

12. Then, reliance is placed on the rules framed by respondent no. 2 in the year 1981 and which were in force till 2010 in respect of the merit list and wait-list. It is submitted that the wait-list prepared by the second respondent was valid for one year from the date of declaration of result or up to the publication of subsequent advertisement for recruitment to the post, whichever is earlier. In case no further advertisements are issued, then, in that case, for a period of two years from the date of publication of merit list. To the further affidavit of the petitioner, relevant extract of the rules is annexed at Annexure 'A' In the year 2011, the commission amended the rules and declared that no waiting list should be prepared for the

competitive examination. Then, it is stated that the commission, again amended the rules in 2014. Rule 10(8)(a) of the Procedural Rules, with which we are concerned in this petition reads as under:-

“10(8)(a) In case of recruitment by Competitive Examination wherever multiple cadre posts are involved, the reserve list shall not be maintained. The posts fallen vacant due to non-acceptance of the offer of appointment by the candidates recommended, shall be filled in through subsequent Competitive Examination. When only single cadre is involved for selection by competitive examination the reserve list shall be maintained for a period of one year from the date of declaration of result or up to the publication of subsequent advertisement for recruitment to the same post “whichever” is earlier.”

13. It is submitted that the commission prepares what are styled as Rules of Procedure. That regulates the internal procedure. These are not rules framed or traceable to Article 234 of the Constitution of India. That is why they cannot override these Judicial Service Rules. Apart from reiterating some of the averments in the writ petition, what the petitioner has then sought to explain is the statement in the reply affidavit of respondent no. 1. That is that the wait-list prepared in respect of

the current or ongoing process has been exhausted in view of the publication of the advertisement dated 23<sup>rd</sup> March, 2016. The petitioner submits that the second respondent commission had published advertisement for the post of CJJD and JMFC in the year 2014 and the result of the said examination was published on 31<sup>st</sup> May, 2014. However, the MPSC published a fresh advertisement for the said posts on 3<sup>rd</sup> March, 2015 and had prepared merit list, which was inclusive of 10% wait-list. It is submitted that the MPSC had not followed Rule 10(8)(a) for the year 2014-15. The fresh advertisement is published in just 14 days of the date of declaration of results. The results were declared on 10<sup>th</sup> March, 2016 for 2014-15 examination and the advertisement has been released on 23<sup>rd</sup> March, 2016. Thus, this inherent contradiction in the procedural rules or their implementation by the commission is highlighted in this additional affidavit filed on 17<sup>th</sup> August, 2016.

14. Then we have before us the affidavits filed in reply to this petition on behalf of the Registrar General of this court.

15. It is stated in this affidavit that the Judicial Service Rules regulate the recruitment of the Maharashtra Judicial Service. Reliance is placed upon Rule 2(i), which is definition of the term “recruiting authority”. It is stated that in case of recruitment to

the post of of CJJD and JMFC, the MPSC is the recruiting authority. As per Rule 6(1)(a) in case of CJJD and JMFC, on or before 15<sup>th</sup> January every year, the recruiting authority is required to be informed about the number of existing vacancies that are likely to occur within one year. As per Rule 6(1)(b), every year the recruiting authority shall, by advertisement, invite applications from the intending candidates, who possess the qualification for filling in the vacancies. The deponent of this affidavit places reliance on the judgment/order of the Hon'ble Supreme Court of India in the case of *Malik Mazhar Sultan and Anr. vs. U. P. Public Service Commission and Ors.*<sup>1</sup>. A time frame has been provided for the appointment to the post of District Judge, Civil Judge, Senior Division and Civil Judge Junior Division and there are directions for submission of report on 31<sup>st</sup> January every year regarding the filling up of vacancies. That is how the Judicial Service Rules prescribe for recruitment process to be undertaken every year by the recruiting authority. In the present matter, for the selection process of 2015, the vacancies were informed to the Law and Judiciary Department with a request to issue necessary instructions to the MPSC. Annexure 'A' to this affidavit is a copy of the letter dated 13<sup>th</sup> January, 2015. That letter is relied upon together with Rule 6(3)(a) and

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<sup>1</sup> (2008) 17 SCC 703

(b) to submit that it is the recruiting authority who prepares the list of candidates eligible for appointment and also the wait-list. Rule 6(4)(c) of the Judicial Service Rules is relied upon to submit that on the publication of the list of candidates eligible for appointment, within one month of the preparation or publication in the official gazette, the same shall be operative for one year from the date of such publication. It is claimed that the Judicial Service Rules do not prescribe any period for the validity of the wait-list prepared by the recruiting authority. This court does not maintain any wait-list of the selection process of CJJD and JMFC. Rule 6(7) of the Judicial Service Rules is then relied upon to submit that the candidates, whose names are included in the wait-list, can be considered for appointment only after the candidates, whose names are included in the select list under Rule 6(3)(a) have been appointed and have not joined or have not been appointed for any reason. It is in these circumstances, Rule 20 is relied upon to submit that insofar as any silence maintained in the Judicial Service Rules, the provisions of the Maharashtra Civil Service Rules shall apply mutatis mutandis. Thus, the validity of the wait-list shall be governed by the provisions as made applicable by the recruiting authority, namely the MPSC.

16. Thereafter, it is submitted that certain representations

were received from the petitioner and they were forwarded to the Commission for necessary action. It is in these circumstances that the petitioner came to be informed on 27<sup>th</sup> July, 2016 by the impugned letter that the advertisement is published on 23<sup>rd</sup> March, 2016 and that is why the wait-list gets exhausted. Thus, the affidavit of respondent no. 3 does not dispute the applicability of the MPSC Procedural Rules and the stipulations therein.

17. This affidavit was filed on 5<sup>th</sup> August, 2016, pursuant to which, the petitioner filed an additional affidavit. The MPSC filed an affidavit seeking to reply the statements made in the writ petition. It highlights the role of the MPSC. It states that it has power to frame its procedural rules and make amendments thereto from time to time. That is because the commission desires to achieve more transparency, impartiality, rationality and reasonableness in its affairs. In the meeting of the commission held on 8<sup>th</sup> August, 2013, the issue of wait-list was discussed. The commission states that various examinations are conducted by the commission and names of the selected candidates therein are recommended by the commission to the concerned departments of the State Government. However, sometimes, some of the selected candidates do not accept the appointments and in such cases, since wait-list is not maintained,

further names of the candidates from the merit list could not be recommended to the State Government. This resulted in number of vacancies occurring in the Government posts and for long time. To fill up such vacant posts, fresh selection process was required to be conducted, which causes financial and administrative burden on the Government. That is how it was decided to introduce the practice of using the merit-list and a waiting list. Rule 10(8)(a) was incorporated pursuant to this decision taken in the meeting held on 8<sup>th</sup> August, 2013. Thereafter, a standing order was issued. Since the Judicial Service Rules are silent about the period of waiting list, the stipulations in the MPSC Procedural Rules would apply. The petitioner being placed at serial number 228 in the merit list, does not, therefore, have any right much less vested to be appointed. The life of that wait-list comes to an end on publication of the advertisement.

18. For all these reasons, it is submitted that the writ petition be dismissed.

19. It is on this material that we have heard both writ petitions and when they were pending, one more petition was moved by Mr. Umesh Mankapure being Writ Petition No. 10576 of 2016 raising identical challenge, but at the instance of another candidate. That candidate was also placed in the list, but after

serial number 227. His name appears at serial number 231. In para 13 of this petition, the petitioner relies upon a notification issued by the State on 25<sup>th</sup> July, 2016 confirming appointment of only 213 candidates for the post of JMFC. Though 227 posts were to be filled in, in terms of the advertisement, but 227 appointments have not been made. The reasons, according to this petitioner, are best known only to the authorities. He also, therefore, submits that this court should issue appropriate declaration.

20. Mr. Avhad learned advocate appearing for the petitioner in Writ Petition No. 8210 of 2016, after taking us through the petition paper book including all annexures and the impugned letter/communication submits that the petitioner is placed at serial number 228 of the merit list. If that is reckoned to be a composite list and comprising of names of both, those eligible in order of merit and those eligible but could not be placed in the number of vacancies notified, then, that should be construed as the wait-list. In the present case, the candidate at serial number 1 does not accept the appointment. This would, therefor, cause a vacancy. That vacancy has to be filled in by operating this composite list. The petitioner is requesting to operate the list in this manner. That has not been replied by the second respondent

commission. The reply of the Law and Judiciary Department at page 65 relying on the MPSC Procedural Rules and the factum of the fresh advertisement dated 23<sup>rd</sup> March, 2016 being released means that the Law and Judiciary Department has given a go by or has completely frustrated the mandate of the Judicial Service Rules. No Procedural Rules of the MPSC can override the substantive rules like the Judicial Service Rules. Our attention has been invited to Rule 6(3)(a) and (b), Rule 6(4)(a) to (c) and Rule 6(7) of the Judicial Service Rules to urge that it is incorrect to conclude that there is no wait-list contemplated by the Judicial Service Rules. The candidates whose names are included in the wait-list shall be considered for appointment after the candidates whose names are included in the list published under sub-clause (a) of sub-rule (3) of Rule 6 have been appointed and have not joined or have not been appointed for any reason are the words and expressions appearing in Rule 6(7). That has not been perused at all. In complete ignorance of this sub-rule (7) of Rule 6, it is communicated that the fresh advertisement having been inserted, the select list comes to an end. It cannot be that the wait-list gets exhausted would mean that the petitioners are ineligible. The wait-list and a composite list is contemplated by Rule 6(3)(a). By Rule 6(4)(c), the words “the lists so prepared” appear. Once this word is used in plural, then, it contemplates

both, the select list and the wait-list to operate for a period of one year from the date of publication. If that is the clear stipulation in the Judicial Service Rules, then, anything contrary thereto cannot be allowed to stand. No reliance can be placed on Rule 20 of the Judicial Service Rules. One Rule cannot be read in isolation to defeat the mandate of another specific binding Rule and direction therein. The Judicial Service Rules have to be read as a whole and in the entirety. So read, Rule 20, which is a residuary provision can in no circumstances be relied upon to deny the request of the petitioners. It is in these circumstances that Mr. Avhad would urge that at least in the case of composite list as is subject of the present petition, this court must issue declarations as prayed. Even if fresh advertisement is issued, this court has ample power to interfere with that process and direct that filling up vacancies shall be as per the list so published and in pursuance of the earlier advertisement in the year 2015. The period of one year has admittedly not expired from the date of publication of that list. In the circumstances, Mr. Avhad would submit that going by the mandate of Articles 233, 234 and 235, it is permissible for us to issue such directions and grant reliefs.

21. In support of his submissions, Mr. Avhad has relied upon the following decisions:-

(i) Mr. Udaysing Jalamsing Valvi vs. The Secretary, District Selection Committee and Anr., **Writ Petition No. 4257 of 2013.**

(ii) Sasidhar Reddy Sura vs. State of Andhra Pradesh and Ors., **AIR 2014 SC 444.**

22. Thus, the emphasis of Mr. Avhad is that the composite merit list of the MPSC includes recommended candidates and wait-listed candidates. Even with regard to the recommended candidates, it is not for the MPSC to take any further steps. It is merely a recruiting authority. It is not a recruiting and appointing authority. Therefore, it merely forwards the names after it receives the requisitions from the Government. Once it forwards the list, its task or job comes to an end. It has a very limited role. It is not the authority contemplated by Article 233 of the Constitution of India. Therefore, any contradiction and dichotomy between the MPSC Procedural Rules and Judicial Service Rules should be resolved by upholding the Judicial Service Rules and not defeating them. The difference in the two Rules, therefore, cannot be lost sight of. In any event, the MPSC Rules do not contemplate a composite list. Therefore, we must go by the mandate of Rule 6(7) of the Judicial Service Rules. It does not make any distinction between a merit list and wait-list.

23. While adopting these contentions of Mr. Avhad,

Mr.Mankapure would submit that in the present case, injustice is writ large. The proceedings and which have been placed on record suffer from complete arbitrariness and total non application of mind. In the present case, merit list was published and within 10 days thereafter, a fresh advertisement has been issued. Mr. Mankapure submits that somebody and sitting at the State and the MPSC level is taking unilateral decisions. It is completely defeating the constitutional mandate. The constitutional mandate cannot be allowed to be defeated or frustrated by the executive by interfering with the process of appointment in the subordinate judiciary. If that is how the constitutional mandate is carved out, then, none has an authority to defeat it. Mr. Mankapure has, therefore, emphasized that the juridical service is distinct from other services. The judicial officer is not an employee of the Government. If he cannot be treated as employee of the Government and his status is granted and recognized in the Constitution, then, none can tinker or interfere therewith. This court, therefore, must strike down the MPSC Rule to the extent it overrides the Judicial Service Rules. Mr.Mankapure has relied upon the following judgments:-

(i) S. D. Joshi and Ors. vs. High Court of Judicature at Bombay and Ors., **AIR 2011 SC 848**.

(ii) Sanjay Singh and Anr. vs. U. P. Public Service

Commission, Allahabad and Anr., **AIR 2007 SC 950.**

(iii) Neelima Shangla vs. State of Haryana and Ors., **AIR 1987 SC 169.**

(iv) Manoj Manu and Anr. vs. Union of India and Ors., **(2013) 12 SCC 171.**

24. The contesting respondents include the MPSC and the State. Ms. Bhende appearing on behalf of them submits that there is never any attempt made till date nor the MPSC has been ever charged with trying to interfere with the work of the judiciary. The MPSC is aware of its limited role. The MPSC is assisting the judiciary in early completion of the recruitment process and in proper, scientific and organized manner. The MPSC holds examinations regularly for enabling the State to make appointment to civil services or to civil posts. Therefore, for its experience, it has been chosen to assist in recruitment to the Judicial Service of the State. If that is how the term “recruiting authority” is defined in the Judicial Service Rules, then, there is no question of the Procedural Rules overriding the Judicial Service Rules. It is only when there is a silence in the Judicial Service Rules about some aspects that assistance is taken of the Procedural Rules of the commission. This should not be understood as interfering with the constitutional mandate noted by us. She, therefore, invited our attention to Rule 20 of the Judicial Service Rules and the MPSC Procedural Rules. She

submits that there is a definite object and purpose as explained in the affidavit of the MPSC for issuing Resolution No. 2 of 2014. There is nothing contrary, much less contradictory, in the two rules. The two rules should be read harmoniously. They can stand together and therefore, the writ petition should be dismissed. The writ petition should also be dismissed because mere insertion of their name in the merit list does not create any right in favour of the petitioners. Now that the fresh advertisement has been issued and that too in March, 2016, this court should not interfere in writ jurisdiction at the instance of the present petitioners. More so when that jurisdiction is both, equitable and discretionary. It is extraordinary as well. For these reasons and when justice is not on the side of the petitioners, the writ petition should be dismissed.

25. Mr. Nerlekar appearing for the High Court fairly invites our attention to the affidavit filed by the Registrar (Legal). He submits that the understanding of the High Court is bonafide, inasmuch as it is of the view that Rule 20 of the Judicial Service Rules can be relied upon to take care of the situation in the present case. As far as the other arguments of Ms. Bhende, he adopts them.

26. For properly appreciating the rival contentions, we must

first outline the settled principles.

27. In a very recent decision in the case of *Kulwinder Pal Singh and Anr. vs. State of Punjab and Ors.*<sup>2</sup> a two Judge Bench of the Hon'ble Supreme Court of India reiterated the settled position. It referred to this settled legal position in paragraphs 11 to 14 of this judgment, which read thus:-

"11. It is fairly well-settled that merely because the name of a candidate finds place in the select list, it would not give him indefeasible right to get an appointment as well. The name of a candidate may appear in the merit list but he has no indefeasible right to an appointment (vide *Food Corporation of India and Ors. v. Bhanu Lodh and Ors.*, (2005) 3 SCC 618 (AIR 2005 SC 2775); *All India SC & ST Employees' Association & Anr. v. A. Arthur Jeen & Ors.* (2001) 6 SCC 380 (AIR 2001 SC 1851) and *Union of Public Service Commission v. Gaurav Dwivedi and Ors.* (1999) 5 SCC 180 : (AIR 1999 SC 2137).

12. This Court again in the case of *State of Orissa & Anr. v. Rajkishore Nanda and Ors.* (2010) 6 SCC 777 (AIR 2010 SC 2100, paras 13, 15), held as under:

*"14. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate.*

*16. A select list cannot be treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required..."*

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<sup>2</sup> AIR 2016 SC 2281

13. In *Manoj Manu and Anr. v. Union of India & Ors.* 2013 (10) SCALE 204: (2013) 12 SCC 171 (AIR 2014 SC (Supp) 927), it was held that merely because the name of a candidate finds place in the select list, it would not give the candidate an indefeasible right to get an appointment as well. It is always open to the government not to fill up the vacancies, however such decision should not be arbitrary or unreasonable. Once the decision is found to be based on some valid reason, the court would not issue any mandamus to government to fill up the vacancies. As noticed earlier, because twenty two other candidates were declared successful by the Supreme Court pertaining to the selection of the years 1998, 1999, 2000 and 2001 as Civil Judges (Junior Division), they were to be accommodated, as rightly resolved by the Administrative Committee in the meeting dated 06.07.2011. The three resultant vacancies of the year 2007- 2008 stood consumed with the joining of the said seventeen candidates and the same could not be filled up from the select list of that year. The decision of the Administrative Committee observing that the three resultant vacancies stood consumed is based on factual situation arising there and cannot be said to be arbitrary.

14. As noticed earlier, as against twenty seven posts of general category advertised for the year 2007-2008, thirty one general category candidates have joined and are working. In *Rakhi Ray And Ors. vs. High Court of Delhi And Ors.* (2010) 2 SCC 637 (AIR 2010 SC 932 paras 14, 15), observing that the vacancies cannot be filled up over and above the number of vacancies advertised, recruitment of the candidates in excess of the notified vacancies would amount to denial of equal opportunity to eligible candidates, this Court held as under:-

"12. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, the process of selection comes to an end. Waiting list, etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted

select list/ waiting list becomes meaningless and cannot be pressed in service any more.”

28. Thus, it is too well settled and hardly justifies multiplicity of precedents, that merely because the name of a candidate finds place in the select list, it would not give him indefeasible right to get an appointment. The name of a candidate may appear in the merit list, but he has no fundamental right to an appointment. We, therefore, need not dwell upon this aspect any further, given the above authoritative pronouncement. What we have to emphasize and what is of paramount importance can be best done by following the view of the Hon'ble Supreme Court of India in the case of *State of Bihar and Anr. vs. Bal Mukund Sah and Ors*<sup>3</sup>. A Constitution Bench (Five Judge Bench) of the Hon'ble Supreme Court of India had to consider the constitutional validity of the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991 and particularly section 4 thereof which sought to impose reservation in direct recruitment to the posts in the judiciary of the state subordinate to the High Court of Patna being the post of District Judge as well as the posts in the lower judiciary. These recruitments and appointments were governed by Bihar Judicial Service Rules, 1955. The Majority Judgment (3:2) concluded that as far as the appointments even in the

<sup>3</sup> AIR 2000 SC 1296

judicial posts subordinate to High Court, the State Government cannot prescribe any reservation. The State's power to prescribe reservation in judicial posts is taken away by Article 309 of the Constitution of India. That power of the State to make appointments is circumscribed to the extent special provisions are made regarding judicial service. In reiterating the constitutional status and role of the judiciary, the Hon'ble Supreme court concluded thus:-

19. It is pertinent to note that independently of general provisions of Article 309, the Constitution has made special provisions for certain Services. Even if they may be part of public services, still separate Constitutional schemes are envisaged for regulating recruitment and conditions of services of officers governed by such Services. Let us have a glance at such specially dealt with Services.

20. Part VI of the Constitution dealing with the States, separately deals with the executive in Chapter II, the State Legislature under Chapter III and thereafter Chapter IV dealing with the Legislative Powers of the Governor and then follows Chapter V dealing with the High Courts in the States and Chapter VI dealing with the Subordinate Courts. It is in Chapter VI dealing with the Subordinate Courts that we find the provision made for appointment of District Judges under Article 233, recruitment of persons other than the District Judges to the Judicial Services under Article 234 and also Control of the High Court over the Subordinate Courts as laid down by Article 235. Article 236 deals with the topic of Interpretation and amongst others, defines by sub-article (b) the expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge. It becomes, therefore, obvious that the framers of the Constitution separately dealt with Judicial Services of the State and made exclusive provisions regarding recruitment to the

posts of District Judges and other civil judicial posts inferior to the posts of the District Judge. Thus these provisions found entirely in a different part of the Constitution stand on their own and quite independent of part XIV dealing with Services in general under the State. Therefore, Article 309, which, on its express terms, is made subject to other provisions of the Constitution, does get circumscribed to the extent to which from its general field of operation is carved out a separate and exclusive field for operation by the relevant provisions of Articles dealing with Subordinate Judiciary as found in Chapter VI of Part VI of the Constitution to which we will make further reference at an appropriate stage in the later part of this judgment.

21. We may also refer at this stage to Article 146 dealing with Services under the Supreme Court which lays down the procedure for appointment of officers and servants of the Supreme Court and provides under sub-article (2) thereof that subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the court authorised by the Chief Justice of India to make rules for the purpose. Similar provision is found in Article 229 dealing with recruitment of officers and servants and the expenses of the High Courts. Sub-article (2) thereof lays down the rule making power of the Chief Justice of the Court concerned or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose subject to the provisions of any law made by any Legislature of the State. Article 148 deals with Comptroller and Auditor-General of India. Sub-article (5) thereof deals with rule making power of the President regarding the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General subject to any provisions of the Constitution or any law made by the Parliament in this connection. Article 98 deals with Secretariat of Parliament. Sub-article (3) thereof provides until provision is made by Parliament under clause (2), the President may, after consultation with the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House of the People or the Council of States, and any rules so made

shall have effect subject to the provisions of any law made under the said clause. Similarly, for Secretariat of State Legislature, we find Article 187 which deals with separate secretariat staff for the House or each House of the Legislature of a State. Sub-article (3) thereof runs parallel to sub-article (3) of Article 98 and provides that until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council and any rules so made shall have effect subject to the provisions of any law made under the said clause. Article 324 is found in Part XV which deals with Superintendence, direction and control of elections to be vested in an Election Commission. Sub-article (5) thereof provides that subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine.

.....

25. We may also refer to Part XI of the constitution, especially Chapter I dealing with Legislative Relations laying down the Distribution of Legislative Powers. Article 245 deals with Extent of Laws made by Parliament and by the Legislatures of States. Sub-article (1) thereof provides that Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Thus, the legislative powers of Parliament and the Legislature of the State are expressly made subject to other provisions of the Constitution. Similarly, Article 246 laying down the category of subject-matter of laws made by Parliament and by the Legislatures of States enumerated in Lists I, II and III of the Seventh Schedule will also have to be read subject to Article 245. Meaning thereby, if other provisions of the Constitution cut down or exclude the Legislative powers of Parliament or State Legislature qua given topics, then those other provisions have to be given their full play and effect.

26. So far as recruitment to District and Subordinate

Judiciary is concerned, we have therefore, to turn to the twin Articles found in Chapter VI of Part VI dealing with Subordinate Courts. The relevant two Articles read as under :

233. Appointment of Judges: (1) Appointment of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

234. Recruitment of persons other than district judges to the judicial service: Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. (Emphasis supplied)

Article 233 dealing with appointment of District Judges, on its own express terminology projects a complete scheme regarding the appointment of persons to District Judiciary as District Judges. In the present appeals, we are concerned with direct recruitment to the cadre of District Judges and hence sub-article (2) of Articles 233 becomes relevant. Apart from laying down the eligibility criterion for candidates to be appointed from the Bar as direct District Judges the said provision is further hedged by the condition that only those recommended by the High Court for such appointment could be appointed by the Governor of the State. Similarly, for recruitment of judicial officers other than District Judges to the Judicial Service at lower level, complete scheme is provided by Article 234 wherein the Governor of the State can make such appointments in accordance with the rules framed by him after consulting with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. So far as the Public Service Commission is concerned, as seen from Article 320, the procedure for recruitment to

the advertised posts to be followed by it is earmarked therein. But the role of the Public Service Commission springs into action after the posts in a cadre are required to be filled in by direct recruitment and for that purpose due intimation is given to the Commission by the State authorities. They have obviously to act in consultation with the High Court so far as recruitment to posts in Subordinate Judiciary is concerned. Of course, it will be for the High Court to decide how many vacancies in the cadre of District Judges and Subordinate Judges are required to be filled in by direct recruitment so far as the District Judiciary is concerned and necessarily only by direct recruitment so far as Subordinate Judiciary is concerned. This prime role of the High Court becomes clearly discernible from Art. 235 which deals with the control of the High Court over the Subordinate Judiciary and also of Subordinate Courts. The said Article provides as under:

“235. Control over subordinate courts. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.”

It is in the light of the aforesaid relevant scheme of the Constitution that we now proceed to tackle the main controversy posed for our consideration.

.....

28. Since it is held that Section 4 of the impugned Act, on its express terms, covers direct recruitment to posts in the cadre of District Judiciary as well as to Subordinate Judiciary in the State of Bihar, moot question arises as to whether Section 4 can be sustained on the touchstone of the relevant Constitutional scheme governing the recruitment and appointments to these posts. For coming to the grip of this problem, we have to keep in view the salient features of the Constitution emanating from the Directive Principles of State Policy

as laid down by Article 50 which underscores the felt need of separation of the Judiciary from the Executive. For achieving that purpose, the Constitution has made separate provisions regarding the recruitment and appointment to the cadre of District Judges as well as the Subordinate Judiciary as found in Chapter VI of Part VI of the Constitution and, as seen earlier, these provisions are conspicuously not included in part XIV dealing in general with Services under the Union and the States. Article 309 itself, which is of general nature, dealing with regulation of Recruitment and conditions of Service of persons serving in the Union or a State is expressly made subject to other provisions of the Constitution.

29. The first part of Article 235 itself lays down that it is for the High Court to control the District Courts and Courts subordinate thereto and in exercise of that control vesting in the High Court, regulation of posting and promotions and granting of leave to persons belonging to the Judicial Services has to be done by the High Court. It is, of course, true that in the second part of Article 235 judicial officers already appointed to the Service have their statutory right of appeal and the right to be dealt with regarding other service conditions as laid down by any other law for the time being in force, expressly protected. But these provisions of the second part only enable the Governor under Article 309, in the absence of any statutory enactment made by the competent Legislature for regulating the conditions of service of judicial officers who are already recruited and have entered and become part and parcel of the State service, to promulgate appropriate rules on the subject. But so far as the entry points are concerned, namely, recruitment and appointment to the posts of Presiding Officers of the courts subordinate to the High Courts, only Articles 233 and 234 would govern the field. Article 234 lays down the procedure and the method of recruiting judicial officers at grass-root level being Subordinate Judges and Munsiffs as laid down by the 1955 Rules. These Rules are also framed by the Governor of Bihar in exercise of his powers under Article 234 obviously after the consultation of the High Court and the Public Service Commission. Rules regarding the procedure of selection to be followed by the State Public Service Commission as found in Rules 4 to 17 deal with the method to be adopted by the Public Service Commission while selecting candidates who offer

their candidature for the posts advertised to be filled in. These Rules obviously require consultation with the Commission on the procedural aspect of selection process. But so far as the High Court is concerned, its consultation becomes pivotal and relevant by the thrust of Article 233 itself as it is the High Court which has to control the candidates, who ultimately on getting selected, have to act as Judges at the lowest level of the Judiciary and whose posting, promotion and grant of leave and other judicial control would vest only in the High Court, as per Article 235 first part, once they enter the judicial service at grass-root level. Thus consultation of the Governor with the High Court under Article 234 is entirely of a different type as compared to his consultation with the Public Service Commission about procedural aspect of selection. So far as direct recruitment to the posts of District Judges is concerned, Article 233 sub-article (2) leaves no room for doubt that unless the candidate is recommended by the High Court, the Governor cannot appoint him as a District Judge. Thus Articles 233 and 234, amongst them, represent a well-knit and complete scheme regulating the appointments at the apex level of District Judiciary, namely, District Judges on the one hand and Subordinate Judges at the grass-root level of Judiciary subordinate to the district court. Thus Subordinate Judiciary represents a pyramidal structure. At base level i.e. grass-root level are the Munsiffs and Magistrates whose recruitment is governed by Article 234. That is the first level of the Judiciary. The second level represents already recruited judicial officers at grass-root level, whose working is controlled by the High Court under Article 235 first part. At the top of this pyramid are the posts of District Judges. Their recruitment to these posts is governed by Article 233. It is the third and the apex level of Subordinate Judiciary.

30. It has also to be kept in view that neither Article 233 nor Article 234 contains any provision of being subject to any enactment by appropriate Legislature as we find in Articles 98, 146, 148, 187, 229(2) and 324(5). These latter Articles contain provisions regarding the rule making power of the concerned authorities subject to the provisions of the law made by the Parliament or Legislature. Such a provision is conspicuously absent in Articles 233 and 234 of the Constitution of India. Therefore, it is not possible to agree with the contention of learned counsel for the

appellant-State that these Articles only deal with the rule making power of the Governor, but do not touch the legislative power of the competent Legislature. It has to be kept in view that once the Constitution provides a complete Code for regulating recruitment and appointment to District Judiciary and to Subordinate Judiciary, it gets insulated from the interference of any other outside agency. We have to keep in view the scheme of the Constitution and its basic framework that the Executive has to be separated from the Judiciary. Hence, the general sweep of Article 309 has to be read subject to this complete Code regarding appointment of District Judges and Judges in the Subordinate Judiciary.

31. In this connection, we have also to keep in view Article 245 which, in its express terms, is made subject to other provisions of the Constitution which would include Articles 233 and 234. Consequently, as these twin Articles cover the entire field regarding recruitment and appointment of District Judges and Judges of the Subordinate Judiciary at base level pro tanto the otherwise paramount legislative power of the State Legislature to operate on this field clearly gets excluded by the Constitutional scheme itself. Thus both Articles 309 and 245 will have to be read subject to Articles 233 and 234 as provided in the former Articles themselves.

.....

34. It has also to be kept in view that judicial independence is the very essence and basic structure of the Constitution. We may also usefully refer to the latest decision of the Constitution Bench of this Court in Registrar (Admn.), High Court of Orissa, Cuttack etc. vs. Sisir Kanta Satapathy (Dead) by LRs., (1999) 7 SCC 725: (1999 AIR SCW 3246: AIR 1999 SC 3265: 1999 Lab IC 3243), wherein K.Venkataswami, J., speaking for the Constitution Bench, made the following pertinent observations in the very first two paras regarding Articles 233 to 235 of the Constitution of India :

“An independent judiciary is one of the basic features of the Constitution of the Republic. Indian Constitution has zealously guarded independence of judiciary. Independence of judiciary is doubtless a basic structure of the Constitution but the said concept of

independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution.

The Constitution Bench in the aforesaid decision also relied upon the observations of this Court in All India Judges Association & Ors.etc. (supra), wherein on the topic of regulating the service conditions of Judiciary as permitted by Art. 235 read with Art. 309, it had been observed as under:

.....the mere fact that Art. 309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary does not mean that the judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any role to the judiciary in that behalf, for theoretically it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary.”

In view of this settled legal position, therefore, even while operating in the permissible field of regulating other conditions of service of already recruited judicial officers by exercising power under Art. 309, the concerned authorities have to keep in view the opinion of the High Court of the concerned State and the same cannot be whisked away.

35. In order to fructify this Constitutional intention of preserving the independence of Judiciary and for fructifying this basic requirement, the process of recruitment and appointment to the District Judiciary with which we are concerned in the present case, is insulated from outside legislative interference by the Constitutional makers by enacting a complete Code for that purpose, as laid down by Articles 233 and 234. Consultation with the High Court is, therefore, an inevitable essential feature of the exercise contemplated under these two Articles. If any outside independent

interference was envisaged by them, nothing prevented the founding fathers from making Articles 233 and 234 subject to the law enacted by the Legislature of States or Parliament as was done in the case of other Articles, as seen earlier. In the case of State of Kerala vs. Smt.A.Lakshmikutty & Ors., (1986) 4 SCC 632: (AIR 1987 SC 331 : 1987 Lab IC 447), a two member Bench of this Court, speaking through Sen,J., placing reliance on the Constitution Bench judgment of this Court in Chandra Mohan vs. State of U.P., (1967) 1 SCR 77 (AIR 1966 SC 1987, made the following pertinent observations in paras 22 to 25 at pages 647-648, which read as under :

“22. The heart of the matter is that consultation between the State Government and the High Court in the matter of appointment of District Judges under Art. 233(1) of the Constitution must be real, full and effective. To make the consultation effective, there has to be an interchange of views between the High Court and the State Government, so that any departure from the advice of the High Court would be explained to the High Court by the State Government. If the State Government were simply to give lip service to the principle of consultation and depart from the advice of the High Court in making judicial appointments without referring back to the High Court the difficulties which prevent the government from accepting its advice, the consultation would not be effective and any appointment of a person as a District Judge by direct recruitment from the bar or by promotion from the judicial services under Art. 233(1) would be invalid. Unless the State Government were to convey to the High Court the difficulties which prevent the government from accepting its advice by referring back the matter the consultation would not be effective.

23. Indubitably, the power of appointment of

persons to be District Judges conferred on the Governor, meaning the State Government, under Art. 233(1) in consultation with the High Court is an executive function. It has been settled by a long line of decisions of this Court starting from Chandra Mohan v. State of U.P. to M.M.Gupta v. State of J & K that the power of the State Government is not absolute and unfettered but is hedged in with conditions. The exercise of the power of the Governor under Art. 233(1) in the matter of appointment of District Judges is conditioned by consultation with the exercise of the power that the power can only be exercised in consultation with the High Court.

24. Appointment of persons to be, and the posting and promotion of, District Judges in any State, shall be made by the Governor of the State under Art. 233(1) in consultation with the High Court exercising jurisdiction in relation to such State. Sub-article (2) thereof provides that a person not already in the service of the Union or of the State shall only be eligible to be appointed as a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment. It is therefore obvious that eligibility of appointment of persons to be District Judges by direct recruitment from amongst the members of the bar depends entirely on the recommendation of the High Court. The State Government has no power to appoint any person as a District Judge except from the panel of names forwarded by the High Court. As stated, the decisions starting from [Chandra Mohan v. State of U.P.](#) have established the principle as a rule of law, that consultation between the Governor and the High Court in the matter of appointment of District Judges under [Article 233\(1\)](#) must not be empty formality but real, full and effective.

25. In Chandra Mohan v. State of U.P. Subba Rao, C.J. speaking for a unanimous court observed :

The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in

consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the Judicial Service or to the bar, to be appointed as a District Judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein.

To the same effect are the decisions in [Chandramouleshwar Prasad v. Patna High Court](#), (1969) 3 SCC 56 : (AIR 1970 SC 370), High Court of P & H v. State of Haryana, (1975) 1 SCC 843 : (AIR 1975 SC 613) : 1975 Cri LJ 375), [A.Panduranga Rao v. State of A.P.](#), (1975) 4 SCC 709 : (AIR 1975 SC 1922 : 1975 Lab IC 1452) and [M. M. Gupta v. State of J. & K.](#) (1982) 3 SCC 412 : (AIR 1982 SC 1579 : 1982 Lab IC 1970).

36. It becomes, therefore, obvious that no recruitment to the post of a District Judge can be made by the Governor without recommendation from the High Court. Similarly, appointments to Subordinate Judiciary at grass-root level also cannot be made by the Governor save and except according to the rules framed by him in consultation with the High Court and the Public Service Commission. Any statutory provision bypassing consultation with the High Court and laying down a statutory fiat as is tried to be done by enactment of Section 4 by the Bihar Legislature has got to be held to be in direct conflict with the complete Code regarding recruitment and appointment to the posts of District Judiciary and Subordinate Judiciary as permitted and envisaged by Articles 233 and 234 of the Constitution. Impugned Section 4, therefore, cannot operate in the clearly earmarked and forbidden field for the State Legislature so far as the topic of recruitment to District Judiciary and Subordinate Judiciary is concerned. That field is carved out and taken out from the operation of the general sweep of Art. 309.

37. It is, of course, true as laid down by a catena of decisions of this Court, that topics of constitution of

courts and services, laying down of rules regarding the conditions of service other than those expressly placed within the jurisdiction of the High Court by Articles 233 and 235, providing for age of superannuation or other retirement benefits to judicial officers, fixing pay scales, diversification of cadres may form part of general recruitment and conditions of services falling within the spheres of Governors rule making power under Art. 309 read with second part of Art. 235 or may even be made subject matter of legislation by competent Legislature in exercise of its legislative powers under entry 41 of List II or for that matter entry 11A of List III of the Seventh Schedule. But save and except this permitted field, the State Legislature cannot enter upon the forbidden field expressly reserved for consultation with the High Court by the thrust of Articles 233 and 234 so far as the initial entry point of recruitment to judicial service at grass root level or at the apex level of the District Judiciary is concerned. A three-Judge Bench of this Court in the case of [A.Panduranga Rao vs. State of Andhra Pradesh & Ors.](#), AIR 1975 SC 1922, speaking through Untwalia, J., considered the question whether any one can be appointed by the Governor as a District Judge without being recommended by the High Court. Relying on the Constitution Bench decision of this Court in Chandra Mohans case (supra) in para 7 of the Report, observations were made as under:

“There are two sources of recruitment, namely, (i) service of the Union or the State, and (ii) members of the Bar. The said Judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court.”

And thereafter following pertinent observations were made in para 8, which read as under:

“A candidate for direct recruitment from the Bar does not become eligible for appointment without the recommendation of the High Court. He becomes eligible only on such recommendation under clause (2) of Art. 233. The High Court in the judgment under appeal felt some difficulty in appreciating the meaning of the word recommended. But the literal meaning given in the Concise Oxford Dictionary is quite simple and

apposite. It means suggest as fit for employment. In case of appointment from the Bar it is not open to the Government to choose a candidate for appointment until and unless his name is recommended by the High Court.”

It is, therefore, obvious that the State Legislature has no role to play while controlling appointments of District Judges under Art. 233 or appointment of Civil Judges to Subordinate Judiciary at grass-root level under the District Judiciary and it is only the Governor who is entrusted with the said task which he has to undertake after consultation with the High Court and by framing appropriate rules for recruitment to Judiciary at grass-root level as enjoined by Art. 234 and can only act on recommendation by the High Court for direct recruitment from the Bar for being appointed as District Judges as laid down by Art. 233 sub-article (2). There is no third method or third authority which can intervene in the process or can have its say, whether legislative authority or executive authority, as the case may be, independently of the complete scheme of such recruitment as envisaged by the aforesaid two Articles. It is, therefore, difficult to appreciate the contention of learned senior counsel for the appellant-State that paramount legislative power of the State Legislature stands untouched by the scheme of the aforesaid two Articles of the Constitution.

29. Thus, in the main judgment delivered by His Lordship Hon'ble Mr. Justice S. B. Majmudar and the views expressed in the concurring orders and judgments by Hon'ble Mr. Justice G. B. Pattanaik and U. C. Banerjee, it has been held that under Article 234, the rule making power of the Governor is hedged in by consultation with the High Court and the Public Service Commission. So far as the Public service Commission is concerned, as per Article 320, sub-article (4), it is not required to be consulted in respect of the manner in which any provision

referred to in clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335. Consultation with the High Court as envisaged by Article 234 is for fructifying the constitutional mandate of preserving the independence of judiciary, which is its basic structure. The Public Service Commission has no such constitutional imperative to be fulfilled. The scope of examining body's consultation can never be equated with that of consultation with the appointing body whose agent is the former.

30. Chapter VI of the Constitution of India is titled as "Subordinate Courts" and opens with Article 233 dealing with appointment of District Judge. Thereunder, appointment of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. Clause (2) of Article 233 is not relevant for our purpose. Similarly, we would not refer to Article 233A. Article 234 is the relevant Article for us. That deals with recruitment of persons other than District Judge to the judicial service. Appointments of persons other than District Judge to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after

consultation of the State Public Commission and with the High Court exercising jurisdiction in relation to such State. Article 235 clarifies that absolute control over subordinate courts shall be that of the High Court. Article 236 entitled as “interpretation” defines both expressions “District Judge” and “Judicial Service”. The expression “judicial service” means a service consisting exclusively of persons intended to fill the post of District Judge and other judicial posts inferior to the post of District Judge.

31. The scheme is therefore that these Articles are not made subordinate to or subject to any other provision of the Constitution of India. In juxtaposition to this, Article 309 opens with the words “subject to the provisions of the Constitution”. Once these words “subject to the provisions of this Constitution” are referred by the Hon’ble Supreme Court in the above authoritative pronouncement, that is to conclude that Article 309 would be subject to Articles 233 to 235. This, therefore, does not mean that insofar as judicial service is concerned, the State has no power to deal in matters covered by the above referred Articles as far as subordinate judiciary. The Governor’s power is to be exercised after consultation with the Public Service Commission and the High Court. However, the degree of this consultation is distinct and separate. Therefore, it is not

permissible to agree with the view and entertained generally that the MPSC plays a prominent role. Reliance placed by Ms. Bhende on the Judicial Service Rules and particularly the definitions set out of the terms “commission” and “recruiting authority” is, therefore, not proper and wholly sound in law. The term “commission” has been defined. However, the term “recruiting authority” means the High Court or the commission as the case may be. Therefore, one cannot say that the High Court and the MPSC play similar roles. The proviso to Article 309 and the Article having been understood in the above perspective, it must not dilute the mandate of Articles 233 to 235 of the Constitution of India. It is, therefore, impermissible for the MPSC to take any steps or measures, which would interfere with the independence and the distinct superior authority of the High Court. It is merely assisting the High Court and not seeking to replace it in the matters of recruitment. Once Articles 233 to 236 are read in the manner indicated by the Hon’ble Supreme Court of India, then, it is apparent that in the recruitment of persons in judicial service, the High Court has absolute authority in matters covered by these Articles. Article 233 and 234 deal with appointment of District Judge and persons other than District Judge. The High Court's role and duty therein cannot be taken over or assumed by any other authority. The Procedural Rules of the MPSC can never

be said to be overriding the mandate contained in Judicial Service Rules.

32. The Judicial Service Rules contains the definition of the term “service” and it is defined to mean the Maharashtra Judicial Service. It also has several Chapters. By chapter II, the “Constitution of Service” is provided and spelt out. The entire service comprises and consist of cadres specified in column (2) of the Schedule appended to Rule 1(2)(3). By Chapter III, recruitment is dealt with. The appointing authority, in rule 4, for the cadre of District Judges and Civil Judge, Junior Division, shall be the Governor and for promotion to the cadre of Senior Civil Judges shall be the High Court. Rule 5 provides for method of recruitment, qualification and age limit. Then, comes Rule 6, which reads as under:-

**“6. Recruitment by Nomination**

(1)(a) On or before the 15th January of every year in case of the Civil Judge, Junior Division and in case of District Judges the 31st March of every year, the Recruiting Authority shall be informed of the number of existing vacancies and the vacancies that are likely to occur within one year for the post of Civil Judge, Junior Division and District Judge.

(b) Every year the Recruiting Authority shall, by advertisement in the Official Gazette and in at least two newspapers, invite applications in such form as it may determine, for intending candidates, who possess the qualifications for filling in the vacancies.

(c) For the purpose of shortlisting the candidates, the

Recruiting Authority may, if necessary, hold preliminary written examination comprising of multiple choice objective type questions, which can be scrutinized by computers and call upon the candidates obtaining the cut-off marks, as may be fixed by the Recruiting Authority, to appear for final written examination, maintaining the ratio of 1:10 of the available vacancies to the successful candidates:

Provided that if there are more than one candidates who have secured identical cut-off marks as fixed by the Recruiting Authority for maintaining ratio of 1:10, all such candidates shall be called upon to appear for final written examination.

(d) (i) (a) The Recruiting Authority shall hold written examinations in Civil Law and Criminal Law, carrying 100 marks each, having duration of 3 hours each, respectively, for the post of Civil Judge, Junior Division

(b) The Recruiting Authority shall hold Written examination consisting of one or more papers carrying total 200 marks for the post of District Judge to be filled up by nomination.

(ii) The medium of written examination for the post of Civil Judge, Junior Division shall be either Marathi or English. The candidate shall specifically mention in his application form about his choice of medium. Choice once given shall not be allowed to be changed subsequently in any case;

(iii) The medium of written examination for the post of District Judge shall be English.

(e) (i) The candidate applying for being appointed for the post of Civil Judge, Junior division who secures not less than 50 marks in each paper shall be eligible for viva-voce carrying 50 marks.

(ii) The candidate applying for being appointed by nomination for the post of District Judge who secures not less than 50% marks, provided if there is more than one paper, then candidate who secures not less than 50% marks in each paper, shall be eligible for viva-voce carrying 50 marks:

Provided that the candidates belonging to

communities recognized as backward by the Government for the purpose of recruitment who secure not less than 45% marks as aforesaid shall be eligible for the vica-voce.

Provided further that, the Recruiting Authority shall call the candidates for viva-voce in the ratio of 1:3 of the available vacancies to the successful candidates:

Provided also that if there are more than one candidates who have secured identical cut-off marks as fixed by the Recruiting Authority for maintaining the ratio of 1:3, all such candidates shall be called upon to appear for viva-voce:

Provided also that only such candidates who obtains at least 40% of marks in viva-voce test shall be eligible for selection.

(f) The object of the viva-voce examination under these Rules is to assess the suitability of the candidate for the cadre by judging the mental alertness, knowledge of law, clear and logical exposition, balance of judgment, skills, attitude, ethics, power of assimilation, power of communication, character, intellectual depth and the like of the candidate.

(2) (a) 13 The mode of evaluating the performance shall be specified in numerical marks obtained in written and viva-voce examination. The scheme of examination of the candidates including written and viva-voce shall be framed by the High Court in consultation with the Commission.

(b) (deleted)

(c) A candidate who has committed any copying or misconduct during course of written examination, or has been convicted in criminal case or is compulsorily retired, removed or dismissed from judicial service or could not successfully complete probation period of any post in judicial service shall not be eligible to appear for the Competitive Examination.

(3) (a) The Recruiting Authority, on the basis of cumulative marks secured by a candidate, shall prepare in the order of merit, a list of candidates eligible for appointment. The number of candidates to be included in the list shall be equal to the number of vacancies as on

the date of examination.

(b) Besides the above list, the Recruiting Authority shall prepare wait list, equal to ten percent of the number of vacancies notified for recruitment or one, whichever is higher.

(4) (a) The Recruiting Authority shall recommend the names of selected candidates by completing the selection process.

(b) The Government within two months of the names of the selected candidates being forwarded to it shall complete the process of verification of antecedents and medical examination and issue appointment orders.

(c) The lists so prepared under clause (a) of sub-rule (3) above shall be published within one month of preparation in the Official Gazette and cease to be operative on the expiry of one year from the date of such publication.

(d) The High Court may issue the posting orders after appointments are notified by the Government.

(5) Every candidate applying for appointment by nomination shall furnish such certificates, from two respectable persons unconnected with his College or University and not related to him, testifying to his character, on declarations as to educational qualification, experience, age, caste, etc. as may be required by the Recruiting Authority, besides certificates.

(6) The decision of the Recruiting Authority as to the eligibility or otherwise of a candidate for admission to the written and viva-voce examination shall be final.

(7) Candidates whose names are included in the list prepared under clause (a) of sub-rule (6) above shall be considered for appointment in the order in which their names appear in the list and subject to rule 8, they may be appointed by the appointing authority in the vacancies notified under clause (a) of sub-rule 1 above. Candidates whose names are included in the wait list shall be considered for appointment after the candidates whose names are included in the list published under sub-clause (a) of sub-rule (3) above have been appointed and have not joined or have not been appointed for any

reason. Inclusion of the name of a candidate in any list prepared under clause (3) shall not confer any right of appointment on such candidate.”

33. A bare perusal of Rule 6 would indicate that it is dealing with recruitment by nomination. On or before every 15<sup>th</sup> January every year in case of the Civil Judge, Junior Division and in case of District Judges the 31<sup>st</sup> March of every year, the Recruiting Authority shall be informed of the number of existing vacancies and the vacancies that are likely to occur within one year for the post of Civil Judge, Junior Division and District Judge. Every year, the recruiting authority shall, by advertisement in the official gazette and in at least two newspapers, invite applications in such form as it may determine, for intending candidates, who possess the qualification for filling in the vacancies. That is how one must understand the definition of the term or word “recruiting authority”. Wherever the commission and as the case may be High Court has a role, it has been indicated with sufficient clarity. It is also well settled that in the recruitment process, it is not for the MPSC to conclude the matters. There is a role of an expert and who is ordinarily a sitting Judge of this court. Therefore, what the recruiting authority does in terms of these rules is to act after obtaining the requirements. These requirements are obtained and through the channels, namely, High Court and the Government. It is the High Court which

indicates and in terms of this rule the number of posts required to be filled in. The further steps, therefore, and within the sub-rules of Rule 6 are contemplated and that too not to the exclusion of the High Court. There is no exclusive power vesting in the commission and as is commonly understood.

34. By Rule 6(3) the recruiting authority, on the basis of cumulative marks secured by a candidate, shall prepare in the order of merit, a list of candidates eligible for appointment. The number of candidates to be included in the list shall be equal to the number of vacancies as on the date of examination. Clause (b) of sub-rule (3) of Rule 6 speaks of wait-list equal to ten percent of the number of vacancies notified for recruitment or one whichever is higher. Then comes sub-rule (4) of Rule 6, which states that the recruitment authority shall recommend the names of selected candidates by completing the selection process. Thereafter, the Government, on receipt of the names of selected candidates after the process of verification of antecedents and medical examination, issue appointment orders. Thereafter, by clause (c) of sub-rule (4) of rule 6 and which is heavily relied upon by both, Mr. Avhad and Mr. Mankapure, it is provided that the lists so prepared under clause (a) of sub-rule (3) shall be published within one month of preparation in the official gazette

and cease to be operative on the expiry of one year from the date of such publication. It may be that a composite list is made. In this case, it is styled as merit list as labeled by the counsel for the petitioners. That contains the names of candidates recommended for appointment to the notified vacancies. The names appear in the order of merit. Therefore, the assumption is Serial Nos.1 to 227 are the candidates recommended in order of merit for appointment against 227 vacancies. The names from Serial No.228, once again in order of merit, are wait-listed candidates as if a single list is prepared, its life is limited. The controversy is whether this list and so prepared under the above sub-rule and clause is mandated to be in operation for a period of one year from the date of publication. Sub-rule (7) of Rule 6 has been relied upon to urge that it is only those candidates whose names are included in the list prepared under clause (a) of sub-rule (6) shall be considered for appointment in the order in which their names appear in the list and subject to Rule 8, they may be appointed by the appointing authority in the vacancies notified under clause (a) of sub-rule (1). The candidates whose names are included in the wait-list shall be considered for appointment after the candidates whose names are included in the list published under sub-clause (a) of sub-rule (3) have been appointed but they have not joined or have not been appointed for any reason.

35. However, Ms. Bhende would rely upon the MPSC Procedural Rules. She would submit that these rules are also clear. They deal with only such matters and seek to clarify those issues which are not covered or dealt with in the Judicial Service Rules. For appreciation of this argument, we would prefer to refer to the MPSC Procedural Rules.

36. As has been set out in the preamble to these rules, these are rules framed by the commission to regulate its internal procedure. They were revised at the instance of the Union Public Service Commission so as to have uniform pattern all over the country and to accommodate the relevant judgments of the various courts of law. These rules have been framed so as to make the functioning of the commission more transparent, impartial, rational, reasonable, fair and equitable. The modifications have been carried out so as to fulfill the mandate of Article 320 of the Constitution of India. Therefore, when these rules contain the definitions and further procedural matters, including the matters to be decided by the commission (see Rule 4) and mode of recruitment, what it clarifies is that the MPSC or PSC enters the scene on receipt of requisitions from the Government. The recruitment is based on competitive examination. Various clauses of Rule 8 and which have been

heavily relied upon cover the aspects of direct recruitment, the mode of the same and till the stage of the interview. Rule 10 deals with appointment of Interview Committee and declaration of result. Various sub-rules of that rule would indicate as to how the Interview Committee is appointed, how it should be assisted and how the results have to be declared. The preparation of final recommendation list for deciding the ranking of the candidates securing equal marks is by following a criteria set out in Rule 10(7). We do not see any substance in the first complaint of Mr. Avhad that number of candidates have been awarded same marks. Moreover, we do not find any challenge to the order in which these candidates securing equal marks have been listed in the merit list. Once sub-rule (7) of Rule 10 sets out that procedure and a broad guideline is given, then, in the given facts, we do not fault the preparation of the merit list by the MPSC. It could be for varied reasons, lot of candidates obtain the same marks, but their ranking in the order of merit has to be by definite guideline and following a proper regulation. That has been indicated in sub-rule (7) of rule 10. Then comes sub-rule (8) of Rule 10, which reads as under:-

“(8)(a) In case of recruitment by Competitive Examination wherever multiple cadre posts are involved, the reserve list shall not be maintained. The posts fallen vacant due to non-acceptance of the offer of

appointment by the candidates recommended, shall be filled in through subsequent Competitive Examination. When only single cadre is involved for selection by competitive examination the reserve list shall be maintained for a period of one year from the date of declaration of result or up to the publication of subsequent advertisement for recruitment to the same post “whichever” is earlier.

(b) In case of direct recruitment, the reserve list shall be maintained to the extent of 50% of the posts advertised and shall lapse on the expiry of one year from the date of declaration of the result or on the publication of subsequent advertisement for recruitment to the concerned post, whichever is earlier.”

37. A bare perusal thereof would indicate as to how the commission holds the competitive examination wherever multiple cadre posts and single cadre are involved. There is no challenge to that part of the sub-rule and particularly clause (a) thereof, where in case of multiple cadre posts, there is no reserve list. We would understand the expression “reserve list” to be equivalent to a wait-list for that deals with a list for filling up those posts falling due to non acceptance of the offer of appointment by candidate recommended. However, in multiple cadre post, no such reserve list shall be maintained and such posts falling vacant due to non acceptance of the offer by candidate recommended shall be filled in through subsequent competitive examination. When, only single cadre is involved for selection by competitive examination, the reserve list shall be maintained for a period of one year from the date of declaration of

result or up to the publication of subsequent advertisement for recruitment to the same post, whichever is earlier. The challenge is to the extent that if such reserve list gets exhausted after publication of the subsequent advertisement for recruitment to the same post, that is earlier to the period of one year. The argument is that this is contrary to the Judicial Service Rules.

38. We must at once notice that the challenge to the subject rule is at the instance of those petitioners who are in the order of merit but not amongst serial numbers 1 to 227. They are below serial no.227. One of them is at serial number 228 and other at serial number 307. Even those who are within or below serial number 227 have no vested right. Therefore, the petitioners' position is no better. The wait listed candidates all the more cannot claim any right and that too higher than higher ranked candidates. In the present case, as against 227 notified candidates in the advertisement of 2015, 227 names have been recommended and at best what we can term the balance names as those of wait or reserved list candidates. That it is one or a single list, therefore, makes no difference. Thus, this list contains the names of both, the recommended and wait-listed candidates. In terms of the Judicial Service Rules, this list remains in force for one year from the date of its publication. However, we would

clarify further that such reserve list would be operative for “one year from the date of declaration of result” are the expressions to be found in Rule 10(8) of the MPSC Rules but those commencing after the word “or”, or separated by word “or” therein have to be seen in the light of the Judicial Service Rules. The Judicial Service Rules carve out the complete procedure and up to Rule 10 for appointment. Once recruitment and appointment are the terms and expressions to be construed broadly in the backdrop of Article 233 to 235, then, in matters which are covered by these Articles and the Rules, namely, Judicial Service Rules, the Rules of Procedure, framed by the MPSC, cannot be given an overriding effect. Article 234 uses the words “appointment of persons other than district judges to the judicial service”. Once *Bal Mukund Sah* (supra) clarifies the constitutional status of the judiciary, the role of the Governor and the limited assistance to be obtained from the MPSC, then, we cannot agree with the argument and which has been canvassed with great vehemence that there is silence in the Judicial Service Rules and that gap can be filled in with the assistance of Rule 20 of the Judicial Services Rules and the MPSC Procedural Rules. The argument of the respondents and of the above nature overlooks Rule 6(3)(a)(b) and Rule 6(7) of the Judicial Service Rules. True it is that on the basis of cumulative marks secured by the candidates, the recruiting

authority shall prepare a list of candidates eligible for appointment in the order of merit, but at the same time, clause (b) of Rule 6(3) cannot be ignored. That says that besides the above list, the recruiting authority shall prepare wait-list equal to 10 percent of the number of vacancies notified for recruitment or one whichever is higher. The recruitment authority shall recommend names of selected candidates by completing the selection process and thereafter what we have is the role of the Government and that of the High Court. At the same time, it has been clarified that such candidates, whose names are included in the list prepared under clause (a) [wrongly printed as sub-rule (6)] of sub-rule (3) of rule 6 shall be considered for appointment in the order in which the names appear in the list and subject to Rule 8, they may be appointed by the “appointing authority”, which expression and term are those referred in Rule 4 of Chapter III of the Judicial Service Rules. However, sub-rule (7) does not stop here or rather does not end. It also refers to candidates, whose names are included in the wait-list shall be considered for appointment after the candidates, whose names are included in the list published under clause (a) of sub-rule (3), have been appointed and have not joined or have not been appointed for any reason. This must be read with the period that has been set out in Rule 6(4)(c). We have to resolve the issue in

this case by referring to this clause (c) as well. Therefore, nothing in the Judicial Service Rules can be read in isolation, much less ignored or brushed aside. If these rules are read together and harmoniously, then, it is clear that they specify all the matters of recruitment. They also provide for preparation of the list styled as merit-list and which can also include names over and above the notified vacancies. Therefore, that is termed as a wait-list. If that is how the Judicial Service Rules prescribe and read, then, we cannot allow the MPSC to rely on its Procedural Rules and the residuary provision, namely Rule 20 of the Judicial Service Rules. The Judicial Service Rules hold their field and in terms of the constitutional status of the judiciary. The judiciary has been vested with a special duty and to render justice fairly, impartially and independently. Its independence must be preserved at all costs and can never be compromised. One can not tinker with the working of the judiciary and interfere with its functioning so as to defeat the mandate of Articles 233 to 235 of the Constitution of India. The judicial service, as *Bal Mukund Sah* (supra) states, has a distinct place in the scheme of constitution. Its functioning and working should be independent and other organs of the State cannot dictate to it anything regarding the above functions, much less interfere therewith. Therefore, we do not think that the Procedural Rules of the MPSC can be relied

upon to take care of such a situation. If the Judicial Service Rules says that the wait-list or the list, which is composite in this case shall remain operative for a period of one year from the date of publication, then, in the facts and circumstances of this case and wherever a composite list is prepared, that must remain operative in terms of Rule 6(4)(c). To that extent, the Procedural Rules of the MPSC are not consistent with the constitutional scheme and the role of judiciary as enshrined therein. We need not, therefore, say anything further.

39. However, insofar as the question of relief to be granted to the present petitioners is concerned, we are of the opinion that in the present case, a list has already been published. True it is that it was not allowed to operate for a period of one year. True it is that this period of one year was interjected by insertion of a fresh advertisement dated 23<sup>rd</sup> March, 2016. Now that the said advertisement is inserted and the process in furtherance thereof has commenced, we do not think that any relief can be granted to the petitioners. More so, considering their ranking and position in merit list. They are not, in the order of merit, higher than those who have not joined the judicial service. It is only when they come to know that one of the candidate has not joined that they thought of making a representation. It is only when these

representations and successive did not meet any favourable response that they deem it fit to approach this court. A lot of time has been spent and after the issuance of fresh advertisement. Now, steps may have also been taken in pursuance thereof. If we interfere at this stage, it would completely disturb the process. When none have acted malafide, but proceeded on a legal position which is now found to be incorrect, we would not be justified in interfering in our writ jurisdiction, that is extraordinary, equitable and discretionary. It is on the understanding of both, the High Court and the MPSC and in terms of the law laid down in the case of *Malik Mazhar Sultan* (supra) that the process has been commenced. That is to follow the entire schedule notified and directed in terms of this judgment. Therefore, when the appointment to the post of CJJD and JMFC by direct recruitment has to be done going by the number of vacancies to be notified by the High Court by 15<sup>th</sup> January every year and such vacancies to be calculated including the existing vacancies and future as well so also the advertisement must be issued by 1<sup>st</sup> February every year, the further time frame also set out up to the date of appointment, we would be acting in contravention of these binding guidelines if we interfere with the advertisement dated 23<sup>rd</sup> March, 2016. We, therefore, do not interfere with it and at the instance of the present petitioners, one of whom is much

below in the order of merit. Therefore, we make the Rule partially absolute.

40. Reliance on Rule 20 of the Judicial Service Rules, which appears in Chapter V is entirely misplaced. Rule 17 falling therein speaks of age of superannuation. Rule 18 provides for addition of certain service for purpose of pension. Rule 19 deals with retirement in public interest and then appears Rule 20. Thereby, the conditions of service of the members for which no express provision is made in these Rules shall be determined by the Rules and Orders for the time being applicable to officers of Indian Administrative Service in the State and if those Rules are silent, then, by the provisions of the Maharashtra Civil Services Rules shall apply mutatis mutandis. The word member means a member of the judicial service of the State. Post appointment and when matters are not covered by other rules such as Rule 17 to 19, then, the Judicial Service Rules permit following and relying on the conditions of service applicable to members of the above services. These conditions and as indicated in the other rules would apply. In the instant case, this rule could not have been relied upon. The reliance placed thereon is therefore misplaced.

41. We also take note of the decisions, which have been cited before us by the respective counsel appearing for the petitioners.

42. Mr. Avhad has relied upon an order passed by a Division Bench of this court in Writ Petition No. 4257 of 2013 decided on 22<sup>nd</sup> January, 2014 (*Mr. Udaysing Jalamsing Valvi vs. The Secretary, District Selection Committee and Anr.*). There, the petitioner sought appointment to the post of Senior Assistant (Accounts) under Scheduled Tribe reserved category. His representation dated 2<sup>nd</sup> November, 2012 was rejected. True it is that this candidate was wait listed at serial no. 1 and the post was vacant. The appointed candidate was unable to join the post, as he did not furnish the caste certificate. The caste certificate, in any event, of that candidate was invalidated. The order of invalidation came on 8<sup>th</sup> August, 2012. That is how the petitioner before this court made representation and demanded the appointment. In November, 2012, the order was passed communicating that the list styled as wait-list has exhausted itself and therefore, the petitioner cannot be appointed. The petitioner made subsequent representation, but without noticing that, a fresh advertisement was issued on 11<sup>th</sup> April, 2013 for filling up the post in question, a writ petition was filed in this court on 29<sup>th</sup> April, 2013. On that date, the post was still vacant and an ad-interim order was passed on 3<sup>rd</sup> September, 2013 by this court directing that the appointment made, if any would be subject to further orders which may be passed in the petition.

This court, therefore, was not required to consider the issue and of legality and validity of any rule much less concerning any wait-list or reserve list. Secondly, the vacancy could not be filled in. Given this peculiar fact situation that the court allowed the petition and granted appointment to the petitioner. This order cannot be seen as laying down any law. It must be, therefore, considered in the facts and circumstances peculiar to that case. No general principle of law and which would govern the subject rules and issue before us, therefore, can be read into this order.

43. As far as Mr. Mankapure is concerned, he has essentially relied upon the judgments of the Hon'ble Supreme Court of India, which emphasise the role of the judiciary under the Constitution of India. The position and status that it enjoys while making recruitment to the post of District Judge and to the posts other than the District Judge in the judicial service of a State. We have no quarrel with that, inasmuch as we have followed that very dictum. However, when *Bal Mukund Sah* (supra) has been followed even in the case of *Sanjay Singh and Anr. vs. U. P. Public Service Commission, Allahabad and Anr.*<sup>4</sup>, then, we do not think that the issue which we have considered fell for determination, in any of these cases. *Sanjay Singh* case (supra) was dealing with a

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4 AIR 2007 SC 950

scaling down. The marks that were assigned and the entire schedule and pattern suffered from the illegalities and irregularities pointed out. In this context and backdrop the Hon'ble Supreme Court of India decided the issue. We have also seen the judgment of the Hon'ble Supreme Court of India in the case of *Neelima Shangla vs. State of Haryana and Ors.*<sup>5</sup>. There also a relief was denied to the petitioner. The only relief insofar as the petitioner was concerned was granted in terms of the penultimate para. The court directed to include the name of the petitioner in the list of candidates selected for appointment as subordinate judges in the Haryana Civil Service (Judicial Branch) and forward the same to the High Court of Punjab and Haryana. That was because the net result was that the qualified candidates, though available, were not selected and were not appointed. Petitioner Neelima in that case was one of them. The present petitioners' case cannot be equated with that of Neelima. We do not think, therefore, that this judgment is of any assistance to the present petitioners. Finally, Mr. Mankapure relies upon the judgment in the case of *Manoj Manu and Anr. vs. Union of India*<sup>6</sup>. The facts in that case were never in dispute. The appellant Manoj Manu and other were working as Assistants in the Central Secretariat Service and appeared in limited departmental

<sup>5</sup> AIR 1987 SC 169

<sup>6</sup> (2013) 12 SCC 171

competitive examination for the next promotion to the post of Section Officer's grade in that service. The two channels of promotion are set out in para 2 of this judgment and the Union Public Service Commission recommended 184 candidates in two lots. In the first lot 141 candidates were found suitable candidates for the said post, whereas in the second lot 43 successful candidates were recommended for appointment. Out of them, 6 candidates did not join. Importantly and crucially, the Department of Personnel and Training, by its letter dated 20<sup>th</sup> November, 2009 requisitioned 6 general category candidates. However, the UPSC recommended names of three candidates out of the reserve list maintained by it. These two appellants, who were next in the merit list had secured 305 marks, same as secured by one Rajesh Kumar Yadav, who was recommended by UPSC in the supplementary list candidates. They felt aggrieved by their non-recommendation, thereby denying them the appointment to the post of Section Officer's grade. It was their case before the tribunal that the UPSC acted in an arbitrary and discriminatory manner in contravention of Articles 14 and 16 of the Constitution of India. Their right to get the appointment has been arbitrarily denied. They are equally placed. In such peculiar circumstances, the Hon'ble Supreme Court considered the issues and which would be categorised in categories 'A' and

'B'. It followed *Neelima Shangla's case* (supra). It held that any person whose name is included in the select list, does not acquire any right to be appointed. The Government may decide not to fill up all the vacancies for valid reasons. Such a decision on the part of the Government not to fill up the required/advertised vacancies should not be arbitrary or unreasonable, but must be based on sound, rational and conscious application of mind. The UPSC sent, in that case 184 persons by recommending their names for appointment. Six out of them did not join. This is not a case where the Government decided not to fill up further vacancies. On the contrary, it acted upon the requisition from the Department and it desired to fill up all the notified vacancies. When there were six persons who did not join, still the UPSC chose to forward names of only three eligible candidates. Therefore, the Hon'ble Supreme Court found that there were vacancies still to be filled in, the Government wants them to be filled in and the UPSC has not acted in terms of the said requisition. The UPSC should have sent names of six candidates instead of three. This is also a decision on facts.

44. We must also clarify that *Manoj Manu* (supra) was considered in the case of *Kulwinder Pal Singh* (supra). After referring to that and other decisions, the Hon'ble Supreme Court

in *Kulwinder Pal Singh's* case (supra) found that there were names up to certain serial number in the wait-list. They were offered appointment, however, three candidates belonging to general category placed at serial number 1, 5 and 32 did not join service. Resultantly, 31 general category candidates accepted the appointment and joined service. The appellants, including Kulwinder Pal Singh belonged to general category. They submitted a representation for appointment orders. Their names were favourably considered and the Registry of the High Court, because it concerned the Punjab Judicial Service, placed the matter before Administrative Committee. The committee, in its meeting resolved to recommend the names of the appellants subject to approval of the Full Court. It is in a fresh consideration by the Administrative Committee that the request of the appellants before the Hon'ble Supreme Court was denied. That is how they approached the High Court. The High Court rejected their petition. They appealed to the Hon'ble Supreme Court of India, but their appeal was also dismissed. After referring to all the judgments in the field, the Hon'ble Supreme Court concluded that vacancies cannot be filled in over and above the vacancies advertised. Once the vacancies notified have been filled up, the process of selection comes to an end. A wait-list cannot be used as a reservoir to fill up the vacancy which comes into existence after

the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.

45. Here, we have found and categorically that 227 vacancies were notified. 227 candidates were recommended. In addition to them, some like the petitioners were also listed in their order of merit. The process concluded by the declaration of result and the scrutiny in terms of the Judicial Service Rules referred in detail above. The petitioners desire continuance of the list even after these events. That is how we would prefer to go by *Kulwinder Pal Singh's* case (supra). We hold and in the facts and circumstances of this case, that now that a fresh advertisement is issued and the earlier list having been exhausted itself in the manner held by us above, the relief to the petitioners' cannot be granted.

46. In the view that we have taken, we need not refer to the judgment relied upon by Mr. Avhad rendered in the case of *Sasidhar Reddy Sura vs. State of Andhra Pradesh and Ors.*<sup>7</sup>. Rather we have gone by the observations and what is held in para 19 of this judgment. These observations are heavily relied upon before us by Mr. Avhad to hold that the MPSC does not play a prominent role. We have followed this very dictum and not deviated from it.

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<sup>7</sup> AIR 2014 SC 444

47. As a result, in all the petitions, Rule is made partly absolute. It is made absolute to the extent it is declared that the Rules of Procedure framed by the MPSC would not override the Maharashtra Judicial Service Rules, 2008, insofar as the matters discussed and covered in the foregoing paragraphs of this judgment. It shall be in terms of the principles of law enumerated above. However, relief to the petitioners as prayed in the petitions is denied. In the facts and circumstances, there would be no order as to costs.

48. Before parting, we would highly appreciate that to avoid present situations, which are avoidable, the MPSC and the Department of Law and Judiciary of the Government of Maharashtra should not take any unilateral decision. There is some substance in the complaint that the petitioners and others make and that is that these authorities have not understood till date that they are bound by the views of the High Court in respect of recruitments and appointments in district judiciary. The State and the MPSC are dealing with peripheral and incidental issues. Moreover, the vacancies are notified and in terms of *Malik Mazhar Sultan and Anr.* (supra), the process commences ending with selection and appointment after the recommendations reach the Government. The least that is expected from the Department

of Law and Judiciary is that it must direct the MPSC to issue fresh advertisement only after seeking the views and opinions of the High Court. In the event the High Court desires a fresh advertisement to be issued including therein all unfilled vacancies or such vacant posts which do not get filled in because some candidates in the earlier process did not join or were found ineligible, then, before the fresh advertisement is issued, such views of the High Court should be obtained. Any deviation from the same would be contrary to the constitutional mandate. Therefore, we feel that hereinafter, before any steps are taken, the MPSC should move the Government and the Government, through its competent ministry, namely the Law and Judiciary, should seek the views and opinion of the High Court before allowing the MPSC to issue and insert a fresh advertisement. That would obviate all the difficulties which eventually the High Court faces including the challenges raised in litigation.

(B.P.COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)