
(2019) 03 CAL CK 0041

In the Calcutta High Court

Case No : Writ Petitions (WP) 31299, 8820 (W) Of 2014

Prabir Kumar Mitra And Anr.

APPELLANT

Vs

State Of West Bengal And Ors

RESPONDENT

Date of Decision : 13-03-2019

Acts Referred:

West Bengal School Service Commission (Selection Of Persons For Appointment To The Post Of Non-teaching Staff) Rules, 2009 — Rule 8, 24(2)
West Bengal Schools (Recruitment Of Non-Teaching Staff) Rules, 2005 — Rule 8(5)(a), 8(5)(b)
Andhra Pradesh Police Service Rules, 1966 — Rule 5

Citation : (2019) 03 CAL CK 0041

Hon'ble Judges : Dipankar Datta, J; Tapabrata Chakraborty, J; Shekhar B. Saraf, J

Bench : Full Bench

Advocate : Biswaroop Bhattacharya, Anindya Bose, Ashim Kumar Halder, B. Nandy, R.K. Ghosh, Kishore Dutta, Joytosh Majumdar, Tapan Kumar Mukherjee, Somnath Naskar, Pinaki Dhole, Nibaran Kumar Das, Ziaul Haque, Srimanta Dutta, Manik Kumar Dan

Final Decision : Dismissed

Judgement

Tapabrata Chakraborty, J

1. A legal tussle has spiralled up to this Court primarily seeking a quietus to the issue as regards commencement of a selection process towards appointment of non-teaching staff in recognized educational institutions.

2. By an administrative order the Hon'ble the Chief Justice constituted this Bench to answer the issues formulated in a judgment delivered on 27th January, 2011 in two writ petitions, being WP 11255 (W) of 2010 and WP 11254 (W) of 2010, and a judgment delivered on 3rd November, 2014 in a writ petition being WP 23303 (W) of 2010. Writ petitions being WP 12879 (W) of 2010, WP 12882 (W) of 2010, WP 7884 (W) of 2010, WP 31299 (W) of 2014 and WP 8820 (W) of 2014 involving similar issues of facts and law have also been placed before this Court for analogous hearing.

3. For a purposeful deliberation and to answer the issues as formulated, we need to set out the facts involved in the lis and the statutory provisions applicable.

4. Under the West Bengal Schools (Control of Expenditure) Act, 2005 (in short, 2005 Act), the West Bengal Schools (Recruitment of Non-teaching Staff) Rules, 2005 (in short, 2005 Rules) were framed and the same came into effect from 26th December, 2005. Subsequent thereto, the West Bengal School Service Commission Act, 1997 was amended by the West Bengal School Service Commission (Amendment) Act, 2008 (in short, the Amendment Act of 2008) and thereafter the West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Non-teaching Staff) Rules, 2009 (in short, 2009 Rules) were framed and the same came into effect from 9th July, 2009. By the 2009 Rules, the earlier 2005 Rules stood superseded. Thereafter, in terms of memo no.28-SE(S) dated 8th January, 2010, the Management of Recognised Non-Government Institutions (Aided and Non-Aided) Rules, 1969 (in short, 1969 Rules) were amended to make provision for recruitment of non-teaching staff in respect of all recognised non-government aided educational institutions in the State solely on the recommendation of the West Bengal School Service Commission. With the issuance of the 2009 Rules, and with the amendment of the Management Rules, the school authorities no longer enjoyed the statutory power to conduct interview for recruitment of non-teaching staff.

5. The writ petition being WP 12879 (W) of 2010 was preferred by one Gopal Patra praying for a direction upon the respondents to issue prior permission for filling up a vacancy in a Group-'D' post in Sahapur Girls High School. The post fell vacant due to the retirement of one Anadi Nath Paul on 30th June, 2002 and though prior permission was sought for from the District Inspector of Schools (SE) (in short, DI) by the school authorities upon adopting a resolution on 13th August, 2002, the DI did not respond. The said writ petition was affirmed on 25th March, 2010.

6. The writ petition being WP 12882 (W) of 2010 was also affirmed on 25th March, 2010. One Abdul Kalam Mallik, the President of the managing committee of Joygram J. N. High School (HS) preferred the writ petition stating inter alia that though prior permission was sought for to fill up the vacancies in two posts of Group-'D' staff, which occurred on 1st February, 2003 and 1st February, 2004 respectively, the DI did not respond.

7. One Sri Subrata Sengupta preferred a writ petition being WP 7884 (W) of 2010 seeking direction upon the DI to grant prior permission to fill up a Group-'D' post at Parui Radhakrishna Vidyapith (HS) and to allow him to participate in the selection process pertaining to the said post upon condonation of age since he was working in the said post on temporary basis on and from 2nd April, 2000. Subsequent thereto, the school authorities approached the DI on 2nd June, 2005 to fill up another Group-'D' post which fell vacant due to the demise of one Sri Ranjit Mandal but in vain. The said writ petition was affirmed on 16th April, 2010.

8. To fill up a vacancy in a Group-'D' post, which occurred on 30th September, 2007 due to the retirement of one Md. Abdul Wahab, the managing committee of Kadamtala High Madrasah approached the DI on 14th November, 2007 seeking prior permission to fill up the same. Without granting such prior permission, the DI by a memo dated 3rd July, 2009 asked the writ petitioner to submit the vacancy report pertaining to the said post, so that the same may be forwarded to the West Bengal Madrasah Service Commission. Challenging the said memo dated 3rd July, 2009, the managing committee of Kadamtala High Madrasah preferred the writ petition WP 11254 (W) of 2010. The said writ petition was affirmed on 21st April, 2010.

9. On the same date another writ petition being WP 11255 (W) of 2010 was filed by the managing committee of Kadamtala High Madrasah stating inter alia that prior permission was granted by the DI on 26th November, 2007 to fill up a Group-'D' post (Schedule Caste) which occurred due to upgradation of the said Madrasah. Subsequently, the said post was de-reserved but prior permission to fill up the de-reserved post was not granted by the DI and in the midst thereof, the DI by a memo dated 3rd July, 2009 asked the writ petitioner to submit the vacancy report pertaining to the said post so that the same may be forwarded to the West Bengal Madrasah Service Commission.

10. A writ petition being WP 23303 (W) of 2010 was affirmed on 19th November, 2010. Shorn of unnecessary details, the facts in WP 23303 (W) of 2010 are that a vacancy occasioned in a Group-'D' post on 5th March, 2008 (reserved for SC) in Dakshin Pathar Beria Balika Vidyapith on 1st March, 2008. The managing committee of the school sought for prior permission from the DI but the same did not evoke any response. The managing committee of the said school was thus constrained to prefer a writ petition being WP 29947 (W) of 2008, in which an order was passed by a learned Judge on 16th December, 2008 directing the concerned DI to pass a reasoned order regarding the grant of prior permission. Pursuant to the said order, prior permission was issued by the concerned DI on 3rd February, 2009. An employment advertisement was published in a newspaper on 11th September, 2009 and names of eligible candidates were also requisitioned from the Employment Exchange to participate in the interview scheduled on 6th June, 2010. The selection committee prepared a panel and submitted the same before the managing committee and the managing committee in its turn approved the resolution of the selection committee and forwarded the panel to the DI for approval on 23rd June, 2010. However, approval was not granted in view of a memo dated 3rd May, 2010 issued by the Deputy Secretary to the Government of West Bengal, School Education Department wherein it was inter alia stated that the DIs in all districts of the State shall not approve the panels forwarded by the school authorities since by the new rules such power of approval of panel had been withdrawn. Aggrieved thereby, Smt. Pratima Dolui, a participant in the said selection process preferred the writ petition.

11. The authorities of Astichak S. J. Vidyapith (HS) preferred a writ petition being WP 8820 (W) of 2014 seeking direction upon the DI to grant permission for holding an interview to fill up a Group-'D' post (Matron). The said vacancy occurred in the year 2007. The school sought for prior permission on 8th August, 2007. The DI granted such prior permission on 17th August, 2007. Names of 35 candidates were sent by the Exchange. The interview letters were issued on 1st March, 2008 and the interview was scheduled on 23rd March, 2008 but the same could not be held due to the absence of the expert and as such the DI was approached in the month of September, 2012 for permission towards re-interview but in vain. The said writ petition was affirmed on 11th March, 2014.

12. The authorities of Badartala High School (HS) preferred a writ petition being WP 31299 (W) of 2014 praying for issuance of necessary direction upon the DI to fill up a vacancy in a Group-'D' (Peon) post, which occurred due to retirement of one Panchu Chandra Mandal on 1st October, 2006. The letters issued on 26th June, 2007 and 6th August, 2014 were not responded to by the DI. The said writ petition was affirmed on 25th November, 2014.

13. In view of conflicting opinion of different benches of equal strength, a judgment was delivered by a learned Single Judge in two writ petitions, being WP 11255 (W) of 2010 and WP 11254 (W) of 2010 on 27th January, 2011 framing the following issues to be referred to a Larger Bench:

"i) whether the decision of the Division Bench of this Hon'ble Court in the case of Kalinagar Girl's High School, Nadia, vs. Archana Ghosh; reported in 2010 (3) CHN (Cal) 940 can be accepted as a law operating in the field of direct recruitment where the recruitment rules were changed after creation of vacancy notwithstanding the fact that the advertisement for the said post in terms of the prior permission, had not been issued before change in the selection Rules was introduced ?

ii) Whether the law laid down by the earlier Division Bench of this Hon'ble Court in the case of Snehansu Jas vs. State of West Bengal; reported in 2001 Vol.2 CLJ 558 (Cal), can still be accepted as a law operating in the field of direct recruitment ?

iii) Whether grant of prior permission alone can create any vested right in the Management to complete the selection process by following the Rules existed as on the date of creation of such vacancy notwithstanding a change was introduced in the selection Rule before publication of advertisement for the vacant post under the old Rules ?"

14. Subsequent thereto, a judgment was delivered by another learned Single Judge in a writ petition being WP 23303 (W) of 2010 on 3rd November, 2014 framing the following issue to be referred to a Larger Bench:

"As to when a selection process is commenced?

Whether with the arising of vacancy (due to the death, resignation or retirement

of the incumbent to the said post or with the creation of new posts) or when the post is advertised and candidates have been called for interview or after the interview is held."

15. As regards the first issue framed by the judgment dated 27th January, 2011, it needs to be stated that a writ petition was preferred alleging inaction on the part of the managing committee of Kalinagar Girls' High School to submit the panel of selected candidates in respect of a Group-'D' post to the DI, Nadia for approval. The said writ petition was disposed of with a direction upon the school authorities to forward the panel prepared by the selection committee to the DI. Against the said judgment an appeal was preferred by the Secretary of the managing committee of Kalinagar Girls' High School. The issue under consideration was as to whether the vacant post of Group-'D' staff in the concerned school should be filled up following the statutory procedure which was in vogue prior to commencement of the West Bengal School Service Commission (Amendment) Act, 2008. The appeal was dismissed on 9th July, 2010 observing inter alia that "since the vacancy in the Group 'D' post of Lady Attendant in the concerned school arose on 31st May, 2006 i.e. prior to the commencement of the West Bengal School Service Commission (Amendment) Act, 2008, the West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Non-Teaching Staff) Rules, 2009 and the West Bengal Schools (Control of Expenditure) Act, 2005, by applying the aforesaid ratio settled by the Supreme Court in *Y.V. Rangaiah & Ors. (supra)*, *State of Rajasthan v. R. Dayal & Ors. (supra)* and *Arjun Singh Rathore (supra)* the selection in question should be governed by the 2005 Rules which were in force when the said vacancy arose and, therefore, the school authority itself being the selecting authority will fill up the aforesaid Group 'D' post of Lady Attendant in the manner laid down in the West Bengal School (Recruitment of Non-teaching Staff) Rules, 2005".

16. Against the said judgment, a Special Leave Petition (in short, SLP) was preferred by the managing committee of the Kalinagar Girls' High School. Leave was granted and the matter was registered as Civil Appeal No.8248 of 2010. The said appeal was finally heard and allowed by an order dated 28th July, 2015 setting aside the impugned judgment dated 9th July, 2010 observing inter alia as follows:

"It appeared that a post of Group 'D' (Lady Attendant) in Kalinagar Girl's High School was lying vacant before 2009. The West Bengal School Service Commission (Amendment) Act, 2008, (for short the 'Amendment Act, 2009') came into force on 1st January, 2009, whereby the power was vested with School Service Commission to fill up that post. Admittedly, the post was advertised on 31.01.2009 that is after the Amendment Act, 2009 came into force. Although this was the admitted position but the High Court proceeded on the basis that since the post was lying vacant before 2009, the process of appointment shall be governed by the unamended provisions of the Act and not by the Amendment Act, 2009. This approach of the High Court is wholly contrary

to the laws settled by the Full Bench of the Calcutta High Court and also by this Court. On this sole ground, the impugned judgment and order passed by the High Court cannot be sustained in law".

17. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of the Hon'ble Supreme Court is let open. The order impugned before the Hon'ble Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. The order dated 28th July, 2015 shows the exercise of appellate jurisdiction and therein the merits of the order impugned were subjected to judicial scrutiny of the Court and the appeal was allowed stating the reasons.

18. In the said conspectus, it would be treated as an affront to the order of the Hon'ble Supreme Court to accept the judgment delivered by the Division Bench on 9th July, 2010 as a law operating in the field of direct recruitment where the recruitment rules were changed after creation of vacancies notwithstanding the fact that the advertisement for the said post in terms of the prior permission had not been issued before change in the selection rules was introduced. Accordingly, the said issue is answered in the negative.

19. To answer the second issue framed by the judgment dated 27th January, 2011 it needs to be stated that in the case of *Snehansu Jas vs. State of West Bengal*, reported in 2001 Vol.2 CLJ 558 (Cal) a decision was rendered by the Division Bench on a reference made by a learned Single Judge to answer an issue as to whether the vacancies, which existed prior to the coming into force of the West Bengal School Service Commission Act, 1997 (in short, the Act of 1997), are necessarily required to be filled up in accordance with the Management Rules of 1969 or not. The Division Bench disagreeing with the views expressed by two learned Judges in *Kanaidighi Deshapran Vidyapith vs. State of West Bengal* reported in 1998(2) CLJ 497 and *Salauddin Miah vs. State of West Bengal* reported in 2000(2) CHN 788 observed as follows :

".....selection process will commence only when the candidates

are invited to appear on the basis of names sent by the Employment Exchange on requisition by the managing committee for recruitment of the teachers and if that stage has not reached then it will not amount to commencement of the selection process. The selection process is deemed to have commenced if the posts have been advertised and candidates have been called for interview and meanwhile if the rules are amended then that selection process should be allowed to continue without being affected by the amendment of the Rules unless the Acts or Rules have been amended with a retrospective effect."

20. The judgment delivered in the case of *Snehansu Jas (supra)* was considered by a learned Single Judge while delivering judgment on 5th October, 2012 in five writ petitions which were heard analogously. The first writ petition was *Asoke Sawoo vs State of West Bengal & Others*. One of the writ petitions was preferred

by the managing committee of Nirjharini Sarkar Balika Vidyalaya (HS) being WP 18474 (W) of 2010. In the judgment dated 5th October, 2012 the learned Single Judge observed that "Snehansu Jas (supra) does not expressly disagree with Narayan Baidya (supra) and Abdul Mannan Laskar (supra) but answers the reference in a manner that seems to me to be inconsistent with the said decisions". The learned Single Judge disagreed with the view expressed in the judgment delivered by the Division Bench in the case of Kalinagar (supra) and dismissed the writ petition being WP 18474 (W) of 2010. Against the said judgment an appeal was preferred by the managing committee of Nirjharini Sarkar Balika Vidyalaya (HS). The said appeal was heard analogously with other appeals preferred by the parties aggrieved by the judgment in the case of Asoke Sawoo (supra). The Division Bench held that the vacant post of non-teaching staff should be allowed to be filled up under the 2005 Rules which were in force when the respective vacancies in question arose in the schools concerned and set aside the judgment delivered by the learned Single Judge. Assailing the said judgment a Special Leave Petition was preferred and the same was allowed and the judgment impugned was set aside observing as follows :

"The issue relates to the selection of the Non-Teaching Staff in the High or Higher Secondary Schools in the State of West Bengal. While the process of selection was pending, the West Bengal School Service Commission (Amendment Act, 2008) and the West Bengal School Service Commission (Selection of persons for Appointment to the Post of Non-Teaching Staff) Rules 2009 were introduced. The applicability of the said Act and Rules is the issue.

Since no vested rights arise in favour of the candidates merely by the initiation of selection process, the new scheme certainly could be applied to the selection process. The learned Single Judge of the High Court took this view which has been reversed in the impugned judgment".

21. The said order passed by the Hon'ble Supreme Court is an appellate order. In the same it has been categorically observed that since no vested rights arise in favour of the candidates merely by the initiation of selection process, the new scheme certainly can be applied to the selection process and it was also observed that the learned Single Judge had rightly applied such proposition and the Division Bench was not justified in interfering with the view taken by the learned Single Judge. The observations of the learned Single Judge have merged with the order passed by the Hon'ble Supreme Court and have attained finality. After such reasoning given by the Hon'ble Supreme Court it cannot be said that a selection process is deemed to have commenced if the posts have been advertised and candidates have been called for interview. In view thereof, it cannot be said that the judgment delivered in the case of Snehansu Jas (supra) can still be accepted as a law operating in the field of direct recruitment. The second issue is, accordingly, answered in the negative.

22. In the Special Leave Petition preferred by the State of West Bengal against the judgment delivered by the Division Bench in the case of Nirjharini Sarkar

Balika Vidyalaya (HS) (supra) on 5th October, 2012, the Hon'ble Supreme Court specifically observed that no vested right accrues in favour of the candidate merely by initiation of a selection process. Lest there be any confusion, we would like to make it clear that the management of a school has no valid subsisting right to claim that the vacancies, having arisen before the Amendment Act of 2008 came into existence, ought to be filled up in accordance with the 2005 Rules. The grant of prior permission does not confer any vested right in the management to complete the selection process by following the rules existing as on the date of the creation of such vacancy notwithstanding any change in the selection rule before publication of advertisement of the vacant post under the old rules. Accordingly, the third issue is also answered in the negative.

23. In the eight writ petitions assigned to this Bench, Mr. Bhattacharya, learned advocate appears on behalf of the petitioner in the writ petition being WP 23303 (W) of 2010. Mr. Nibaran Das, learned advocate appears on behalf of the managing committee of Dakshin Patharberia Anandamoyee Balika Viyapith in the said writ petition. Mr. Ashim Kumar Halder, learned advocate appears on behalf of the petitioner in WP 8820 (W) of 2014. None appears on behalf of the petitioners in the remaining writ petitions. Mr. Kishore Dutta, learned Advocate General has advanced his arguments on behalf of the State respondents in all the writ petitions.

24. Before considering the arguments advanced before this Court, it needs to be stated that in the SLP preferred by the managing committee of Kalinagar Girls' High School, the Hon'ble Supreme Court referred to an order passed by the Full Bench of our Court. When the present matter came up for hearing before the Larger Bench on 23rd September, 2016, hearing was adjourned since the judgment delivered by the Full Bench in the case of Tulsi Roy vs. Krishanu Roy, reported in 2011 (2) CHN (Cal) 1021 was under challenge in an appeal (Civil Appeal No.1510 of 2011) preferred by Krishanu Roy and as the parties were directed to maintain status quo, the hearing of the present matter was adjourned. The said Civil Appeal No.1510 of 2011 was ultimately disposed of by an order dated 14th January, 2019. The said order runs as follows :

"SLP (C) No.30620/2011 Heard learned counsel for the parties. Learned counsel for the petitioner submits that the petitioner is still in service.

Since the petitioner is working, we allow him to continue till the fresh selection is made. However, he may be allowed to participate in the selection process, by giving age relaxation in case he was within the age as on the date, on which he was appointed.

Let a fresh selection take place, within three months from today, as per the West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Non-Teaching Staff) Rules, 2009.

On merits, no case for interference is made out. The special leave petition is disposed of, in aforesaid terms. Pending application(s), if any, shall stand

disposed of. SLP (C) Diary No.13368/2018 (XVI) Delay condoned.

Heard learned counsel for the parties. We do not see any reason to interfere in the matter. The special petition is, accordingly, dismissed. Pending application(s), if any, shall stand disposed of."

25. One of the issues decided by the Full Bench in the case of Tulsi Roy (*supra*) was as follows :

"3. Whether the West Bengal School Service Commission (Selection of Person for Appointment to the Post of Non-teaching Staff) Rules, 2009 is applicable in respect of vacancy where the selection of the selected candidate has been set aside by a Writ Court for non-compliance of the formalities mentioned by the Supreme Court in the case of Excise Superintendent (*supra*), notwithstanding the fact that the process of the initial selection for the post concerned started at a point of time, when the aforesaid Rules of 2009 had not come into operation."

26. By a judgment dated 29th April, 2011 the Full Bench answered the said issue in the affirmative observing inter alia that once the process of selection was completed, an appointment was given, the appointed candidate joined service and subsequently, such appointment was found to be vitiated and the appointment given, based on such selection, has been set aside by an order of the Court, the resultant vacancy has to be filled up on the basis of the new Rules. The Full Bench further observed that "in a given situation, where due to pendency of the Court proceedings challenging the process of selection as illegally, for any reason, no appointment was made but the proceedings for selection remain stayed and the Court ultimately passes direction for selection after advertising, the process should re-start from that stage and should be completed in accordance with the old Rules and in those cases, the process of selection having already been commenced, there is no scope of including those vacancies while preparing the report of vacancy in terms of Rule 8 of 2009 Rules simply because the vacancy has not been filled up yet".

27. Mr. Bhattacharya, learned advocate appearing for the writ petitioner in WP 23303 (W) of 2010, submits that a right has accrued in favour of the writ petitioner with the grant of the prior permission by the DI to fill up the concerned post and for having been called to participate in the interview on 6th June, 2010. Such right stands saved by the provisions of Section 24(2) of the 2009 Rules which came into force on 9th July, 2009. The amended Rules are not retrospective in nature and as such the selection must be regulated in accordance with the Rules and orders which were in force on the date of issuance of the prior permission memo by the DI. As the petitioner is eligible and is otherwise qualified in accordance with the relevant Rules referred to in the prior permission memo, she does acquire a vested right for being considered for selection in accordance with the Rules as they existed on the date of issuance of the prior permission memo. She cannot be deprived of that limited right on the basis of the amended Rules.

28. Mr. Nibaran Das, learned advocate appearing for the school submits that in spite of a sincere endeavour on the part of the school authorities, they could not immediately hold the interview after receiving prior permission on 3rd February, 2009 in view of the political turmoil in the said district and, as such, the delay in conducting the interview is not attributable to the school authorities. The post of matron required for proper administration of the school is lying vacant for more than a decade. Since prior permission was issued by the competent authority prior to commencement of the 2009 Rules and the selection process stood initiated, necessary direction needs to be issued upon the concerned DI to approve the panel so that the school authorities can appoint the successful candidate in the said post of matron.

29. Mr. Ashim Kumar Halder, learned advocate appearing for the writ petitioners being the managing committee of the Asthichak S.J. Vidyapith (HS) and the Secretary of the said committee in WP 8820 (W) of 2010 submits that the vacancy in the non-teaching post occurred in the year 2007. The school authorities approached the DI for prior permission to fill up the same. Such prior permission was accorded on 17th August, 2007. Thereafter requisition was sent to the Employment Exchange and 35 candidates were sponsored on 8th October, 2007. Interview letters were thereafter issued to the candidates on 1st March, 2008 scheduling the date of interview on 23rd March, 2008. Due to the absence of the external expert the interview on the date scheduled had to be postponed. Immediately thereafter the DI was approached for grant of permission to conduct a re-interview. The said representation was, however, not responded to by the DI and aggrieved thereby the writ petition was preferred.

30. Mr. Halder contends that by a judgment delivered in the case of Mangalmoy Bandyopadhyay versus State of West Bengal & others reported in 2008 (1) CLJ 823 on 11th April, 2008, this Hon'ble Court declared Rule 8 (5) (a) and 8 (5)(b) of the Rules 2005 as ultra vires the Constitution of India and directed the school authorities to fill up the Group-'D' posts after inviting applications by making publication in the newspapers having wider circulation and then to consider the cases of all those who have applied and the interim order passed was directed to continue till publications in the newspapers. In view thereof, it was incumbent upon the DI to pass necessary direction allowing the school authorities to take steps for invitation of names of suitable candidates by open advertisement and in view of the observations made by the Division Bench in Tulsi Ray (supra) the selection process should re-start from the stage of advertisement and should be completed in accordance with the old Rules.

31. Mr. Dutta, learned Advocate General appearing for the State respondents submits that to answer the issue it would be necessary to consider the ambit of a recruitment process and the ambit of a selection process. A recruitment process would commence on and from the date the managing committee takes the decision to fill up the said post and would end with the grant of appointment in respect of the concerned post whereas a selection process begins with the

issuance of the advertisement and culminates with the forwarding of the list to the approving authority. Thus, the ambit of a recruitment process is much wider than the ambit of a selection process. A selection process cannot be construed to have commenced on the date the recruitment process commences. In WP 23303 (W) of 2010, the advertisement was issued on 11th September, 2009 and the interview was held on 6th June, 2010. In the midst thereof, the new rules came into effect from 9th July, 2009. In WP 8820 (W) of 2014, the names were requisitioned from the Exchange on 15th September, 2007 and the interview was scheduled on 23rd March, 2008 which ultimately could not be held and in the midst thereof, the new rules came into effect from 9th July, 2009. In view thereof, as the new rules came into force prior to the advertisement, no relief can be granted to the petitioners. With the commencement of the new rules the right of the managing committees to select candidates ceased for all times to come and as such it cannot be contended that the legal right of the managing committees have been infringed in any manner warranting interference of the Court. In support of the arguments advanced reliance has been placed upon the judgments delivered in the case of A.P. Public Service Commission, Hyderabad and Another vs. B. Sarat Chandra and Others, reported in (1990) 2 SCC 669 and in the case of Pawan Pratap Singh and Others vs. Reevan Singh and Others, reported in (2011) 3 SCC 267.

32. He further argues that the issue may be considered from another angle. The cut-off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules and if there be no cut-off date appointed by the rules, then such date as may be appointed for the purpose in the advertisement calling for applications. If there be no such date appointed, then the eligibility criteria shall be applied by reference to the last date appointed by which the applications have to be received by the competent authority. In support of such contention, he has placed reliance upon the judgments delivered in the case of Bhupinderpal Singh and Others vs. State of Punjab and Others, reported in (2000) 5 SCC 262 and in the case of Alka Ojha vs. Rajasthan Public Service Commission and Another, reported in (2011) 9 SCC 438.

33. In the case of Sarat Chandra (supra) an order passed by the Tribunal considering Rule 5 of the A.P. Police Services Rules was under challenge. The Tribunal observed that a selection can be said to have been done only when the list is prepared. The order of the Tribunal was set aside by the Hon'ble Supreme Court observing inter alia that it would be unreasonable to construe the word 'selection' only as the factum of preparation of the select list. The word 'selection' cannot be construed to mean only the 'final selection' since the process of selection involves several steps which begins with the issuance of the advertisement and ends with the preparation of the select list.

34. In the case of Pawan Pratap Singh (supra) the question presented for consideration was pertaining to determination of seniority between two groups of

direct recruits. Considering the judgment delivered in the case of Sarat Chandra (supra) it was observed that "the effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be". In the case of Bhupinderpal Singh (supra) and in the case of Rajasthan Public Service Commission (supra), the issue as regards cut-off date towards fulfilment of eligibility criteria was under consideration and it was observed "(i) that the cut-off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules and if there be no cut-off date appointed by the rules then such date as may be appointed for the purpose in the advertisement calling for applications; (ii) that if there be no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications have to be received by the competent authority".

35. The WP 12879 (W) of 2010 and WP 12882 (W) of 2010 were affirmed on 25th March, 2010. WP 7884 (W) of 2010 was affirmed on 16th April, 2010. WP 11254 (W) of 2010 and WP 11255 (W) of 2010 were affirmed on 21st April, 2010. WP 23303 (W) of 2010 was affirmed on 19th November 2010. WP 8820 (W) of 2014 was affirmed on 11th March, 2014 and WP 31299 (W) of 2014. Amongst the same, WP 12882 (W) of 2010, WP 11254 (W) of 2010, WP 11255 (W) of 2010, WP 8820 (W) of 2014 and WP 31299 (W) of 2014 have been preferred by the concerned school authorities.

36. There is no doubt about the broad proposition of law that if the process of selection has already been initiated, it should be finished in accordance with law that stood at the time of initiation of the process even if a new law has come into force in the meantime. Indisputably, the new rules came into effect from 9th July, 2009 and prior thereto no advertisement was published in any of the matters. On the date of prior permission to fill up the vacancy no right crystallised in favour of the candidate. Upon availing such prior permission, a school is required to seek names of eligible candidates for the concerned post by sending requisition to the Exchange and by making open advertisement.

37. Viewed from a different angle, even during the period of hiatus on and from the date of provisional appointment to the date of confirmation, no right crystallises in favour of the appointee and with the alteration of the rules in the midst thereof, the appointee would be bound by the rigors of the new rules even though there is nothing in the new rules showing any necessary intendment for enforcing the same with retrospective effect.

38. The term 'selection' means exercise of discretion of the members in the selection committee in examining the participants. The candidature of the aspirant cannot be construed to have been considered on the date of creation of the vacancy or on the date of issuance of prior permission. Since the said two dates are prior to invitation to participate in the interview, the selection process

cannot be construed to have commenced on the said dates. It is only on the date of advertisement, when the candidates are invited to apply, the selection process commences and the fourth issue is, accordingly, answered.

39. Applying the proposition of law and the findings arrived at, to the facts of the writ petitions, we are unable to grant the reliefs, as prayed for in the writ petitions and the same are, accordingly, dismissed.

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

Dipankar Datta, J

41. I have had the advantage of reading the draft judgment prepared by brother Chakraborty, J. The decisions of the Supreme Court rendered in the recent past dated July 18, 2015 in Civil Appeal No.8248 of 2010 [Secretary of Managing Committee, Kalinagar Girls High School v. Archana Ghosh (Saha)] and dated December 5, 2017 in Civil Appeal No. 20883 of 2017 [State of West Bengal v. The Managing Committee, Nirjharini S.B. Vidyalaya (H.S.) etc.], noted by His Lordship, have made the task of answering the referred questions easy. I express my respectful concurrence with the reasons assigned by His Lordship for the conclusions reached in such judgment. However, my concurrence notwithstanding, and with respect again, I wish to express my brief views on a few of the points emerging for answers bearing in mind the decision in Nirjharini S.B. Vidyalaya (supra). The relevant part of such decision reads as follows:

"Since no vested rights arise in favour of the candidates merely by initiation of selection process, the new Scheme certainly could be applied to the selection process. The learned Single Judge of the High Court took this view which has been reversed in the impugned judgment.

We are of the view that Division Bench is not justified in interfering with the view taken by the learned Single Judge."

(emphasis supplied)

42. Mr. Biswaroop Bhattacharya, learned advocate appearing for the petitioner in W.P.23303(W) of 2010 contended that the decision in Nirjharini S.B. Vidyalaya (supra) neither refers to the facts of the case nor spells out the reasons for its conclusion and, therefore, cannot be treated to be a binding precedent. However, in course of arguments, he conceded that the said decision is an appellate order of the Supreme Court reversing the decision of the Division Bench of this Court reported in 2012 (3) CLJ (Cal) 482 (Asoke Sawoo v. The State of West Bengal &ors.) and restoring the decision of the Single Bench reported in 2011 (2) CHN (CAL) 82 (Asoke Sawoo v. The State of West Bengal). The facts giving rise to the civil appeal before the Supreme Court are pellucid on reading the said two decisions and hence, there is no difficulty on this score. However, despite elaborate reasons not having been assigned by the Supreme Court, there can be and is no dispute that the passage extracted above has to be read keeping in mind the undisputed factual perspective as noted in the said two decisions

coupled with the law settled by the Supreme Court to which I propose to refer hereafter.

43. I am in complete agreement with the learned Advocate General that although, ordinarily, the words recruitment process and selection process are used inter-changeably, the same are not synonymous; by and large, a selection process is an integral part of a recruitment process that an employer initiates to fill up vacancies by open selection. While recruitment process starts with a decision to fill up an identified number of vacancy/vacancies in the manner prescribed and ends with appointment(s) in favour of the selected candidate(s), a selection process could commence with a requisition of names of eligible candidates from the relevant employment exchanges and/or issuance of a public advertisement or even thereafter, depending upon the language of the governing rules, and normally, a selection process would terminate with preparation of the final panel/merit list.

44. Quite frequently, a question that engages the attention of the courts of law is whether by dint of mere empanelment/enlistment of the name of an aspirant for the public post sought to be filled up, any right accrues in favour of such an aspirant? Decisions are legion that by mere empanelment or enlistment, no indefeasible right accrues in his favour. The employer may, in its wisdom, decide to cancel the panel/merit list or even not to carry the process further, meaning thereby that the vacancy/vacancies which had been notified/advertised may not be filled up pursuant to the selection process that has been conducted. However, since every process of recruitment necessarily involves substantial expenses which have to be borne from the public exchequer and the aspirants for the posts (who, according to their estimation, have performed sufficiently well in the selection process) cherish hopes of appointment, the decision not to carry the process further (which is in the nature of a policy decision) must be taken bona fide and not suffer from the vice of arbitrariness. This is the only check on the employer's power not to make any appointment from a panel/merit list despite vacancy/vacancies on public post(s) being available.

45. Law being fairly well-settled that even an eligible candidate, who might have been found suitable by the selectors and thus selected, has no vested right of appointment, the proposition seems to me to be unsound that a candidate who wishes to take part in a selection process and might have offered his candidature or even taken part in such process without a final panel/merit list having been prepared, could claim a better right (than candidates selected) that the selection process must not only be taken forward but that too in accordance with the rules in force on the date the process commenced, notwithstanding that such rules may have been amended or repealed during the continuance of such process. That a candidate for a public post has a right to claim fair consideration of his candidature admits of no doubt, but to enforce a right, if at all, the minimum that is required of him is to show that he has been empanelled/enlisted. However, so long the amendment that is effected in the governing rules and is

sought to be enforced soon after the selection process has commenced or even in the midst thereof does not impair his right of participation and also does not impede a fair consideration of his candidature, it is difficult to comprehend on what basis could a candidate for a public post claim that the process must move forward without the amendments, insofar as they are relevant, being enforced and to take the selection process to its logical conclusion on the basis of the unamended rules. If it were a case of repeal of the earlier rules by a new set of rules, and initiation of the selection process based on the former not being saved by the latter, the recruitment process itself has to be aborted and commenced afresh in tune with the new rules.

46. It is in such perspective that I read and understand the decision in *Nirjharini S.B. Vidyalaya (supra)* to negate any attempt of the petitioners herein to have the process of selection completed in terms of the West Bengal Schools (Recruitment of Non-teaching Staff) Rules, 2005 and not in accordance with the West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Non-Teaching Staff) Rules, 2009 (hereafter the 2009 Rules), particularly when prior to enforcement thereof no advertisement inviting applications was issued by any of the Managing Committees of the concerned schools and hence it had no applications before it from any candidate.

47. It is, therefore, fair, just and proper that the process of recruitment for filling up the vacancies in question, available at the concerned schools, are governed by the 2009 Rules.

Shekhar B. Saraf, J

48. I have been fortunate to have gone through the draft judgments prepared by my brother judges Dipankar Datta, J. and Tapabrata Chakraborty, J. and am at consensus *ad idem* with them with regard to the four questions answered in the draft judgment. The views expressed and the reasons assigned to the said views match with my own, and accordingly, I do not see any reason for assigning any further reasons for the conclusions reached therein. However, only for the sake of clarity, I wish to pen down the issues referred to this Special Bench and the answers to the same herein. The questions referred to us and answers in the said judgment are as follows:-

A. Question No. 1: Whether the decision of the Division Bench of this Hon'ble Court in the case of *Kalinagar Girl's High School, Nadia, vs. Archana Ghosh* reported in 2010 (3) CHN (Cal) 940 can be accepted as a law operating in the field of direct recruitment where the recruitment rules were changed after creation of vacancy notwithstanding the fact that the advertisement for the said post in terms of the prior permission, had not been issued before change in the selection Rules was introduced?

Answer: The Supreme Court vide an order dated 28th July, 2015 passed in Civil Appeal No. 8248 of 2010 has reversed the judgment passed by the Division Bench of Calcutta High Court in the case of *Kalinagar Girl's High School, Nadia,*

vs. Archana Ghosh reported in 2010 (3) CHN (Cal) 940. Thus the first issue is, accordingly, answered in the negative.

B. Question No. 2: Whether the law laid down by the earlier Division Bench of this Hon'ble Court in the case of Snehansu Jas vs. State of West Bengal reported in 2001 Vol.2 CLJ 558 (Cal), can still be accepted as a law operating in the field of direct recruitment?

Answer: In light of the judgment passed by the Apex Court in the case of State of West Bengal and Ors. vs. The Managing Committee, Nirjharini Sarkar Balika Vidyalaya (H.S) wherein it was held that no vested rights arise in favour of the candidates merely by the initiation of the selection process and the new Rule certainly would be applied to the selection process, the judgment in Snehansu Jas vs. State of West Bengal reported in 2001 Vol.2 CLJ 558 (Cal) no longer is the correct law, and accordingly, the question is answered in the negative.

C. Question No. 3: Whether grant of prior permission alone can create any vested right in the Management to complete the selection process by following the Rules existed as on the date of creation of such vacancy notwithstanding a change was introduced in the selection Rules before publication of advertisement for the vacant post under the old Rules?

Answer: Following the principles laid down in the case of Nirjharini Sarkar Balika Vidyalaya (supra) it is clear that grant of prior permission to the management does not confer any vested right in the management to complete the selection process by following the earlier Rules upon legislative change in the selection Rules before publication of advertisement for the vacant post under the old Rules. Ergo, this issue is also answered in the negative.

D. Question No. 4: As to when a selection process is commenced? Whether with the arising of vacancy (due to the death, resignation or retirement of the incumbent to the said post or with the creation of new posts) or when the post is advertised and candidates have been called for interview or after the interview is held.

Answer: The selection process would commence only after the advertisement asking candidates to apply for a particular post.

49. In light of the above conclusions reached with regard to the above four issues, all the writ petitions are liable to be dismissed, and are accordingly, dismissed.

50. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.