

"C.R"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE T.R.RAVI

WEDNESDAY, THE 26TH DAY OF AUGUST 2020 / 04TH BHADRA, 1942

WA.No.994 OF 2020

AGAINST THE JUDGMENT IN WP(C).10361/2020(R) DATED 07.07.2020
OF HIGH COURT OF KERALA

APPELLANT/ 2ND RESPONDENT IN THE WRIT PETITION:

HIGH COURT OF KERALA,
REPRESENTED BY ITS REGISTRAR (GENERAL) ,
HIGH COURT BUILDING, ERNAKULAM - 682 031.

BY ADV. SRI.ELVIN PETER P.J.

RESPONDENTS/ PETITIONERS & RESPONDENT NO.1 IN THE WRIT PETITION:

- 1 RESHMA A. , D/O.ASHOK P. ,
 AISWARYA HOUSE, 48/2164, DIG LANE,
 ELAMAKKARA P.O. , ERNAKULAM - 682 025.
- 2 MIDHUN DAS, S/O.D.SARACHANDRA DAS,
 KARTHIKA HOUSE, PALAMAROOR, KAMBAZHA P.O. ,
 PATHANAMTHITTA - 689 645.
- 3 SABARI S. , W/O.RENJITH KUMAR,
 'CASA' RESIDENCY, MUVATTUPUZHA - 686 661.
- 4 STATE OF KERALA,
 REPRESENTED BY THE SECRETARY TO GOVERNMENT,
 HOME (C) DEPARTMENT, SECRETARIAT,
 THIRUVANANTHAPURAM - 695001.

R1 TO R3 BY ADV. SRI.P.C.SASIDHARAN

R4 BY BY SPECIAL GOVT.PLEADER SRI.N.MANOJ KUMAR.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20-08-2020,
ALONG WITH WA.998/2020, THE COURT ON 26-08-2020 DELIVERED THE
FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE T.R.RAVI

WEDNESDAY, THE 26TH DAY OF AUGUST 2020 / 04TH BHADRA, 1942

WA.No.998 OF 2020

AGAINST THE JUDGMENT IN WP(C).10007/2020(R) DATED 07.07.2020
OF HIGH COURT OF KERALA

APPELLANT/ 2ND RESPONDENT IN THE WRIT PETITION:

HIGH COURT OF KERALA,
REPRESENTED BY ITS REGISTRAR GENERAL,
HIGH COURT OF KERALA, ERNAKULAM-682031.

BY ADV. SRI.ELVIN PETER P.J.

RESPONDENTS/ PETITIONER & RESPONDENT NO.1 IN THE WRIT PETITION:

1 SWETHA SASIKUMAR,
MADHAVIKA, PALLOM.P.O.,
KOTTAYAM DISTRICT, PIN-686007.

2 STATE OF KERALA,
REPRESENTED BY ITS PRINCIPAL SECRETARY,
DEPARTMENT OF HOME, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695001.

R1 BY ADV. SRI.JACOB P.ALEX

R1 BY ADV. SRI.JOSEPH P.ALEX

R1 BY ADV. SHRI.MANU SANKAR P.

R2 BY BY SPECIAL GOVT.PLEADER SRI.N.MANOJ KUMAR.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20-08-2020,
ALONG WITH WA.994/2020, THE COURT ON 26-08-2020 DELIVERED THE
FOLLOWING:

K. Vinod Chandran & T.R.Ravi, JJ.

W.A.Nos.994/2020 & 998/2020

Dated, this the 26th day of August, 2020

JUDGMENT

Vinod Chandran, J.

Whether Rule 7 of the Kerala Judicial Service Rules, 1991 as amended in the year 2019, runs counter to the directions issued in Malik Mazhar Sultan (3) v. U.P. Public Service Commission [2008] 17 SCC 703]? If not, whether the party respondents/writ petitioners and other similarly placed candidates, who figure in the merit list approved by the Governor, could be appointed to the vacancies arising within one year of the date of approval, in excess of the vacancies notified? These are the two questions arising for our consideration in the appeal. The learned Single Judge directed that an additional list be forwarded to the Governor for approval and appointment as Munsiff-Magistrates, in accordance with the rules, from the merit list dated 20.02.2020. The High Court is in appeal from the directions issued by the learned Single Judge.

2. Sri.Elvin Peter, learned Standing Counsel appearing for the appellant, would invite us to the various Record of Proceedings of the Hon'ble Supreme Court and

specifically refer to Malik Mazhar Sultan (3) and Malik Mazhar Sultan v. U.P. Public Service Commission [(2009) 17 SCC 24]. The Hon'ble Supreme Court while laying down a time line for filling up the vacancies arising in the Higher and Subordinate Judicial Service, has specifically prescribed the manner in which the recruitment is to be carried out, from initial notification to the eventual appointment. The directions issued require notification of the vacancies at the beginning of an year including, (i) existing vacancies, (ii) anticipated vacancies in the selection year and (iii) vacancies that may arise due to unprecedented circumstances like death, promotion etc.; the third category being restricted to 10% of the number of vacancies.

3. Malik Mazhar Sultan, [(2009) 17 SCC 24] is referred only to point out that the restriction in the third category has been modified insofar as providing for future vacancies to the extent of 10% of the existing vacancies and not the sanctioned posts. Hence, only those vacancies which exist and that arise within one year as also 10% of such vacancies could be notified for selection. Notification of vacancies arising later, even as per the statutory rules would run counter to the directions issued

by the Hon'ble Supreme Court. Appointments cannot be made, it is asserted, in accordance with the rules which run counter to the directions of the Supreme Court having binding effect under Articles 141 & 142 of the Constitution of India.

4. The further impediment in making appointments is that such anticipated vacancies, as provided for in the Rules were never notified when the applications were called for. It is argued, based on the counter-statement filed on behalf of the appellant in the writ petition, that the amendment brought in, to the Rules of 1991 in the year 2019 was proposed in 2015. Prior to that, the rule provided for the list published, to have validity for three years from the date of its approval. In the year 2016, the Committee of Judges of the High Court resolved to confine the selection to the vacancies which arise only upto 31st December of that year. The same was followed in the year 2017 and 2019. The pre-amended Rule, it is asserted, was binding only upto 2016 and thereafter it lost its relevance, even when the amendment was brought in. The resolution of the Committee of Judges in the year 2016, also is justified on the ground of it being taken to bring the recruitment process in concurrence with the directions

of the Hon'ble Supreme Court in Malik Mazhar Sultan (3).

5. The vacancies notified are that existing as on 01.01.2019 and those anticipated to arise by 31.12.2019 and 10% of such vacancies. The notification specifically indicated 8 'No Candidate Available' [NCA] vacancies and 37 'probable' vacancies, totaling 45. Out of the 37 probable vacancies, one is set apart for Persons with Disabilities [PwD]. In the course of selection, two vacancies arose, i.e., of a Munsiff promoted to the cadre of Sub Judge and a fresh recruit in the cadre of Munsiff-Magistrate being recruited directly as a District Judge. These vacancies are covered by the four additional vacancies notified. Appointments were made to 37 vacancies, one of which is in the quota for PWDs and 4 NCA. The balance are again NCA vacancies of earlier years (4) and the instant year (4), to which appointment can be made only from specified categories enjoying the benefit of reservation. There could be no further appointments made, since the notification having spoken of only appointment to 45 vacancies which included the probable vacancies. The available vacancies were filled up in accordance with the rotation as prescribed by Kerala State and Subordinate Service Rules, 1958 ['KS&SSR' for brevity]. What remains is, only filling

up of vacancies reserved to specific reserved categories; to which none others can be appointed as of now. The High Court seeks for setting aside the judgment of the learned Single Judge and dismissing the writ petitions.

6. It is specifically pointed out that the writ petitioners, who were trained in law and who were quite aware of the rule position, as on the date of notification, have not challenged the notification. Having subjected themselves to the selection as per the notification, which called for applications for appointment to specified number of posts, they cannot turn around and seek for appointment to posts in excess of that notified. This would result in denial and deprivation of the constitutional right under Article 14 read with Article 16(1); of those persons who acquired eligibility for the post in question, subsequent to the date of notification. There is also a fresh notification issued as on 30.06.2020, which takes in the vacancies arising after 31.12.2019 and till 31.12.2020. Applications have also been received in accordance with the subsequent notification, concludes the learned Standing Counsel.

7. Learned Counsel appearing for the party respondents Sri.P.C.Sasidharan and Sri.Jacob P. Alex argue

for sustaining the judgment in appeal. It is pointed out that the various Record of Proceedings in Malik Mazhar Sultan never intended that directions issued, should run counter to the statutory rules. The Hon'ble Supreme Court was in fact careful to repeatedly state, that they do not intend to issue any directions counter to the statutory rules. It is pointed out that in Rakhi Ray v. High Court of Delhi [(2010) 2 SCC 637] when the recruitment to Delhi Judicial Service came up before the Hon'ble Supreme Court it was categorically found that the recruitment challenged, was held in consonance with the Delhi Rules which, though running counter to the directions issued in Malik Mazhar Sultan(3), was sustained. The statutory rules would prevail over the notification and there cannot be any presumption that the High Court consciously violated the statutory rule. Shankarsan Dash v. Union of India [(1991) 3 SCC 47], Asha Kaul v. State of J&K [(1993) 2 SCC 573], Union of India v. Somasundaram Viswanath [(1989) 1 SCC 175], Ashish Kumar v. State of U.P. [(2018) 3 SCC 55] and Pannivizha Service Co-operative Bank v. Smitha T.Pillai [2018 (2) KHC 611 (DB)] were relied on. As far as the policy of recruitment and appointment as available in Rule 7, anticipated vacancies for one year from the date of

approval of the merit list, is permitted. Virender S. Hooda v. State of Haryana [(1999) 3 SCC 696], State of J&K v. A.R.Zakki [1992 Supp (1) SCC 548] and Bindeshwari Ram v. State of Bihar [(1989) 4 SCC 465] are relied on to advance their contentions on this aspect.

8. Both the learned Counsel would urge that appointments are to be made to vacancies arising till 06.05.2021, which would be appropriate insofar as the training commenced now, will be completed on that date and all vacancies upto that date could be occupied by Judicial officers as on that date. Sri.P.C.Sasidharan would argue for the position that the rule is embedded in the notification. Sri.Jacob P.Alex points out that the rule specifically speaks of notified vacancies plus anticipatory vacancies and hence the probable vacancies arising as per the rule has to be filled up from the approved merit list. It is the contention of Sri.Jacob P.Alex that at least those vacancies that arose till the date of approval of merit list, that is as on 07.05.2020, ought to be filled up. The word 'probable' even going by the dictionary meaning can be, more or less, and could also include anticipated vacancies; the appointment being permissible only on the arising of such vacancies.

9. Immediately we have to notice that we cannot go mid-way to direct appointment to vacancies arising till the date of approval. We either decline the relief or grant it as permissible under the rules. The date of approval is only relevant to determine the validity period of the list, as per the rules. We cannot give the date of approval any significance other than that prescribed in the rules, which if allowed would literally be a half baked cake, neither good for consumption nor completely worthless to be thrown out. We would not rest ourselves on such sticky premise of uncertainty.

10. The learned Special Government Pleader Sri.N.Manoj Kumar would support the judgment especially referring to All India Judges Assn (III) v. Union of India [(2002) 4 SCC 247], which pertinently noticed that an independent and efficient judicial system is one of the basic structures of our Constitution. Delay in appointments would undermine the basic structure as declared by the Hon'ble Supreme Court and the directions in the judgment as also the rule now brought in, would eminently serve the purposes for which a time line was prescribed by the Hon'ble Supreme Court in Malik Mazhar Sultan (3).

11. We have to first deal with the contention that the rule runs counter to the directions of the Hon'ble Supreme Court. Admittedly Rule 7, earlier provided for appointments to anticipated vacancies arising within three years from the date of approval of the list by the Governor, which was later amended in the year 2006 to two years and 2019 to one year. The amendment of 2019, which was more comprehensive, was proposed in the year 2014, again by a Committee of Judges after Malik Mazhar Sultan (3). This proposal was after specifically noticing that decision as we will, a little later, advert to, from the records produced before us. Suffice it to observe for the present that the rule as it existed prior to amendment, permitted filling up of vacancies arising within two years of the date of approval, or the date of publication of the next list, whichever was earlier. There is no basis for the appellant to contend that the amendment proposed after Malik Mazhar Sultan (3) was without noticing that decision. We would now look at the rule prior to and after amendment; relied on by the respondents/writ petitioners and then proceed to look at the decisions taken by the Committee of Judges.

12. The un-amended Rule 7 was as under:

"7. Preparation of lists of approved candidates and reservation of appointments: (1) The High Court of Kerala shall, from time to time, hold examinations, written and oral, after notifying the probable number of vacancies likely to be filled up, prepare a list of candidates considered suitable for appointment to category (2). The list shall be prepared after following such procedure as the High Court deems fit and by following the rules relating to reservation of appointments contained in Rules 14 to 17 of Part II of the Kerala State and Subordinate Services Rules, 1958.

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

13. The amended Rule is as hereunder:

"7. Preparation of lists of approved candidates and reservation of appointments: (1) The High Court of Kerala shall, from time to time, hold examinations, written and oral, after notifying the probable number of vacancies likely to be filled up, prepare a list of

candidates considered suitable for appointment to category (2). The selection shall be on the basis of competitive examination at two successive stages. At the first stage, a Preliminary screening examination is to be conducted to find out the true aspirants for the posts and to make the Main examination more competitive. In the Preliminary examination, the ratio of 1:10 of the notified vacancies to the successful candidates be maintained. At the second stage, there shall be a Main examination consisting of a written examination and a viva voce. The main (written) examination shall have four papers with 100 marks each at a total of 400 marks, based on the syllabus prescribed by the High Court from time to time. The number of candidates for the viva voce shall not ordinarily exceed three times of the notified vacancies. The maximum mark for viva voce shall be 50. The cut off mark in the viva voce is 40% for the general and Other Backward Class candidates and 35% for the SC/ST candidates. The merit list shall be prepared on the basis of aggregate marks secured by the successful candidates in the Main (written) examination and viva voce. For the preparation of the merit list and select list, rules 14 to 17 of Part II of the Kerala State and Subordinate Services Rules, 1958 shall be followed.

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

14. The amendment to sub-rule (1) was insofar as the second sentence being deleted to bring in a comprehensive procedure for selection and speaks of a merit list to be prepared on the basis of the aggregate marks secured by the successful candidates in the main written examination and viva voce. There is also a select list contemplated in sub-rule (1) itself, both of which lists are to be prepared in consonance with Rules 14 to 17 of Part II of KS&SSR. Sub-rule (2) speaks of the merit list prepared by the High Court being forwarded for the approval of the Governor and on such approval being granted, the list coming into force from that date. The validity of the approved list shall be till the notified vacancies and the vacancies that may arise within one year from the date of approval, being filled up or till a fresh list comes into

force; whichever is earlier. In the present case, there is no fresh list as of now and the period of validity as per the rules has not expired. The list comes into force from the date of approval of the Governor, which is 07.05.2020 and the validity is till 07.05.2021, if no fresh list comes into force before that. The contention of the writ petitioners based on the rule is, according to us, perfectly legal and sustainable.

15. We would pause here to just note the relevant dates and the vacancies which were notified. The notification inviting applications was issued on 01.02.2019 and the last date for submission of applications 05.03.2019. A preliminary examination was conducted on 26.05.2019, result of which was declared on 19.07.2019. The main examination was conducted on 31.08.2019 and 01.09.2019, result of which was declared on 21.12.2019. The viva voce was conducted between 08.01.2020 and 25.01.2020 and merit list published on 20.02.2020. The merit list was approved by the Governor on 07.05.2020 by a Government Order and posting orders were issued on 19.06.2020. The new recruits joined their posts and reported for training on 29.06.2020. The procedure for selection was in consonance with the amendment brought out in 2019 to Rule 7. The new

recruits who commenced training would be placed in the respective judicial posts after training of one year, i.e., on or after 28.06.2021. The prayer made in the writ petitions is that the vacancies up to 07.05.2021, or till a fresh list is published, be filled up from the merit list now approved by the Governor. We cannot but observe that this would definitely be in compliance with the spirit and tenor in which the directions were issued in Malik Mazhar Sultan (3) of timely filling up of vacancies each year, since the selection of 2020 would have then, already commenced for the vacancies anticipated to arise after 07.05.2021.

16. Malik Mazhar Sultan (3), as was pointed out by the Special Government Pleader, specifically noticed All India Judges Assn (III) and a declaration made therein with respect to independent and efficient judicial system being one of the basic structures of the Constitution and of delay in appointments undermining such basic structure. The learned Judges in paragraph 1, after noticing the earlier decision of the Hon'ble Supreme Court, expressed concern about the delay in dispensation of justice, one of the major causes of which, was the insufficient number of Judges available. It was held that there should be every

possible step taken to ensure that vacancies in Courts are finally filled. Their Lordships in paragraph 3 noticed the earlier Record of Proceedings of 03.04.2006, having spoken of the necessity to evolve a mechanism to speedily determine and fill vacancies of Judges at all levels. The earlier observations as to the requirement to fix a time schedule and the need to adhere to such strict time schedule prompted the Court to lay down broad guidelines. It was specifically noticed in paragraph 5 that the selections all the same are '*required to be conducted by the authorities concerned as per the existing Judicial Service rules in the respective States/Union Territories*' (sic). The Hon'ble Supreme Court also expressed the opinion that as far as possible the recruitment should be entrusted with the High Courts. Even then it was observed that the said issue is not before Court for consideration and that the selection is to be conducted by authorities empowered to do so as per the existing rules (paragraph 5). We notice that, in the State of Kerala the entire recruitment process is entrusted with the High Court itself.

17. While laying down the guidelines in Malik Mazhar Sultan (3), the Court noticed the objections raised by certain State Governments in their responses and

categorically declared that the apprehension of interference with Judicial Services Rules is wholly misplaced (paragraph 6). A time schedule was fixed for the various cadres in the Higher Judiciary and the Subordinate Judiciary, which generally commences with the notification by the High Court on 15th January and ends with the 2nd week of January of the following year, which is the last date prescribed for joining. The Hon'ble Supreme Court, hence, from the time-line, indicated a recruitment starting with the notification on the commencement of every year, ensuring completion of the selection by the close of the year and appointment by the commencement of the very next year. There would, hence, be no delay in filling up the vacancies, since the Hon'ble Supreme Court also specifically directed the notification published in the commencement of an year to include the anticipated vacancies that may arise in that year of recruitment. Thus, ensuring that when appointments are made on the commencement of the next year, every vacancy which arose till that date is filled. Here, with all the respect at our command, it has to be pertinently noticed that even when such time line is scrupulously followed, there is a delay in appointment to the judicial posts, by reason of the

training stipulated of one year. The discharge of judicial duties occur only when the trained new recruits are posted to the respective judicial posts. This delay, has been reckoned and attempted to be rectified by the Committee of Judges of this Court when proposing the amendment of the year 2014, to which we will refer after noticing a few relevant decisions, that came later.

18. As we noticed from Malik Mazhar Sultan (3), the Hon'ble Supreme Court never intended interference with the statutory rules and only issued broad guidelines so as to ensure expeditious filling up of vacancies for strengthening the judicial system to make more effective the dispensation of justice. In this context, we also have to notice Rakhi Ray, wherein also the specific contention with respect to violation of the directions in Malik Mazhar Sultan (3), was projected as the main ground. Rakhi Ray and some others were general category candidates who sought appointment to 13 vacancies which came into existence during the pendency of the selection process. The notification was to fill up 20 vacancies in the cadre of District Judges in Delhi. Out of these 20 vacancies 13 were to be filled up from the general category candidates, 3 from SC and 4 from ST. All the 13 vacancies in the general

category were filled from the merit list published. The appellants before the Hon'ble Supreme Court who were also the petitioners before the High Court were lower down in merit. After looking at the various precedents on the established legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised, it was held that "*such appointment made beyond the number of vacancies advertised would be without jurisdiction being violative of Articles 14 and 16(1) of the Constitution of India, thus a nullity inexecutable and unenforceable in law (sic-para:7)*". Though this proposition would have to be looked at when we answer the second question posed, what we are concerned with at present is the further declaration in Rakhi Ray with respect to the submissions made by the appellants regarding such exercise being permissible under Malik Mazhar Sultan(3).

19. In Rakhi Ray answering the contention raised of the directions issued by the Supreme Court having been flouted, it was held so in Paragraph 18:

"18. In Malik Mazhar Sultan (3) case, this Court made it clear that appointments in Judicial Service have to be made as per the existing statutory rules. However, direction was issued to amend the rules for future selections. This

Court considered the correspondences between various authorities of the States and also the decision taken in the conference of the Chief Ministers and Chief Justices held on 11.03.2006 and observed as under:

"... Before we issue general directions and the time schedule to be adhered to for filling vacancies that may arise in subordinate courts and district courts, it is necessary to note that selections are required to be conducted by the authorities concerned as per the existing Service Rules in the respective States/Union Territories... As already indicated, the selection is to be conducted by authorities empowered to do so as per the existing rules. ... In view of what we have already noted about the appointments to be made in accordance with the respective Judicial Services Rules in the States, the apprehensions of interference seems to be wholly misplaced..."

(emphasis added)

Therefore, it is clear that this Court clarified that selection was to be made as per the existing rules and direction was issued for amending the existing laws to adopt the recommendations of Justice Shetty Commission as approved by this Court for the future."

The Delhi Higher Judicial Service Rules, 1917 was looked at to find that the said rule provides for advertisement of vacancies after being determined and hence, taking into consideration the anticipated vacancies as per the judgment

in Malik Mazhar Sultan(3) does not arise. It was hence categorically held that when the statutory rules provided otherwise, the directions in Malik Mazhar Sultan(3) would not prevail.

20. We have already noticed the time-line prescribed by the Hon'ble Supreme Court, and now specifically notice that prescribed for appointment to the post of Civil Judge, Junior Division, which is the post of Munsiffs/Magistrates in this State. The specific contention taken up by the High Court is that the Hon'ble Supreme Court restricted anticipated vacancies to the year of recruitment and not beyond that. We specifically extract the time-line hereunder:

<i>Sl No</i>	<i>Description</i>	<i>Date</i>
1	<u>Number of vacancies to be notified by the High Court</u> <u>Vacancies to be calculated including</u> <u>(a) Existing vacancies.</u> <u>(b) Future vacancies that may arise within one year due to retirement.</u> <u>(c) Future vacancies that may arise due to promotion, death or otherwise, say ten per cent of the number of posts.</u>	15 th January
2	Advertisement inviting applications from eligible candidates.	1 st February
3	Last date for receipt of application.	1 st March
4	Publication of list of eligible applicants The list may be put on the website.	2 nd April
5	Dispatch/Issue of admit cards to the eligible applicants.	2 nd to 30 th April
6	Preliminary written examination Objective questions with multiple choice which can be scrutinised by computer.	15 th May

7	Declaration of result of preliminary written examination (a) Result may be put on the website and also published in the newspaper. (b) The ratio of 1:10 of the available vacancies to the successful candidates be maintained.	15 th June
8	Final written examination Subjective/Narrative.	15 th July
9	Declaration of result of final written examination (a) Result may be put on the website and also published in the newspaper. (b) The ratio of 1:3 of the available vacancies to the successful candidates be maintained. (c) Dates of interview of the successful candidates may be put on the internet which can be printed by the candidates and no separate intimation of the date of interview need be sent.	30 th August
10	Viva voce.	1 st to 15 th October
11	Declaration of final select list and communication to the appointing authority 1st November (a) Result may be put on the website and also published in the newspaper. (b) Select list be published in order of merit and should be double the number of vacancies notified.	1 st November
12	Issue of appointment letter by the competent authority for all existing vacant posts as on date.	1 st December
13	Last date for joining	2 nd January of the following year

21. The argument of the High Court is based on Sl.No.1, (underlined by us for emphasis), which specifies the number of vacancies to be notified. The date is 15th January and the notified vacancies include, (a) existing vacancies, (b) future vacancies that may arise within one year due to retirement, (c) future vacancies that may arise due to promotion, death or otherwise, say 10% of the number

of posts. It is pointed out that Malik Mazhar Sultan (2009) 17 SCC 24 specified that the future vacancies as seen from the 3rd category has been restricted to 10% of the vacancies and not the sanctioned posts. We immediately find that though a modification was made in 2009, there was no such prescription made as to the third category of anticipated vacancies being confined to 10% of the number of vacancies. It was pointed out by the various High Courts, as seen from the 2009 Record of Proceedings in Malik Mazhar Sultan that, if 10% of the sanctioned posts are notified there would be a large number of notified posts; which may never arise, which would lead to unwanted litigation. Hence the Hon'ble Supreme Court directed that in addition to existing vacancies and future vacancies as specified in clause (a) and (b), there shall be a waiting list prepared. There is no restriction that the future vacancies arising due to promotion, death or otherwise, when notified, has to be 10% of the vacancies.

22. Malik Mazhar Sultan(3) according to us does not create any fetter on the statutory rules and is intended at pursuing with expeditious recruitment and appointments to the judicial service. When the rules do not provide for notifying anticipated vacancies, and spoke of

notifying the determined vacancies, the Hon'ble Supreme Court in Rakhi Ray found that the anticipated vacancies in excess of that notified cannot be filled up merely for reason of such inclusion having been permitted in Malik Mazhar Sultan(3). There should then be amendment of the Rules. Likewise when the statutory rule provides for notification of anticipated vacancies, even in excess of that permitted by the Hon'ble Supreme Court, it would not run counter to the directions issued in Malik Mazhar Sultan(3).

23. Hirendra Kumar vs. High Court of Allahabad 2019 SCC Online SC 254 again considered the conflict alleged, of the rules, with the directions in Malik Mazhar Sultan(3). The statutory rule applicable to the Higher Judicial Service provided for a recruitment to be made atleast in three years and provided for filling up the existing vacancies as also anticipated vacancies of the next two years. One of the grounds urged was that it violates the time schedule in Malik Mazhar Sultan(3), which mandate filling up of vacancies on a yearly basis. The petitioner claimed age relaxation on the ground that if recruitment was held every year, he would have been eligible, since he crossed the maximum age in

the intervening three years. Their Lordships held so in para 20:

" The directions in Malik Mazhar Sultan (supra) are intended to address the issue of vacancies in the district judiciary. Those directions do not override the prevailing rules which govern selections to the HJS in the States and Union Territories nor do they create any enforceable right in a candidate for selection or to assert age relaxation in violation of the rules. So long as the rules hold the field, a candidate in order to be eligible, must fulfill the age and other conditions which are prescribed by the Rules."

The provision in the Kerala Rules to fill up vacancies arising within one year of approval of the merit list or the next list is published; whichever is earlier, hence is unassailable and does not run counter to the directions in Malik Mazhar Sultan(3); for the simple reason of the Hon'ble Supreme Court having not interfered with the statutory rules. We too searched in vain to find a prescription in Malik Mazhar Sultan (3) that the recruitment be carried on strictly on a yearly basis.

24. We have also looked at the recommendation of the Committee of the Hon'ble Judges of this Court for

amendment of the Rules of 1991. Paragraphs 20 and 21 of which are extracted hereunder:

"20. It is further submitted that as per rule 7(2) of the Kerala Judicial Service Rules, 1991, the list approved by the Governor shall come into force from the date of the approval and shall remain in force for a period of three years or until a fresh approved list is prepared, whichever is earlier. As per the directions in the Malik Mazhar Sultan Case, the select list prepared for all categories of officials shall be valid till the next select list is published. It is also held therein that recruitment is to be conducted every year.

21. In view of the direction of the Hon'ble Supreme Court, the existing provision regarding the validity period of the merit list contained in rule 7(2) is to be modified to the effect that the merit list shall be valid till the next select list is published".

The present amendment was proposed with specific reference to paragraph 14 of Malik Mazhar Sultan(3) which reads: "*The select list prepared for all categories of officials shall be valid till the next select list is published*" (sic). The learned Judges in the Committee noticed the time-line prescribed and the above direction. However, presumably noticing the vagaries of recruitment process and

possibility of litigation, the learned Judges included a restriction insofar as providing for appointment to only those anticipated vacancies which arise within one year from the date of approval or till a new merit/select list come into force, whichever is earlier. The anticipated vacancies reckoned, at its maximum, can only be those arising within one year of the approval of the merit list of a particular selection year. Here, it is pertinent to observe that the amendment proposed also included a comprehensive procedure of selection; with preliminary and main exams followed by viva voce, which was included under sub-rule (1) of Rule 7.

25. We have also looked at the decision of the Committee of Judges in the year 2016, the decision is as follows:

"Item No.2 REC-4-10945/2016 KERALA JUDICIAL SERVICE EXAMINATION, 2016 - RECRUITMENT TO THE POST OF MUNSIFF-MAGISTRATE (GENERAL VACANCIES) - REG.

The Committee deliberated over this agenda item and resolved that the number of vacancies to be notified for recruitment to the post of Munsiff-Magistrate needs re-calculation. With regard to the 30 posts sanctioned for Gram Nyayalayas, the Registry may find out how many courts are to be made functional this year, so

that their actual number may be taken for notification. In view of the judgment of the Apex Court dated 04.01.2007, the Committee resolved that the number of vacancies likely to arise till 31.12.2016 may also be taken into account. The re-calculation may be done accordingly".

This was a decision taken for the specific year and for accommodating those vacancies which may arise due to the constitution of Gram Nyalayas. Though the rule then existing provided for anticipated vacancies up to two years from the date of approval of the Governor to be filled up, the learned Judges restricted the notification to those vacancies arising up to 31.12.2016. This cannot be seen as a deviation from the recommendation to amend the rules. This was a decision, good for that year and that recruitment, noticing the expected constitution of Gram Nyalayas, which had then, not come into existence. There is also nothing produced to show that the High Court had at any time after the recommendation made for amendment, in the year 2014, sought for such proposal to be withdrawn.

26. We would look at the present notification for recruitment and appointment; in the background of what we have just stated, on the law and as noticed from the

records. The notification was published on 01.02.2019 with 45 vacancies; 8 NCA vacancies and 32 (Probable) vacancies which also included one reserved for PwD. According to the High Court it took in 15 vacancies that existed as on 01.01.2019 and 17 vacancies that would arise in the post of Munsiff/Magistrate on promotion of the senior incumbents in that cadre to the post of Sub Judge/CJM. There was also vacancies arising in the cadre of District Judges to which Sub Judge/CJMs would be promoted again resulting in further promotions from the cadre of Munsiff/Magistrate. Hence a total of 41 posts along with 4 anticipated vacancies were notified and it was qualified as 'Probable'. This does not take in the further vacancies claimed by the writ petitioners, is the forceful submission.

27. As was noticed by us, every conceivable vacancies up to 31.12.2019 has been taken into consideration along with 10% of such conceivable vacancies and specified in the notification. If Rule 7(2) is to be given full play after approval of the merit list on 07.05.2020 those vacancies arising between 31.12.2019 to 07.05.2020 and till an year later, ie., till 06.05.2021 or till a new select list is published, whichever is earlier, would also have to be filled up from the merit list

approved as on 07.05.2020. The only impediment would be insofar as the immediate appointment being possible only to those vacancies arising as on 07.05.2020, the date on which the merit list is approved. The further appointments can only be as and when such vacancies arise in the ensuing year after approval or till the new list is published, whichever is earlier. This would be a permissible exercise especially since as of now there is no subsequent merit list published, though the recruitment for 2020 has commenced.

28. Looking at the time frame of recruitment and appointment, the recruitment which commenced with the notification in January of 2019 culminated in the approval of the merit list by the Governor in May 2020. The persons appointed as per the select list would be deputed for training for one year when they would not be regularly discharging their duties in the vacant posts of Munsiff/Magistrates. The training having commenced on 29.6.2020, it would come to an end only in June 2021, at which point possibly there would be a merit list published in pursuance to the notification issued in January of 2020, let us say by May of 2021. Hence as soon as the Munsiff/Magistrates deputed for training as on June 2020

takes charge in June 2021, they would occupy all the vacancies up to June 2021 or if the new merit list has come into force prior to that, in those vacancies arising till that prior date. At that point there would also be a fresh set of recruits ready for training who would fill up the entire vacancies as on the date of their assuming charge within one year of the newly approved merit list. This would ensure seamless filling up of posts, thus bringing to fruition the avowed objectives of expedition in appointments and prompt dispensation of justice as contemplated by their Lordships in Malik Mazhar Sultan(3).

29. There could arise one problem insofar as the High Court having to carry out training, piece-meal, of the recruits appointed to the vacancies arising in the one year after the approval of the merit list. This could be solved by selecting for training even persons whose vacancies have not arisen, in anticipation. When appointments are made in June 2020 in accordance with Rule 7(2) it could only be regularly made to vacancies that actually arose till that date. The High Court then would be faced with the problem of appointing fresh recruits in the ensuing year to arising vacancies who also would have to be given training for one year which may put the training process into

jeopardy. We only observe that the High Court on its administrative side in consultation with the Government could device a procedure through which training could be commenced even for successful candidates, finding a place in the merit list, who could be appointed to the anticipated vacancies, which vacancies definitely would arise by the time their training is completed. This can especially be managed since the validity of the list cannot go beyond one year from the date of approval and the training can commence only after the approval of the merit list. The selection of recruits to anticipated vacancies for undergoing training could also be made subject to the vacancy arising and the new list coming into force; with continuance in training on a stipend till regular appointment is made to the vacancy. We do not intend these observations to be in the nature of a direction and are only our thoughts, expressed aloud.

30. Now we come to the issue of whether the relief sought for by the writ petitioners would lead to appointing persons in excess of the vacancies notified. The notification dated 01.02.2019 announced 8 NCA vacancies and as to the number of other vacancies to which appointment is to be made, this was specifically indicated

as: 37 (Probable) (includes one vacancy reserved for Persons with Disabilities which was kept unfilled in the previous year for want of eligible candidate and carried forward to this year as per section 34(2) of the Rights of Persons with Disability Act, 2016) (sic). The appellant seems to contend that the 37 vacancies itself are probable since as on the date of notification there existed only 15 vacancies and 26 are those arising in the year of recruitment with an addition of 10% of the total vacancies, existing and anticipated. We have to notice that understanding under which the recruiting authority issued the notification would be irrelevant insofar as construing the notification, on the face of it. We have to look at the notification and understand the stipulations as seen from the notification, as any reasonable person would construe it, in the background also of the rule position.

31. The word "Probable" has the following meaning in Blacks Law Dictionary:

"Probable. Having the appearance of truth; having the character of probability; appearing to be founded in reason or experience. Having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely. See also possible."

The word indicates that though normally what is indicated will be the position, a doubt exists and there could be variance. When the possibility of variance is indicated, with respect to vacancies, for which applications are invited to make appointments, there could be reduction or enhancement. Here the contention is that the recruiting authority had not reckoned the vacancies which would arise as per Rule 7(2). But in any event, it could not have been determined at the time of notification since it is not clear as to when the merit list would be published, approval of the Governor obtained and at what pace and expediency the subsequent selection would be carried out. Especially when the vacancies that could be filled up by a notification issued for recruitment as per Rule 7 are those notified and that would arise within a period of one year, from the date of approval of the Governor or coming into force of the approved select list for the next year; whichever is earlier. There could be no prediction made of the number of vacancies that could be filled up by a given notification, as per Rule 7(2). It would depend on various factors, the most important factor being the date of approval of the merit list by the Governor, which has to happen in the future. There cannot be any anticipation of

the exact number Of vacancies as per Rule 7(2) and the qualification or categorisation, of the specified number of 37 vacancies, with the word "Probable" would eminently convey the intention of rule 7(2) and validate its compliance. As rightly found by the learned Single Judge the use of the word "Probable" could mean either an increase or reduction of the number of vacancies, from that notified.

32. Ashis Kumar was a case in which an applicant to the post of Psychologist was disqualified for reason of not possessing a LT/BT/BEEd qualification; which was shown as an alternative qualification in the notification along with post-graduation in Psychology. Looking at the rules it was found that the LT/BT/BEEd was not an essential qualification and even in the notification those were shown as alternative qualifications. It was undisputed that by LT/BT/BEEd qualification alone, no candidate could be selected without post-graduation in Psychology. We garner support from the decision to look at the notification in the background of the Rule position and find it to be indicating filling up of vacancies over and above the specified number shown in the notification.

33. Shankarsan Dash held that if a number of vacancies are notified and adequate number of candidates are successful, even then those figuring in the select list do not acquire an indefeasible right to be appointed. Asha Kaul stressed upon the aspect of obligation of the Government to act fairly in not approving a select list, which also has to be supported by reasons. Somasundaram Vishwanath considered the interplay of executive instructions, the Rules and the statute; in the event of conflict. We are of the opinion that these decisions does not advance the case of the writ petitioners. Here we are not concerned with any such issue. If the Hon'ble Supreme Court, after considering the Rules had spoken against it and issued directions contrary to the prescription in the rules, despite the prescription remaining in the rule book, necessarily the directions prevail. In Malik Mahzar Sultan(3) no such direction was issued and it was stressed that the recruitment has to be in accordance with the statutory rules.

34. Virender S. Hooda was a case in which the question arose as to whether the administrative instructions can be read as obligatory, enabling the appointing authority to appoint candidates in excess of

posts advertised. Therein a notification was issued by the Haryana Public Service Commission and select list was published. There were only seven general category candidates notified and all the posts were filled from the select list. The 8th rank holder before Court specifically contended that there was a fresh notification issued within 6 months wherein again 9 vacancies in the general category were notified. The Hon'ble Supreme Court found that there were circulars issued by the Government obliging the Public Service Commission to fill up vacancies, that arise within 6 months from the receipt of the recommendation, from the waiting list itself. Even in the case of such administrative instructions the Hon'ble Supreme Court found that it is a policy declared by the Government, which has to be given full effect as long as such instructions do not run counter to the Rules of recruitment. Sandeep Singh v. State of Haryana [(2002) 10 SCC 549] raised the very same question pursuant to a notification wherein the number of posts were only tentatively indicated. Relying on Virender S. Hooda the Hon'ble Supreme Court directed the appointments to be made to vacancies which arose from the date of advertisement to the date of interview.

35. In the present case the policy of the appointing authority is very clear and it is to keep the list valid for one year from the date of approval or till the next list is published, whichever is earlier. The said policy has been declared in the statutory rule itself. Quite in consonance with the statutory prescription the recruiting authority has specified the number of vacancies and indicated that 37; apart from 8 NCA vacancies, are the notified vacancies, which is clearly made tentative and subject to change dependent on various factors by showing it as (Probable). There is nothing in the notification to indicate what has been declared as probable, are only those future vacancies spoken of by the Hon'ble Supreme Court in Malik Mazhar Sultan (3). Read with the Special Rules it has to be understood as providing for appointment as per the rule position itself. There are 37 notified vacancies as spoken of in the rule. The word "Probable" indicates either (i) reduction of those anticipated from among the 37, by reason of some not really arising or (ii) there being scope for addition by reason of the additional vacancies that arise, which are possible of being filled up as per the rule for the simple reason that the next selection list has not come into force; but confined to one year from the date

of approval of the present merit list.

36. There can be no doubt that the statutory rule has to be followed by the appointing and recruiting authority. In the present case though the appellant submits that the amendment to the Rule was not considered when the notification was issued, for the reason of the rule running contrary to the Supreme Court directions; we are unable to accept it. We have found that Rule 7(2) does not run counter to the directions of the Supreme Court. The Rule provides for keeping a select list valid for a period of one year from the date of its approval by the Governor or till the date of publication of the subsequent select list, whichever is earlier. The notification issued on the basis of the Special Rules specifically indicate the vacancies and qualify it as probable. The qualification as "Probable", in brackets, seen from the notification can only be understood as being in harmony with the rule position which permits appointment from the select list to anticipated vacancies.

37. Looking at the notification, we cannot find the High Court having departed from the rule position, though the counter-statement filed would suggest otherwise. We have to judge the notification by what is stated there

and not by what the High Court submits in a statement filed subsequently, before this Court. Mohinder Singh Gill v. Chief Election Commr., [(1978) 1 SCC 405], is apposite here:

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji* AIR 1952 SC 16:

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older".

Though not having the flavour of an order, the notification for recruitment is issued on a conscious decision taken by the authority, in accordance with the statutory rules. Just as its validity has to be adjudged on what appears in its face, without any supplanting, it cannot be vitiated on grounds of an admission of a conscious departure from the rules, that too on a wrong understanding of the directions issued by the Hon'ble Supreme Court. In any event the High Court could not have departed from the statutory rules and the justification based on the directions of the Hon'ble Supreme Court has already been found to be unsustainable on a plain reading of Malik Mazhar Sultan (3). We have also referred to Hirandra Kumar where the Hon'ble Supreme Court, in the year 2019, after referring to Malik Mazhar Sultan (3), upheld the Rules of the Uttar Pradesh Higher Judicial Service, which mandated selection atleast in three years and filling up of existing and anticipated vacancies of two years.

38. On the above reasoning we answer the first question posed in the negative and the second question positively, affirming the decision of the learned Single Judge. We direct the appellant to prepare a select list from the approved merit list including those vacancies

which arise as on today and those anticipated till 06.05.2021 or any other date on which the appellant expects the next list to be published. Appointment to the anticipated vacancies, definitely can only be from the date on which such vacancy arise. However, as we noticed herein above; to ensure that the training of all candidates are continued together, a device agreed upon by the Government and the High Court could be thought of; if there are so many candidates available from the merit list.

39. Before leaving with the matter, we cannot but notice the practise of assigning seniority to the new recruits as per a notification for a particular year, along with those appointed under the NCA vacancies. In the subject recruitment, various NCA vacancies and regular recruitment for 2019 was proceeded with simultaneously. The person who obtains seniority above all the candidates herein, is one appointed in a NCA vacancy which arose pursuant to a notification of 2013. The said candidate, however, is the 69th rank holder among the 69 candidates in the merit list. This is in accordance with Rules 14 to 17 of the KS&SSR, which has been adopted in the Kerala Judicial Service Rules, 1991 brought out in exercise of powers conferred under Articles 234 and 235 of the

Constitution of India and sub-section (1) of Section 2 of the Kerala Public Services Act, 1968. We cannot but observe that this is a complete negation of merit in a fortuitous circumstance of a candidate being eligible to be posted in a vacancy, which arose far earlier (here, seven years) when the said candidate was not even eligible, at the time of the original notification, to apply to that post. We are quite conscious of the fact that the rotation practised under the KS&SSR could also result in certain candidates having lesser merit being placed senior to those having higher merit. But, that does not result in such negation of merit as we noticed hereinabove of the last candidate in the rank list being placed as the first and the senior-most. As of now, this is perfectly permissible under the KS&SSR, which has been adopted in the Rules framed for the Judicial Services. We were of the opinion that the above circumstance should be brought to the notice of the Full Court. We are told by the learned Standing Counsel appearing for the High Court that the Registry informs him that there is such a proposal before the Rule Committee. We, hence, desist from making any reference; but, however, direct the Registry to place our opinion before the Rule Committee expeditiously.

We dismiss the Writ Appeals, directing the High Court to forward a select list in accordance with Rules 14 to 17 of Part II of the KS&SSR, 1958 from the approved merit list. The same shall be done expeditiously. Parties are left to suffer their respective costs.

Sd/-
K.VINOD CHANDRAN
JUDGE

Sd/-
T.R.RAVI
JUDGE

Vku/jma/nak

APPENDIX OF WA 994/2020

APPELLANT'S/ANNEXURE(S) :

DOCUMENT PRODUCED ALONG WITH APPEAL MEMORANDUM:

ANNEXURE A1 TRUE COPY OF THE NOTIFICATION
 NO.REC4-10546/2020 DATED 30/06/2020
 ISSUED BY THE APPELLANT FOR THE YEAR 2020.

DOCUMENTS PRODUCED ALONG WITH STATEMENT DATED 18.08.2020

ANNEXURE A1 TRUE COPY OF THE LIST SHOWING THE RELEVANT
 DATES COMMENCING FROM THE DATE ON WHICH THE
 NOTIFICATION WAS ISSUED AND SHOWING THE DATES
 OF VARIOUS STAGES OF SELECTION.

ANNEXURE A2 TRUE COPY OF THE LIST SHOWING THE RELEVANT
 NUMBER OF VACANCIES THAT AROSE AND THE MANNER
 IN WHICH THE VACANCIES AROSE.

ANNEXURE A3 TRUE COPY OF THE DETAILS OF VACANCIES WHICH
 AROSE IN THE YEAR 2020.

APPENDIX OF WA 998/2020

APPELLANT'S/ANNEXURE(S) :

ANNEXURE A1

**TRUE COPY OF THE NOTIFICATION
NO.REC-4-10546/2020 DATED 30.6.2020
ISSUED BY THE APPELLANT FOR THE YEAR 2020.**

[TRUE COPY]