**(2011) 12 CAL CK 0045**

**Calcutta High Court**

**Case No:** M.A.T. No. 846 of 2009

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| Sri Tapan Kumar Das-II and Others | | APPELLANT |
| | Vs | |
| The High Court at Calcutta and Others | | RESPONDENT |

**Date of Decision:** Dec. 22, 2011

**Acts Referred:**

- Constitution of India, 1950 - Article 14, 141, 226, 234, 235
- West Bengal Judicial (Condition of Service) Rules, 2004 - Rule 24(1), 26, 26(1), 6(1)

**Hon'ble Judges:** Pratap Kumar Ray, J; Md. Abdul Ghani, J

**Bench:** Division Bench

**Advocate:** D.N. Ray and Ms. Munmun Tewary, for the Appellant; Alok Kumar Ghosh, for the Respondent

**Final Decision:** Dismissed

**Judgement**

Pratap Kumar Ray, J.

Assailing the judgement and order dated 24th July, 2009 passed by learned Trial Judge in W. P. No.13020 (w) of 2009, this appeal has been preferred. The learned Trial Judge dismissed the writ application. Twelve writ petitioners belonging to the cadre of Civil Judge, Senior Division, of West Bengal Judicial Service who were functioning as Additional District Judge on the basis of ad-hoc promotion being posted in different Fast Track Courts, moved the writ application affirming on 22nd day of June, 2009, by assailing the selection process for the rank of District Judge within the cadre of Higher Judicial Service of State of West Bengal as notified following the recruitment rules namely West Bengal Judicial (Condition of Service) Rules, 2004 effected from the date of notification in Calcutta Gazette dated 1st October, 2004, on the ground that petitioner should be regularised first in the rank of District Judge in view of their long service as ad-hoc appointee discharging function of Additional District Judge of different Fast Track Courts as established and

for declaration further that there would be no necessity for further suitability tests to promote the writ petitioners in the rank of District Judge of Higher Judicial Service cadre of the State of West Bengal. Schedule of selection process namely dates of filing application, scrutiny of application, holding of examination and publication of result also was assailed by contending that the same was not in terms of mandate of Apex Court passed in the case Malik Mazhar Sultan being Civil Appeal No.1867 of 2006 pending in the Apex Court wherein time schedule was framed by the Apex Court to complete the process of selection for appointment in the post of Higher Judicial Service. Following prayers made in the writ application.

a) Directing the respondent to withdraw the notification No.5632R(JS) and to issue notification afresh showing the actual vacancy as on date and also the vacancy that may arise within one year by adding 10% of the cadre strength to the actual vacancy;

b) A writ of mandamus directing the respondent to ensure that 50% of the vacancies are filled up by way of merit cum seniority without caring for the number of the officers now in the cadre, and directing the respondent to issue notification afresh for filing up 66 posts by way of merit cum seniority and also to ensure that while preparing the list of eligible officers for promotion through merit cum seniority all the senior officers in the permanent cadre of Civil Judge(Sr. Div.) are brought within the zone of consideration in the ratio of 1:3;

c) A direction to the effect that the officers who were once found suitable by the High Court to be promoted to the posts of District Judges are not liable to face suitability test again. They are to be absorbed in the vacancies to be filled up by way of merit cum seniority.

d) A writ of mandamus directing the respondent that the date, the subject and the manner of holding Limited Competitive Examination are to be notified well in advance so that some of the officers are not caught unaware. The officers who applied for appearing in the Limited Competitive Examination must be given fair chance to appear in such examination, if they are otherwise found eligible.

e) An interim order do issue directing the respondents herein to postpone the ensuing examination scheduled to be held on and from 29.6.2009 till rules in this regard are framed ad circulated amongst all concerned so that every eligible officer gets the opportunity to get himself prepared for appearing in such examination.

f) An order quashing all the notifications in this regard issued by the respondent treating those arbitrary and unreasonable.

g) Rule NISI in terms of the above prayers.

h) Any other writ order or directions as the Hon''ble Court may deem fit ad appropriate in the facts and circumstances of the case.

2. Learned Trial Judge discussed all points and came to the conclusion that

(I) breach of order of the Apex Court passed in Malik Mazhar sultan & Anr. case was marginal and will not vitiate the selection process.

(II) Regularisation prayer in the rank of District Judge within the cadre of Higher Judicial Service automatically, was negatived following the judgment of Apex Court passed in the case Brij Mohan Lal Vs. Union of India (UOI) and Others, wherein the status of ad-hoc appointee in the post of Additional District Judge to discharge the function of Judges of Fast Track Court was stipulated in paragraph 14 of the said report by directing that those officer would remain in the parent cadre during their function in the Fast Track Court and no right would be conferred to claim regular promotion on the basis of said ad-hoc appointment.

3. The judgement of the learned Trial Judge reads such:

1. The twelve petitioners, who have jointly moved this writ petition are judicial officers belonging to the cadre of civil judge (senior division) and barring one of them, that is petitioner no. 10, they have been functioning as additional district judges on the basis of ad hoc promotion given to them in different phases as fast track court judges in different districts of West Bengal.

2. In this writ petition, different prayers have been made for directions on the High Court administration and the State Government for promotion of the petitioners in the rank of district judges, but in course of hearing, submissions were made on behalf of the petitioners on two grounds. Prayer was made, in substance, for invalidating an examination for promotion of civil judges (Senior division) to the rank of district judges. The second prayer made was declaratory in nature. A direction was sought from this Court to the effect that the officers who were given ad- hoc promotion as additional district and session judges of the fast track courts should not be required to face suitability test again for promotion, and they should be regularised in the rank of district judges.

3. The examination over which complain is made is termed as "Limited competitive examination", which is held for promotion of civil judges (senior division) having not less than five years of qualifying service; to the rank of district judges. The examination commenced on 29 June 2009 and appears to have been concluded on 7 July 2009. In the writ petition there is also prayer for an interim order seeking postponement of this examination, but when the writ petition was first argued before me on 29 June 2009, the examination was scheduled to commence on that very date. Mr. Roy, learned Advocate appearing for the petitioner fairly submitted that he was not pressing the prayer for interim order at that stage since the examination had already commenced, but would pray for quashing or invalidating the same. The main ground on which he has sought invalidation of the examination is that the same has been conducted in breach of directive of the Hon''ble Supreme Court specifying a schedule of dates to be maintained for holding of the

examination. The case of the petitioners is that departure from such schedule mandated by the Hon''ble Supreme Court has caused prejudice to them, as well as other similarly situated officers. This directive was given by the Hon''ble Supreme Court on 4 January 2007, in the case of (Civil Appeal No. 1867 of 2006) Malik Mazhar Sultan & Anr. Vs. U.P. Public Service Commission & Ors.)

4. The recruitment to the rank of district judges in West Bengal is guided by the West Bengal Judicial (Conditions and Services) Rules, 2004 (The 2004 Rules, in short). Paragraph 26 of the said Rules contains the provisions relating to recruitment to such posts, which provides:-

26. Method of recruitment.- (1) On or after the commencement of these rules, the appointment of the Higher Judicial Officers in the rank of District Judges in the post of District Judge as mentioned in clause (a) of sub-rule (1) of rule 24, shall be made

(a) by direct recruitment from the Bar;

(b) by selection through promotion, on the basis of merit-cum-seniority and on passing of a suitability test, from amongst such Judicial Officers other than District judges as mentioned in clause (b) of sub rule (1) of rule 6 of these rules;

(c) by promotion strictly on the basis of merit through limited competitive examination of such Judicial Officers other than District judges as mentioned in clause (b) of sub-rule (1) of rule 6 of these rules having not less than five years qualifying service;

Provided that the number of vacancies to be filled up by direct recruitment as stated in clause (a) shall not be more than 25% of the total permanent strength and such recruitment shall as far as possible be made annually;

Provided further that the number of vacancies to be filled up by promotion as stated in clause (c) shall, subject to the provision of the third proviso, not be more than 25% of the total permanent strength and such recruitment shall as far as possible be made annually; Provided also that where suitable persons are not available for appointment to the posts of the Judicial Officers in the rank of District judges under this part, the number of vacancies required to be filled up by direct recruitment as stated in clause (a) and by promotion as stated in clause (c), shall not be carried forward and such vacancies may be filled up.

(a) in respect of vacancies required to be filled up by direct recruitment as stated in clause (a),-

(i) firstly, from amongst the eligible Judicial Officers in the rank of District Judges selected by the method as stated in clause (c);

(ii) secondly, from amongst the eligible Judicial Officers in the rank of District Judges selected by the method as stated in clause (b);

(b) in respect of vacancies required to be filled up by promotion on the basis of merit as stated in clause (c), from amongst the eligible Judicial Officers in the rank of District Judges selected by the method as stated in clause (b).

(2) The appointment of the Higher Judicial Officers in the rank of District Judges in the posts of District Judge in selection grade and District Judge in super time scale, as referred to in clauses (b) and (c) of sub-rule (1) of rule 24, shall be made by the High Court by selection of the Higher Judicial Officers in the rank of District Judges of the service from posts as referred to in clause (a) and clause (b), respectively, of that rule and such appointment shall be made by selection on the basis of meritcum-seniority.

5. The fast track courts have been constituted for expeditious disposal of long pending cases, and sessions cases in particular. So far as the status or rank of the judges of the fast track courts are concerned, the Hon''ble Supreme Court in an order passed in the case of Brij Mohan Lal Vs. Union of India (UOI) and Others, issued certain directions. Paragraphs 10(1) and (14) of the order of the Hon''ble Supreme Court are relevant in this respect. The direction of the Hon''ble Supreme Court in these paragraphs are:-

10. Keeping in view the laudable objectives with which the Fast Track Courts Scheme has been conceived and introduced, we feel the following directions, for the present, would be sufficient to take care of initial teething problems highlighted by the parties:

Directions by the Court:

1. The first preference for appointment of judges of the Fast Track Courts is to be given by ad-hoc promotions from amongst eligible judicial officers. While giving such promotion, the High Court shall follow the procedures in force in the matter of promotion to such posts in Superior/Higher Judicial Services. -

14. No right will be conferred on Judicial Officers in service for claiming any regular promotion on the basis of his/her appointment on ad-hoc basis under the Scheme. The service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre. In case any Judicial Officers promoted to higher grade in the parent cadre during his tenure in Fast Track Courts, the service rendered in Fast Track Courts will be deemed to be service in such higher grade.

6. The examination which is the subject of dispute in the present writ petition, is being conducted, as it has been observed earlier, in terms of a direction of the Hon''ble Supreme Court issued on 4 January 2007 in the case of Malik Mazhar Sultan & Anr. (supra). In this order, which has been relied on by Mr. Roy, the Hon''ble Supreme Court has directed the following time schedule to be maintained for holding such examination:-

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

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

(b) twenty five per cent by promotion through limited competitive examination of Civil Judges (Senior Division) not having less than five years of qualifying service. Sl. No., Description, Date

Number of vacancies to be notified by the High Court. 31st March Vacancies to be calculated including

a) existing vacancies

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

c) future vacancies that may arise due to elevation to the High Court, death or otherwise, say ten per cent of the number of posts.

d) Vacancies arising due to deputation of Judicial officers to other department may be considered as temporary vacancy.

2. Advertisement inviting application from eligible candidates 15th April

3. Last date for receipt of application 30th April

4. Publication of list of eligible applicants 15th May List may be put on the website

5. Despatch/issue of admit cards to the 16th May to eligible applicants 15th June

6. Written Examination 30th June Written examination may be

a) objective questions with multiple choice which can be scrutinised by the computer; and

b) subjective/narrative

7. Declaration of result of written Examination 16th August

a) Result may be put on the website And also published in the newspaper

b) The ratio of 1:3 of the available Vacancies to the successful candidates be maintained.

8. Viva Voce 1st to 7th September

9. Declaration of final select list and Communication to the appointing Authority 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. c) Select list shall be valid till the next select list is published.

10. Issue of appointment letter by the competent authority for all existing vacant posts as on date 30th September

11. Last date of joining 31st October

7. In the present case, the petitioners'' basic grievance is that this time scheduled has not been strictly adhered to by the High Court administration. The applications were invited from the members of the West Bengal Judicial Service belonging to the cadre of civil judge (senior division) having the requisite period of qualification, under a notification dated 15 April 2009 bearing number 5952-RG. Thereafter, on 15 May 2009 a list of judicial officers found eligible to sit for the limited competitive examination for promotion to the posts of District Judges (Entry level) was published. It appears that the petitioners had responded to the notification dated 15 April 2009 but their names were not published in this list. I also find in the footnote to this notification (of 15 May 2009) the following instruction:-

The list of eligible Applicants from Adhoc promotees, now posted in the Fast Track Courts as Additional District and Sessions Judge will be separately dealt with.

8. Thereafter, on the same date, that is on 15 May 2009 another notification was issued. This notification provides:-

High Court

APPELLATE SIDE

CALCUTTA

NOTIFICATION

No. 6745-RG Friday, May 15, 2009

It is notified for general information that 55 posts of District Judges Entry Level will be filled up by Limited Departmental Examination as per time schedule mentioned in the decision of Malik Mazhar Sultan''s Case. In terms of the Judgment in Brij Mohan Lal''s Case, the Additional District Judges appointed on ad hoc promotion from the rank of Civil Judge (Sr. Div) will belong to the cadre of Civil Judge (Sr. Div) till their appointment is regularised in the permanent cadre and in that case their seniority will counted from the date of ad hoc promotion. Accordingly, in connection with filling up of 26 vacant posts from the 50% cadre, all the Judicial Officers now posted on ad hoc promotion as Additional District Judge in the Fast Track Court will come up under the zone of consideration in due course. Moreover, since all the 150 Fast Track Court Judges belong to the permanent cadre of Civil Judge (Sr. Div), they may apply for appearing in the Limited Departmental Examination for 2009 along with those who have already applied for.

Accordingly, the willing Judicial Officers having eligibility criteria may apply along with 10 copies of their judgment five Civil and five Criminal delivered in May and June, 2008 by 30.05.2009.

This notification shall abide by the judgments/orders passed in Malik Mazhar Sultan''s case (Civil Appeal no. 1867 of 2006) and W.P.(C) 46 of 2007 now pending before the Hon''ble Supreme Court.

By order Sd/-

(S.K. Chakrabarti)

Registrar Judicial Service-in-Charge

9. On 17 June 2009, however, a further notification was issued bearing no. 7488, in which names of some of the petitioners were incorporated, signifying their eligibility to sit for this examination. The case of the petitioners, is that this notification was posted on the website of the High Court on 18 June 2009, and was actually published on that date.

10. The petitioners have also contended that since they have been already found suitable to be the judges of the fast track courts, as additional district and sessions judges which is in the cadre of district judge, they should not be required to sit for a further selection process and should be regularised or automatically promoted in the rank of district judge. In support of such submission the petitioners have relied on an order passed by the Hon''ble Supreme Court in W.P. (C) 2405 in the case of Madhumita Das & Ors. Vs. State of Orissa & Ors. which was passed on June 11 2008. In this case, dispute was in relation to filling up of sixteen posts in the rank of district judges.

Nine of these posts were held by judicial officers, who had been selected to function as ad-hoc additional district judges in terms of the decision of Brij Mohanlal (supra). In this order, a copy of which has been submitted to the Court by Mr. Roy, learned Advocate appearing for the petitioners, the Hon''ble Supreme Court had directed:-

Therefore, we direct that the process of selection pursuant to the Advertisement No.1 of 2008 may continue but that shall only be in respect of 7 posts, and not in respect of 9 posts presently held by the petitioners. It is pointed out that the High Court, after the advertisement has been issued, has issued certain letters regarding the non-disposal of adequate number of cases. The petitioners have given reasons as to why there could not be adequate disposal of the cases. Needless to say, the High Court shall consider the stand taken in the responses while judging their suitability for appointment on regular basis. The petitioners shall continue to hold the posts until further orders, for which necessary order shall be passed by the High Court. It is made clear that as and when regular vacancies arise, cases of the petitioners shall be duly considered. There shall not be any need for them to appear in any examination meant for recruitment to the cadre of District Judge.

List these matters in the first week of September, 2008. In the meantime, counter and rejoinder affidavits, if any, shall be filed.

11. Mr. Roy in support of his submissions also relied on certain statements made in an affidavit filed on behalf of the High Court administration before the Hon''ble Supreme Court in a proceeding arising out of the case of Malik Mazhar Sultan & Anr. (supra), being I. A. Civil No. 34 of 2006. This affidavit appears to have been affirmed

by the Registrar General of this Court and verified on 29 August 2009. A copy of this affidavit has been produced before this Court by Mr. Roy. He placed reliance on paragraphs 20, 21 and 22 of this affidavit in which it has been stated:-

20. So far as appointment of District Judges by promotion from Civil Judge (Senior Division) is concerned the total posts would be 102. The total posts available as per actual vacancies would be 50% of 65 equal to 33. On 25.11.2004 that is before the order dated 4th January 2007 in the present case, the Administrative committee of the High Court by a resolution darted 25.11.2004 empanelled 65 persons for promotion to the post of District Judge from the Civil Judge (Senior Division) at the entry level. The panel was approved by the full court on 15th December 2004.

21. In the meantime in another matter pending before this Hon''ble Court namely Brij Mohanlal case which was dealing with the creation of Fast Track Courts, order was passed on 12th may 2006 directing that 32 posts in the Fast Track Courts are to be filled up immediately.

A copy of this order is annexed hereto and marked as Annexure-D. In order to comply with this direction, out of the panel of 65 Judicial Officers, the State Government granted promotions to 31 Judicial Officers on 8th February 2007. Further 17 Fast Track Courts fell vacant upon completion of regularization process and pursuant to a full Court resolution dated 12th December 2007 the State Government vide a notification dated 8th January 2008 promoted another 17 officers o the said panel on ad hoc basis to the Fast Track Court.

By the process of regularization, 17 temporary District Judges from the Fast Track category have been posted as permanent District Judges in the year 2007.

12. The case of the petitioners, on the point of delayed publication of their names, is that the timeframe was prescribed by the Hon''ble Supreme Court to enable the candidates to prepare for the examination. According to them, since the names of the candidates who come from the category of the fast track Court judges were published only eleven days prior to the date of commencement of the examination, they were deprived of sufficient opportunity to prepare for the examination.

13. Mr. Roy submitted that under these circumstances the High Court administration ought to have obtained clarification from the Hon''ble Supreme Court for postponement of the examination on account of delayed publication of the names of candidates who had responded to the notification of 15 April 2009 but whose names were not published as eligible candidates on or before 15 May 2009. He also argued that it was within the jurisdiction of the High Court under Article 235 of the Constitution of India to vary the dates of the examination to ensure that the petitioners could have had sufficient preparation time. On this count, he relied on a judgment of the Hon''ble Supreme Court in the case of Gauhati High Court & Anr. Vs. Kuladhar Phukan & Anr. reported in AIR 2002 SCW 1492. My attention has been drawn to the following passages of this judgment:-

13. The doctrine of separation of powers and the need for having an independent judiciary as a bulwark of constitutional democracy persuaded the founding fathers of Constitution assigning a place of distinction to judiciary. Chapter VI of the Constitution dealing with subordinate Courts seeks to achieve the avowed object of insulating even the subordinate judiciary from the influence of the executive and the legislature. Article 234 provides for appointments of persons other than District Judges to the judicial services of a State being made by the governor of the State in accordance with the 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. Article 235 vests in the High Court the control over District Courts and Courts subordinate thereto. All the matters touching the service career of incumbents in subordinate judiciary including their posting and promotion are subject to the control of the High Court. Once a person has entered in the judicial service, he cannot depart therefrom save by the leave of the High Court. It is settled by a catena of decisions that the word ''control'' referred to in Art. 235 of the Constitution has been used in a comprehensive sense and includes the control and superintendence of the High Court over the subordinate Courts and the persons manning them both on the judicial and the administrative side. Even in such matter in which the Governor may take a decision, the decision cannot be taken save by consultation with the High Court. The consultation is mandatory and the opinion of the High Court is binding on the State Government; else the control, as contemplated by Art. 235, would be rendered negated. Such control and consultation are not a matter of mere formality, they are the constitutional power and privilege of the High Court, also its obligation, and cannot be diluted by sheer inaction of railing to act when the High Court must act. The Governor cannot proceed to act in any matter relating to subordinate judiciary and bypass the process of consultation merely because the High Court, though informed, did not act or respond. The consultation here means meaningful, effective and conscious consultation. In Tej Pal Singh Vs. State of U.P. and Another, , it was held that in a matter affecting the service career of a judicial officer ordinarily the initiative for an action must come from the High Court and even otherwise in the absence of recommendation of the High Court an action taken by the governor would be illegal and devoid of constitutional validity. Such error, if committed, would be incurable and even an ex post facto approval would not cure the invalidity.

14. No prayer for filing affidavit was made on behalf of the High Court administration or the State. The learned advocates appearing for the said respondents raised preliminary objection on maintainability of the writ petition, and prayed for dismissal of the writ petition at the motion stage only. Appearing for the High Court administration, though it was not disputed by Mr. Ghosh that the timeframe specifying publication of the names of candidates was not adhered to strictly, his case was that the petitioners could not have been prejudiced by such delayed publication as they well knew the date on which the examination was going

to be held. If they were otherwise eligible, according to Mr. Ghosh, they should have gone on with their preparation irrespective of the date of publication of their names. His further submission was that the time granted by the Hon''ble Supreme court for publication of the list of eligible candidates after notification was issued inviting applications from the potential candidates was for the benefit of the administration, to enable the administration to properly verify the names of the candidates. The examinees could not be in anyway prejudiced if some of their names were published after 15 May 2009. It was thus his argument that any variation in the date stipulated for publication of the list of eligible candidates would not be fatal to the entire examination process.

15. Mr. Ghosh further contended that the High Court administration was also mandated by the Hon''ble Supreme Court to hold the examination by 30 June and the result of the examination is to be published on 6 August 2009. According to him, sticking to the timeframe for holding the examination and publication of result were of more fundamental requirement contained in the directive of the Hon''ble Supreme Court, which the High Court administration had to adhere to. In the event the examination was postponed, the same would have constituted violation of the order of the Hon''ble Supreme Court. He further submitted that the case of Malik Mazhar Sultan (supra) as well as the case of Brij Mohanlal (supra) were still pending before the Hon''ble Supreme Court and directions were being issued from time to time by way of interim orders in both these cases. It was his contention that the petitioners ought to have had applied before the Hon''ble Supreme Court seeking appropriate direction if they were in any way aggrieved by the time schedule of the present examination.

16. As regards the requirement of the fast track court judges to sit in a further selection process for being promoted to the rank of district judges, his submission was that the High Court administration was bound to follow the recruitment rule to which reference has been made in the earlier part of this order. Such recruitment rule, he argued, did not permit direct absorption or regularisation of fast track court judges in the rank of district judges. In support of his submission, he relied on paragraph 10.14 of the order of the Hon''ble Supreme Court in the case of Brij Mohanlal (supra). It was his case that since the petitioners belong to the cadre of senior division civil judges, they could not claim automatic promotion to the post of district judges on the strength of selection process through which they were given ad hoc promotion. As regards the direction of the Hon''ble Supreme Court in the case of Madhumita Das (supra), it was his submission that this was only an interim order arising out of recruitment process in the State of Orissa. Having regard to the recruitment rules already formulated for the judicial officers in West Bengal, the administration could not commit breach such rules. He, however, also submitted that in the case of Brij Mohanlal directions are being passed from time to time by the Hon''ble Supreme Court, and if directions are issued in future for regularising the fast track court judges in the cadre of district judge, the High Court

administration would comply with such direction.

17. Ms. Suchitra Saha, learned Advocate appearing for the State respondents also raised preliminary objection on the maintainability of the writ petition. It was her case that having responded to the notification inviting applications from candidates eligible to appear for limited departmental examination, it was not open to the petitioners to contend that they would not be required to sit for such examination at all and that they ought to be regularised straightaway in the rank of district judges. She also submitted that no case was made out in the writ petition on the aspect of dispensing with the requirement of the petitioners for sitting in the limited departmental examination for the purpose of promotion to the rank of district judge. On this count, she further argued that the petitioners were estopped from making such plea, which were inherently inconsistent. She contended that since the basic complain of the petitioners was that they were not given sufficient time for preparation of the examination, they could not be permitted to argue that they could not be required to sit in such examination for getting promotion to the rank of district judge.

18. In the pleadings, a case was sought to be made out that all the vacancies in the rank of district judges, which are required to be filled up on merit-cum seniority basis, i.e. 50% of the total vacancies, were not being filled up in the prescribed manner, and the High Court administration was intending to fill up the vacancies in a manner which was contrary to the 2004 recruitment rules or the directive of the Hon''ble Supreme Court. But Mr. Roy did not press this point in course of hearing. If fact, he conceded that the issue of irregularity in declaring vacancy was premature, and the cause of action of the petitioners on this issue was yet to arise. Under these circumstances, I am not examining the claim of the petitioners on this count. In the event any dispute arises on this count in future, the petitioners shall be at liberty to approach this Court or any other forum as they may be advised to seek redressal of their grievances as regards irregular declaration or filling up of vacancies in the rank of district judges in pursuance of such irregular declaration.

19. On behalf of the respondents, arguments have been advanced before me primarily on the question of maintainability of the writ petition only, but such arguments touched upon the merits of the case, particularly on the two points on which I was addressed to by Mr. Roy. To adjudicate on that question, examination of certain factual issues is inevitable. Accordingly, I shall first consider the allegations of irregularity in publication of the list of eligible candidates, and the impact of such irregularity on the examination process. Thereafter, I propose to examine the claim of the petitioners that they ought to be regularised in the rank of district judges, and shall not be required to undergo a further suitability tests. These are the two points on which the petitioners have made submissions, and in this writ petition I shall address these two issues only.

20. The basic complain of the petitioners, is that the directive of the Hon''ble Supreme Court in the order passed on 4 January 2007 on the question of publication of the list of eligible candidates on 15 May was not complied with by the High Court administration. Mr. Ghosh''s submission was that this was only a minor procedural irregularity, which was not fatal to the entire examination process. In my opinion, however, there is little scope for construing a specific directive of the Hon''ble Supreme Court passed in a pending proceeding in an independent action brought before the High Court.

21. Moreover, in the present writ petition, if I accept the submissions of Mr. Roy that the examination itself ought to be quashed for not maintaining the schedule as regards publication of the list of eligible candidates by 15 May 2009, then another part of the directive of the Hon''ble Supreme Court contained in the same order specifying the date within which the examination was to be held would have to be breached. Mr. Roy sought to contend that in view of the judgment of the Hon''ble Supreme Court delivered in the case of Gauhati High Court Vs. Kuladhar Phukan & Anr. (supra), the High Court administration had sufficient latitude for rearranging the dates or schedule. But in view of the specific direction of the Hon''ble Supreme Court contained in the order passed on 4 January 2007, I do not think that variation of the dates specified for taking different steps in the process of completing schedule would be permissible.

22. Mr. Roy had also argued that the High Court administration ought to have obtained clarification from the Hon''ble Supreme Court for deciding the fate of the judicial officers of the fast track courts whose names were published as eligible candidates for the "limited competitive examination" beyond the specified date, that is 15 May 2009. But I do not think that question can be examined in this proceeding at a stage when the examination has already been held. I also have my doubt as to whether I have jurisdiction under Article 226 of the Constitution of India to issue a writ in the nature of mandamus on the High Court administration requiring them to obtain clarification from the Supreme Court on the course they ought to adopt while complying with an order of the Hon''ble Supreme Court. But I am not delving into this question in this judgment, as this issue at present has become purely academic one, the examination having already been held. Now the question which remains to be determined is as to whether the examination already held is valid or not.

23. The case of the High Court administration is that the entire schedule of dates specified in the order of the Hon''ble Supreme Court were not of mandatory character. As regards the specification for publishing the names of eligible candidates on or within a certain date, it was argued by Mr. Roy that such date was specified to enable the administration to verify the eligibility of the individual applicants, and was meant for giving adequate time to the administration to discharge their functions effectively. Mr. Ghosh refuted the contention of the petitioners that publication of the names of the eligible candidates within a certain

date was not for the purpose of giving such candidates preparation time. Such candidates, according to him, knew the date on which the examination ought to have started when the notification was published inviting applications from the eligible individual candidates. This part of the directive, i.e. specifying the date for publishing the names of eligible candidates, according to Mr. Ghosh, ought to be held directory.

24. When a legislative instrument gives rise to a controversy in a given factual context, where compliance of one part of a statute may lead to breach of another part, well established canon of interpretation of statutes can be taken recourse to by the Court to ascertain the manner in which such statutory provisions ought to be complied with. The Court in such a situation can examine what is the dominant purpose of the legislation. Court can also examine the intention of the legislature to ascertain which part of the statute is mandatory in nature and which part is directory. But in the present case, it is not a legislative instrument which I have been invited to construe. What the parties in this proceeding seek from this Court in substance is interpretation of an order of the Hon''ble Supreme Court. The proceeding in which such order has been passed, as I have been apprised by Mr. Ghosh, is still pending before the Hon''ble Supreme Court.

25. In the light of these facts, I do not think it would be proper to apply the principles of construction of statutes to interpret an order of the Hon''ble Supreme Court to ascertain if non-compliance of a part of a composite directive for holding an examination was fatal to the examination process itself or not. Of course, if it was a clear case of violation of an order of the Hon''ble Supreme Court, like holding of the examination without inviting applications from the eligible candidates, a different course would have been adopted, and I could have had exercised my jurisdiction under Article 226 of the Constitution of India to test the validity of such actions taken in wilful non-compliance of an order of the highest Court of the land. But in the present case, the violation complained of is marginal, in a matter of which is still pending before the Hon''ble Supreme Court. Moreover, if the violation is directed to be cured in the manner prayed for by the petitioners, that would also be contrary to another part of the same order of the Hon''ble Supreme Court. I do not think prayer for invalidation of the entire examination process ought to be entertained by this Court in such a situation. More appropriate course, in my opinion, for the parties who feel prejudiced by such violation, would be to apply before the Hon''ble Supreme Court for obtaining necessary clarification or direction.

26. Next comes the question as to whether the petitioners at all should be required to go through a process of selection. The case of the petitioners on this count is that at the time of granting of ad hoc promotion, the judges of the fast track courts had to undergo a performance appraisal process, which was approved by the High Court in a Full Court meeting. In these circumstances, it was contended that such judicial officers should not be required to undergo a further Selection test. The learned

Advocate for the State submitted that majority of the petitioners had responded to the notification inviting application published on 14 April 2009, and thereby they had shown their willingness to submit to the authorities for being tested in the "limited competitive examination." She argued that since the case made out by the petitioners in the writ petition was that the examination schedule was not being adhered to, they were estopped from raising a plea that they did not require any further suitability test for promotion to the rank of district judge. It was also the contention of the State that no case on this point was made out in the pleadings.

27. From the pleadings, however, I find that this point has been urged in paragraph 4.11 of the writ petition. The petition has also been founded on the ground that judicial officers once tested and found eligible by the High Court administration and given ad hoc promotion as additional district and sessions judges cannot be again asked to go through a further eligibility test to be promoted in the rank of district judges. This submission is contained in ground (iv) of the writ petition, and prayer (c) in the writ petition is for a direction on the authorities to give promotion to the officers who were once found suitable for the posts of district judges without requiring them to face suitability test again.

28. Since the writ petition contains such specific pleadings and prayers, I do not think the petitioners are deviating from the pleadings while urging this point.

But are they running an inconsistent case, indulging in approbation and reprobation? The objection taken by the State on this count has to be tested in the factual context of the present case. Ordinarily, a litigant should not be allowed to raise inconsistent pleas. The doctrine of election does not permit taking such a course. Here, the petitioners are alleging discriminatory treatment on the ground that in the past, one set of similarly situated officers have been regularised in the rank of district judges, and they are questioning the action of the administration to require them to undertake a further suitability test. In addition, they are also alleging improper procedure adopted in the suitability test which they are being required to undergo. This approach, in my opinion, does not constitute raising of inconsistent pleas. This would constitute alternative pleas, which in my opinion is permissible. If the petitioners'' case fail on one ground, they may seek to rely on the other ground to establish their right to be considered for promotion through a certain process. Only limitation the Court would impose on a litigant in such a situation would be that such litigant shall not be permitted to take the benefit of both the provisions together. In the present case, the petitioners may have chosen to apply for "limited competitive examination" in the event promotion through this route comes earlier. But if they are otherwise found entitled to be regularised, such claim for regularisation cannot be forfeited only because they have applied for, or sat in the limited competitive examination. If they are successful in such examination, and are promoted in pursuance thereof, the question of their further regularisation would not arise. But if they fail to clear such examination, but are

otherwise found to be entitled to be regularised, then such regularisation may take effect in due course. The petitioners'' case in my opinion cannot be rejected at the threshold on this count, on the principle of estoppel or doctrine of election.

29. But on the question of their entitlement to be regularised, I find that the recruitment rules do not provide for such regularisation. My attention was drawn to the affidavit filed on behalf of the High Court administration in the case of Malik Mazhar Sultan (supra), in which it has been disclosed that seventeen fast track court judges were regularised in the rank of district judges. This position has not been disputed by Mr. Ghosh. But the decision of the Hon''ble Supreme Court in the case of Brij Mohanlal (supra) clearly stipulates that no right would be conferred on judicial officers in service for claiming any regular promotion on the basis of his/her appointment on ad hoc basis under the scheme constituting fast track courts. As regards the direction of the Hon''ble Supreme Court in the case of Madhumita Das (supra), this direction has been issued in an interim order, as submitted by Mr. Ghosh, and service of the applicants in that case was not regulated by the rules applicable to judicial officers of West Bengal. Thus, as the law stands now, in my opinion, there is no provision for regularisation of a judicial officer belonging to the cadre of civil judge (senior division) functioning as additional district judge on the basis of ad hoc promotion given to him or her. Of course there appears to be an element of uncertainty on the question of their regularisation in the rank of district judges, as the High Court administration appears to have regularised 17 fast track court judges in the rank of district judge in the past. But in the absence of any legal provision permitting such regularisation, I do not think promotion to the post of district judges can be directed in the case of the petitioners following the example of 17 fast track Court judges.

30. On this point, I also take into account the submission of Mr. Ghosh that the Service Rules of 2004 does not postulate appointment or promotion of fast track court judges, and the entire process of functioning of fast track courts is being implemented as per the directions of the Hon''ble Supreme Court. His further submission on this point was that in the event the Hon''ble Supreme Court directs regularisation of civil judge (senior division) who are functioning as additional district judges on the basis of ad hoc promotion, the administration would remain bound to comply with such directive.

31. In view of this specific stand taken by Mr. Ghosh on behalf of the administration, I am of the view that on this point also the petitioners ought to have approached the Hon''ble Supreme Court for appropriate direction. But in view of the subsisting directions of the Hon''ble Supreme Court in the case of Brij Mohanlal (supra), and the provisions of the West Bengal Judicial (conditions of Service) Rules, 2004. I do not think this Court can direct regularisation of the petitioners in the rank of district judges. The prayer of the petitioners on this count would also have to be rejected.

32. In the writ petition, allegations were also made about several judicial officers being misled to the belief that the judges of the fast track courts were not eligible to sit in the limited competitive examination, and an association of judicial officers was persuaded by the Registrar General to impress its members not to submit any application. But this is not a petition filed in a representative capacity, and as it appeared from the submissions of the learned Advocates appearing for the parties, the petitioners had responded to the notification inviting applications from the judicial officers holding the ranks of civil judges, senior division for the limited departmental examination. In course of hearing also, no submission was advanced on behalf of the petitioners on this ground.

Accordingly, I do not find it necessary to examine complain of the petitioners on this ground

33. No affidavit has been filed by the respondents, and this writ petition was heard mainly on preliminary objection as regards maintainability of the writ petition. On behalf of the petitioners, two points were pressed which I have discussed in the earlier part of this judgment. These preliminary issues, however are intricately linked with the factual matrix of the case, and while adjudicating on the preliminary issues, it became necessary to refer to certain facts, which were undisputed. Considering these facts and the legal position, on the two points which were urged before me, I am of the opinion that the petitioners are not entitled to any relief from this Court in this writ petition. This conclusion could be made on the basis of undisputed facts. Under these circumstances, I do not think any purpose would be served in keeping the writ petition pending, and direct the respondents to file affidavits for deciding the writ petition.

34. For these reasons, no relief can be granted to the petitioners in this writ petition, and accordingly the present petition fails.

35. There shall, however, be no order as to costs.

Sd/-Aniruddha Bose, J.

4. Being aggrieved by and dissatisfied with the judgement and order passed by the learned Trial Judge as quoted above, this appeal has been preferred. At the time of hearing of the appeal only question urged about absorption/regularisation of the appellants/writ petitioners in the rank of District Judge under Higher Judicial Cadre without passing the suitability tests in terms of recruitment rule being West Bengal Judicial (Condition of Service) Rules, 2004, hereinafter for brevity referred as ''recruitment rules'', which came into effect from 1st October, 2004 mandating under Rule 26 "method of recruitment", by selection through promotion on the basis of merit-cum-seniority and on passing of suitability tests in terms of clause 1 sub clause (b) of the said rule. In support of said contention twofold argument has been advanced namely one that identically placed/situated thirty two candidates holding the post of Additional District Judge in the rank of District Judge in Fast Track

Courts, being ad-hoc appointees under the scheme by which Fast Track Courts were established to clear the backlog of huge number of cases as pending, since after coming into effect of the said recruitment rule were regularised by promoting them in the rank of District Judge without any further suitability tests and secondly that at the initial appointment stage in the posts of Additional District Judge for placement in the Fast Track Courts, the Recruitment Rule as existing prior to said recruitment rule, 2004, in the nature of administrative order, were duly followed and thereby appellants/writ petitioners were selected for the posts of Additional District Judges for being appointed in different Fast track Courts as established.

5. So far as promotion in the rank of District Judge of 32 candidates who earlier held posts as Additional District Judge in Fast Track Courts, it is true that there was no further selection test following recruitment rules of the year 2004 as referred to above. To counter this point learned Advocate Mr. Ghosh appearing for the High Court administration has distinguished the cases of those persons by advancing an argument that those appointees in Fast Track Courts were promoted in respective vacancies which occurred prior to coming into effect of said recruitment rules, 2004. It is further contended by High Court administration that in respect of vacancies occurred after coming into effect of recruitment rule 2004, effective from 1st October, 2004, no appointment directly in the rank of District Judge from the appointees who discharged function of Fast Track Courts were made straightway without suitability tests and only those candidates including some of the writ petitioners/appellants who became successful in suitability tests following recruitment rules, 2004, were promoted in the rank of District Judge.

6. It is a fact that 32 candidates holding respective posts of Additional District Judge in different Fast Track Courts as adhoc promotee, got straightway appointment by placement in permanent posts in the rank of District Judge without any further tests, but that ipso facto will not give a premium to the present appellants/writ petitioners to have the identical benefit applying the principle of Article 14 of the Constitution of India which mandates a positive concept to identify the discrimination issue as and when a case will be made out that lawfully the candidates who moved the Court were entitled for appointment without any test and thereafter question of discrimination issue could be considered. Article 14 of the Constitution of India does not envisage a negative concept to grant identical benefit to appellants even if a group or batches identically situated were provided with a benefit even after coming into effect of recruitment rules of 2004 from 1st October, 2004.

7. The argument advanced by Mr. Ghosh, learned Advocate for the High Court administration that the vacancies occurred prior to coming into effect of recruitment rules, 2004 effective from 1st October, 2004 were filled up following the procedures by administrative order as existing prior to 1st October, 2004 which only provides consideration of service records only, is based on sound legal principle and settled law. It is a settled law that vacancies as arose prior to amendment of rule are

required to be filled up in accordance with law existing prior to that date and vacancies as would arise subsequent to amendment of rules are required to be filled up in accordance with law existing namely amended rule. Reliance is placed to the judgement passed in the case Arjun Singh Rathore and Others Vs. B.N. Chaturvedi and Others, wherein the earlier views of the Apex Court to that effect as passed in the cases State of Rajasthan Vs. R. Dayal and Others, and Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, were relied. Paragraphs 8 of the Y. G. Rangaiah (supra) read such:-

8. ... This Court has specifically laid (sic) that the vacancies which occurred prior to the amendment of the Rules would be governed by the original Rules and not by the amended Rules. Accordingly, this Court had held that the posts which fell vacant prior to the amendment of the Rules would be governed by the original Rules and not the amended Rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the Rules are required to be filled in accordance with the law existing as on the date when the vacancies arose.

8. In view of such legal position, the writ petitioners/appellant cannot claim that their cases to be considered for promotion to the rank of District Judge on the basis of rule existing prior to 1st October, 2004.

9. The discrimination issue, if any, under Article 14 as already discussed is required to be considered in the angle of positive concept. This point is now legally settled that Article 14 of the Constitution of India is a positive concept. Reliance is placed to the judgements passed in the cases Union of India (UOI) and Another Vs. Kartick Chandra Mondal and Another, ; State of Orissa and Another Vs. Mamata Mohanty, ; State of Uttaranchal Vs. Alok Sharma and Others, , State of Bihar Vs. Upendra Narayan Singh and Others,

10. Beside the aforesaid point question of waiver and estoppel principle is also applicable in the instant case so far as present appellants/writ petitioners are concerned to claim identical benefit granted to said 32 identically placed candidates promoted to the rank of District Judge without any further suitability tests, since the present appellants/writ petitioners appeared in the examination conducted by the High Court administration following Rule 26 of the recruitment rules, 2004 and only seven writ petitioners/appellants became successful in such examination and other five writ petitioners/appellants were unsuccessful. The writ petitioners/appellants did not pray leave of the Court for their appearance in the said selection test for consideration of their candidature to the rank of District Judge following the recruitment rules of 2004 from the learned Trial Judge and their appearance in suitability test was not without prejudice to their rights and contentions as made in writ application. There was no order to that effect at the initial stage when the writ application was moved assailing the fixation of examination schedule inviting applications from the eligible candidates for promotion to the rank of District Judge. Hence, the waiver and estoppel principle is strictly applicable in the instant case.

11. It appears from the records and from the judgement of the Apex Court passed in the case Brij Mohan Lal Vs. Union of India (UOI) and Others, , a judgement of three Judges Bench of Apex Court wherein the question of establishment of Fast Track Courts, its tenure and scheme, and method of recruitment/appointment of the Presiding Officer in such Fast Track Courts, were dealt with in detail and the legal position was settled in the said judgement. In Brij Mohan Lal (supra), it is categorical finding of the Apex Court in paragraphs 14 of the said report that no judicial officer would be entitled to claim as a matter of right any regular promotion due to his/her appointment on ad-hoc basis under the scheme and the service as would be rendered in such Fast Track Courts would be deemed as service rendered in the parent cadre. Paragraph 14 of the said report read such:-

14. No right will be conferred on Judicial Officers in service for claiming any regular promotion on the basis of his/her appointment on ad-hoc basis under the Scheme. The service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre. In case any Judicial Officer is promoted to higher grade in the parent cadre during his tenure in Fast Track Courts, the service rendered in Fast Track Courts will be deemed to be service in such higher grade.

12. It is an admitted position that all writ petitioners/appellants were appointed at the post judgement stage of Brij Mohan Lal (supra). Judgement of this case was delivered on 6th May, 2002 and the writ petitioners/appellants got ad hoc promotion to discharge the function of Judges of Fast Track Courts after 6th May, 2002. Hence, even if there is no administrative order from High Court administration and there is no rule to identify the nature, character and legal status of such ad hoc appointees working in Fast Track Courts, but in view of judgement of Apex Court in Brij Mohan Lal(supra) as legal status and rights, were clearly earmarked, the same became the law of the land under Article 141 of the Constitution of India as guiding principle to consider the legal status and claim of the writ petitioners/appellants. In view of categorical finding in paragraphs 14 of the said report as quoted above, the writ petitioners/appellants cannot claim any right for regular promotion on the basis of appointment on ad hoc basis under the scheme of Fast Track Courts. The conceptual and purposive object of making the aforesaid observation by the apex Court was for the sole reason that the Fast Track Courts were established on temporary basis under a scheme to clear backlog of cases which became huge in numbers and the posts as created under the said scheme of Fast Track Courts, were under a temporary scheme and no permanent posts in the rank of District Judge being in the cadre of Higher Judicial Service, were created/sanctioned increasing cadre strength. In view of temporary nature of Fast Track Courts created for urgent need to dispose of huge pending cases, Apex Court in paragraphs 14 of the report categorically stipulated that appointees would not be entitled to claim any right for regularisation in the rank of District Judge and they would remain in the parent cadre irrespective of discharge of judicial function as Judge of Fast Track Courts.

13. In view of the aforesaid findings made by us, point as raised about automatic regular promotion on the basis of appointment on adhoc basis under the scheme of Fast Track Courts is answered negatively, against, the appellants/writ petitioners.

14. So far as the point urged that for a long period the writ petitioners/appellants have discharged the function of Additional District Judge in Fast Track Courts and they were initially selected following the administrative circulars/orders for promotion to the rank of District Judge, as such there was no necessity of further suitability test, it has no legs to stand on the face of recruitment rules, 2004 which has been framed in exercise of the power conferred by the proviso to Article 309 of the Constitution of India. In view of recruitment rules as existing with effect from 1st October, 2004 which mandates selection on the basis of merit-cum-seniority and on passing of a suitability test in terms of rule 26 clause 1 sub clause (b) and having regard to their legal status identified by the Apex Court long back in the year 2002 in the judgement Brij Mohan Lal(supra), there is little scope to urge this point by the appellants before us. Rule 26(1) (b) of the said rule read such:-

15. Method of recruitment-(1) On or after the commencement of these rules, the appointment of the Higher Judicial Officers in the rank of District Judges in the post of District Judge as mentioned in clause (a) of sub-rule (1) of rule 24, shall be made-

(b) by selection through promotion, on the basis of merit-cum-seniority and on passing of a suitability test, from amongst such Judicial Officers other than District Judges as mentioned in clause (b) of sub-rule (1) of rule 6 of these rules.

15. A point has been taken in course of argument on the basis of subsequent events with reference to appellants who became successful in the suitability test and thereby promoted to the rank of District Judge following recruitment rules of 2004 for counting their seniority with effect from the date when they were initially appointed to discharge the function as Additional District Judge in different Fast Track Courts being appointed on ad hoc basis. This submission is not legally sustainable to grant any relief taking note of subsequent events in view of judgement of the Apex Court passed in the case Brij Mohan Lal (Supra) wherein it has been categorically observed by the Apex Court that the ad hoc promotees who would discharge the function in different Fast Track Courts would remain in the parent cadre and their service in Fast Track Courts would be countable when such judicial officers would be promoted to higher grade in the parent cadre during tenure of service in Fast Track Courts. The successful appellants who have been promoted following the recruitment rules of 2004 in the rank of District Judge were not promoted to higher grade in the parent cadre but it was a promotion to the post in higher cadre namely Higher Judicial Service, following recruitment rules. As such, the tenure of service in Fast Track Courts is not countable to determine the seniority in the rank of District Judge. Hence, the submission stands rejected.

16. In view of the findings and observation above stated, we are not findings any merit in this appeal. The appeal accordingly stands dismissed. There will be no order as to costs.

Md. Abdul Ghani, J.

17. I agree

18. Urgent photostat certified copy of this order, if applied for, be given to the learned Advocate appearing for the parties