

Form No. J (1)

IN THE HIGH COURT AT CALCUTTA
(CONSTITUTIONAL WRIT JURISDICTION)

Present:

The Hon'ble Justice Biswajit Basu.

WPA 25056 of 2022

CAN 11 of 2025

[ASSIGNED]

MINAKSHI GHOSH & ORS.

VS.

THE STATE OF WEST BENGAL & ORS.

with

WPA 24929 of 2022

CHINA MONDAL & ORS.

VS.

THE STATE OF WEST BENGAL & ORS.

with

WPA 23784 of 2022

ANIRBAN PANDA & ORS.

VS.

THE STATE OF WEST BENGAL & ORS.

with

WPA 23757 of 2022

SAIKAT BAIRAGI & ORS.

VS.

THE STATE OF WEST BENGAL & ORS.

For the petitioner :
in **WPA 25056 of 2022.**

Mr. Bikash Ranjan Bhattacharyya, Ld. Sr. Adv.,
Mr. Sudipta Dasgupta,
Mr. Bikram Banerjee,
Mr. Arka Nandi,
Mr. Sondwip Sutradhar,
Mr. Sinjini Chakraborti,
Mr. Baibhav Roy.

For the petitioner :
in **WPA 23757 of 2022**,
WPA 23784 of 2022 &
WPA 24929 of 2022.

Mr. Samim Ahammed,
Mr. Arka Maiti,
Ms. Ambiya Khatun,
Mr. Nasirul Haque.

For the State :
In **WPA 25056 of 2022**

Mr. Kishore Dutta, Ld. AG,
Mr. Sirsanya Bandopadhyay, Ld. Sr. St. Counsel,
Mr. Biswabrata Basu Mullick, AGP,
Mr. Sandip Das Gupta,
Mr. Sanjib Das,
Mr. Aviroop Mitra,
Mr. Niket Ojha.

For the State :
in **WPA 23757 of 2022**

Mr. Biswajit Dutta.

For the WBCSSC :
in **all the matters.**

Dr. Sutanu Kumar Patra,
Ms. Supriya Dubey.

For the WBBSE :
except **WPA 24929 of 2022.**

Ms. Koyeli Bhattacharyya.

For the WBBSE :
in **WPA 24929 of 2022.**

Ms. Koyeli Bhattacharyya,
Mr. Bibek Dutta.

For the Respondent:
nos. 289-301
in **WPA 25056 of 2022.**

Mr. Kalyan Kumar Bandopadhyay, Sr. Adv,
Mr. Biswaroop Bhattacharya,
Mr. Rahul Kumar Singh,
Ms. Neelanjana Ghorui.

For the Respondent:
nos. 208-288
in **WPA 25056 of 2022.**

Mr. Ashis Kumar Chowdhury,
Mr. BabhruBahanBera,
Mr. Sudip Jana,
Mr. Rohan Paul.

For the Respondent:
nos. 307-309
in **WPA 25056 of 2022**

Mr. Firdous Samim,
Ms. Gopa Biswas,
Mr. Mainak Ghoshal,
Ms. Rajashree Saha,
Mr. Rajosik Dutta,
Mr. Ayhush Majumdar,
Mr. Brinta Dutta,
Mr. Naman Saha.

For the Respondent:
nos. 302-306
in **WPA 25056 of 2022**

Mr. Abdul Rakib,
Mr. Saikat Chatterjee,
Mr. Biswajit Sarkar,
Mr. Puranjan Pal,
Mr. Mojahid Mehedi.

For the added Respondent:
nos. 07-207
in **WPA 25056 of 2022**

Mr. Partha Sarathi Sengupta, Sr. Adv.,
Mr. Deepan Kr. Sarkar,
Mr. Saptarshi Banerjee,
Ms. Deepti Priya,
Ms. Anshumala Bansal,
Ms. Richik Chowdhury,
Mr. Bhargav Verma.

Judgment Reserved on: 24.11.2025

Judgment Delivered on: 04.12.2025

Biswajit Basu, J.

1. The West Bengal Central School Service Commission (hereinafter referred to as '**the Commission**' in short) by a Notification bearing memo no. 1150/6867/CSSC/ESTT/2016 dated December 16, 2016 had announced the State Level Selection Test for recruitment of Assistant Teachers in Physical Education and Work Education in recognized Non-Government aided/sponsored schools in West Bengal (hereinafter referred to as '**1st SLST 2016**' in short). The petitioners of this batch of writ petitions had participated in the said selection test but were unsuccessful.
2. The petitioners are challenging the said selection process on the grounds that it is vitiated by corruption and malpractices of the respondent authorities. They are also challenging the legality and validity of the order of the School Education Department (Secondary Branch), Government of West Bengal bearing no. **692-SL/5S/202/2022(Part)** dated May 19, 2022, so far as it relates to creation of 1600 supernumerary posts of Assistant Teachers (with a break up of **750**

posts for Work Education and 850 posts for Physical Education teachers) to appoint all waitlisted candidates of the said 1st SLST, 2016 under the said two categories and the Notice bearing Memo No. **1358/6867/CSSC/ESTT/2022** dated October 14, 2022 whereby the Commission had notified the dates of counselling for filling up the said supernumerary posts.

3. In order to afford opportunity of being heard, the said waitlisted candidates were notified, some of them had applied for their addition in one of the writ petitions being WPA 25056 of 2022. Except one being CAN 11 of 2025 which was not moved all applications were allowed, in consequence the applicants of those applications have been added as respondent nos. 07 to 301 in the said writ petition. The legality and propriety of the 1st SLST, 2016 and of the said two Notifications are under challenge in the writ petitions.
4. The added respondents, in terms of the said Notification dated May 19, 2022 have already been recommended for appointment long back but could not be appointed due to the interim order of stay passed in one of the present writ petitions. Therefore, there is an imminent urgency in deciding the challenge to the said notification dated May 19, 2022 and October 14, 2022 as such the said challenge is taken up for consideration independently *first*, keeping the other disputes/issues raised in the writ petitions pending.

5. The State and the said added respondents, at the threshold, have raised an objection as to the *locus standi* of the petitioners to maintain the writ petitions particularly to throw challenge to the said notifications dated May 19, 2022 and October 14, 2022 as the petitioners are unsuccessful candidates of the 1st SLST, 2016.

6. Therefore the first issue falls for consideration in the matters is thus:-

(I) Whether the petitioners, being unsuccessful candidates of the relevant selection Test, are entitled to challenge the notification dated May 19, 2022 and whether such challenge is barred by limitation.

The issue being related to the maintainability of the writ petitions, the respondents have the right to begin. The arguments of learned counsel for the parties on the said issue are recorded herein below in seriatim.

7. Mr. Partha Sarathi Sengupta, learned senior advocate for the added respondent nos. 7 to 207: -

- i. The consideration of the matters on merit would be a futile exercise if the petitioners are found to have no *locus standi* to maintain the writ petitions, in order to avoid such situation, the objection as to the maintainability of the writ petitions should be decided as a preliminary issue, to fortify such contention, he places reliance on the decision of the learned Single Judge of this Court in the case of **GANESH CHANDRA MUKHERJEE & ORS. vs. NATIONAL**

TEXTILE CORPORATION (WEST BENGAL, ASSAM) BIHAR & ORISSA LTD. & ORS. reported in **1982 (2) CHN 232**, besides, the Hon'ble Division Bench of this Court, in its order dated May 20, 2025 passed in an appeal being MAT 723 of 2025 arising out of the order dated May 07, 2025 passed by this Court in WPA 25056 of 2022, had observed that the issue of locus standi of the petitioners, being fundamental and jurisdictional, needs to be decided first.

- ii. Reliance is placed on the decisions of the Hon'ble Supreme Court in the cases of **BOMBAY DYEING & MANUFACTURING CO. LTD. vs. BOMBAY ENVIRONMENTAL ACTION GROUP AND OTHERS** reported in **(2005) 5 Supreme Court Cases 61** and **TAYABBHAI M. BAGASARWALLA AND ANOTHER vs. HIND RUBBER INDUSTRIES PVT. LTD. AND OTHERS** reported in **(1997) 3 Supreme Court Cases 443** to contend that *prima facie* case is not sufficient to maintain injunction; if an objection regarding jurisdiction of the Court is raised at the time of hearing of an application for grant of, or vacating of interim relief, the Court should determine the issue at the first instance as a preliminary issue before granting or setting aside the relief already granted provided that the petitioners satisfy the Court that non-interference will result in irreparable injury.

- iii. The creation of the supernumerary posts to accommodate the said waitlisted candidates have not caused any *legal injury* to the petitioners inasmuch as even if the petitioners succeed in their challenge, *no right of appointment* against the posts so created would be accrued in their favour, therefore, the petitioners have no enforceable legal right as they are not '*persons aggrieved*', consequently, are not entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution. In this context, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **AYAAUBKHAN NOORKHAN PATHAN vs. STATE OF MAHARASHTRA AND OTHERS** reported in **(2013) 4 Supreme Court Cases 465**.
- iv. No fundamental right, even an acquired right of the petitioners is violated directly or substantially by the creation of supernumerary posts, as such the petitioners have no *locus standi* to maintain the challenge to the said notice. In support of such contention, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **VINOY KUMAR vs. STATE OF U.P. AND OTHERS** reported in **(2001) 4 Supreme Court Cases 734**.
- v. Six years back, the petitioners were declared unsuccessful, they remained dormant till the notification dated May 19, 2022 was published, such belated approach to enforce an imaginary right should not be entertained.

8. Mr. Kishore Dutta, learned Advocate General:-

Mr. Dutta adopts the argument of Mr. Sengupta and to supplement it, he submits that the unsuccessful candidates, after taking part in the selection process, cannot turn back and call names to the system, in support of such contention, reliance is placed on decisions of the Hon'ble Supreme Court in the cases of **SADANANDA HALO AND OTHERS vs. MOMTAZ ALI SHEIKH AND OTHERS** reported in (2008) 4 Supreme Court Cases 619 and **TRIVEDI HIMANSHU GHANSHYAMBHAI vs. AHMEDABAD MUNICIPAL CORPN. AND OTHERS** reported in (2007) 8 Supreme Court Cases 644.

9. Mr. Kalyan Bandopadhyay, learned senior advocate for the added respondent nos. 289 to 301:-

- i. It is settled position of law that only because the result is not palatable to a candidate, he cannot contend that the selection process was unfair. To lend support to his such contention, reliance is placed on the decisions of the Hon'ble Supreme Court in the cases of **MADAN LAL AND OTHERS vs. STATE OF J&K AND OTHERS** reported in (1995) 3 Supreme Court Cases 486, **TAJVIR SINGH SODHI vs. STATE OF J&K** reported in (2023) 17 Supreme Court Cases 147, **ANUPAL SINGH AND OTHERS vs. STATE OF UTTAR PRADESH THROUGH PRINCIPAL SECRETARY, PERSONNEL DEPARTMENT AND OTHERS** reported in (2020) 2 Supreme Court Cases 173 and **VIJENDRA KUMAR VERMA vs.**

PUBLIC SERVICE COMMISSION, UTTARAKHAND AND OTHERS

reported in **(2011) 1 Supreme Court Cases 150.**

- ii. Third party interest has been created by the delay and laches of the petitioners as such the writ petitions are liable to be dismissed; in support of such contention, reliance is placed on the decisions of the Hon'ble Supreme Court in the cases of ***AFLATOON AND OTHERS vs. LT. GOVERNOR OF DELHI AND OTHERS*** reported in **(1975) 4 Supreme Court Cases 285**, ***CHENNAI METROPOLITAN WATER SUPPLY AND SEWERAGE BOARD AND OTHERS vs. T.T. MURALI BABU*** reported in **(2014) 4 Supreme Court Cases 108** and ***UNION OF INDIA AND OTHERS vs. N. MURUGESAN AND OTHERS*** reported in **(2022) 2 Supreme Court Cases 25.**
- iii. The petitioners were unsuccessful in the relevant selection test, as such could not be considered for appointment against the said supernumerary posts, at the instance of such type of candidates, Court must not place itself in the position of a fact-finding commission. On this point, reliance is placed on the decisions of the Hon'ble Supreme Court in the cases of ***SADANANDA HALO (supra)*** and ***THE STATE OF WEST BENGAL & OTHERS vs. CHANDRA KANTA GANGULI*** reported in **2017 SCC OnLine Cal 3799.**

iv. The Division Bench judgment of the Delhi High Court in the case of **S.S. GOYAL AND OTHERS vs. THE VISITOR, UNIVERSITY OF DELHI AND OTHERS** reported in **1978 SCC OnLine Del 82** is relied on to contend that the judicial oath does not enjoin a judge simply to do justice or to apply law, it requires to do justice according to law.

10. Mr. Ashis Chowdhury, learned advocate for the added respondent no. 282-288:-

The merit list was published as per direction of the Co-ordinate Bench of this Court, the recruitment process was complete, the petitioners, though were unsuccessful but did not challenge the said merit list and/or interview list, the petitioners therefore have no *locus standi* to challenge the selection process. The State as well as the Cabinet has the Constitutional immunity guaranteed under Articles 74(2) and 163(3) of the Constitution, such issue cannot be inquired in any Court of law as such the challenge to the notice dated May 19, 2022 is not sustainable. The decisions of the Hon'ble Supreme Court in the cases of **MADAN LAL (supra)** and **SADANANDA HALO (supra)** are cited to contend that the petitioners being unsuccessful candidates of the relevant selection test, do not have any locus standi to maintain the writ petitions to challenge the said notice dated May 19, 2022.

11. Mr. Bikash Ranjan Bhattacharyya, learned senior advocate for the petitioners: -

- i. Maintainability and entertainability are two different concepts; the former refers to a legal bar to file a *lis* whereas the entertainability depends upon the facts and circumstances of the case which can *only* be decided after adjudication of such *lis* on merit. In the present writ petitions, the challenge to the entire selection process of 1st SLST 2016 including the memo dated May 19, 2022 is on the allegations of violation of statutory Rules, fraud, corruption and malpractices of the respondent authorities. To decide the issue of maintainability as a preliminary issue, the averments made in the writ petition must be taken to be true and correct as required under Order VII Rule 11 of the Code of Civil Procedure, if the said test is applied, the issue of maintainability, in the facts and circumstances of the present case, cannot be decided as a preliminary issue. In the case of **GANESH CHANDRA MUKHERJEE (supra)**, the issue of maintainability was raised on the specific allegation on the lack of jurisdiction of the Court, which is not the case here, as such, the said decision has no manner of application in the present matters.
- ii. The Hon'ble Division Bench in MAT 723 of 2025 had observed that the issue of *locus standi* being fundamental and jurisdictional, needs to be decided first before any interim order could be passed. The said observation was made in the context of the interim order passed in

the matter, cannot be construed to be a direction to decide the issue of maintainability of the writ petitions at the threshold in isolation of the facts and circumstances of the present case, therefore, the said issue cannot be decided as a preliminary issue.

- iii. The allegations made in the writ petitions, if are taken to be true and correct, the writ petitions are very well maintainable on the ground of infringement of fundamental rights *vis-à-vis* the public employment. It is the duty of the Court to undo such infringement when alleged, no delay can defeat the enforcement of fundamental rights of the petitioners guaranteed under Articles 14 and 16 of the Constitution.
- iv. It cannot be said that no fundamental right, even an acquired right of the petitioners has been violated directly or substantially by the creation of the said supernumerary posts inasmuch as the State, instead of announcing fresh vacancies, has created such supernumerary posts to provide appointments to the waitlisted candidates of the said 1st SLST, 2016 by illegally reviving an expired panel thereby depriving the petitioners of a fair opportunity to be considered for appointments against such new vacancies.
- v. The State, to defeat the legitimate claim of the citizens, should not adopt the practice of relying upon technical plea. In support of such contention, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **RAJENDRA SHANKAR SHUKLA AND OTHERS**

vs. STATE OF CHHATTISGARH AND OTHERS reported in **(2015) 10 Supreme Court Cases 400**.

- vi. The attempt of the State to give life to a dead panel to give appointments to the waitlisted candidates of such panel is shocking, the decision of the Hon'ble Supreme Court in the case of **DHARNIDHAR MISHRA (D) AND ANOTHER vs. STATE OF BIHAR AND OTHERS** reported in **(2024) 10 Supreme Court Cases 605** is relied on to contend that delay and laches cannot be raised in a case if the circumstances shock the judicial conscience of the Court. The decision of the Hon'ble Supreme Court in the case of **RAM AUTAR SINGH YADAV vs. THE STATE OF UTTAR PRADESH & ORS. (CIVIL APPEAL NO. 13806 OF 2024)** is relied on to contend that enforcement of the fundamental rights cannot be denied on the ground of belated approach. The decision of the Hon'ble Supreme Court in the case of **M.S. JAYARAJ vs. COMMISSIONER OF EXCISE, KERALA AND OTHERS** reported in **(2000) 7 Supreme Court Cases 552** is relied on to contend that the *locus standi* is an expanded concept and that if any order is passed in violation of law, it would be improper to allow such an order to be operative only on the sole ground that the petitioners have no *locus standi*.
- vii. The decision of the Hon'ble Division Bench of this Court in the case of **BAISAKHI BHATTACHARYYA (CHATTERJEE) & ORS. vs. THE STATE OF WEST BENGAL & ORS.** reported in **2024 SCC OnLine**

Cal 3862 is relied on to contend that the issue of maintainability of the writ petitions should not be decided in the limited prism of the pleadings to the exclusion of all other materials.

- viii. The judgments relied on by the respondents are not relevant to the issue under consideration. The Hon'ble Supreme Court, in the case of **AYAAUBKHAN NOORKHAN PATHAN (supra)** has held that a person must have a legal right and corresponding legal injury to have the locus to move a writ petition. The petitioners are required to be heard on merit to determine whether the petitioners have a legal right and have suffered a corresponding legal injury, which cannot be decided without considering the allegations of the petitioners on merit. The case of **VINOY KUMAR (supra)** stands on different factual footing altogether inasmuch as in the said case, an advocate had filed a writ petition espousing the cause of his clients. In the case of **BOMBAY DYEING & MANUFACTURING CO. LTD. (supra)**, the Hon'ble Supreme Court has laid down factors to be considered before passing an interim order in a Public Interest Litigation. In the case of **TAYABBHAI M. BAGASARWALLA (supra)**, the issue regarding jurisdiction of the Court to entertain the matter was raised, such is not the case here.
- ix. The Hon'ble Supreme Court, in the case of **SADANANDA HALO (supra)** has decided the matter on merit to come to the conclusion that the unsuccessful candidates, after taking part in the interview

process, could not turn back and call names to the system, moreover, no allegation of mass corruption or discrepancies in the merit list as well as the panel was fastened on the State, which is the case here. The Hon'ble Supreme Court, in the case of **TRIVEDI HIMANSHU GHANSHYAMBHAI (supra)** after adjudication on merit, has decided that the challenge to the appointments were unsustainable. In the case of **S.S. GOYAL (supra)**, the Hon'ble Supreme Court had heard the parties on merit to come to a finding that the petitioners since were not eligible to be considered for supernumerary posts, as such, had no locus standi to challenge the action of the executive council of the college to create such posts.

- x. In the case of **MADAN LAL (supra)**, challenge was brought to the selection process on the ground of defect in constitution of the selection committee and unfairness, such is not the case here. The Hon'ble Supreme Court, in the case of **TAJVIR SINGH SODHI (supra)**, has laid down that selection process involves high degree of expertise and discretion as such it is not appropriate for the court to substitute their judgment for that of a selection committee unless there are proven allegations of malfeasance or violation of statutory rules. In the present case there is specific allegation of malpractice in the selection process and violation of the statutory rules, therefore the said judgment does not support the objection of the respondents rather it supports the case of the petitioners.

12. The next issue falls for consideration is as follows:-

(II) Whether the creation of supernumerary posts to give appointment to the waitlisted candidates of the panel of 1st SLST, 2016 in the posts of Assistant Teacher for the subjects work education and physical education in upper primary level of Schools is legally sustainable.

13. The arguments of the learned counsel for the parties on the second issue are recorded here in below in order of their appearance:-

14. Mr. Bikash Ranjan Bhattacharya, learned Senior counsel:-

(i) The vacancies created by the impugned order dated May 19, 2022 following the Cabinet discussion memo dated May 05, 2022 though classified as supernumerary posts but are new vacancies in reality these vacancies, admittedly were created for the agitating aspirants, who were allegedly in the waiting list in respect of 1st SLST, 2016 for Physical Education and Work Education. The said waiting list stood expired on December 11, 2019, therefore, the so-called waitlisted candidates had no status on the date of creation of the said posts, the petitioners and the added respondents were all on the same footing for the posts newly created in the name of supernumerary post. The State has no authority to create such post for a particular group in violation of Articles 14 and 16 of the Constitution. The petitioners have specifically pleaded in the writ petition that the entire selection process is vitiated by corrupt practice.

(ii) Creation of supernumerary posts for fresh recruitment, particularly for a group of persons who could not get appointment in the selection process is in gross violation of Articles 14 and 16 of the Constitution, it is also in violation of the West Bengal School Service Commission (Selection for appointment to the post of teachers for upper-primary Level of Schools) Rules, 2016 (hereinafter referred to as '**the Rules of 2016**' in short) inasmuch as on perusal of the Cabinet memo dated May 05, 2022 it would appear that 1600 supernumerary posts with the breakup of 750 posts for Work Education and 850 posts for Physical Education were created to save illegal appointment subject to validation of panel though there was no existence of the said panel on the said date.

The panel and the waiting list in question had expired on December 11, 2019 as such the neither the State nor the Commission has the power under the law to extend the validity of the said panel and waiting list for the simple reason that waiting list cannot be treated as a perpetual reservoir for the purpose of appointment, therefore, the State action is violative of the extant rules.

(iii) Supernumerary post as a judicial concept was enunciated to save the employment of person who because of fortuitous circumstances was found within the cadre strength. The administrative decision was authorised to be taken by the judgment laws to protect the job but not to give fresh employment, keeping the said legal concept in mind the

Cabinet memo persistently recorded that the supernumerary posts are created to absorb, therefore, the intention and/or understanding was to save the existing employment by way of absorbing. The so-called waitlisted candidates were never in employment inasmuch as the selection process and/or the panel had expired long back consequently there was no existence of any waitlist.

(iv) The State's decision to create fresh vacancies in the name of supernumerary posts was made in exercise of powers under Article 162 of the Constitution but the said provision is subject to the other provisions of the Constitution. The State cannot take any decision under Article 162 in violation of other provisions of the Constitution viz. Articles 14 and 16 which are the part of the fundamental rights and thus have precedence over the other Articles of the Constitution. The State, therefore, had no administrative power to create new posts for a particular group of job seekers, denying fair and equal opportunity.

(v) Reliance is placed on the five Judges Constitutional Bench decision in the case of **B.P. SINGHAL vs. UNION OF INDIA AND ANOTHER** reported in **(2010) 6 Supreme Court Cases 331** to contend that the judicial review is permissible even in case of exercise of power under Article 156(1) of the Constitution by the President of India. Reliance is also placed on the nine Judges Constitutional Bench decision of the Hon'ble Supreme Court in the case of **S.R. BOMMAI AND OTHERS vs. UNION OF INDIA** and others reported in **(1994) 3 Supreme Court**

Cases 1 to contend that judicial review is permissible even in case of President proclamation made under Article 356(1) of the Constitution.

(vi) The Court can interfere in the policy matter of the State if the same is unconstitutional, arbitrary and contrary to the statutory provision, to buttress the said argument reliance is placed on the decision of the Hon'ble Supreme Court in the case of **MANOHAR LAL SHARMA vs. UNION OF INDIA AND ANOTHER** reported in (2013) 6 Supreme Court Cases 616.

(vii) Once a panel stands exhausted upon filling up of all the posts, the question of enforcing a future panel could not arise, in support of such contention reliance is placed on the decisions of the Hon'ble Supreme Court in the cases of **UNION OF INDIA AND OTHERS vs. B. VALLUVAN AND OTHERS** reported in (2006) 8 Supreme Court Cases 686 and **STATE OF ORISSA AND ANOTHER vs. RAJKISHORE NANDA AND OTHERS** reported in (2010) 6 Supreme Court Cases 777.

(viii) Any appointment made in violation of the statutory rules is *void ab initio*; in support of such contention reliance is placed on the decision of the Hon'ble Supreme Court in the case of **STATE OF ODISHA AND OTHERS vs. SULEKH CHANDRA PRADHAN AND OTHERS** reported in (2022) 7 Supreme Court Cases 482. The Court will always help the cause of the truth by acting and speaking as if they do, in aid of his such contention, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **MARIA MARGARIDA SEQUEIRA**

FERNANDES AND OTHERS vs. ERASMO JACK DE SEQUEIRA (DEAD) THROUGH LRS. reported in **(2012) 5 Supreme Court Cases 370.**

(ix) Reliance is placed on the decision of the Hon'ble Supreme Court in the case of **SHRIMANTH BALASAHEB PATIL vs. SPEAKER, KARNATAKA LEGISLATIVE ASSEMBLY AND OTHERS** reported in **(2020) 2 Supreme Court Cases 595** to contend that Constitutional morality must prevail which cannot be replaced by political morality. Absorption in service jurisprudence presupposes that the person is already in employment, to explain the meaning of the word 'absorb', reliance is placed on the decisions of the Hon'ble Supreme Court in the cases of **DEV DUTTA AND OTHERS vs. STATE OF M.P. AND OTHERS** reported in **1991 Supp (2) Supreme Court Cases 553** and **RAMAKANT SHRIPAD SINAI ADVALPALKAR vs. UNION OF INDIA AND OTHERS** reported in **1991 Supp (2) Supreme Court Cases 733.**

(x) Supernumerary posts is to be created for the purpose of existing employees to be absorbed in the cadre, to give support to the said argument, reliance is placed on the decision of the Hon'ble Division Bench of Delhi High Court in the case of **S. S. GOYAL (supra)**. Lastly, the decision of the Hon'ble Supreme Court in the case of **STATE OF RAJASTHAN AND OTHERS vs. JAGDISH CHOPRA** reported in **(2007) 8 Supreme Court Cases 161** is relied on to contend that a candidate who is selected and is kept in the waiting list does not acquire any absolute right to get appointment.

15. Mr. Kishore Datta, learned Advocate General:-

(i) Work Education and Physical Education are compulsory subjects up to Class-VIII in all recognized aided/sponsored schools. Article 21A of the Constitution has created a fundamental right in favour of the children between the ages 6-14 years and as a follow up legislation Section 25 of the Right to Education Act, 2009 has emphasised such right with an obligation on the State to provide adequate Pupil-Teacher Ratio, therefore, the State is bound by the constitutional as well as statutory duty to enforce the said fundamental rights of the children and to provide them teachers in the subjects of Physical Education and Work Education.

(ii) The petitioners cannot have any grievance against the policy to create the supernumerary post since they could not prove their merit to be empanelled in the merit list and in the wait list, the Court, in exercise of its power under Article 226 of the Constitution should not interfere with such policy decision, to buttress the said argument, reliance is placed on the case of **S.S. GOYAL (supra)**.

(iii) The policy decision on recruitment/creation of a post is not amenable to a judicial review, unless the same is arbitrary, where the dominant object is to enforce fundamental rights and to comply with the statutory obligations, a decision to create supernumerary posts cannot be alleged to be arbitrary and to give support to the said argument, reliance is placed on the decisions of the Hon'ble Supreme Court in the

cases of **STATE OF ORISSA AND OTHERS vs. BHIKARI CHARAN KHUNTIA AND OTHERS** reported in (2003) 10 Supreme Court Cases 144, **OFFICIAL LIQUIDATOR vs. DAYANAND AND OTHERS** reported in (2008) 10 Supreme Court Cases 1 and **LT. CDR. M. RAMESH vs. UNION OF INDIA AND OTHERS** reported in (2018) 16 Supreme Court Cases 195.

(iv) There is no right to employment under the Constitution, one has a right to be considered for appointment in the selection process, the petitioners have exhausted their such right in the 1st SLST, 2016 but could not succeed. Therefore, the petitioners cannot assert any legal or statutory right in regard to creation of supernumerary posts.

(v) Creation of supernumerary posts is intended to promote the objective of the Article 21A of the Constitution and corresponding provisions of the Right to Education Act, 2009. Such power has been conferred undoubtedly in public interest and not for individual or private gain, whims and caprice of any individual. A discretion exercised in creating the supernumerary posts to promote object and purpose of Article 21A of the Constitution may be achieved without taking recourse to a fresh selection process.

(vi) The State Cabinet has approved the creation of supernumerary posts, in public interest and in the interest of education in upper primary section, a right which has been elevated to that of a fundamental right under Article 21A of the Constitution. The dominant purpose for creation

of supernumerary post is not to provide employment but to provide adequate number of teachers in upper primary schools.

(vii) The Hon'ble Supreme Court in the case of **CHANDAN BANERJEE AND OTHERS vs. KRISHNA PROSAD GHOSH AND OTHERS** reported in **(2022) 15 Supreme Court Cases 453** explaining the meaning and purport of the word 'Supernumerary' has held that "*a post exceeding the usually stated or prescribed number*". Reliance is placed on the decision of the Hon'ble Supreme Court in the case of **UNION OF INDIA vs. PUSHPA RANI AND OTHERS** reported in **(2008) 9 Supreme Court Cases 242** to contend that the supernumerary posts created at the same time in different grades can also constitute part of the cadre.

(viii) It is not the case of the petitioners that the waitlisted candidates are ineligible to be appointed. The case argued is of expiry of a panel of the waitlisted candidates, the Hon'ble Supreme Court, in the case of **A.P. AGGARWAL vs. GOVT. OF N.C.T. OF DELHI AND ANOTHER** reported in **(2000) 1 Supreme Court Cases 600** has considered various judgments and held that where the selected candidates are available for appointment, there should be no hesitation in directing the authorities to appoint the selected persons even in a situation where the selection was over and the first candidate selected, joined the post and resigned after a few days.

(ix) Creation of posts is an executive and legislative function of the State involving economic factors and the power of the State to create such posts cannot be questioned. The decision to create supernumerary posts is the prerogative of the executive to meet a special exigency as such does not call for intervention. In this regard, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **UNION OF INDIA AND OTHERS vs. PARUL DEBNATH AND OTHERS** reported in **(2009) 14 Supreme Court Cases 173**.

(x) The preparation of the waiting list for the subjects Work Education and Physical Education were not under challenge in any proceeding nor has it been pleaded or argued that the preparation of waitlist is contrary to the Rules or in violation of the *inter se* merit of the candidates.

(xi) Waitlisted candidates have been held to be eligible and qualified candidates who, in order of merit, are placed below the last selected candidates. To explain what is the waiting list, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **GUJARAT STATE DY. EXECUTIVE ENGINEERS' ASSOCIATION vs. STATE OF GUJARAT AND OTHERS** reported in **1994 Supp (2) Supreme Court Cases 591**.

(xii) The contention of the petitioners that the Hon'ble Division Bench of this Court in the case of **BAISHAKHI BHATTACHARYA (CHATTERJEE) (supra)** since has set aside the entire selection process of

1st SLST, 2016 for the recruitment of Assistant Teachers and Group-‘C’/Group-‘D’ employees in Secondary and Higher Secondary Schools for the Classes IX,X,XI,XII, the creation of the supernumerary posts to give appointment to the said waitlisted candidates for the subjects Work Education and Physical Education would face the same consequence is not sustainable as the Hon’ble Division Bench of the Court in the case of **RAJIB BRAHMA AND OTHERS vs. STATE OF WEST BENGAL AND OTHERS** reported in **2024 SCC OnLine Cal 7948/(2025) 1 CHN 24** has upheld the validity of the recruitment process of assistant teachers in upper primary level of schools and the said decision has been affirmed by the Hon’ble Supreme Court.

(xii) The judgment of **BAISHAKHI BHATTACHARYA (CHATTERJEE) (supra)** and the judgment of the Hon’ble Supreme Court arising therefrom **STATE OF WEST BENGAL vs. BAISHAKHI BHATTACHARYA (CHATTERJEE)** reported in **2025 SCC OnLine SC 719** are misplaced inasmuch as in the said matters, different selection process was under challenge. Moreover, the Hon’ble Supreme Court in the judgment dated April 03, 2025 reported in **2025 SCC Online 719** did not make any assumption regarding the findings of the Hon’ble Division Bench made in its judgment dated April 22, 2024 that the State Government has resolved to create supernumerary post to accommodate illegal appointees, in the absence of any such finding on the creation of 5261 supernumerary posts no inference can be drawn from the

observations of the Hon'ble Division Bench made in the judgment of ***BAISHAKHI BHATTACHARYA (CHATTERJEE) (supra)***.

(xiii) The petitioners did not throw any contemporaneous challenge to the said selection process till such time the impugned notifications dated May 19, 2022 and October 14, 2022 were published. An order dated February 08, 2024 passed by this Court in WPA 285 of 2023 is cited to contend that a similar challenge was dismissed on the ground of limitation. Creation of the supernumerary posts cannot confer on the petitioners a cause of action to challenge the selection process, not challenged contemporaneously. The petitioners have acquiesced to the entire selection process and have waived their rights in respect of the Prayers (a), (b), (c), (d) and (e) made in the writ petition (WPA 25056 of 2022).

The prayer (f) of the said writ petition is barred by the principles of misjoinder of causes of action.

(xiv) Section 10 of the Control of Expenditure Act, 2005 empowers the State to sanction additional posts. The supernumerary posts have been created, considering the budgetary allocations, sanction of the Finance Department and finally by the approval of the Cabinet, as such the posts created are within the authority of the State Government.

(xv) The decision to create supernumerary post has not been made by the Hon'ble Governor such submission of the petitioners is contrary to the constitutional scheme. Different Articles of the Constitution are

referred to explain mode and manner of the powers to be exercised by the Council of Ministers with the Chief Minister as the Head to aid and advise the Hon'ble Governor. To explain the power of the Hon'ble Governor, reliance is placed on the decisions of the Hon'ble Supreme Court in the cases of **SAMSHER SINGH vs. STATE OF PUNJAB AND ANOTHER** reported in **(1974) 2 Supreme Court Cases 831** and **BHURI NATH AND OTHERS vs. STATE OF J&K AND OTHERS** reported in **(1997) 2 Supreme Court Cases 745** is relied on.

(xvi) It is settled law that the provision of Article 166 of the Constitution is only directory not mandatory in character, and if they are not complied with, it can be established as a question of fact that the impugned order was issued infact by the State Government or the Governor, on this point, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **STATE OF BIHAR AND ANOTHER vs. SUNNY PRAKASH AND OTHERS** reported in **(2013) 3 Supreme Court Cases 559**.

(xvii) The Hon'ble Supreme Court, in respect of the same Cabinet decision and the impugned order dated May 19, 2022, had observed that the advice tendered by the Council of Ministers of the Cabinet to the Governor shall not be inquired into in any Court under Article 163 (3) of the Constitution as the said Council of Ministers, under the said provision, exercise the executive powers of the State provided under Article 154 of the Constitution. The advice given to the Governor by the

Council of Ministers is protected under Article 163(3) of the Constitution. In this regard reliance is placed on the decision of the Hon'ble Supreme Court in the case of **STATE OF PUNJAB vs. SODHI SUKHDEV SINGH** reported in **AIR 1961 Supreme Court 493** and on the decision of the Hon'ble Division Bench of the Bombay High Court in the case of **LAXMAN LIMBRAJ RANKHAMB AND OTHERS vs. STATE OF MAHARASHTRA** reported in **AIR 1981 Bombay 179**.

(xvi) The decisions cited by the petitioners are no pointer to the issue under consideration for the following reasons: -

- a. In the decision of **B.P. SINGHAL (supra)** relied on by the petitioners, the issue was the doctrine of pleasure, which is not an issue here. The decisions of **S.R. BOMMAI (supra)** and **B.VALLUVAN (supra)** are irrelevant to the present issue.
- b. The proposition of law laid down in the decision of **MANOHAR LAL SHARMA (supra)** is not applicable to the present case inasmuch as the creation of supernumerary posts is not arbitrary, unconstitutional or contrary to any statutory provision.
- c. The decision of **RAJKISHORE NANDA (supra)** is of no aid to the petitioners as in the said case, it has been laid down that in rare and exceptional circumstances, the Government, only after adopting a policy decision based on some

rationale, can extend the life of a panel, which is the situation here.

- d. The proposition of law laid down in the decision of **SULEKH CHANDRA PRADHAN (supra)** is no pointer to the issue under consideration inasmuch as there is no judicial finding of illegality in respect of the appointments made for Assistant Teachers (Work Education and Physical Education) in Upper Primary level of schools.
- e. The decisions of **MARIA MARGARIDA SEQUEIRA FERNANDES (supra)**, **SHRIMANTH BALASAHEB PATIL (supra)** and **DEV DUTTA (supra)** are factually distinguishable as such not applicable to decide the issue under consideration.
- f. The proposition of law laid down by the Hon'ble Division Bench of Delhi High Court in the case of **S. S. GOYAL (supra)** that the persons who could not prove their merit to be empanelled in the merit list or in the waitlist will not have any grievance over the policy to create supernumerary posts is of no aid to the petitioners and the respondents are also relying on the said decision.
- g. The decision of **JAGDISH CHOPRA (supra)** is no pointer to the issue under consideration inasmuch as the said proposition of law does not negate the fact that in the

present case, the waitlisted candidates are eligible and qualified candidates.

- h. The judgment of the Hon'ble Division Bench of this Court in the case of **BAISAKHI BHATTACHARYYA (CHATTERJEE) (supra)** and the judgment of the Hon'ble Supreme Court arising out of it are not applicable in the present case as the context and subject matter of the present case and the said case are completely different.

16. Dr. Sutanu Patra, Learned Advocate:-

(i) The Commission has an insignificant role in creation of the said supernumerary post. The power to create the supernumerary post is purely within the domain of the State Government, the Commission has only carried out the directions of the State Government to recommend the waitlisted candidates for appointment.

(ii) The Government by the impugned order dated May 19, 2022 has created two different categories of supernumerary posts. The paragraph (a) of the said notification has two parts, the first part deals with the creation of supernumerary post for Assistant Teachers for Classes- IX, X, XI and XII and non-teaching staffs i.e. Group-‘C’ and Group-‘D’ who are adversely affected by the rank jumping.

The second part of the said order deals with the creation of supernumerary posts for recruitment of Assistant Teachers in subjects

Work Education and Physical Education in the upper primary level of schools to absorb all waitlisted candidates.

(iii) The said first part of the said order was under challenge before the Hon'ble Division Bench in the case of **BAISHAKHI BHATTACHARYA (CHATTERJEE) (supra)**. The Hon'ble Division Bench has set aside the said first part of the said order. The decision of the Hon'ble Division Bench has been upheld by the Hon'ble Supreme Court in Civil Appeal No. 4805 of 2025. However, the findings of the Hon'ble Division Bench in the judgment of **BAISHAKHI BHATTACHARYA (CHATTERJEE) (supra)** and the decision of the Hon'ble Supreme Court affirming the said judgment of the Hon'ble Division Bench has no bearing in the selection process for the work education and physical education since the said selection process is not related with the said litigations.

(iv) The writ petitioners are unsuccessful candidates, they were eliminated from the selection process as their marks were below the cut off marks as such the petitioners were not within the zone of consideration for recommendation, that being the position the petitioners have nothing to do with creation of supernumerary posts, consequently not entitled to challenge the creation of such posts.

(v) Substantive post cannot be equated with the supernumerary post. The said rules of 2016 deals with the filling up all substantive posts by the Commission, vacancies/posts referred to in the said rules deals with the substantive post and do not apply to supernumerary post,

therefore, the argument made on behalf of the writ petitioners with regard to Section 2(1) (p) and Section 8 and/or any other provision of the said Rules of 2016 is totally misplaced as such the writ petitions are liable to be dismissed.

17 . Mr. Partha Sarathi Sengupta learned senior advocate:-

(i) The challenge to the notification dated May 19, 2022 is *mala fide* inasmuch as the petitioners though are neither entitled nor are seeking the relief of appointment against the post created by the said notification but the whole intention of the petitioners is to throw spanner in the works to deny the right of the answering respondents to get the appointment as per the recommendation of the Commission. Therefore, such *mala fide* act of the petitioners should not be condoned rather equity demands the dismissal of the writ petition as equity follows the law.

(ii) The State has a Constitutional mandate to create supernumerary post and it has multiple source of power for issuance of the impugned notification starting from Article 162 of the Constitution. The State has already indicated source of its power and reasons for issuance of the impugned notification. The impugned notification though does not mention any specific provisions of law save and except Section 19 of the said Act of the West Bengal School Service Commission Act, 1997 (hereinafter referred to as '***the said Act of 1997***' in short). Omission to mention other sources of power would not invalidate the

impugned notification as there is no necessity to quote the power expressly if such power is vested with the authority. In support of such contention reliance is placed on the decision of the Hon'ble Supreme Court in the case of **SMALL INDUSTRIES DEVELOPMENT BANK OF INDIA vs. SIBCO INVESTMENT PRIVATE LIMITED** reported in **(2022) 3 SCC 56**.

(iii) There is no provision in the said Act of 1997 prohibiting creation of supernumerary posts, rather Section 19 thereof enables the State Government to direct the Commission to discharge its function in conformity with the said Act of 1997. The creation of supernumerary posts is not in dissonance with any provision of the said Act of 1997. The State Government, therefore, was empowered to issue the impugned notification for creation of supernumerary posts.

(iv) The State Government is empowered within the statutory framework to fill the void with the issuance of executive orders which are completely valid in the eyes of law, reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of **KARNATI RAVI AND ANOTHER vs. COMMISSIONER, SURVEY SETTLEMENTS AND LAND RECORDS AND OTHERS** reported in **(2018) 2 SCC 635** and on the decision of the Hon'ble Division Bench of the Andhra Pradesh High Court in the case of **COMMR., SURVEY SETTLEMENTS & LAND RECORDS vs. KARNATI RAVI** reported in **(2007) SCC OnLine AP**.

(v) The petitioners and the answering respondents are not similarly situated as the petitioners were unsuccessful and the answering respondents were successful in the relevant selection test, therefore, there cannot be any infringement of Articles 14 and 16 of the Constitution as alleged.

(vi) The waitlisted candidates are not responsible for the expiry of the panel, therefore, they cannot be made to suffer to the said situation. The position in law pertaining to expiry of panel due to pendency of litigation has been well settled by the Co-ordinate Bench of this Court in the case of **SAROJ KARMAKAR vs. THE STATE OF WEST BENGAL & ORS.** reported in **2015 SCC OnLine Cal 7880**.

(vii) No one shall suffer by an act of Court, it is not a rule confined to erroneous act of the Court, it embraces within its sweep all such acts as to which the Court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and the law. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of **SOUTH EASTERN COALFIELDS LTD. vs. STATE OF M.P. AND OTHERS** reported in **(2003) 8 Supreme Court Cases 648**.

(viii) The instant proceeding suffers from inexcusable delay and laches, by which petitioners are challenging a recruitment process which is in aid of initial recruitment initiated in the year 2016, there was a finite number of applicants who were in the realm of the consideration in

2016. The answering respondents upon receipt of recommendation letters had their rights crystallized under the 2016 recruitment process. Reliance in this regard is placed on the decision of the learned Single Judge of this Court in the case of **OSMAN ALI SEKH vs. STATE OF WEST BENGAL AND ORS.** reported in **2006 SCC OnLine Cal 776** to contend that once the commission issues recommendation right to appointment automatically flows from such recommendation and refusal to issue the appointment letter is a gross irregularity.

(ix) The executive indeed can exercise powers of departmental or subordinate legislation so long as the exercise is not contrary to the provision of Article 162 of the Constitution. To explain the scope of Article 162 of the Constitution, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **RAI SAHIB RAM JAWAYA KAPUR AND OTHERS vs. STATE OF PUNJAB** reported in **(1955) 1 Supreme Court Cases 553**. The decision of the Hon'ble Division Bench of this Court in the case of **SHARAD KUMAR SINGH vs. STATE OF WEST BENGAL AND ANOTHER** reported in **2020 SCC OnLine 1528** is cited to contend that the executive action of the State in respect of a matter which is not covered by any legislation or for which there is no express or implied statutory prohibition is justified on the basis of the Constitutional authority vested to state under Article 162 of the Constitution.

(x) The entirety of the case sought to be made out by the petitioners are de hors of pleadings and evidence. In fact, some of the allegations made in the writ petition are bare statements without any basis in fact and law and the same should be disregarded. Several of the allegations made during arguments pertaining to source of power are wholly de hors of pleadings and should be ignored as well.

18. Mr. Ashish Chowdhury learned advocate:-

(i) The added respondents, being successful candidates of the relevant selection test are entitled to get the appointment. The selection process of 1st SLST, 2016 for recruitment of Assistant Teachers of Upper Primary Level of Schools was unsuccessfully challenged and the said recruitment process was conducted and completed as per direction of the Hon'ble Division Bench. The Hon'ble Supreme Court has observed that the Government and the Cabinet has the right to create supernumerary post and in view of the immunity granted by the Articles 74(2) and 163 of the Constitution, the said decision cannot be inquired into by any Court as such the petitioners cannot challenge the legality and validity of the said impugned order dated May 19, 2022. Reliance is placed on the decisions of the Hon'ble Supreme Court in the cases of **MADAN LAL (supra)** and **SADANAND HALO (supra)** to contend that the unsuccessful candidates, after participating, cannot turn back and challenge the legality and/or propriety of the said selection process. A presumption of correctness of the official act should be inferred, to give support to the

said contention, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **UNION OF INDIA AND OTHERS vs. BIKASH KUANAR** reported in **(2006) 8 Supreme Court Cases 192**.

19. Mr. Kalyan Bandopadhyay, learned senior advocate:-

(i) Unsuccessful candidates like the petitioners in different writ petitions (WPA 944 of 2019, WPA 986 of 2023 and WPA 23033 of 2019) at multiple stages, had challenged the validity of the panel in relation to the 1st SLST, 2016 (Physical Education and Work Education) but till date no Court of law has returned any adverse finding regarding the procedure as well as panel and/or merit list prepared in connection with the said selection test. Many of the candidates from the said panel have already been appointed and are also working.

(ii) The petitioners have made some vague and speculative allegations and have invited the Court to go into a roving enquiry based on their fictitious claims regarding alleged illegalities committed in the said 1st SLST, 2016. However, the said allegations remain undecided and the same cannot be decided in the absence of appointed candidates of the said 2016 selection process.

(iii) In the absence of adverse finding regarding the panel and waitlist prepared in relation to the said selection test, neither the respondents' positions in the said waitlist can be questioned nor can it be said that any candidate was illegally appointed and/or recommended for appointment. The petitioners cannot be allowed to import the findings

of illegality passed by the Hon'ble Division Bench of this Court in its judgment (**BAISHAKHI BHATTACHARYA (CHATTERJEE) (supra)**) in connection with the 1st SLST, 2016 for appointment of Assistant Teachers for Classes- IX,X,XI, XII and Group- 'C' and Group- 'D' posts for creating a prejudice in the instant case.

(iv) The Upper Primary Selection Process which is governed by the same Rules of 2016 has been upheld by the Hon'ble Division Bench of this Court in the case of **RAJIB BRAHMA (supra)**, the said decision has been upheld by the Hon'ble Supreme Court and Review thereof was also dismissed.

(v) The petitioners have failed to discharge their burden of proof that the rejection of their candidature in the said selection process had any infirmity warranting interference, without discharging such onus, the petitioners have not acquired any locus to challenge any of the appointments made in connection with the said selection process nor the creation of supernumerary posts.

(vi) The creation of supernumerary posts is the prerogative of the Executive and is within the executive power of the governance invoked by the Government. The State, in pursuit of exigency, retains the power to create supernumerary posts. To explain the meaning of the term 'supernumerary', reliance is placed in the case of **CHANDAN BANERJEE (supra)** and to explain the purport thereof in service law, reliance is placed on the decision of the learned Single Judge of the Guahati High

Court in the case of **HAREN BORGOHAIN AND ORS. vs. STATE OF ASSAM AND ORS.** reported in **2016 SCC OnLine Gau 649** to contend that the said concept of supernumerary posts denotes creation of temporary posts outside the cadre personal to the incumbent and would mean that the said posts exist co-terminus with the service of the incumbent i.e., till the incumbent holds office.

(vii) There is no illegality in the creation of supernumerary posts provided that the said posts are filled up by the candidates having due eligibility. In the present case, the supernumerary posts are to be filled up by the waitlisted candidates who otherwise, have been found to be eligible in the relevant selection test and have been accordingly recommended for appointment as Assistant Teachers.

(viii) Creation of supernumerary posts neither can be equated with the filling up of vacancies nor such creation would affect any future vacancies. The policy decision of the Government was not for the purpose of filling up excess vacancies in the 2016 selection process. The supernumerary posts in question will be extinguished at the end of the service tenure of the persons who will be appointed against the said posts. In the absence of infringement of their legal rights, the petitioners cannot maintain the instant writ petition.

(ix) The supernumerary posts have been created in public interest and in the interest of the education to maintain adequate Pupil-Teacher Ratio and to meet the demand of the Right to Education Act,

2005. The State, in order to comply with its constitutional and statutory responsibility towards the children at large, has taken the policy decision to create the said supernumerary posts.

(x) The supernumerary posts were created with the approval of the Cabinet for accommodating all Work Education and Physical Education waitlisted candidates to meet the exigencies created due to the delay in completing the recruitment process of 1st SLST, 2016.

(xi) Quelling the protest was not the consideration for the creation of supernumerary posts, the intention of creating such posts ought to be gathered from the impugned Government Order dated May 19, 2022 itself and any outside source, including the affidavit filed by the State of West Bengal, if provides any additional reason for the creation of the said post, the same cannot be taken into consideration. The decision of the Hon'ble Supreme Court in the case of **MOHINDHR SINGH GILL AND ANOTHER vs. CHIEF ELECTION COMMISSIONER, NEW DELHI AND OTHERS** reported in **(1978) 1 Supreme Court Cases 405** is relied on to contend 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.

(xii) The supernumerary posts were created on the basis of a policy decision in terms of powers conferred upon the authorities under Section 19 of the West Bengal School Service Commission Act, 1997 (hereinafter

referred to as '**the said Act of 1997**' in short) and the creation of such supernumerary posts do not require adherence to the Rules of 2016, which were not even existence on May 19, 2022 as the State, in supersession of the said Rules of 2016 has enacted the West Bengal School Service Commission(Selection for appointment to the post of Assistant Teachers in Junior High, Secondary and Higher Secondary Schools), 2019, thus reliance cannot be placed on the said Rules of 2016 to question the creation of supernumerary posts.

(xiii) The petitioners and the waitlisted candidates are two distinct classes inasmuch as the petitioners are unsuccessful candidates of the said selection process and the waitlisted candidates have been found eligible entitled to be recommended for the appointment, this is a reasonable classification as such does not attract Articles 14 and 16 of the Constitution, to buttress the said argument, reliance is placed on the decision of the Division Bench of the High Court of Delhi in the case of **S.S. GOYAL (supra)**.

(xiv) In view of the pendency of the litigations, the panel and the waitlist prepared in connection with the 1st SLST, 2016 (Physical Education and Work Education) remain valid. In view of the fact that many waitlisted candidates had approached the Hon'ble Court by way of writ petitions during the lifetime of such panel, the life of the said panel as well as the waiting list stood extended and was subsisting when the impugned order dated May 19, 2022 was passed, in support of his such

contention, reliance is placed on the decision of the learned Single Judge of the Rajasthan High Court in the case of **RAM BABU KOLI vs. ZILA PARISHAD SAWAI MADHOPUR** reported in **1999 SCC OnLine Raj 241**.

(xv) The cabinet memorandum dated May 05, 2022 wherein the proposal for creation of supernumerary post for the subjects Work Education and Physical Education was adopted is not under challenge in the instant writ petitions and rightly so as the discussions made in Cabinet *per se*, are not amenable to judicial review. The petitioners though have ostensibly brought the said Cabinet memorandum on record by filing supplementary affidavit without assailing the same, this Hon'ble Court should refrain from considering the validity of the said Cabinet memorandum, in support of his such contention, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **STATE OF HIMACHAL PRADESH AND OTHERS vs. HIMACHAL PRADESH NIZI VYAVSAYIK PRISHIKSHAN KENDRA SANGH** reported in **(2011) 6 Supreme Court Cases 597** to contend that without there being any question raised regarding the validity of the Cabinet decision or any relief sought for, the said Cabinet decision ought not to be lightly interfered with in judicial review to restrict the constitutional authority and powers of the State to frame policy in vital areas. Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of **BHARAT SINGH AND OTHERS vs. STATE OF HARYANA AND OTHERS** reported in **(1988) 4 Supreme Court Cases 534** to contend

that if the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition, the Court will not entertain the point.

(xvi) The decisions cited by the petitioners are sought to be distinguished on the similar points as argued by the learned Advocate General.

20. Mr. Bikash Ranjan Bhattacharya, in reply:-

Neither of the judgments cited on behalf of the respondents are of no help to resolve the issue under consideration. The order of this Court cited on behalf of the State is of no help of the respondents rather it supports the case of the petitioners as in the said case the writ petition was dismissed on the ground that the panel has expired long back.

(A) The Court on the first issue: -

21. The Hon'ble Supreme Court in the case of ***DHARNIDHAR MISHRA*** (**supra**) cited on behalf of the petitioners has observed that "*in a case where the demand for justice is so compelling, a constitutional court would exercise its jurisdiction with a view to promote justice, and not defeat it.*" Keeping the said object in view, the issue of maintainability is addressed.

22. The decision the learned Single Judge of this Court in the case of ***GANESH CHANDRA MUKHERJEE*** (**supra**) cited on behalf of the respondents is completely irrelevant to decide the issue inasmuch as in the said decision, objection was taken as to the jurisdiction of the Court to entertain an application under Article 226 of the Constitution against a company such is not the challenge here.

23. I am at one with Mr. Bhattacharya, that to decide the issue of maintainability of the writ petitions raised by the respondents, the averments made in the writ petitions must be taken to be true and correct. If the said test is applied, the issue of maintainability vis-à-vis the *locus standi* of the petitioners cannot be decided at the threshold as a preliminary issue.

24. The Hon'ble Division Bench in MAT 723 of 2025 while affirming the order of injunction passed by this Court had never directed that the said issue is required to be heard first deferring the decision on merit. Therefore, I am unable to convince myself to accept the argument of Mr. Sengupta that the issue of maintainability should be decided as a preliminary issue, particularly when the said issue raises a mixed question of law and fact.

25. To answer the issue under consideration, it is necessary to understand the scope of the present writ petitions. The petitioners are challenging the legality and validity of the entire 1st SLST, 2016 so far as it relates to the recruitment of Assistant Teachers at the Upper Primary level of recognized Non-Government aided/sponsored schools in West Bengal for the subjects Physical Education and Work Education on the grounds that the said selection test is vitiated by the malpractices, illegal actions and manipulation of the respondent authorities. The petitioners, though have participated in the said selection test but were unsuccessful as such their locus to maintain the said challenge is questioned.

26. There was another recruitment drive conducted by the Commission in the year 2016 for recruitment of Assistant Teachers for Classes- IX,X,XI and XII and Group-‘C’ and ‘D’ posts. In several writ petitions the said selection test was challenged on the self-same grounds of fraud, illegality and malpractice of the authorities, the challenge was sustained, as a consequence the entire selection process was set aside by the Hon’ble Division Bench of this Court in the case of **BAISAKHI BHATTACHARYYA (CHATTERJEE) (supra)**, the said decision was affirmed by the Hon’ble Supreme Court. In the backdrop of such facts and circumstances, it will not be just and proper to dismiss the writ petitions at the threshold on the ground of maintainability without verifying the veracity of the allegations made therein.

27. The petitioners are alleging that fresh vacancies have been created in the name of supernumerary posts as such, all participants in the said relevant selection test have a right to be considered against those vacancies, the allegation needs to be investigated on merit and without such step being taken, the writ petitions cannot be dismissed on the ground that the petitioners being unsuccessful in the relevant selection test, have no *locus standi* to maintain the writ petitions. The Hon’ble Division Bench of this Court in the case of **BAISHAKHI BHATTACHARYYA (CHATTERJEE) (supra)** while overruling the similar objection, had observed at paragraph 163 that the writ petitioners are participants of the selection process, albeit unsuccessfully by most but

they are entitled to a fair consideration in the selection process, the said paragraph is quoted below for ready reference:-

“163.The writ petitioners are participants of the of the selection process, albeit unsuccessfully by most, in respect of which they allege misadventure. They are entitled to a fair consideration in the selection process, a fundamental right under Article 14, denial of which they allege in the writ petitions.”

28. The Hon’ble Supreme Court, in the case of **VIDYA DEVI vs. STATE OF HIMACHAL PRADESH AND OTHERS** reported in **(2020) 2 Supreme Court Cases 569** has held that *“delay and laches cannot be raised in a case of a continuing cause of action, or where the facts shock judicial conscience of the Court. Moreover there is no period of limitation for Courts to exercise Constitutional jurisdiction to do substantial justice.”*

29. The action complained of shocks the judicial conscience of this Court inasmuch as the State by the impugned notification has sought to inject life into a dead panel, such action of the State is not legally sustainable. The present context demands consideration of paragraph 147 of the decision of the Hon’ble Division Bench in the case of **BAISHAKHI BHATTACHARYA (CHATTERJEE) (supra)** as such it is quoted below:-

“147. No appointment can be made after expiry of the panel as the panel is not a perennial reservoir for appointments. Panel is valid for the declared vacancy and for the specified period. Appointments towards future vacancies cannot be made from the panel. Appointments made in violation of Articles 14 and 16 of the Constitution of India are a nullity. Courts have

no jurisdiction to direct appointment to be made beyond the validity period of the panel.”

Therefore, in the facts and circumstances of the present case the alleged delay and laches are no fetter to maintain the present challenges. The decisions cited on behalf of the respondents on this point in the cases of **AFLATOON AND OTHERS (supra)**, **CHENNAI METROPOLITAN WATER SUPPLY (supra)**, **N. MURUGESAN (supra)** are therefore factually distinguishable.

30. The petitioners had participated in the relevant selection test, though unsuccessful but they cannot be said to be totally strangers to the said selection process, in view of the nature of the allegations and relief claimed in the writ petitions, the petitioners cannot be thrown overboard on the allegation of not having the *locus standi* without addressing the said allegations on merit, in view thereof the proposition of law laid down in the following decisions on the point of *locus standi* to maintain a writ petition cited on behalf of the respondents in the cases of **AYAAUBKHAN NOORKHAN PATHAN (supra)**, **VINOY KUMAR (supra)**, **TRIVEDI HIMANSHU GHANSHYAMBHAI (supra)**, **MADAN LAL (supra)**, **SADANAND HALO (supra)**, **TAJVIR SINGH SODHI (supra)**, **ANUPAL SINGH (supra)** and **VIJENDRA KUMAR VERMA (supra)** are not applicable in the present case inasmuch as in all those decisions, the Hon’ble Supreme Court had decided the said issue upon consideration of the cases on merit.

31. In the case of **BOMBAY DYEING & MANUFACTURING CO. LTD. (supra)** and in the case of **TAYABBHAI M. BAGASARWALLA (supra)**, the issue was relating to the grant of an order of injunction and the maintainability of the *lis*, which is not the issue under consideration, therefore the said decisions are not relevant to the context. In the case of **CHANDRA KANTA GANGULI (supra)**, the Hon'ble Division Bench of this Court has held that when the executive action of the State is challenged, the Court must tread with caution and should not overstep its limit but with a further observation that the Court is warranted only when there are oblique motives and miscarriage of justice, the petitioners have alleged both, it has already been held that the step taken by the State to give life to an expired panel *prima facie*, is not legally justifiable. Therefore, the said decision cited on behalf of the respondents is of no help to them.

32. It is not the validity of the decision but the validity of the decision making process to create supernumerary posts is under challenge, therefore, the said challenge is open to judicial review, the premise of the challenge, being different, the decision of the Hon'ble Division Bench of the Delhi High Court in the case of **S.S. GOYAL (supra)** is not applicable in the present case.

In view of the discussion made above, the first issue is answered in affirmative, the petitioners have the locus standi to maintain the writ

petitions and are entitled to challenge the notification dated May 19, 2022 and October 14, 2022.

(B) The Court on the second issue:-

33. The Government of West Bengal School Education Department (Secondary Branch) by a notification bearing no. 1104-SE/S/1S-26/2010(Pt.-III) dated September 20, 2016 had framed the rules regulating the manner and scope of selection of person for appointment to the post of teachers for upper-primary level of schools, namely the West Bengal School Service Commission (Selection for appointment to the post of Teachers for upper-primary level of schools) Rules, 2016,(hereinafter referred to as **‘the said Rules of 2016’** in short).

34. The Commission being designated by the said rules of 2016 had notified the 1st SLST 2016 for recruitment of assistant teachers in physical education and work education in recognized non-Government aided/sponsored school in West Bengal vide notification bearing no. 1150/6867/CSSC/ESTT/2016 dated December 16, 2016 against the vacancies available under the said Rules of 2016. The relevant portion of the said recruitment notification dated December 16, 2016 is quoted below for ready reference:-

“As per the instruction vide ref. no. 1104-SE/S/1S-26/2010(Pt.-III) dated 20th September, 2016 of the Department of School Education (Govt. of West Bengal), i.e. West Bengal School Service Commission(Selection for Appointment to the Posts of Teachers for Upper Primary Level of Schools) Rules, 2016. The West Bengal School Service Commission has been designated to conduct State Level Selection Test for Recruitment of Assistant Teachers in Physical Education and Work Education in Recognized Non-Govt. aided/Sponsored Schools in West Bengal against the vacancies available under The West Bengal School Service

Commission (Selection for Appointment to the Posts of Teachers for Upper Primary Level of Schools) Rules, 2016.

The entire processes will be guided by The West Bengal School Service Commission Act, 1997, above Rules and subsequent Amendments as on the date of Advertisement.”

35. The said Rules of 2016 prescribes a complete mechanism for the selection of persons for appointment to the post of teachers for upper primary level of schools, the Rule 8 thereof lays down the procedure as to how the vacancies for such recruitment process would be ascertained, the said Rule prescribes that the District Inspector of Schools, on being asked by the Director of School Education shall prepare a report regarding the number of vacancies in posts and shall send it to the Directorate of the School Education, the said Directorate, on receipt of such report with due approval of the State Government, shall send it to the Central Commission, firstly before the date of publication of the advertisement inviting application, lastly fifteen days before the date of publication of the result of the written examination or interview list as the case may be. The relevant portion of the Rule 8 of the said Rules of 2016 is quoted below for ready reference:-

“8. Information regarding vacancies.-(1) The District Inspectors of Schools (Secondary Education) shall, on being asked by the Director of School Education, prepare a report regarding the number of vacancies in posts, Subject group-wise, subject-wise, medium-wise, gender-wise and reservation category-wise for the posts of Teachers and send it to the Directorate of School Education.

(2) On receipt of report under sub-rule (1), the Directorate of School Education shall, with due approval of the State Government, send the Subject group-wise, subject-wise, medium-wise, gender-wise and reservation category-wise vacancy report complied region-wise, earmarked vacancies such posts, if any, declared by the State Government for any year, to the Central Commission.

(3) The report as mentioned in sub-rule (2), shall be sent to the Central Commission in the following manner:-

(a) firstly, before the date of publication of the advertisement inviting application; and

(b) lastly, fifteen (15) days before the date of publication of the result of the written examination or Interview list, as the case may be...

(4).....
.....”

36. Rule 16 of the said Rules of 2016, apart from mandating that each panel and waiting list shall remain valid for one year from the date of publication of the panel and waiting list or the date of advertisement for the next recruitment process whichever is earlier, by virtue of the proviso thereof also stipulates that the names of candidate shall not be recommended against any post other than the post applied for or against any vacancy which has not been notified in terms of sub-rule(3) (b) of Rule 8 of the said Rules of 2016. The relevant portion of the Rule 16 of the said Rules of 2016 is quoted below for ready reference:-

“16. Validity of panel and waiting list.-(1) Each panel and waiting list shall remain valid for one year from the date of publication of the panel and waiting list, or the date of advertisement for the next Recruitment Process whichever is earlier:

Provided that the names of candidates shall not be recommended against any post other than the post applied for or against any vacancy which has not been notified in terms of sub-rule(3) (b), of rule (8).

(2).....”

The Clause 11 of the recruitment notification dated December 16, 2016 reiterates the said mandate of the said Rules of 2016, the same is also reproduced below for ready reference: -

“....11) Validity of panel and waiting list

(i) Each panel and waiting list shall remain valid for one year from the date of publication of the panel and waiting list, or the date of advertisement for the next Recruitment process whichever is earlier. Provided that the names of the candidates shall not be recommended against any post other than the post applied for or against any vacancy which has not been notified in terms of sub-rule(3)(b), of rule (8) of The West Bengal School Service Commission (Selection for Appointment to the Posts of Teachers for Upper Primary Level of Schools) Rules, 2016.”

37. The position of the extant rule as it appears from the above discussion is that the recruitment drive was initiated to fill up the vacancies available under the said Rules of 2016, the Rule 8(3) thereof fixes the time limit within which such vacancies are required to be ascertained and reported to the Commission but the said procedures were not followed in creating the vacancies for the said waitlisted candidates of 1st SLST, 2016.

38. The State has created the said vacancies in the name of supernumerary posts with the approval of the cabinet. The petitioners of WPA 25056 of 2022 by way of a supplementary affidavit have brought the cabinet memorandum bearing no.**596/SL/5S-202/2022 (Pt.)** dated **May 05, 2022** on record. The Principal Secretary to the Government of West Bengal, School Education Department, by the said memorandum *inter alia*, had proposed to create 1600 supernumerary posts (with

breakup of 750 work education and 850 physical education) for absorption of all waitlisted candidates of 1st SLST, 2016.

39. To understand as to how the said vacancies in the name of supernumerary posts were proposed to be created, the said cabinet memorandum dated May 05, 2022 demands a close look. The said memorandum records the proposal of the Central School Service Commission for creation of 5261 posts, the relevant portion of the said proposal is reproduced below:-

“2. Proposal of Central School Service Commission and Commissioner of School Education:

(i) The Central School Service Commission:

The Chairman, West Bengal Central School Service Commission vide its letter dated 33/04/2022 placed a report to the State Government stating that 5261 numbers of candidates have been affected by rank jumping in the 1st SLST, 2016 (Assistant Teacher) and 3rd RLST, 2016 (Group C and Group D Staff) (1932 post of Assistant Teacher for Class IX-X, 247 posts of Assistant Teacher for Class XI-XII, 1102 posts of Gr. C and 1980 posts of Gr. D) and if all the similarly placed candidates like Soma Das are to be recommended, 5261 posts are required to be created.”

40. The said memorandum thereafter records the proposal of the Commissioner of School Education to create 1600 supernumerary posts (breakup 750 Work Education and 850 Physical Education) to absorb all waitlisted candidates of Physical and Work Education Teachers subject to validation of panel, the relevant portion of the said proposal is reproduced below: -

“ Proposal of the Commissioner of School Education:

The Commissioner of School Education vide its proposal dated 04/05/2022 has proposed to create 1600 nos. of supernumerary posts (breakup 750 Work Education and 850 Physical Education) to absorb all waitlisted candidates of Physical and Work Education Teachers subject to validation of panel.”

41. The following views of the School Education Department, Government of West Bengal on the said proposal were recorded in the said memorandum:-

“ Department’s views:-

(a) Creation and filling up of:

(i) 5261 supernumerary posts with breakup of as follows:

(a) 1932 posts of Assistant Teacher for class IX-X

- (b) 247 posts of Assistant Teacher for class XI-XII
- (c) 1102 posts of Gr. C and
- (d) 1980 posts of Gr. D in the recognized aided/sponsored Schools for accommodating Soma Das and other similarly situated waitlisted candidates subject to outcome of the pending cases.

(b) The State Government may be permitted to issue necessary direction to the Commission by invoking section 19 of the West Bengal Board of Secondary Education, in the interest of education, in terms rule 3(2) of the West Bengal Board of Secondary Education (Appointment, Confirmation, Conduct and Discipline of Teachers and Non-Teaching Staff) Rules, 2018 for absorption of such waitlisted candidates in the proposed supernumerary posts, to be created with the approval of the Cabinet. However, the same shall be subject to outcome of pending litigation(s) before the Hon'ble High Court at Calcutta."

42. The no-objection of the Finance Department has been recorded in the said memorandum which was subject to the approval of cabinet and adherence to the extant rules. The said memorandum ultimately records the proposal of the Department of School Education to create supernumerary posts. The said proposal is reproduced below for ready reference: -

"Proposal:-

Now the Department of School Education proposes for-

(a) Creation and filling up of:

(i) 5261 supernumerary posts with breakup of as follows:

- (a) 1932 posts of Assistant Teacher for class IX-X
- (b) 247 posts of Assistant Teacher for class XI-XII
- (c) 1102 posts of Gr. C and
- (d) 1980 posts of Gr. D in the recognized aided/sponsored Schools for accommodating Soma Das and other similarly situated waitlisted candidates subject to outcome of the pending cases.

(ii) 1600 supernumerary posts (with breakup of 750 Work Education and 850 Physical Education) for absorbing all waitlisted candidates.

(b) Permission to the State Govt. in the Department of School Education to issue necessary direction to the Commission by invoking section 19 of the West Bengal Board of Secondary Education. In the interest of education, in terms rule 3(2) of the West Bengal Board of Secondary Education (Appointment, Confirmation, Conduct and Discipline of Teachers and Non-Teaching Staff) Rules, 2018 for absorption of such waitlisted candidates in the proposed supernumerary posts, to be created with the approval of the Cabinet. However, the same shall be subject to outcome of pending litigation(s) before the Hon'ble High Court at Calcutta."

The aforesaid proposal was approved by the Cabinet vide U/O No. CAB (D)-276 dated May 12, 2022, received on May 17, 2022.

43. It is clear from the above discussion that the aforesaid vacancies, in the name of supernumerary posts have been created without following the said Rules of 2016, particularly, Rule 8 thereof, as such the said vacancies are apparently new vacancies consequently, it cannot be exploited to give appointment to the waitlisted candidates of the panel of the 1st SLST, 2016 inasmuch as proviso appended to Rule 16 of the said Rules of 2016 clearly stipulates that the names of the candidates shall not be recommended against any vacancy which has not been notified in terms of sub-rule (3)(b) of Rule 8 of the said Rules of 2016.

44. The Hon'ble Division Bench of this Court in its judgment dated April 22, 2024 passed in ***BAISHAKHI BHATTACHARYA (CHATTERJEE) (supra)*** had directed the CBI to undertake further investigation with regard to the persons involve in the State Government approving creation of supernumerary post to accommodate illegal appointments, if necessary shall undertake custodial interrogation of such person involved, the Hon'ble Supreme Court in its order dated April 08, 2025 passed in Civil Appeal No. 4800 of 2025 arising out of the said judgment of the Hon'ble Division Bench had set aside the said direction for investigation into creation of supernumerary post with a clarification that the observations and direction given in the said order are limited to the extent of such direction of the Hon'ble Division Bench. The relevant portion of the said order is quoted below:-

“Having regard to the aforesaid discussion, we are of the view that the High Court was not justified in referring the issue of creation of supernumerary posts pursuant to the Cabinet decision for investigation by the CBI.

It may be relevant to take note of Clause (2) to Article 74 and Clause (3) to Article 163 of the Constitution of India which specifically state that the

question whether any, and if so what advice was tendered by the Council of Ministers to aid and advise the President or tendered by the Ministers of the Cabinet to the Governor, shall not be inquired into in any Court.

The aforesaid direction is, therefore, set aside and quashed.

We, however, clarify that our observations and directions given in the present order are limited to the extent of the directions for investigation into creation of supernumerary posts, and do not, in any way, impinge or reflect upon the investigation and the chargesheets filed by the CBI on other aspects.”

The Hon’ble Supreme Court by the said order dated April 08, 2025 had never put a restriction to look into the legality and propriety of the creation of such supernumerary post, therefore, the present challenge is no way affected by the said order.

45. The State has sought to justify the creation of said vacancies in the name of supernumerary posts on the ground that the State is obliged to fulfill the Constitutional mandate of Article 21-A to provide free and compulsory education to all children of the age of six to fourteen years and the follow up legislation, the Right to Education Act, 2009 puts the State under the obligation to provide adequate number of teachers to the schools as such it has taken a decision to create supernumerary posts to absorb the waitlisted candidates of the 1st SLST 2016 to meet a special exigency, the same being a policy decision is not open to judicial review. The said justification is not tenable inasmuch as it is a settled position of law that policy decision is open to judicial review, if it is found to be arbitrary, unconstitutional and in violation of statutory provisions, of course a cautious approach is needed when such policy is based on a Cabinet decision as has been held by the Hon’ble Supreme Court in the case of **HIMACHAL PRADESH NIZI VYAVSAYIK PRISHIKSHAN KENDRA SANGH (supra)** cited by Mr. Kalyan Bandopadhyay learned senior

advocate for the respondent nos. 289 to 301 however in the present case even if the said test is applied this Court cannot foreclose its jurisdiction of judicial review under Article 226 of the Constitution of India as the decision is arbitrary and in complete violation of the extant rules. In this backdrop the decisions cited by the learned Advocate General in the cases of **BHIKARI CHARAN KHUNTIA (supra)**, **PUSHPA RANI (supra)**, **OFFICIAL LIQUIDATOR (supra)**, **PARUL DEBNATH (supra)** and **LT. CDR. M. RAMESH (supra)** are of no help to the State. In this context the observations of the Hon'ble Supreme Court in the case of **MANOHAR LAL SHARMA (supra)** at paragraph 14 being relevant are quoted below:-

“14. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned Policy that allows FDI up to 51% in multi-brand retail trading does not appear to suffer from any of these vices.”

The Hon'ble Supreme Court in the cases of **B.P. SINGHAL (supra)** and **S.R. BOMMAI (supra)** has held that though no reason need to be assigned for discontinuance of the pleasure resulting in removal of the Governor but even then the power under Article 156(1) of the Constitution is open to judicial review if such power is exercised in an arbitrary, capricious or unreasonable manner.

46. No doubt the State has the obligation to achieve the Constitutional mandate enshrined under Article 21-A but to get it, the State cannot compromise with the Rules and Regulations framed to regulate the appointments of the teachers, in the present case such compromise has been made to give appointments to the waitlisted candidates of an expired panel. The argument of the learned Advocate General that a discretion can be exercised for creation of supernumerary posts to promote the object

and purpose of Article 21-A of the Constitution without taking recourse to a fresh selection process cannot be accepted for the reason that such discretion has been exercised in an arbitrary manner in violation of the relevant rules.

47. The vacancies so created in the name of supernumerary posts since are new vacancies, those are required to be filled up in the new selection process. The petitioners, being eligible, had participated in the 1st SLST, 2016 but could not qualify however, with their such eligibility, they are, subject to the age bar, entitled to participate in the next selection process to offer themselves against those new vacancies but the petitioners, in view of the decisions of the State to exploit the said vacancies to accommodate the said waitlisted candidates of the earlier selection test i.e. 1st SLST, 2016 have lost the said opportunity, the said decision therefore, certainly offends the Constitutional schemes of Articles 14 and 16. The Hon'ble Supreme Court in the case of **RAJKISHORE NANDA (supra)** has held that it is settled legal proposition that vacancies cannot be filled over and above the number of vacancies advertised, as the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under article 14 read with article 16(1) of the constitution of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of the vacancies. In this backdrop, the argument of the respondents that the petitioners being unsuccessful and the waitlisted candidates being successful in the 1st SLST, 2016 are wholly different classes, as such there is no infringement of Article 14 of the Constitution is misconceived. Therefore, challenge to the *locus standi* of the petitioners to maintain the writ petitions and to throw challenge to the impugned notices is overruled.

48. The creation of vacancies in the name of supernumerary posts have been sought to be justified from another angle i.e. the State in exercise of its executive power vested in it under Article 162 of the Constitution can create such vacancies, the said justification is also not tenable inasmuch as the executive powers so vested are subject to other provisions of the Constitution. In other words such executive powers cannot be exercised to defeat the right to equality guaranteed under Articles 14 and 16 of the Constitution. The decision of the Hon'ble Supreme Court in the case of **RAI SAHIB RAM JAWAYA KAPUR (supra)** and the decision of the Hon'ble Division Bench of this Court in the case of **SHARAD KUMAR SINGH (supra)** have explained the scope of executive power of the State under Article 162 of the Constitution of India. There is no dispute that the Executive Power of the State shall extend to the matters with respect to which the legislature of the State has power to make laws but exercise of such power is not immune from judicial review when it is done arbitrarily, capriciously or unreasonably. The decisions of the Hon'ble Supreme Court in the cases of **SAMSHER SINGH (supra)** and **BHURI NATH (supra)** cited by learned Advocate General is on the issue regarding the extent of power of the Governor in conducting the business of the Government under Article 166(3) of the Constitution but the said issue is no way connected with the present issues under consideration.

49. The cabinet memorandum dated May 05, 2022 has recorded grievances of the candidates in the recruitment process of 1st SLST, 2016 which inter alia indicates that the proposal for creation of such vacancies was to instill confidence in general public in the matters pertaining to education and involving public employment. It is rightly submitted by Mr. Bhattacharya learned senior counsel for the petitioners that Constitutional morality must prevail and cannot be replaced by the political morality,

paragraph 146 of the decision of the Hon'ble Supreme Court in the case of **SHRIMANTH BALASAHEB PATIL (supra)** being relevant to the context is quoted below:-

146. The contention of the respondents that the political exigencies required such measures to be taken needs to be rejected. The Constitutional silences cannot be used to introduce changes of such nature.

50. The Hon'ble Supreme Court in the case of **CHANDAN BANERJEE (supra)** has noted the following definition of the term 'supernumerary' from Oxford English Dictionary:-

"present in excess of the normal or requisite number", or "not belonging to a regular staff but engaged for extra work". A "supernumerary post" is defined as "a post exceeding the usual stated or prescribed number."

There is no dispute with regard to the nature of the supernumerary posts. A supernumerary post is a temporary, additional position created for a limited time to accommodate an employee when a regular post is not available. The Cabinet has approved the proposals as contained in the Cabinet memo dated May 05, 2022 to absorb the waitlisted candidates of 1st SLST, 2016 in the vacancies created in the name of supernumerary posts, therefore, conceptually the supernumerary post is a post to be created to absorb an existing employee when such employee could not be accommodated in a regular post. There is no dispute with regard to the proposition of law laid down in the case of **HAREN BORGOHAIN (supra)** cited by Mr. Kalyan Bandopadhyay that supernumerary post denotes creation of temporary posts outside the cadre personal to the incumbent, however the said decision is of no help to the respondents. The decision cited by the learned

Advocate General in the case of **PUSHPA RANI (supra)** to contend that supernumerary post created at the same time in different grades can also constituted part of the cadre is completely irrelevant to the present issue.

51. The waitlisted candidates of the 1st SLST, 2016 were not in employment, in fact the panel and waitlist of the said selection test had expired long before the Cabinet approval of the proposal of creation of vacancies in the name of supernumerary posts to accommodate the said waitlisted candidates. Interestingly the Finance Department, Government of West Bengal had granted its no objection to the proposals to ‘absorb’ the waitlisted candidates subject to the validation of the panel. The Cabinet was aware about the position that supernumerary post cannot be created to appoint a person as such consciously used the word ‘to absorb’ in the Cabinet memorandum dated May 05, 2022. The Hon’ble Supreme Court in the case of **DEV DUTTA (supra)** has held that the term ‘absorbed’ in service jurisprudence, with reference to a post implies that an employee who has not been holding a particular post in his own right by virtue of either recruitment or promotion to that post but is holding a different post in a different department, is brought to that post either on deputation or by transfer and is subsequently absorbed in that post whereafter he becomes a holder of that post in his own right and loses lien on parent post.

Summing up the discussion made above, I am of the opinion that supernumerary posts cannot be created to appoint the waitlisted candidates of 1st SLST, 2016 for the subjects work education and physical education.

52. In terms of the said Rules of 2016 the panel of 1st SLST 2016 was remained valid for one year from the date of publication of panel of the waiting list or the date of advertisement for the next recruitment process whichever is

earlier. The recruitment notification dated December 16, 2016 also stipulates the same time limit for the life of the said panel. The panel has admittedly expired on December 11, 2019 long prior to the date of Cabinet approval of the proposal of the School Education Department to create vacancies in the name of supernumerary posts to accommodate the waitlisted candidates of the said expired panel. The Hon'ble Supreme Court in the case of **B. VALLUVAN (supra)** has held that life of panel, as is well known, must be for a limited period. It is governed by the statutory rules. The following excerpts of Paragraph 9 of the decision of the Hon'ble Supreme Court in the case of **JAGDISH CHOPRA (supra)** being relevant is quoted below:-

“9. Recruitment for teachers in the State of Rajasthan is admittedly governed by the statutory rules. All recruitments, therefore, are required to be made in terms thereof. Although Rule 9(3) of the Rules does not specifically provide for the period for which the merit list shall remain valid but the intent of the legislature is absolutely clear as vacancies have to be determined only once in a year. Vacancies which arose in the subsequent years could be filled up from the select list prepared in the previous year and not in other manner. Even otherwise, in absence of any rule, ordinary period of validity of select list should be one year.....”

53. The decision of the Hon'ble Supreme Court in the case of **A.P. AGGARWAL (supra)** cited by the learned Advocate General is completely misplaced in the facts and circumstances of the present case inasmuch as in the said case the validity of the panel was not extended rather the second candidate of the panel was given appointment in terms of the office

memorandum as the vacancy had occurred due to the resignation of the first candidate within six months of joining. The order of this Court cited on behalf of the State is of no help to the respondents, rather it supports the case of the petitioners inasmuch as in the said case this Court had dismissed the writ petition accepting the submission made on behalf of the Commission that the panel has expired long back. In the case of **GUJARAT STATE DY. EXECUTIVE ENGINEERS' ASSOCIATION (supra)** the Hon'ble Supreme Court has explained, what a waiting list is, in the present case there is no issue on the validity of the waiting list, therefore, the said case has no manner of application. It is settled position of law that waiting list cannot be treated a perpetual reservoir for filling up the future vacancies.

54. The argument of the respondent that the life of the panel stood extended due to the pendency of the litigation in respect of the 1st SLST, 2016 is completely unacceptable inasmuch as the selection process was conducted in terms of a statutory rule. The decision of the learned Single Judge of the Rajasthan High Court cited on behalf of the respondent nos. 289-301 in the case of **RAM BABU KOLI (supra)** on this point is factually distinguishable. The Hon'ble Supreme Court in the case of **SULEKH CHANDRA PRADHAN(supra)** has specifically held that appointment *de hors* the statutory rules is *void ab initio*. That being the position, I am unable to accept the argument of Mr. Sengupta that the supernumerary posts have been created as a gap filling measure since the 1st SLST 2016 is governed by a statutory rules, therefore, on this score the judgment of the Hon'ble Supreme Court in the case of **KARNATI RAVI (supra)** cited on behalf of

the respondent no. 07 to 207 is of no help for the said respondents. The decision of the learned Single Judge of this Court in the case of **SAROJ KARMAKAR (supra)** is no pointer to the issue under consideration.

55. The argument of Dr. Patra that the substantive post cannot be equated with the supernumerary post as such the said Rules of 2016 is not applicable in respect of the posts created by the impugned notification is completely fallacious inasmuch as the waiting list is in relation to 1st SLST, 2016, a selection test governed by a statutory rule i.e. the said Rules of 2016.

56. The Hon'ble Division Bench of this Court in the case of **RAJIB BRAHMA (supra)** has dealt with the 1st SLST, 2016 for recruitment of Assistant Teacher in (upper primary except physical and work education) in government aided/sponsored schools (except hilly region), therefore the said decision has got no manner of application in the present case.

Conclusion:

In view of the discussion made above the impugned notices bearing nos. **692-SL/5S/202/2022(Part)** dated May 19, 2022 and **1358/6867/CSSC/ESTT/2022** dated October 14, 2022 are set aside and quashed. The connected application being CAN 11 of 2025 is dismissed.

There shall be no order as to costs.

Let the writ petitions be listed in the **monthly combined list of January, 2026** for consideration and disposal of the other issues involved in the writ petitions.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)