

**IN THE HIGH COURT OF HIMACHAL PRADESH**  
**AT SHIMLA**

**CWP No.8361 of 2023**  
**Reserved on:18.04.2024**  
**Pronounced on: 30.04.2024**

Nitin Mittal

.....Petitioner

Versus

State of H.P. & Another

.....Respondents

**Coram:**

**Hon'ble Mr. Justice M.S. Ramachandra Rao, Chief Justice.**

**Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.**

Whether approved for reporting?

For the petitioner	:	Mr. Arjun Lall, Advocate.
For the respondents	:	Mr. Gobind Korla, Additional Advocate General, for respondent no.1. Ms. Devyani Sharma, Senior Advocate with Mr. Basant Pal Thakur, Advocate, for respondent no.2.

**M.S. Ramachandra Rao, Chief Justice.**

The petitioner is a Member of the Himachal Pradesh Judicial Service and is presently posted as Senior Civil Judge-cum-CJM, Bilaspur, H.P.

2. The High Court of Himachal Pradesh had invited applications on 20.11.2022( **Annexure P-1**) on the prescribed format from eligible Senior Civil Judges having minimum service of five years in the said cadre for promotion and appointment as Additional District & Sessions Judges in the H.P. Judicial Services in the cadre of District/Additional District

Judges, on the basis of merit by *limited competitive examination* against *one* anticipated vacancy likely to be arising within one year due to retirement.

3. On 13.07.2022, the High Court vide **Annexure P-2** declared the select list in order of merit for the aforesaid examination.

4. Candidate bearing Roll No.100007 secured first position whereas the petitioner secured 2<sup>nd</sup> position.

5. On 31.07.2023, vide **Annexure P-3**, the candidate who secured 1<sup>st</sup> position, was given appointment as an Additional District & Sessions Judge against the advertised vacancy.

6. On 09.08.2023, the petitioner made a representation **Annexure P-7** dt. 09.08.2023 to the High Court for consideration of his candidature for promotion and appointment as an Additional District Judge in the cadre of District Judge/Additional District Judge against a vacancy which had arisen on 30.7.2023 on account of elevation of Sh. Rakesh Kainthla, District & Sessions Judge as a Judge of the High Court. The same was rejected on 07.10.2023, vide **Annexure P-8**.

7. Challenging the same, the petitioner has filed this Writ petition.

### **Contentions of Petitioner**

8. The petitioner sought quashing of **Annexure P-8** dt. 07.10.2023 wherein the High Court had rejected his representation dt. 09.08.2023 and also sought a Writ of Mandamus directing the State of Himachal Pradesh

to send requisition for the said post with a further direction to the High Court to recommend the name of the petitioner from the combined merit list/select list in order of merit for appointment to the post in the cadre of District Judges/Additional District Judges in terms of **Annexure P-1**.

9. Petitioner's contention is that since the vacancy in the cadre of District Judge/Additional District Judge occurred on 30.07.2023 on the elevation of Sh. Rakesh Kainthla, District & Sessions Judge as a Judge of the High Court of Himachal Pradesh, it was a vacancy which had arisen on account of exigency of service; that the said vacancy had arisen within the Recruitment/Selection Year 2022-23; that the vacancy had also arisen during the period of validity/enforcement of the select list in terms of the Himachal Pradesh Judicial Service Rules, 2004; and therefore, since he is the next candidate available in the select list, he ought to be appointed against the said post.

10. It is the contention of the petitioner that as per the judgments rendered by the Supreme Court in *Malik Mazhar Sultan (3) and Anr. vs. U.P. Public Service Commission*<sup>1</sup>, and in *Malik Mazhar Sultan and Anr. vs. U.P. Public Service Commission*.<sup>2</sup>, there is a mandate to include some candidates in the wait list which was to operate as a pool with respect to anticipated vacancies which may arise on account of death, elevation or

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

<sup>2</sup> (2009) 17 SCC 24

otherwise, *qua* the concerned recruitment year; and the action of the High Court in rejecting his request for consideration against the vacancy which has arisen on account of the elevation of Justice Rakesh Kainthla to the post of High Court Judge from the cadre of District Judge, is arbitrary, illegal and unreasonable and also violative of the Principles of Natural Justice.

11. It is the contention of the petitioner that the High Court should take into consideration the actual/existing and anticipated vacancies, but not future vacancies; that the determination of existing vacancies annually is clear and definitive; anticipated vacancies are the vacancies which can be reasonably contemplated to arise due to normal exigencies of service such as promotion, resignation or death; it may be difficult to determine with precision vacancies which may arise out of circumstances like promotion, resignation or death; that the vacancy which has been created on 30.07.2023 is not a future vacancy, but is an anticipated vacancy; and he is entitled to be considered against the said vacancy which arose due to exigencies of service.

**The stand of the respondent No.1 (High Court of H.P)**

12. Reply is filed by the High Court of HP (for short 'the High Court') opposing the said contentions.

13. The High Court contended that the applicable rules for the promotion to this category are the Himachal Pradesh Judicial Services Rules, 2004 (for short 'the HPJS Rules').

14. It is stated that the method of recruitment to the District Judges/Additional District Judges' posts is from three sources, i.e.

*“(a) 65% by promotion from amongst the Senior Civil Judges on the basis of principle of merit-cum-seniority and passing a suitability test, as may be prescribed & conducted by the High Court in accordance with the regulations;*

*(b) 10% by promotion from amongst Senior Civil Judges on the basis of merit through limited competitive examination, as may be prescribed and conducted by the High Court in accordance with the regulations; &*

*(c) 25% by direct recruitment from amongst eligible Advocates, on the basis of examination, written as well as oral (viva voce) test, as may be prescribed and conducted by the High Court in accordance with the regulations.”*

15. The said rules provided for a time schedule as well.

16. More importantly, in Rule 5(A), it is mentioned that for filling up vacancies in the cadre of District Judges/Addl. District Judges by way of promotion shown in Clauses (b) and (c) above, the number of vacancies to be notified by the High Court have to be calculated by including:

*“(a) existing vacancies;*

*(b) vacancies that may arise within one year due to retirement;*

*(c) future vacancies that may arise due to deputation of Judicial Officers to other Departments, which will be considered as temporary vacancies; &*

*(d) vacancies arising due to deputation of Judicial Officers to other Departments, may be considered as temporary vacancies”.*

17. Counsel for the High Court stated that the vacancies which arise due to elevation to the High Court, death or otherwise are not mentioned to be included in the number of vacancies to be notified by the High Court, since the elevation to the High Court or death are uncertain events.

18. It is stated that previously such vacancies were also included in the 10% vacancies prior to 2009, but the Supreme Court in its judgment dt. 24.03.2009 in **Malik Mazhar Sultan’s case (2 supra)** directed all the High Courts to delete the said category and notify only the existing number of vacancies plus the anticipated vacancies for the next one year though it did mention that some candidates also be included in the wait list.

19. It is asserted that the HPJS Rules were brought in conformity with the above order dt. 24.03.2009 of the Supreme Court and such vacancies which arise on account of elevation to the High Court or death, are not to be included in calculating the number of vacancies to be notified for filling up.

20. It is contended that an unadvertised vacancy cannot be filled up and any such action would be violative of Articles 14 & 16 of the Constitution of India.

21. It is also contended that where determined number of vacancies are notified, appointments cannot be in excess thereof; and if the wait list is

operated to fill up an unadvertised vacancy, constitutional rights of persons who become eligible during the interregnum to be considered for appointment, would be infringed.

22. It is denied that the vacancy which arose on account of elevation of Justice Rakesh Kainthla as Judge of the High Court of Himachal Pradesh on 30.07.2023, was a vacancy which arose on account of exigency of service and is required to be filled up from the select list, as contended by the petitioner.

23. It is also stated that merely because a wait list is to be maintained, it does not follow that the wait list would become an alternative method for filling up the vacancies, as it is settled law that a wait list cannot be used as a reservoir to fill up unadvertised vacancies.

### **Consideration by the Court**

24. We have noted the contentions of the parties.

25. In the judgment dt. 04.01.2007 in *Malik Mazhar Sultan (1 supra)*, the Supreme Court of India had given directions fixing an annual time schedule in respect of filling up of vacancies in the cadre of District Judges.

26. One of the categories of vacancies indicated in the said order for calculating the number of vacancies to be notified by the High Courts was “*future vacancies that may arise due to elevation to the High Court, death or otherwise, say 10% of the number of posts*”.

27. It was subsequently brought to the notice of the Supreme Court in 2009 by counsel appearing for various High Courts that 10% of sanctioned posts were notified in some States; a large number of posts are to be notified whereas there was corresponding number of vacancies to be filled, if the candidates are selected in the select list; there may be an expectation for such candidates to get appointment in the event of elevation to the High Court or in case of death, and this creates unwanted litigation by the candidates. The High Courts prayed that the existing vacancies alone be notified along with the anticipated vacancies that may arise in the next one year and some candidates also be included in the wait list prepared by the High Courts/Public Service Commissions.

28. Therefore, the Supreme Court passed an order on 24.03.2009 in *Malik Mazhar Sultan* (2 supra) superseding its previous order dt. 04.01.2007 in *Malik Mazhar Sultan* (1 supra), and directed that in future the High Courts/Public Service Commissions, shall notify the existing number of vacancies plus the anticipated vacancies for the next one year and some candidates also be included in the wait list.

**29. Thus, by virtue of the direction of the Supreme Court, vacancies that would arise due to elevation or death, stood excluded from the vacancies which had to be notified by the High Courts.**

30. After this judgment came into operation, the Himachal Pradesh Judicial Service Rules, 2004 were brought in conformity with it and the



above category, i.e. *vacancy that may arise due to elevation to the High Court or death*, was specifically deleted in Rule 5 in regard to calculation of vacancies in the cadre of District/Addl. District Judges.

31. According to the Rule as it stands, for calculation of vacancies in the above cadre to be filled either by regular promotion (category (a)) or by promotion through limited competitive examination (category (b)) (like in the instant case), only (i) existing vacancies, (ii) vacancies that may arise within one year due to retirement or future vacancies that may arise due to *deputation*, are mentioned.

32. When there is no provision in the rules to treat a vacancy arising on account of elevation to the High Court as an 'anticipated' vacancy, and an 'anticipated' vacancy would only be a vacancy, which may arise within one year due to retirement, the petitioner cannot claim to be considered against the said vacancy of Justice Rakesh Kainthla upon his elevation to the High Court, which occurred on 30.07.2023.

33. Merely because a wait list is being maintained, it is not open to the petitioner to contend that he ought to be considered against the vacancy which arose on account of elevation of Justice Rakesh Kainthla as Judge of the High Court and he (petitioner) be appointed against the said post.

34. It is settled law that a waiting list prepared in an examination conducted by the Public Service Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the

selected candidates does not join, then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency, the Government may as a matter of policy decision, pick up persons in order of merit from the waiting list. Thus, candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative. In case vacancies notified stand filled up and the process of selection comes to an end, the waiting list etc. cannot be used as a reservoir to fill up the vacancy, which comes into existence *after* the issuance of a notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more. (*See: Gujarat State Dy. Executive Engineer's Association vs. State of Gujarat*<sup>3</sup>, *Surinder Singh & Ors. vs. State of Punjab & Ors.*<sup>4</sup> & *Rakhi Ray & Ors. vs. High Court of Delhi & Ors.*<sup>5</sup>).

35. Recently, in *Vivek Kaisth & Anr. vs. State of Himachal Pradesh & Ors.*<sup>6</sup>, also this principle has been reiterated.

36. Much emphasis has been placed by the petitioner on the judgment of the Supreme Court in *High Court of Kerala vs. Reshma A. & Ors.*<sup>7</sup>.

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<sup>3</sup> 1994 Supp 2 SSC 591

<sup>4</sup> (1997) 8 SCC 488

<sup>5</sup> (2010) 2 SCC 637

<sup>6</sup> (2024) 2 SCC 269

<sup>7</sup> (2021) 3 SCC 755

37. In that case, the issue before the Supreme Court was “*whether appointments to the post of Magistrates, can be beyond the probable number of vacancies advertised or whether vacancies not specified in the notification inviting applications, can be filled up in view of the provisions of the Kerala Judicial Service Rules, 1991?*” The point was answered in favour of the High Court, holding that appointments cannot be beyond the vacancies notified.

38. Also the Kerala Judicial Service Rules, 1991, provide for probable number of vacancies for calculation of vacancies to be notified and do not define the said expression ‘*probable vacancies*’.

39. Therefore, the Supreme Court went into the said aspect. The matter before the Supreme Court was not regarding mode of calculation of vacancies.

40. When the HPJS Rules, unlike the Kerala Judicial Service Rules, categorically spell out the modes of calculation in no uncertain terms and do not provide for any ambiguity with regard to calculation of number of vacancies, the said judgment cannot be of any assistance to the petitioner.

41. The observation in Para-55 of the said decision that anticipated vacancies are vacancies which can be reasonably contemplated to arise due to the normal exigencies of service such as promotion, resignation or death and that such vacancies may be difficult to precisely determine, are general observations, and the Supreme Court cannot be understood to

introduce the said category of vacancies again in the Recruitment Rules, having specifically directed in its judgment of 24.03.2009 (*Malik Mazhar Sultan* (2 Supra)) to delete the said category from the anticipated vacancies, on the basis of which, the said category had been removed in the HPJS Rules, 2004.

42. In Para 62, the Supreme Court itself noticed this, and has also observed that in its order passed on 24.03.2009, only vacancies which are existing or anticipated vacancies, arising out of retirement, should be retained.

43. Therefore, we find no merit in the plea of the petitioner that the vacancy which arose out of the elevation of Justice Rakesh Kainthla as Judge of the High Court, would fall in the category of anticipated vacancy, and he is entitled to be considered against the said vacancy since he was in the Select List at Sr. No.2.

44. In our opinion, the said vacancy cannot be treated as an anticipated vacancy at all as per the Himachal Pradesh Judicial Service Rules, 2004.

45. We are also of the opinion that once the single vacancy notified to be filled up, was in fact filled up, the process of selection had come to an end. The select list/waiting list cannot be used as a reservoir to fill up the vacancy which has come into existence *after* the issuance of the notification/ advertisement.

46. The unexhausted select list/waiting list became meaningless and cannot be pressed into service any more by the petitioner. Such a wait list will not furnish a source of recruitment. It could be operated only in the contingency where the selected candidate to the single post did not join, which was not the case of the petitioner here.

47. We, therefore, do not find any merit in the Writ petition, it is accordingly dismissed.

48. Pending miscellaneous application(s), if any, shall also stand disposed of.

**(M.S. Ramachandra Rao)**  
**Chief Justice**

**April 30, 2024**  
*(Yashwant)*

**(Jyotsna Rewal Dua)**  
**Judge**